



State of New Jersey
GOVERNMENT RECORDS COUNCIL
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TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

January 25, 2011 Government Records Council Meeting

Bradley Peterson
Complainant

Complaint No. 2009-319

v.

New Jersey Department of Corrections
Custodian of Record

At the January 25, 2011 public meeting, the Government Records Council (“Council”) considered the January 18, 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’s response to the Complainant’s OPRA request failed to address the Complainant’s request for records responsive to Request Items No. 1 and No. 6 his response was insufficient pursuant to N.J.S.A. 47:1A- 5.g., and Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008).
2. Because at the time of the Complainant’s Denial of Access Complaint the New Jersey Department of Correction’s proposed but not adopted regulation N.J.A.C. 10A:22-3.2(a)(6) was in effect, it was reasonable for Mr. Bruno to rely upon such regulation to deny access to the requested records based on the state of the law at that time. Mr. Bruno lawfully denied access to records requested for Items No. 2 through No. 5 pursuant to N.J.S.A. 47:1A-9.a. and Executive Orders 21 and 26.
3. Because Mr. Bruno certified that he informed the Complainant of the copying costs for the records responsive to Item No. 1 and further certified that he did not receive a response from the Complainant, and the Complainant has offered no competent, credible evidence to refute the Custodian’s certification in this regard, Mr. Bruno was under no obligation to release the records until payment was received pursuant to N.J.S.A. 47:1A-5.b. and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006).
4. Because the Custodian has certified that no records responsive to the Complainant’s OPRA request exist and there is no credible evidence in the record to refute the Custodian’s certification, the Custodian has not unlawfully denied the Complainant



access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). N.J.S.A. 47:1A-6.

5. Since the Freedom of Information Act does not fall under the authority of the GRC, the Council will not consider whether the Custodian should have disclosed the records pursuant to the Freedom of Information Act. N.J.S.A. 47:1A-7.b.
6. Although Mr. Bruno violated N.J.S.A. 47:1A-5.g. by providing an insufficient response to the Complainant's request, Mr. Bruno properly denied the Complainant's request for records Item Nos. 2 through No. 5 pursuant to proposed regulation *N.J.A.C.* 10A:22-3.2(a)(6), which was effective at the time of the Complainant's OPRA request. Furthermore, Mr. Bruno has certified that he informed the Complainant via letter on November 20, 2009 that the cost for the records responsive to Item No. 1 would be \$8.50 and also certified that the Complainant failed to pay for these records responsive. Lastly, Mr. Bruno has certified that no records exist which are responsive to Item No. 6 of the Complainant's request. 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 Mr. Bruno'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.

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 January, 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: February 7, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 25, 2011 Council Meeting**

**Bradley Peterson¹
Complainant**

GRC Complaint No. 2009-319

v.

**New Jersey Department of Corrections²
Custodian of Records**

Records Relevant to Complaint: Copies of the following:

1. Disciplinary Report dated September 4, 2009
2. Three (3) page letter sent to Ms. Raupp that preceded the Disciplinary Report dated September 4, 2009
3. Envelope containing the three page letter to Ms. Raupp
4. Copy of the full report into the courtline investigation of the September 4, 2009 disciplinary report, including the outside independent handwriting analysis findings
5. Any and all material pertaining to the September 4, 2009 disciplinary report
6. Administrator's response to Complainant's appeal of Inmate Remedy System Form (IRSF) CN: 09-08-668

Request Made: October 3, 2009³

Response Made: October 20, 2009

Custodian: Deirdre Fedkenheuer⁴

GRC Complaint Filed: December 10, 2009⁵

Background

October 3, 2009

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

¹ No legal representation listed on record.

² Represented by DAG Ellen M. Hale, on behalf of the NJ Attorney General.

³ The evidence of record indicates that the Custodian received the Complainant's OPRA request on October 8, 2009. Also please note, the Appellate Division decided the matter of Slaughter v. Government Records Council 413 N.J. Super. 544 (App. Div. 2010) on June 4, 2010; therefore the Complainant's OPRA request predates the Appellate Division's decision.

⁴ Frank Bruno, OPRA Liaison, responded to the Complainant's OPRA request on October 20, 2009.

