



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

**CHRIS CHRISTIE**  
*Governor*

**KIM GUADAGNO**  
*Lt. Governor*

**LORI GRIFA**  
*Commissioner*

**FINAL DECISION**

**June 28, 2011 Government Records Council Meeting**

Gregory Byrnes  
Complainant

Complaint No. 2009-323

v.

Morris County Prosecutor's Office  
Custodian of Record

At the June 28, 2011 public meeting, the Government Records Council ("Council") considered the June 21, 2011 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 complied in part with the Council's March 29, 2011 Interim Order by providing Counsel's letter brief to the Executive Director within seven (7) business days from receipt of the Council's Interim Order; however, the Custodian's failure to comply with the Council's directive to submit a certified confirmation of compliance to the Executive Director together with a detailed document index explaining the lawful basis for each denial has resulted in a finding that the Custodian failed to comply with the Council's Interim Order.
2. Because the record responsive to the request is a grand jury subpoena and because Court Rule 1:38-3 (c) (4) provides that "...records relating to grand jury proceedings..." are excluded from public access, and because this exemption is applicable to OPRA by operation of N.J.S.A. 47:1A-9.a., the Custodian lawfully denied the Complainant access to said record.
3. Although the Custodian did not properly comply with the Council's March 29, 2011 Interim Order by failing to provide a detailed document index explaining the lawful basis for each denial as directed by the Council and by failing to submit certified confirmation of compliance to the Executive Director, 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. Additionally, the evidence of record does not indicate that the Custodian's violations of the terms of the Council's Order had a positive element of conscious wrongdoing or were intentional and deliberate.



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 28<sup>th</sup> Day of June, 2011

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: July 12, 2011**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
June 28, 2011 Council Meeting**

**Gregory Byrnes<sup>1</sup>  
Complainant**

**GRC Complaint No. 2009-323**

v.

**Morris County Prosecutor's Office<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Any subpoena served on Michael Gosden of the Rockaway Borough Police Department to appear from May 21, 2007 to June 17, 2007.

**Request Made:** October 20, 2009

**Response Made:** November 4, 2009

**Custodian:** Shelia M. Leary

**GRC Complaint Filed:** December 14, 2009<sup>3</sup>

**Background**

**March 29, 2011**

At the March 29, 2011 public meeting, the Government Records Council ("Council") considered the March 22, 2011 *Reconsideration* Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the amended findings and recommendations. The Council, therefore, found that the Custodian's request for reconsideration is procedurally flawed as it does not offer evidence to show that the Council's December 21, 2010 Interim Order requires reconsideration because said Order is based upon a "palpably incorrect or irrational basis" or it is obvious that the Council did not consider, or failed to appreciate, the significance of probative, competent evidence pursuant to Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996). Further, the Custodian failed to show that, in reaching its decision, the Council acted in an arbitrary, capricious or unreasonable manner pursuant to D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990). Rather, the Custodian in the request for reconsideration recited privileged communications from the earlier mediation process; communications which cannot be considered by the Council. As such, the Custodian's motion for reconsideration is denied.

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

<sup>2</sup> Represented by Assistant Prosecutor Matheu Nunn on behalf of the Morris County Prosecutor's Office (Morristown, NJ).

<sup>3</sup> The GRC received the Denial of Access Complaint on said date.

Accordingly, the Council re-issued its December 21, 2010 Interim Order as follows:

“1. Because the Complainant identified a type of government record (a subpoena or subpoenas), within a specific date range (from May 21, 2007 to June 17, 2007), and also identified the subject named in the subpoena and his employer (Michael Gosden of the Rockaway Borough Police Department) MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005) do not apply to the request relevant to this complaint. The Custodian’s search is not open-ended, nor does it require research, rather it requires the Custodian to locate the corresponding subpoena or subpoenas, if any. Therefore, the Custodian must disclose the requested record to the Complainant.<sup>4</sup>

**2. The Custodian shall comply with Paragraph No. 1 above by locating the record or records responsive to the Complainant’s request, if any, and within seven (7) business days from receipt of the Council’s Interim Order either: (a) *disclose to the Complainant the requested record or records, if any, with any appropriate redactions together with a detailed document index explaining the lawful basis for each redaction, or (b) deny the Complainant access to said record or records together with a detailed document index explaining the lawful basis for each denial. Simultaneously with whichever action is taken the Custodian shall provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. (Emphasis Added)***

3. The Council defers analysis of whether the Custodian’s denial of access to the requested records is a violation of OPRA, and if so, if it rises to the level of a knowing and willful violation and unreasonable denial of access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.”

### **March 30, 2011**

Council’s Interim Order distributed to the parties.

### **April 7, 2011**

Letter brief from the Custodian’s Counsel to the GRC. Counsel asserts that the letter brief is in response to the Council’s Interim Order dated March 29, 2011. Counsel asserts that, upon researching the Complainant’s request, the subpoena served on Michael Gosden was determined to be a grand jury subpoena. Citing In Re Grand Jury Subpoena Issued to Galasso, 389 N.J. Super. 281 (App. Div. 2006), the Custodian’s Counsel argues that the grand jury is an “independent investigatory body.” *Id.* at 292. Counsel further

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<sup>4</sup> **The record cannot be referenced as a part of mediation discussions. The Custodian must independently locate the record responsive to the Complainant’s request and provide a document index which clearly identifies the requested record.**

argues that because a grand jury subpoena has been determined by the Appellate Division to be part of the criminal investigatory process, said subpoena is a criminal investigatory record pursuant to N.J.S.A. 47A:1A-1.1.

The Custodian's Counsel argues in the alternative that the secrecy of the grand jury process exempts a grand jury subpoena from disclosure. Counsel asserts that the provisions of OPRA "...shall not abrogate any exemption of a government record from public access heretofore made pursuant to...any other statute...Rules of Court; any federal law; federal regulation or federal order...or erode any ...grant of confidentiality heretofore established or recognized by the Constitution of this State, statute, court rule or judicial case law..." Counsel further asserts that the confidentiality associated with the grand jury is set forth in the following Rules of Court: R. 1:38-3, R. 3:6-6, R. 3:6-7 and R. 3:6-8.

### **April 13, 2011**

Letter from the Complainant to the GRC. The Complainant asserts that the Custodian did not properly comply with the Council's March 29, 2011 Interim Order because the Custodian did not provide the Complainant with a copy of the document index explaining the lawful basis for each denial. The Complainant also asserts that the form of response was directed to the GRC and not to the Complainant. The Complainant further asserts that the Custodian has argued in the alternative in support of the denial: first, that the subpoena is exempt from disclosure as a criminal investigatory record pursuant to N.J.S.A. 47A:1A-1.1., and second, that the secrecy of the grand jury process exempts a grand jury subpoena from disclosure. The Complainant contends that an argument in the alternative is disallowed under OPRA. The Complainant cites N.J.S.A. 47A:1A-5.g.and Schwarz v. New Jersey Department of Human Services, GRC Complaint No. 2004-60 (February 2005) in support of his contention.

With respect to Counsel's reliance on the confidentiality associated with the grand jury as set forth in R. 1:38-3, R. 3:6-6, R. 3:6-7 and R. 3:6-8, the Complainant states that R. 1:38 has been revised to favor public access under the Report of the Supreme Court Special Committee on Public Access to Court Records. According to the Complainant, minutes of a grand jury proceeding are the only records restricted from public access

The Complainant also argues that grand jury subpoenas are government records under OPRA's definition of a government record and cites the Superior Court's decision in Gannett New Jersey Partners L.P. v. County of Middlesex, 379 N.J. Super. 205 (App. Div. 2005) in support thereof.

Finally, the Complainant asserts that in Gannett, *supra*, wherein the court denied access to subpoenas, the court determined that the custodian of records in Middlesex County was not in a position to know whether the release of subpoenas could reasonably be expected to cause some articulable harm to the criminal investigation. The Complainant states that in the instant case the MCPO is in a position to know whether the subpoenas could cause some articulable harm; however, the Complainant states that because the Custodian has not asserted such an objection to disclosure, the GRC should

assume that there is no active investigation that could be harmed by disclosing the subpoenas.

### Analysis

#### **Whether the Custodian complied with the Council's March 29, 2011 Interim Order?**

At its March 29, 2011 public meeting, the Council found that the Custodian failed to offer evidence that the Council's December 21, 2010 Interim Order was based upon a "palpably incorrect or irrational basis" or that it was obvious that the Council did not consider, or failed to appreciate, the significance of probative, competent evidence pursuant to Cummings, *supra*. Further, the Custodian failed to show that the Council acted in an arbitrary, capricious or unreasonable manner pursuant to D'Atria, *supra*, in reaching its decision. Accordingly, the Council ordered the Custodian, within seven (7) business days from receipt of the Council's Interim Order, to either disclose to the Complainant the record relevant to this complaint or deny the Complainant access to said record together with a detailed document index explaining the lawful basis for such denial, and simultaneously provide certified confirmation of compliance in accordance with N.J. Court Rule 1:4-4, to the Executive Director.

On March 30, 2011, the Council's Interim Order was distributed to the Custodian and the Custodian's Counsel, and the evidence of record reveals that the Order was received by the Custodian on March 31, 2011. The Council's Order allowed the Custodian seven (7) business days to provide certified confirmation of compliance to the Executive Director. The Custodian, rather than providing certified confirmation of compliance, deferred to Counsel, who submitted a letter brief to the Executive Director on the fifth (5<sup>th</sup>) business day after receipt of the Interim Order.

In this response to the Council's March 29, 2011 Order, the Custodian failed to adhere to the directives of the Council; however, the GRC will accept Counsel's letter brief as a minimally compliant response to said Order. As such, the GRC accepts the letter brief as the Custodian's denial of access to the record requested by the Complainant, which Counsel asserts is one (1) grand jury subpoena. As substitution for a detailed document index explaining the lawful basis for such denial, the Council will accept the legal arguments in support of the Custodian's denial of access submitted by the Custodian's Counsel in his letter brief.

Accordingly, the Custodian complied in part with the Council's March 29, 2011 Interim Order by providing Counsel's letter brief to the Executive Director within seven (7) business days from receipt of the Council's Interim Order; however, the Custodian's failure to comply with the Council's directive to submit a certified confirmation of compliance to the Executive Director together with a detailed document index explaining the lawful basis for each denial has resulted in a finding that the Custodian failed to comply with the Council's Interim Order.