⁵ The GRC received the Denial of Access Complaint on said date.

October 20, 2009

Frank Bruno's, OPRA Liaison, response to the OPRA request. Mr. Bruno responds in writing to the Complainant's OPRA request on the seventh (7th) business day following receipt of such request.⁶ Mr. Bruno states that the request cannot be fulfilled because these records are confidential and are not government records pursuant to N.J.S.A. 47:1A-1. Mr. Bruno further states that pursuant to Executive Order 26 (McGreevey 2002), "records or reports that identify an individual which, if disclosed, would jeopardize that person's safety or the safety and security of the correctional facility [are] exempt from disclosure." Lastly, Mr. Bruno states that information gathered by the Special Investigations Division cannot be released because it would compromise the investigative techniques by the Department and any other on-going investigations.

December 12, 2009

Denial of Access Complaint filed with the Government Records Council ("GRC") attaching:⁷

- Letter from Mr. Bruno to the Complainant dated October 20, 2009
- New Jersey Department of Corrections ("NJDOC") Inmate Remedy System Form dated September 23, 2009

The Complainant states that, contrary to the assertions contained in the Custodian's response to the OPRA request, granting access to the records requested poses no threat to the safety of any person nor to the correctional facility because there are no individual names in the records requested that disclosure would jeopardize. The Complainant states that he is the only one named in the records requested, to which he asserts he is entitled under the Freedom of Information Act. The Complainant asserts that the requested records are not confidential classified information.

The Complainant asserts that he was wrongly charged with a disciplinary infraction based on submission of a letter by someone else who used the Complainant's name and inmate number. The Complainant asserts that he was subjected to 30 days of confinement without liberty or any property, and that during this period he was not allowed phone calls, showers, mail, visits or recreation. The Complainant further asserts that the requested disciplinary report is not valid. The Complainant also asserts that at his hearing he was not shown any material that was alleged against him.

The Complainant states that after requesting a handwriting analysis for his defense to the disciplinary charges he was told one would be conducted, but he has not seen the results of said analysis and does not believe one was conducted.

The Complainant denies the Custodian's assertion that disclosure of the requested records might compromise investigative techniques used by the Department and/or ongoing investigations and states that he does not believe an investigation was

⁶ October 12, 2009 was Columbus Day, a State holiday.

⁷ The Complainant also included additional materials not relevant to the adjudication of this Denial of Access Complaint.

performed.

January 4, 2010⁸

Letter from Ms. Michelle Hammel⁹ to the Complainant. Ms. Hammel states that the Complainant's OPRA request was correctly denied by Mr. Bruno on October 20, 2009. Ms. Hammel further states that the records requested are confidential pursuant to N.J.S.A. 47:1A-1. Ms. Hammel also states that pursuant to Executive Order 26, a report or record relating to an identified individual which, if disclosed, would jeopardize the safety of any person or the safe and secure operation of the correctional facility is exempt from disclosure under OPRA. Finally, Ms. Hammel states that the information gathered by the Special Investigations Division cannot be disclosed because it might compromise investigative techniques used by the NJDOC, as well as other ongoing investigations.

April 23, 2010

Offer of Mediation sent to both parties.

May 13, 2010

The Complainant agrees to mediate this complaint.

May 25, 2010

The Custodian declines mediation.

May 26, 2010

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

June 8, 2010

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 May 26, 2010 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.

June 9, 2010

E-mail from the Custodian to the GRC. The Custodian confirms a telephone conversation with the GRC in which the Custodian requested and the GRC granted a five (5) business day extension for the Custodian to file the SOI.

June 15, 2010

Custodian's SOI with the following attachments:

⁸ It appears from the evidence of record that the Complainant made a similar OPRA request to Ms. Hammel. That request is not the subject of this complaint.

⁹ Michelle Hammel was the Records Custodian for the Department at the time the Complainant filed his OPRA request.

- Complainant's OPRA request dated October 3, 2009
- Letter from Mr. Bruno to the Complainant dated October 20, 2009
- Letter from Ms. Hammel to the Complainant dated January 4, 2010
- Copy of NJDOC Adjudication of Disciplinary Charge
- Copy of OPRA Records Request Payment Notification and Authorization dated October 20, 2009

The Custodian provided the following document index:

| List of all records responsive to Complainant's OPRA request | List the records retention and disposition schedule for each record responsive | List of all records provided to the complainant in their entirety or with redactions | If records were disclosed with redactions, give a general nature description of the redactions | If records were denied in their entirety, give a general nature description of the record. | List the legal explanation and statutory citation for the denial of access to records in their entirety or with redactions |
|--|--|---|--|--|---|
| A copy of the September 4, 2009 disciplinary report | 10 years | Will be provided to complainant upon payment of the appropriate fee from the inmate's account | N/A | N/A | N/A |
| A copy of the 3-page letter sent to Ms. Raupp that preceded the September 4, 2009 disciplinary report. | 10 years | N/A | N/A | N/A | This record contains pornographic material which is prohibited. <u>N.J.S.A.</u> 47:1A-1 et seq., regarding confidential documents prepared by the Special Investigation |

| | | | | | |
|--|-----|-----|-----|-----|---|
| | | | | | <p>Division, specifically <u>N.J.S.A.</u> 47:1A-1.1, security measures and surveillance techniques, which, if disclosed, would create a risk to safety of persons, property, electronic data or software, Executive Order 26 (McGreevey). DOC OPRA regulations excluding the release of records that may jeopardize operation of a correctional facility and the safety and security of any person or the safe and secure operation of the correctional facility.</p> |
| <p>A copy of the envelope containing the 3-page letter sent to Ms. Raupp</p> | N/A | N/A | N/A | N/A | <p><u>N.J.S.A.</u> 47:1A-1 et seq., regarding confidential documents prepared by</p> |

| | | | | | |
|--|-----|-----|-----|-----|---|
| | | | | | the Special Investigation Division, specifically <u>N.J.S.A. 47:1A-1.1</u> , security measures and surveillance techniques, which, if disclosed, would create a risk to safety of persons, property, electronic data or software, Executive Order 26 (McGreevey). DOC OPRA regulations excluding the release of records that may jeopardize operation of a correctional facility and the safety and security of any person or the safe and secure operation of the correctional facility. |
| A copy of the full report into the courtline investigation | N/A | N/A | N/A | N/A | <u>N.J.S.A. 47:1A-1</u> et seq., regarding confidential |

| | | | | | |
|--|------------|------------|------------|------------|---|
| <p>of the September 4, 2009 disciplinary action.</p> | | | | | <p>documents prepared by the Special Investigation Division, specifically <u>N.J.S.A. 47:1A-1.1</u>, security measures and surveillance techniques, which, if disclosed, would create a risk to safety of persons, property, electronic data or software, Executive Order 26 (McGreevey). DOC OPRA regulations excluding the release of records that may jeopardize operation of a correctional facility and the safety and security of any person or the safe and secure operation of the correctional facility.</p> |
| <p>A copy of the outside independent</p> | <p>N/A</p> | <p>N/A</p> | <p>N/A</p> | <p>N/A</p> | <p><u>N.J.S.A. 47:1A-1</u> et seq.,</p> |

| | | | | | |
|-----------------------|--|--|--|--|--|
| handwriting analysis. | | | | | <p>regarding confidential documents prepared by the Special Investigation Division, specifically <u>N.J.S.A. 47:1A-1.1</u>, security measures and surveillance techniques, which, if disclosed, would create a risk to safety of persons, property, electronic data or software, Executive Order 26 (McGreevey). DOC OPRA regulations excluding the release of records that may jeopardize operation of a correctional facility and the safety and security of any person or the safe and secure operation of the correctional facility.</p> |
|-----------------------|--|--|--|--|--|

The Custodian certifies that Frank Bruno, Records Custodian Liaison for New Jersey State Prison, received the Complainant's OPRA request on October 8, 2009 and that he obtained the requested records from the Complainant's institutional file at New Jersey State Prison. The Custodian certifies that the requested records were part of a disciplinary charge, *005, Threatening another with bodily harm or with any offense against his or her person or his or her property, which was received on or about September 4, 2009 and later dismissed by the administration on October 2, 2009.