## Whether the Custodian unlawfully denied access to the requested record?

OPRA provides that:

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

Additionally, OPRA defines a government record as:

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

OPRA further provides that:

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

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 Custodian’s Counsel argued first that the record responsive to the complaint, a grand jury subpoena, is a criminal investigatory record and therefore exempt from access under N.J.S.A. 47A:1A-1.1.

The Council rejects the Custodian’s contention that a subpoena is a criminal investigatory record pursuant to N.J.S.A. 47A:1A-1.1. Although a subpoena is a record

that may be part of the criminal investigatory process, the subpoena itself does not contain or set forth the examination and findings of a criminal investigation. Moreover, a subpoena does not fit within OPRA's definition of a criminal investigatory record. OPRA defines a criminal investigatory record as:

“ ... a record which is *not required by law to be made*, maintained or kept on file that is held by a law enforcement agency which pertains to any criminal investigation or related civil enforcement proceeding...”  
N.J.S.A. 47:1A-1.1. (Emphasis added.)

A subpoena is a writ issued under authority of a court to compel the appearance of a witness at a judicial proceeding. As such, it is required by law to be made if said witness is to be compelled to appear. Accordingly, because a subpoena is required by law to be made, it cannot be a criminal investigatory record as defined in OPRA. Therefore, a subpoena is not exempt from access pursuant to the criminal investigatory record exemption under N.J.S.A. 47A:1A-1.1.

Counsel also argued, however, that a grand jury subpoena is exempt from disclosure because of the secrecy of the grand jury process as provided by the Rules of Court, specifically R. 1:38-3, R. 3:6-6, R. 3:6-7 and R. 3:6-8. Counsel asserted that the provisions of these Rules of Court are applicable to OPRA via application of N.J.S.A. 47:1A-9.

The Complainant maintained that Counsel improperly argued in the alternative by raising the issue of the secrecy of the grand jury process and its exemption of a grand jury subpoena from disclosure. The Complainant asserted that an argument in the alternative is disallowed under OPRA and he cited N.J.S.A. 47A:1A-5.g. and Schwarz v. New Jersey Department of Human Services, GRC Complaint No. 2004-60 (February 2005) in support of his argument.

The Complainant's assertion on this point is without merit. An argument in the alternative is not disallowed under OPRA. If there is a possibility that more than one argument articulating a legal reason for denial of access can be made, then it behooves a custodian to make such arguments jointly or in the alternative. Neither N.J.S.A. 47:1A-5.g. nor any other provision of OPRA prohibits such argumentation by a custodian. Further, Schwarz, *supra*, does not stand for the proposition that a custodian cannot assert more than one legal reason for denying access. The Complainant notes that in Schwarz the Council mentioned that the custodian bears the burden of proving that a denial of access is lawful pursuant to N.J.S.A. 47:1A-6. The Complainant is correct in that the Council did make such a statement; however, the Council was only restating N.J.S.A. 47:1A-6., which provides in relevant part that, “...[t]he public agency shall have the burden of proving that the denial of access is authorized by law.” OPRA does place the burden of proof upon the custodian, but does not impose limitations upon the manner in which such proof is marshaled by him or her.



With respect to the Rules of Court, Rule 1:38-1 provides:

“Court records and administrative records as defined by R. 1:38-2 and R. 1:38-4 respectively and within the custody and control of the judiciary are open for public inspection and copying except as otherwise provided in this rule. Exceptions enumerated in this rule shall be narrowly construed in order to implement the policy of open access to records of the judiciary.”<sup>5</sup>

Court Rule 1:38-3 goes on to provide for court records which are excluded from public access and R. 1:38-3 (c)(4) includes “...records relating to grand jury proceedings pursuant to R. 3:6-7 except as provided by R. 3:6-6 (b) and R. 3:6-9 (d).”<sup>6</sup> A grand jury subpoena is a record relating to grand jury proceedings; therefore, said record is excluded from public access.

The Complainant argued, however, that R. 1:38 was revised to favor public access under the Report of the Supreme Court Special Committee on Public Access to Court Records. According to the Complainant, minutes of a grand jury proceeding are the only records restricted from public access. The Complainant is correct that the Rules of Court were revised and relabeled to express a spirit of more openness in government (from a policy of “Confidentiality of Court Records” to a policy of “Public Access to Court Records...”), but there is nothing in the revision to support the Complainant’s conclusion that the minutes of a grand jury proceeding are the only records restricted from public access.

Therefore, because the record responsive to the request is a grand jury subpoena, and because Court Rule 1:38-3 (c)(4) provides that “...records relating to grand jury proceedings...” are excluded from public access, and because this exemption is applicable to OPRA by operation of N.J.S.A. 47:1A-9.a., the Custodian lawfully denied the Complainant access to said record.

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

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

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<sup>5</sup> R. 1:38-2 and R. 1:38-4 provide definitions for court records and administrative records, respectively. All Rules of Court examined by the GRC were the most recent revisions thereof.

<sup>6</sup> R. 3:6-7 provides for secrecy of grand jury proceedings. R. 3:6-6 (b) addresses transcripts and R. 3:6-9 (d) concerns the filing and publication of the presentment; neither provision provides an exception for grand jury subpoenas.

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

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

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

In the instant complaint, the Custodian was directed by Interim Order of the Council dated March 29, 2011 to:

“... (a) *disclose to the Complainant the requested record or records, if any, with any appropriate redactions together with a detailed document index explaining the lawful basis for each redaction, or (b) deny the Complainant access to said record or records together with a detailed document index explaining the lawful basis for each denial.* Simultaneously with whichever action is taken the Custodian shall provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.” (Emphasis in original.)

The Custodian failed to comply with the terms of the Council’s Interim Order, and instead had Counsel respond to the GRC, which Counsel did in the form of a letter brief. The Custodian knew that regardless of whether the record was disclosed or not disclosed, the Council directed the Custodian to provide certified confirmation of compliance in accordance with N.J. Court Rule 1:4-4; however the Custodian failed to execute and submit such a certification.

Therefore, although the Custodian did not properly comply with the Council’s March 29, 2011 Interim Order by failing to provide a detailed document index explaining the lawful basis for each denial as directed by the Council and by failing to submit

certified confirmation of compliance to the Executive Director, 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. Additionally, the evidence of record does not indicate that the Custodian's violations of the terms of the Council's Order had a positive element of conscious wrongdoing or were intentional and deliberate.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied in part with the Council's March 29, 2011 Interim Order by providing Counsel's letter brief to the Executive Director within seven (7) business days from receipt of the Council's Interim Order; however, the Custodian's failure to comply with the Council's directive to submit a certified confirmation of compliance to the Executive Director together with a detailed document index explaining the lawful basis for each denial has resulted in a finding that the Custodian failed to comply with the Council's Interim Order.
2. Because the record responsive to the request is a grand jury subpoena and because Court Rule 1:38-3 (c) (4) provides that "...records relating to grand jury proceedings..." are excluded from public access, and because this exemption is applicable to OPRA by operation of N.J.S.A. 47:1A-9.a., the Custodian lawfully denied the Complainant access to said record.
3. Although the Custodian did not properly comply with the Council's March 29, 2011 Interim Order by failing to provide a detailed document index explaining the lawful basis for each denial as directed by the Council and by failing to submit certified confirmation of compliance to the Executive Director, 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. Additionally, the evidence of record does not indicate that the Custodian's violations of the terms of the Council's Order had a positive element of conscious wrongdoing or were intentional and deliberate.

Prepared By: John E. Stewart

Approved By: Catherine Starghill, Esq.  
Executive Director

June 21, 2011



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**

**March 29, 2011 Government Records Council Meeting**

Gregory Byrnes  
Complainant

Complaint No. 2009-323

v.

Morris County Prosecutor's Office  
Custodian of Record

At the March 29, 2011 public meeting, the Government Records Council ("Council") considered the March 22, 2011 *Reconsideration* Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the amended findings and recommendations. The Council, therefore, finds that the Custodian's request for reconsideration is procedurally flawed as it does not offer evidence to show that the Council's December 21, 2010 Interim Order requires reconsideration because said Order is based upon a "palpably incorrect or irrational basis" or it is obvious that the Council did not consider, or failed to appreciate, the significance of probative, competent evidence pursuant to Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996). Further, the Custodian failed to show that, in reaching its decision, the Council acted in an arbitrary, capricious or unreasonable manner pursuant to D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990). Rather, the Custodian in the request for reconsideration recited privileged communications from the earlier mediation process; communications which cannot be considered by the Council. As such, the Custodian's motion for reconsideration is denied.

Accordingly, the Council re-issues its December 21, 2010 Interim Order as follows:

"1. Because the Complainant identified a type of government record (a subpoena or subpoenas), within a specific date range (from May 21, 2007 to June 17, 2007), and also identified the subject named in the subpoena and his employer (Michael Gosden of the Rockaway Borough Police Department) MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005) do not apply to the request relevant to this complaint. The Custodian's search is not open-ended, nor does it require research, rather it requires the Custodian to locate the corresponding subpoena or subpoenas, if any. Therefore, the Custodian must disclose the requested record to the Complainant.<sup>1</sup>

<sup>1</sup> **The record cannot be referenced as a part of mediation discussions. The Custodian must independently locate the record responsive to the Complainant's request and provide a document index which clearly identifies the requested record.**

2. The Custodian shall comply with Paragraph No. 1 above by locating the record or records responsive to the Complainant's request, if any, and within seven (7) business days from receipt of the Council's Interim Order either: (a) *disclose to the Complainant the requested record or records, if any, with any appropriate redactions together with a detailed document index explaining the lawful basis for each redaction, or (b) deny the Complainant access to said record or records together with a detailed document index explaining the lawful basis for each denial. Simultaneously with whichever action is taken the Custodian shall provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4<sup>2</sup>, to the Executive Director.*<sup>3</sup> (Emphasis Added)

3. The Council defers analysis of whether the Custodian's denial of access to the requested records is a violation of OPRA, and if so, if it rises to the level of a knowing and willful violation and unreasonable denial of 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 29<sup>th</sup> Day of March, 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: March 30, 2011**

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<sup>2</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

<sup>3</sup> 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.

**STATE OF NEW JERSEY**  
**GOVERNMENT RECORDS COUNCIL**  
*Reconsideration*  
**Findings and Recommendations of the Executive Director**  
**March 29, 2011 Council Meeting**

**Gregory Byrnes<sup>1</sup>**  
**Complainant**

**GRC Complaint No. 2009-323**

v.