The Custodian further certifies that on October 20, 2009, seven (7) business days after the receipt of the OPRA request, Mr. Bruno responded to the OPRA request denying access to the requested records. The Custodian certifies that Mr. Bruno did not include a denial of or reference to the Complainant's request for the disciplinary report or adjudication. The Custodian asserts that access to the requested disciplinary report and its non-confidential exhibits (with the exception of A-1, a report by SID), was not denied.

The Custodian certifies that on October 20, 2009, the Complainant was sent an OPRA Records Request Payment Notification and Authorization form noting a copying cost of \$8.50 for 12 pages of records. The Custodian certifies that the Complainant failed to pay for the requested records and the Complainant's case was closed on December 21, 2009.

The Custodian certifies that, regarding the remainder of the requested records, Mr. Bruno denied access to such records on October 20, 2009 and further certifies that Mr. Bruno correctly determined that these records were confidential or not to be disclosed pursuant to OPRA.

The Custodian certifies that records responsive to request Items No. 2 through No. 5 relate to a complaint from Ms. Raupp that she received inappropriate correspondence from someone using the Complainant's name and inmate number. The Custodian also certifies that the Special Investigations Division investigated the matter and the handwriting expert issued a report.

The Custodian asserts that Mr. Bruno correctly denied records responsive to request Items No. 2 through No. 5 on October 20, 2009. The Custodian argues that the records responsive to request Items No. 2 through No. 5 were marked confidential and are therefore not subject to disclosure. The Custodian argues that the Department of Correction's regulations state that "any records designated as confidential pursuant to N.J.S.A 47:1A-1.1...shall not be considered government records subject to public access, including...informant documents and statements and ... a report or record relating to an identified individual which, if disclosed would jeopardize the safety of any person or the safe and secure operation of the correctional facility or other designated place of confinement." The Custodian asserts that Mr. Bruno denied the Complainant these requested records because disclosure of such records might compromise investigative techniques utilized by the Department and/or ongoing investigations.

The Custodian asserts that although the Complainant was charged with a disciplinary infraction which entitles him to certain procedural due process rights, the Complainant is not entitled under OPRA to the records responsive to request Items No. 2

through No. 5. Furthermore, the Custodian states that because prison disciplinary hearings are not part of a criminal prosecution the rights of a defendant do not apply pursuant to Avant v. Clifford, 67 N.J. 496, 522 (1975). However, the Custodian states that in McDonald v. Pinchak, 139 N.J. 188 (1995) and Jacobs v. Stephens, 139 N.J. 212 (1995), the New Jersey Supreme Court found that then-current regulations struck the proper balance between the prison's security concerns, the need for swift and fair discipline and the inmate's due process rights.

The Custodian further certifies that the hearing officer showed the Complainant a copy of the requested records, however, the Custodian asserts that she is not held to the same standard as a hearing officer because of the nature of the Complainant's due process rights. The Custodian certifies that the responsive records were denied because the report contained the Special Investigation Division's procedure used when handling investigations. Lastly, the Custodian certifies that Ms. Hammel again denied the Complainant the records responsive to Items No. 2 through No. 5 on January 4, 2010 for reasons set forth by Mr. Bruno in his letter dated October 20, 2009.

June 30, 2010

E-mail from the GRC to Mr. Bruno. The GRC states that the response to the Complainant's OPRA request denying access to the requested records is different than that to which the Custodian certified in the SOI. The GRC asks Mr. Bruno for a legal certification to establish whether he actually provided a copy of records responsive to request Item No. 1 to the Complainant.

July 1, 2010

Letter from Mr. Bruno to the GRC, attaching Mr. Bruno's legal certification. Mr. Bruno certifies that he sent the Complainant a request for payment in the amount of \$8.50 for portions of records responsive to request Item No. 1 that were not considered confidential enclosed with his denial of access dated October 20, 2009. Mr. Bruno also certifies that he sent a letter to the Complainant on October 20, 2009 advising him that no records existed which were responsive to request Item No. 6 and attaching the Inmate Remedy System Form ("IRSF") pertaining to 09-08-665, as evidence that there were no records responsive to request Item No. 6. Furthermore, Mr. Bruno certifies that he sent a letter to the Complainant on November 20, 2009 stating that there is a pending request for payment of \$8.50 for portions of records responsive to Item No. 1. Lastly, Mr. Bruno certifies that he closed the Complainant's OPRA request on December 21, 2009 because the Complainant failed to pay the requested copying fees.