**Morris County Prosecutor's Office<sup>2</sup>**  
**Custodian of Records**

**Records Relevant to Complaint:** Any subpoena served on Michael Gosden of the Rockaway Borough Police Department to appear from May 21, 2007 to June 17, 2007.

**Request Made:** October 20, 2009

**Response Made:** November 4, 2009

**Custodian:** Shelia M. Leary

**GRC Complaint Filed:** December 14, 2009<sup>3</sup>

**Background**

**December 21, 2010**

At the December 21, 2010 public meeting, the Government Records Council ("Council") considered the December 14, 2010 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. Because the Complainant identified a type of government record (a subpoena or subpoenas), within a specific date range (from May 21, 2007 to June 17, 2007), and also identified the subject named in the subpoena and his employer (Michael Gosden of the Rockaway Borough Police Department) MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005) do not apply to the request relevant to this complaint. The Custodian's search is not open-ended, nor does it require research, rather it requires the Custodian to locate the corresponding subpoena or subpoenas, if any. Therefore, the Custodian must disclose the requested record to the Complainant.

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

<sup>2</sup> Represented by Assistant Prosecutor Matheu Nunn on behalf of the Morris County Prosecutor's Office (Morristown, NJ).

<sup>3</sup> The GRC received the Denial of Access Complaint on said date.

2. **The Custodian shall comply with Paragraph No. 1 above by locating the record or records responsive to the Complainant's request, if any, and within seven (7) business days from receipt of the Council's Interim Order either: (a) disclose to the Complainant the requested record or records, if any, with any appropriate redactions together with a detailed document index explaining the lawful basis for each redaction, or (b) deny the Complainant access to said record or records together with a detailed document index explaining the lawful basis for each denial. Simultaneously with whichever action is taken the Custodian shall provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
3. The Council defers analysis of whether the Custodian's denial of access to the requested records is a violation of OPRA, and if so, if it rises to the level of a knowing and willful violation and unreasonable denial of access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

#### **December 21, 2010**

Council's Interim Order distributed to the parties.

#### **December 29, 2010**

Letter from the Custodian to the GRC. The Custodian requests reconsideration of the Council's December 21, 2010 Interim Order. The Custodian states that the complaint must be reconsidered due to illegality. The Custodian's Counsel identifies the record determined to be responsive to the Complainant's request and then provides a legal argument in support of the Custodian's decision not to disclose the requested record to the Complainant.<sup>4</sup>

#### **January 4, 2011**

Complainant's response to the Custodian's request for reconsideration. The Complainant responds to the legal argument set forth by the Custodian's Counsel.<sup>5</sup>

### **Analysis**

#### **Whether the Complainant has met the required standard for reconsideration of the Council's December 21, 2010 Interim Order?**

Pursuant to *N.J.A.C. 5:105-2.10*, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. Requests must be in writing, delivered to the Council and served on all parties. Parties must file any objection to the request for reconsideration within ten (10)

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<sup>4</sup> The Custodian's argument concerns discussions which took place during mediation of this complaint. Pursuant to the Uniform Mediation Act, N.J.S.A. 2A:23C-1 et seq., all communications which occur during the mediation process are privileged from disclosure and may not be used in any judicial, administrative or legislative proceeding, or in any arbitration, unless all parties and the mediator waive the privilege. N.J.S.A. 2A:23C-4. There is no evidence in the record that the parties or the mediator did so. Thus, the GRC may not consider the Custodian's argument in this regard. *N.J.A.C. 5:105-2.5(f)*.

<sup>5</sup> See footnote 4, *infra*.

business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. *N.J.A.C. 5:105-2.10(a) – (e)*.

In the matter before the Council, the Council's December 21, 2010 Interim Order was distributed via e-mail and overnight delivery to the parties on December 21, 2010. The Custodian submitted a request for reconsideration of said Order on December 29, 2010. Accordingly, the Custodian's request for a stay and reconsideration of the Council's Interim Order was filed with the GRC four (4) business days from receipt of the Council's decision.

Applicable case law holds that:

"[a] party should not seek reconsideration merely based upon dissatisfaction with a decision." *D'Atria v. D'Atria*, 242 *N.J. Super.* 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, *Cummings v. Bahr*, 295 *N.J. Super.* 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. *D'Atria, supra*, 242 *N.J. Super.* at 401. 'Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement.' *Ibid.*" In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

In this request for reconsideration, the Custodian was only able to identify the record that was responsive to the complaint as a result of communications that occurred in a prior mediation. The Custodian's Counsel divulged the identity of the record responsive to the request which was learned via the mediation process and thereafter he crafted non-disclosure arguments specific to that particular record.

On June 17, 2010, the GRC provided the Complainant with a post-mediation opportunity to amend his complaint. The Complainant could have amended his complaint to reflect the precise record sought; however by letter dated June 23, 2010, the Complainant stated only that the Custodian's initial reason for denial (that the record's description was too vague to locate the record) should be the only reason considered by the GRC for denial of access to the requested record.

**Pursuant to the Uniform Mediation Act, N.J.S.A. 2A:23C-1 et seq., communications that take place during the mediation process are not deemed to be public records subject to disclosure under OPRA. N.J.S.A. 2A:23C-2. All communications which occur during the mediation process are privileged from**



**disclosure and may not be used in any judicial, administrative or legislative proceeding, or in any arbitration, unless all parties and the mediator waive the privilege. N.J.S.A. 2A:23C-4. Here, there is no evidence of record that reveals both parties and the mediator waived said privilege. As such, the GRC cannot take cognizance of any information concerning the record responsive to the complaint or the arguments for non-disclosure thereof. See N.J.A.C. 5:105-2.5(f) (“Neither the mediator nor any party to mediation shall divulge to anyone the content of any mediation session or share any document produced in the course of or resulting from mediation without the written consent of the party who made the statement or produced the document. No party may use the statements made or documents produced during mediation proceedings against another party in any proceeding before the Council if mediation fails to resolve all issues presented in the complaint and the complaint is referred to the Council for adjudication”).**

As the moving party, the Custodian was required to establish either of the necessary criteria set forth above; namely 1) that the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence. See Cummings, *supra*. The Custodian was also required to show that the GRC acted arbitrarily, capriciously or unreasonably in reaching its decision. See D'Atria, *supra*. Because the record responsive to the request was identified during the mediation process, the GRC can neither take cognizance of the record nor the legal argument for or against disclosure of said record. Accordingly, the Custodian has failed to establish in her motion for reconsideration of the Council's December 21, 2010 Interim Order that 1) the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider, or failed to appreciate, the significance of probative, competent evidence. The Custodian has also failed to show that the GRC acted arbitrarily, capriciously or unreasonably in reaching its decision. See D'Atria, *supra*.

The Custodian's request for reconsideration is procedurally flawed as it does not offer evidence to show that the Council's December 21, 2010 Interim Order requires reconsideration because said Order is based upon a "palpably incorrect or irrational basis" or it is obvious that the Council did not consider, or failed to appreciate, the significance of probative, competent evidence pursuant to Cummings, *supra*. Further, the Custodian failed to show that, in reaching its decision, the Council acted in an arbitrary, capricious or unreasonable manner pursuant to D'Atria, *supra*. Rather, the Custodian in the request for reconsideration recited privileged communications from the earlier mediation process; communications which cannot be considered by the Council. As such, the Custodian's motion for reconsideration is denied. The Custodian can cure this deficiency by locating the record responsive to the Complainant's request and providing a document index which clearly identifies the requested record and sets forth the lawful basis for denial of access to said record.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that the Custodian's request for reconsideration is procedurally flawed as it does not offer evidence to show that the Council's December 21, 2010 Interim Order requires

reconsideration because said Order is based upon a "palpably incorrect or irrational basis" or it is obvious that the Council did not consider, or failed to appreciate, the significance of probative, competent evidence pursuant to Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996). Further, the Custodian failed to show that, in reaching its decision, the Council acted in an arbitrary, capricious or unreasonable manner pursuant to D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990). Rather, the Custodian in the request for reconsideration recited privileged communications from the earlier mediation process; communications which cannot be considered by the Council. As such, the Custodian's motion for reconsideration is denied.

Accordingly, the Council re-issues its December 21, 2010 Interim Order as follows:

"1. Because the Complainant identified a type of government record (a subpoena or subpoenas), within a specific date range (from May 21, 2007 to June 17, 2007), and also identified the subject named in the subpoena and his employer (Michael Gosden of the Rockaway Borough Police Department) MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005) do not apply to the request relevant to this complaint. The Custodian's search is not open-ended, nor does it require research, rather it requires the Custodian to locate the corresponding subpoena or subpoenas, if any. Therefore, the Custodian must disclose the requested record to the Complainant.<sup>6</sup>

**2. The Custodian shall comply with Paragraph No. 1 above by locating the record or records responsive to the Complainant's request, if any, and within seven (7) business days from receipt of the Council's Interim Order either: (a) *disclose to the Complainant the requested record or records, if any, with any appropriate redactions together with a detailed document index explaining the lawful basis for each redaction, or (b) deny the Complainant access to said record or records together with a detailed document index explaining the lawful basis for each denial. Simultaneously with whichever action is taken the Custodian shall provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4<sup>7</sup>, to the Executive Director.<sup>8</sup> (Emphasis Added)***

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<sup>6</sup> **The record cannot be referenced as a part of mediation discussions. The Custodian must independently locate the record responsive to the Complainant's request and provide a document index which clearly identifies the requested record.**

<sup>7</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

<sup>8</sup> 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.

3. The Council defers analysis of whether the Custodian's denial of access to the requested records is a violation of OPRA, and if so, if it rises to the level of a knowing and willful violation and unreasonable denial of access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order."

Prepared By: John Stewart, Esq.  
Mediator

Approved By: Catherine Starghill, Esq.  
Executive Director

March 22, 2011



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

December 21, 2010 Government Records Council Meeting

Gregory Byrnes  
Complainant

Complaint No. 2009-323

v.