July 1, 2010

E-mail from the GRC to Mr. Bruno. The GRC informs Mr. Bruno that in his certification he stated that he enclosed an attachment regarding an appeal indicated on the IRSF pertaining to 09-08-665, but there was no attachment with the certification. The GRC requests a copy of this attachment.

August 24, 2010

Letter from the Complainant to the GRC. The Complainant responds to the Custodian's SOI. The Complainant states that he would have received a copy of records

responsive to Items Nos. 2 through 5 at the October 2, 2009 hearing. The Complainant asserts that he did not receive any records pertaining to his hearing.

The Complainant disputes the Custodian's assertion that the requested report is exempt from disclosure as "[a] report or record relating to an identified individual which, if disclosed would jeopardize the safety of any person, or the safe and secure operation of the correctional facility." The Complainant asserts that if this is true he would not have received a copy of this report at the conclusion of his hearing on October 2, 2009.

The Complainant disputes the Custodian's contention that a copy of the records responsive to request Item No. 5 were shown to the Complainant at his disciplinary hearing and states that he was never shown a copy of records responsive to request Item No. 5.

The Complainant contends that at no time during his hearing was he given the opportunity to view the records responsive to the request. Thus, the Complainant argues that the only way he can obtain the records is through OPRA. The Complainant contends that since he is being truthful in his response, the Custodian should disclose the records. The Complainant asserts that he was denied access to view the information that was the cause of the disciplinary charges and resulting investigation and questions if the Department of Corrections manufactured the entire event.

October 18, 2010

Letter from the Complainant to the GRC. The Complainant argues that the release of requested records will not present any risk to the safety and security of the correctional institution. The Complainant also argues that the release of any records responsive to request Item No. 4 will not compromise any Special Investigation Division investigations. The Complainant asserts that if the requested records would present a security issue, he would not have been able to review these records at his disciplinary hearing.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

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

Additionally, OPRA defines a government record as:

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

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

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

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

In the instant complaint, the Complainant filed an OPRA request on October 3, 2009, seeking copies of the following records:

- 1) Disciplinary Report dated September 4, 2009,
- 2) the three (3) page letter sent to Ms. Raupp that preceded the Disciplinary Report dated September 4, 2009
- 3) envelope containing the three page letter to Ms. Raupp,
- 4) full report into the investigation of the Disciplinary Report dated September 4, 2009,
- 5) Findings of the independent hand writing analysis, and
- 6) all materials pertaining to the September 4, 2009 disciplinary report and a copy of the Administrator’s response to his appeal of IRSF CN: 09-08-668.

The evidence of record shows that Mr. Bruno responded in writing to the Complainant’s OPRA request on the seventh (7th) business day following receipt of such request, denying the Complainant access to the records responsive to request Items No. 2 through No. 5 pursuant to N.J.S.A. 47:1A-1 and E.O. 26. The evidence of record also shows that Mr. Bruno did not respond to request Items No. 1 and No. 6 of the Complainant’s OPRA request.

In Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008), the Complainant’s Counsel asserted that the Custodian violated OPRA by failing to respond to each of the Complainant’s request items individually within seven (7) business days. The GRC examined how the facts in Paff applied to its prior holding in O’Shea v. Township of West Milford, GRC Complaint No. 2004-17 (April 2005) (finding that the Custodian’s initial response stating that the Complainant’s request was a duplicate of a previous request to the Complainant’s June 22, 2007 request was legally insufficient because the Custodian has a duty to answer each request individually). The Council reasoned that, “[b]ased on OPRA and the GRC’s holding in O’Shea, a custodian is vested with the responsibility to respond to each individual request item within seven (7) business days after receipt of such request.” The GRC ultimately held that:

“[a]lthough the Custodian responded in writing to the Complainant’s August 28, 2007 OPRA request within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i., the Custodian’s response was legally insufficient because he failed to respond to each request item individually. Therefore, the Custodian has violated N.J.S.A. 47:1A-5.g.” *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-166 (April 2009) *and* Kulig v. Cumberland County Board of Chosen Freeholders, GRC Complaint No. 2008-263 (November 2009).