Morris County Prosecutor's Office  
Custodian of Record

At the December 21, 2010 public meeting, the Government Records Council ("Council") considered the December 14, 2010 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Complainant identified a type of government record (a subpoena or subpoenas), within a specific date range (from May 21, 2007 to June 17, 2007), and also identified the subject named in the subpoena and his employer (Michael Gosden of the Rockaway Borough Police Department) MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005) do not apply to the request relevant to this complaint. The Custodian's search is not open-ended, nor does it require research, rather it requires the Custodian to locate the corresponding subpoena or subpoenas, if any. Therefore, the Custodian must disclose the requested record to the Complainant.
2. **The Custodian shall comply with Paragraph No. 1 above by locating the record or records responsive to the Complainant's request, if any, and within seven (7) business days from receipt of the Council's Interim Order either: (a) disclose to the Complainant the requested record or records, if any, with any appropriate redactions together with a detailed document index explaining the lawful basis for each redaction, or (b) deny the Complainant access to said record or records together with a detailed document index explaining the lawful basis for each denial. Simultaneously with whichever action is taken the Custodian shall provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4<sup>1</sup>, to the Executive Director.<sup>2</sup>**

<sup>1</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

3. The Council defers analysis of whether the Custodian's denial of access to the requested records is a violation of OPRA, and if so, if it rises to the level of a knowing and willful violation and unreasonable denial of 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 21<sup>st</sup> Day of December, 2010

Robin Berg Tabakin, Chair  
Government Records Council

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

James W. Requa, Secretary  
Government Records Council

**Decision Distribution Date: December 21, 2010**

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<sup>2</sup> 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.

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Gregory Byrnes<sup>1</sup>  
Complainant**

**GRC Complaint No. 2009-323**

v.

**Morris County Prosecutor's Office<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Any subpoena served on Michael Gosden of the Rockaway Borough Police Department to appear from May 21, 2007 to June 17, 2007.

**Request Made:** October 20, 2009

**Response Made:** November 4, 2009

**Custodian:** Shelia M. Leary

**GRC Complaint Filed:** December 14, 2009<sup>3</sup>

**Background**

**October 20, 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.

**November 4, 2009**

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the sixth (6<sup>th</sup>) business day following receipt of such request.<sup>4</sup> The Custodian states that access to the requested record is denied because the Complainant's request is too vague and lacks pertinent information to determine if the record exists. The Custodian informs the Complainant that a case name or case number would help in locating the requested record.

**December 14, 2009**

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

- Complainant's OPRA request dated October 20, 2009
- Custodian's response to the OPRA request dated November 4, 2009

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

<sup>2</sup> Represented by Daniel O' Mullan, Esq., on behalf of Morris County Counsel (Morristown, NJ).

<sup>3</sup> The GRC received the Denial of Access Complaint on said date.

<sup>4</sup> The Custodian states that she received the Complainant's OPRA request on October 27, 2009.

The Complainant states that his request was made to the Morris County Prosecutor's Office ("MCPO") on October 20, 2009, and that the request was rejected because it was too vague. The Complainant further states that the Custodian suggested that a case name or case number would assist in locating the record. The Complainant states that he thereafter made several attempts to telephone the Custodian to no avail.

The Complainant states that he sent a second letter to the Custodian in which he stated that the information he already provided should be sufficient to locate the record, but that the Custodian left him a message in reply stating that it was not possible to locate the record without a case name or number. The Complainant states that he made several more attempts to contact the Custodian to no avail.

The Complainant contends that a subpoena is a very specific identifiable government record and that the identifying information he supplied in his request resulted in his request being very narrow. The Complainant states that he does not have the other information the Custodian requested to further narrow the request. The Complainant asserts that if the Custodian cannot locate the record itself with the information the Complainant provided that the Custodian should be able to obtain secondary documents which would lead her to the requested record.

The Complainant agrees to mediate this complaint.

**December 15, 2009**

Offer of Mediation sent to the Custodian.

**December 21, 2009**

The Custodian agrees to mediate this complaint.

**December 28, 2009**

The complaint is referred for mediation.

**March 17, 2010**

The complaint is referred back from mediation to the GRC for adjudication.

**June 17, 2010**

Letter from the GRC to the Complainant. The GRC provides the Complainant with an opportunity to amend his complaint no later than June 24, 2010, in the event some issues were resolved during the mediation process and no longer require adjudication.

**June 21, 2010**

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

**June 23, 2010**

Letter from the Complainant to the GRC. The Complainant states that the Custodian's initial denial, which was that the record's description was too vague to locate

the record, should be the only reason considered by the GRC for the denial of access to the requested record.<sup>5</sup>

**June 25, 2010**

E-mail from the Custodian to the GRC. The Custodian requests an extension of time for the Custodian's Counsel to review the Denial of Access Complaint and provide legal advice to the Custodian concerning preparation of the SOI.

**June 30, 2010**

E-mail from the GRC to the Custodian. The GRC grants the Custodian a five (5) business day extension of time to prepare and submit the SOI.

**July 8, 2010<sup>6</sup>**

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated October 20, 2009
- Custodian's response to the OPRA request dated November 4, 2009

The Custodian certifies that she could not search for the requested record because the Complainant's OPRA request was too vague.

The Custodian certifies that the Complainant's OPRA request was received on October 29, 2009. The Custodian further certifies that on November 4, 2009 she wrote to the Complainant and requested more information about the Complainant's OPRA request. The Custodian certifies that she thereafter responded to the Complainant's OPRA request in writing on November 15, 2009 stating that the Complainant's request was vague and again seeking more information about the request.