Therefore, because the Custodian’s response to the Complainant’s OPRA request failed to address the Complainant’s request for records responsive to request Items No. 1 and No. 6, said response was insufficient pursuant to N.J.S.A. 47:1A-5.g. and Paff, *supra*.

Records for Items No. 2 through No. 5:

Mr. Bruno responded to the Complainant’s OPRA request for Items Nos. 2 through 5 stating that pursuant to Executive Order 26 (McGreevey 2002), “records that identify an individual which if disclosed would jeopardize that person’s safety or the safety and security of the correctional facility are exempt from disclosure.”

OPRA provides “[t]he provisions of this act...shall not abrogate any exemption of public record from public access...made pursuant to any regulation...[or] Executive Order of the Governor.” N.J.S.A. 47:1A-9.a.

Additionally, Paragraph 4 of Executive Order No. 21 provides in relevant part as follows:

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

Paragraph 6 of Executive Order No. 26 provides that:

“[t]he remaining provisions of Executive Order No. 21 are hereby continued to the extent that they are not inconsistent with this Executive Order.”

The Custodian argued in the SOI that the Department’s regulations stated in pertinent part that:

“A report or record relating to an identified individual which, if disclosed, would jeopardize the safety of any person or the safe and secure operation

of the correctional facility or other designated place of confinement.”
N.J.A.C. 10A:22-3.2(a)(6), July 1, 2002 (proposed but not adopted).

In the instant complaint, the Custodian certified that the Complainant’s request for Items No. 2 through No. 5 if disclosed would “jeopardize the safety of any person or the safe and secure operation of the correctional facility or other designated place of confinement.” *N.J.A.C. 10A:22-3.2(a)(6)*, July 1, 2002 (proposed but not adopted), N.J.S.A. 47:1A-9.a. and Executive Order 21 and 26 (McGreevey, 2002).

At the time of the Complainant’s Denial of Access Complaint, although these Executive Orders were issued over six (6) years ago, no rescinding or modifying order had been issued. Accordingly, they were still in full force and effect at the time of this complaint. The Superior Court in an unpublished opinion examined the continuing effect of these Orders in 2005. In Newark Morning Ledger Co., Publisher of the Star-Ledger v. Division of the State Police of the New Jersey Department of Law and Public Safety, Law Division – Mercer County, Docket No. MER-L-1090-05 (July 5, 2005), the court stated “[p]aragraph 6 of Executive Order No. 26] continues to permit a department or agency within State Government (sic) to adopt rules and regulations and to permit the operation of a proposed rule or regulation prior to its final adoption. Therefore...public ‘agencies are hereby directed to handle all government records requests in a manner consistent with the rules as they have been proposed and published...’” *Id.* at 11.

In that case, the court went on to state that “[i]t appears, from the language of both Executive Orders, that these provisions were added to provide sufficient time for departments and agencies within State government to evaluate their records, propose regulations and withhold certain documents from public inspection pending the adoption of the proposed rules. While this process may be at variance with the normal regulatory process, one can only conclude that the Executive Branch, understanding the broad scope of OPRA, felt it was appropriate to have agencies and departments, within State government, undertake a careful review and analysis of its records to determine, for purposes of security and safety, those records to be considered confidential.” *Id.* at 12.

The court further held that “[r]ecognizing the time delay inherent in the normal rule adoption process, Executive Order No. 21 and Executive Order No. 26 included language to permit custodians of records to deny access, based on the proposed rule, pending final adoption. Now, three years after the passage of OPRA, for the court, the continued efficacy of that practice raises some concerns.” *Id.*

The court concluded, however, that “[w]hile [it] does not know the status of this proposed regulation, under Executive Order No. 21, paragraph 4 and Executive Order No. 26, paragraph 6, resolution of that issue is not required. ... the court assumes that the proposed rule change is still pending.” *Id.* at 13.

Therefore, because at the time of the Complainant’s Denial of Access Complaint the NJDOC’s proposed but not adopted regulation *N.J.A.C. 10A:22-3.2(a)(6)* was in

effect,¹⁰ it was reasonable for Mr. Bruno to rely upon such regulation to deny access to the requested records based on the state of the law at that time. Mr. Bruno lawfully denied access to records requested for Items No. 2 through No. 5 pursuant to N.J.S.A. 47:1A-9.a. and Executive Orders 21 and 26.

Whether Mr. Bruno unlawfully denied access to the records responsive to request Item No. 1?

Mr. Bruno certified that he informed the Complainant by letter dated November 20, 2009 that the cost for records responsive to Item No. 1 would be \$8.50; Mr. Bruno further certified that he never received a response from the Complainant. Lastly, Mr. Bruno certified that on December 21, 2009 after sixty (60) days of no correspondence from the Complainant, Mr. Bruno closed out the Complainant's OPRA request.

OPRA provides that copies of government records may be purchased upon payment of the fee prescribed by law or regulation. N.J.S.A. 47:1A-5.b. Additionally, in Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006), the Council held that:

“[a]s the Custodian is awaiting payment for the duplication cost of the requested records, she is not required to release said records until payment is received pursuant to N.J.S.A. 47:1A-5.b., Santos v. New Jersey State Parole Board, GRC Case No. 2004-74 (August, 2004), and Cuba v. Northern State Prison, GRC Case No. 2004-146 (February, 2005).”

Therefore, because Mr. Bruno certified that he informed the Complainant of the copying costs for the records responsive to Item No. 1 and further certified that he did not receive a response from the Complainant, and the Complainant has offered no competent, credible evidence to refute the Custodian's certification in this regard, Mr. Bruno was under no obligation to release the records until payment was received pursuant to N.J.S.A. 47:1A-5.b. and Paff, supra.

Whether records responsive to request Item No. 6 exist?

In the matter before the Council, Mr. Bruno certified that he sent a letter on October 20, 2009 to the Complainant stating that there were no records responsive to request Item No. 6. The Custodian also attached a copy of the IRSF which states that there is no cause for action in the Complainant's complaint. The Complainant has submitted no competent, credible evidence to refute the Custodian's certification in this regard.

In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the complainant sought telephone billing records showing a call made to him from the New Jersey Department of Education. The Custodian responded

¹⁰ The Appellate Division decided the matter of Slaughter v. Government Records Council 413 N.J. Super. 544 (App. Div. 2010) on June 4, 2010; therefore the Complainant's OPRA request predates the Appellate Division's decision.

stating that there was no record of any telephone calls made to the Complainant. The Custodian subsequently certified that no records responsive to the Complainant's request existed. The Complainant failed to submit any evidence to refute the Custodian's certification. The GRC held the Custodian did not unlawfully deny access to the requested records because the Custodian certified that no records responsive to the request existed and because no competent, credible evidence existed to refute the Custodian's certification.

Therefore, because the Custodian has certified that no records responsive to the Complainant's OPRA request exist and there is no credible evidence in the record to refute the Custodian's certification, the Custodian has not unlawfully denied the Complainant access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). N.J.S.A. 47:1A-6.

Whether the Council has jurisdiction over the Freedom of Information Act?

The Complainant asserts in his Denial of Access Complaint that since he is the only individual mentioned in the requested records that he should be entitled to such records pursuant to the Freedom of Information Act.

OPRA provides pursuant to N.J.S.A. 47:1A-7.b:

The Government Records Council shall:

- establish an informal mediation program to facilitate the resolution of disputes regarding access to government records;
- receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian;
- issue advisory opinions, on its own initiative, as to whether a particular type of record is a government record which is accessible to the public;
- prepare guidelines and an informational pamphlet for use by records custodians in complying with the law governing access to public records;
- prepare an informational pamphlet explaining the public's right of access to government records and the methods for resolving disputes regarding access, which records custodians shall make available to persons requesting access to a government record;
- prepare lists for use by records custodians of the types of records in the possession of public agencies which are government records;
- make training opportunities available for records custodians and other public officers and employees which explain the law governing access to public records; and
- operate an informational website and a toll-free helpline staffed by knowledgeable employees of the council during regular business hours which shall enable any person, including records custodians, to call for information regarding the law governing access to public records and

allow any person to request mediation or to file a complaint with the council when access has been denied

N.J.S.A. 47:1A-7.b. delineates the powers of the GRC. The GRC administers OPRA and adjudicates denial of access complaints filed under OPRA. In this complaint, the Complainant asserts that the Custodian should disclose the requested records pursuant to the Freedom of Information Act.