The Custodian certifies that the MCPO maintains no central file of subpoenas and that without more information she could not locate the record(s) requested by the Complainant. The Custodian further certifies that she was unsuccessful in obtaining further information from the Complainant clarifying his request. The Custodian cited several other reasons for denying the Complainant access to the record; however, those reasons could not be considered by the GRC.<sup>7</sup>

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<sup>5</sup> The Complainant disputed other grounds upon which the Custodian based the denial but such argument was not considered by the GRC because it related to matters discussed during mediation.

<sup>6</sup> Additional correspondence was submitted by the parties. However, said correspondence is either not relevant to this complaint, restates the facts/assertions already presented to the GRC and/or relates to matters discussed during mediation.

<sup>7</sup> The Custodian included additional information regarding correspondence between the parties while this complaint was in mediation. Pursuant to the Uniform Mediation Act, N.J.S.A. 2A:23C-1 et seq., communications that take place during the mediation process are not deemed to be public records subject to disclosure under OPRA. N.J.S.A. 2A:23C-2. All communications which occur during the mediation process are privileged from disclosure and may not be used in any judicial, administrative or legislative proceeding, or in any arbitration, unless all parties and the mediator waive the privilege. N.J.S.A. 2A:23C-4.



## Analysis

### **Whether the Custodian unlawfully denied access to the requested record?**

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...A government record shall not include...*criminal investigatory records...*” (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.

The Complainant asserts that he filed his OPRA request on October 20, 2009, but he did not receive a response until November 5, 2009. The Custodian certifies that she did not receive the request until October 27, 2009, and that she responded to it six (6) business days later on November 4, 2009. Whether the response was made on November 4, 2009 or November 5, 2009 is inconsequential because it would still be a timely response if the Custodian received the request on October 27, 2009.

The Custodian certified that she denied the Complainant access to the requested record because the Complainant’s request was too vague and lacked pertinent information to determine if the record existed. The Custodian further certified that she informed the Complainant that a case name or case number would help in locating the requested record. The Complainant stated that he does not have the other information the Custodian requested.

The New Jersey Superior Court has held that "[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records 'readily accessible for inspection, copying, or examination.'* N.J.S.A. 47:1A-1." (Emphasis added.) MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005). The Court further held that "[u]nder OPRA, *agencies are required to disclose only 'identifiable' government records* not otherwise exempt ... In short, OPRA does not countenance open-ended searches of an agency's files." (Emphasis added.) *Id.* at 549.

In determining that MAG Entertainment's request for "all documents or records" from the Division of Alcoholic Beverage Control pertaining to selective enforcement was invalid under OPRA, the Appellate Division noted that:

"[m]ost significantly, the request 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. Such an open-ended demand required the Division's records custodian 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 in the OAL litigation. 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.*

Further, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),<sup>8</sup> the Superior Court references MAG in that the Court held that a requestor must specifically describe the document sought because OPRA operates to make identifiable government records "accessible." "As such, a proper request under OPRA must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting all of an agency's documents."<sup>9</sup>

Additionally, in New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007) the court cited MAG by stating that "...when a request is 'complex' because it fails to specifically identify the documents sought, then that request is not 'encompassed' by OPRA..." The court also 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." The court further stated 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..."

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<sup>8</sup> Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

<sup>9</sup> As stated in Bent, *supra*.

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

In the instant case, however, the Complainant framed his request such that the records sought were specifically identifiable pursuant to 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.

Because the Complainant identified a type of government record (a subpoena or subpoenas), within a specific date range (from May 21, 2007 to June 17, 2007), and also identified the subject named in the subpoena and his employer (Michael Gosden of the Rockaway Borough Police Department) MAG and Bent do not apply to the request relevant to this complaint. The Custodian’s search is not open-ended, nor does it require research, but rather requires the Custodian to locate the corresponding subpoena or subpoenas in her files. Therefore, the Custodian must disclose the requested record to the Complainant.

**Whether the Custodian’s denial of access to the requested records is a violation of OPRA, and if so, if it 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’s denial of access to the requested records is a violation of OPRA, and if so, if it rises to the level of a knowing and willful violation and unreasonable denial of 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 Complainant identified a type of government record (a subpoena or subpoenas), within a specific date range (from May 21, 2007 to June 17, 2007), and also identified the subject named in the subpoena and his employer (Michael Gosden of the Rockaway Borough Police Department) MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005) do not apply to the request relevant to this

complaint. The Custodian's search is not open-ended, nor does it require research, rather it requires the Custodian to locate the corresponding subpoena or subpoenas, if any. Therefore, the Custodian must disclose the requested record to the Complainant.

2. **The Custodian shall comply with Paragraph No. 1 above by locating the record or records responsive to the Complainant's request, if any, and within seven (7) business days from receipt of the Council's Interim Order either: (a) disclose to the Complainant the requested record or records, if any, with any appropriate redactions together with a detailed document index explaining the lawful basis for each redaction, or (b) deny the Complainant access to said record or records together with a detailed document index explaining the lawful basis for each denial. Simultaneously with whichever action is taken the Custodian shall provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4<sup>10</sup>, to the Executive Director.<sup>11</sup>**
3. The Council defers analysis of whether the Custodian's denial of access to the requested records is a violation of OPRA, and if so, if it rises to the level of a knowing and willful violation and unreasonable denial of access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: John Stewart  
Mediator

Approved By: Catherine Starghill, Esq.  
Executive Director

December 14, 2010

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<sup>10</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

<sup>11</sup> 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.