Thus, since the Freedom of Information Act does not fall under the authority of the GRC, the Council will not consider whether the Custodian should have disclosed the records pursuant to the Freedom of Information Act. N.J.S.A. 47:1A-7.b.

Whether Mr. Bruno’s actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

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

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

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

Mr. Bruno responded in writing to the Complainant’s OPRA request on the seventh (7th) business day following receipt of such request. Mr. Bruno denied request Items No. 2 through No. 5 stating that such records are confidential and are not government records pursuant to N.J.S.A. 47:1A-1. Mr. Bruno further stated that pursuant to Executive Order 26 (McGreevey 2002) “records or reports that identify an individual which if disclosed would jeopardize that person’s safety or the safety and security of the correctional facility [are] exempt from disclosure.” Mr. Bruno did not respond to Items No. 1 and No. 6 of the Complainant’s OPRA request.

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 (Felder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian’s actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian’s actions must have been forbidden with actual, not imputed,

knowledge that the actions were forbidden (Berg); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J.Super. 86, 107 (App. Div. 1996)).

Although Mr. Bruno violated N.J.S.A. 47:1A-5.g. by providing an insufficient response to the Complainant's request, Mr. Bruno properly denied the Complainant's request for records Item Nos. 2 through No. 5 pursuant to proposed regulation N.J.A.C. 10A:22-3.2(a)(6), which was effective at the time of the Complainant's OPRA request. Furthermore, Mr. Bruno has certified that he informed the Complainant via letter on November 20, 2009 that the cost for the records responsive to Item No. 1 would be \$8.50 and also certified that the Complainant failed to pay for these records responsive. Lastly, Mr. Bruno has certified that no records exist which are responsive to Item No. 6 of the Complainant's request. 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 Mr. Bruno'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.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian's response to the Complainant's OPRA request failed to address the Complainant's request for records responsive to Request Items No. 1 and No. 6 his response was insufficient pursuant to N.J.S.A. 47:1A-5.g., and Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008).
2. Because at the time of the Complainant's Denial of Access Complaint the New Jersey Department of Correction's proposed but not adopted regulation N.J.A.C. 10A:22-3.2(a)(6) was in effect, it was reasonable for Mr. Bruno to rely upon such regulation to deny access to the requested records based on the state of the law at that time. Mr. Bruno lawfully denied access to records requested for Items No. 2 through No. 5 pursuant to N.J.S.A. 47:1A-9.a. and Executive Orders 21 and 26.
3. Because Mr. Bruno certified that he informed the Complainant of the copying costs for the records responsive to Item No. 1 and further certified that he did not receive a response from the Complainant, and the Complainant has offered no competent, credible evidence to refute the Custodian's certification in this regard, Mr. Bruno was under no obligation to release the records until payment was received pursuant to N.J.S.A. 47:1A-5.b. and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006).
4. Because the Custodian has certified that no records responsive to the Complainant's OPRA request exist and there is no credible evidence in the record to refute the Custodian's certification, the Custodian has not unlawfully

denied the Complainant access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). N.J.S.A. 47:1A-6.

5. Since the Freedom of Information Act does not fall under the authority of the GRC, the Council will not consider whether the Custodian should have disclosed the records pursuant to the Freedom of Information Act. N.J.S.A. 47:1A-7.b.

6. Although Mr. Bruno violated N.J.S.A. 47:1A-5.g. by providing an insufficient response to the Complainant's request, Mr. Bruno properly denied the Complainant's request for records Item Nos. 2 through No. 5 pursuant to proposed regulation *N.J.A.C. 10A:22-3.2(a)(6)*, which was effective at the time of the Complainant's OPRA request. Furthermore, Mr. Bruno has certified that he informed the Complainant via letter on November 20, 2009 that the cost for the records responsive to Item No. 1 would be \$8.50 and also certified that the Complainant failed to pay for these records responsive. Lastly, Mr. Bruno has certified that no records exist which are responsive to Item No. 6 of the Complainant's request. 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 Mr. Bruno'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.

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Approved By: Catherine Starghill, Esq.
Executive Director

January 18, 2011