



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

December 18, 2018 Government Records Council Meeting

Richard Rivera
Complainant

Complaint No. 2010-181

v.

Passaic County Sheriff's Office
Custodian of Record

At the December 18, 2018 public meeting, the Government Records Council ("Council") considered the December 11, 2018 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 the Council accept the Honorable Leslie Z. Celentano's, Administrative Law Judge, November 23, 2018 Initial Decision concluding that "this matter should be and is hereby dismissed with prejudice."

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 18th Day of December, 2018

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: December 20, 2018



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Council Staff
December 18, 2018 Council Meeting**

**Richard Rivera¹
Complainant**

GRC Complaint No. 2010-181

v.

**Passaic County Sheriff's Office²
Custodial Agency**

Records Relevant to Complaint: On-site inspection of the following records:³

1. Arrest reports of individuals arrested by the Passaic County Sheriff's Office ("PCSO") in connection with a traffic stop for criminal infractions, not including Title 39 offenses, from July 1, 2009 to the present;
2. "Confidential Informant Report File" showing the "confidential informant number" and "monies dispersed" for the year 2009;
3. All forfeited assets received, forfeiture program reports filed on behalf of the PCSO from 2009 through the present;
4. All reallocation of property forfeiture program report forms filed on behalf of the PCSO from 2009 through the present;
5. All requests for forfeiture fund disbursements to a non-law enforcement agency and forfeiture program reports forms filed on behalf of the PCSO from 2009 through the present;
6. Law enforcement trust account statements from 2009 through the present;
7. Seized asset trust account statements from 2009 through the present;
8. Passaic County Prosecutor escrow account statements for funds held on behalf of the PCSO from 2009 through the present;
9. Vehicle asset forfeiture inventory for 2009 through the present;
10. Inventory record from 2009 through the present of direct purchases made with forfeited assets.

Copies of the following records:

11. Past records requests made by the Complainant indicating that Sheriff Speziale and command staff members received overtime and accumulated compensation time;
12. Overtime reports and requests for compensation time filed by Sheriff Speziale and command staff members, including the names of policy makers, division leaders and supervisors that received the compensation, the persons that approved such compensation,

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

² Represented by James M. Labianca, Esq., of DeYoe, Heissenbuttel, & Buglione, LLC (Wayne, NJ).

³ The Complainant filed four (4) separate OPRA requests for these records. All of these requests were the subject of the Denial of Access Complaint. However, due to the commonality of the parties and the date of the requests, the GRC refers to these requests as a single request for the purposes of this adjudication.

and the date, time, event, purpose and location for which the compensation was requested for incidents/events, from 2009 through the present.

Custodian of Record: William Maer

Request Received by Custodian: July 15, 2010

Response Made by Custodian: July 23, 2010

GRC Complaint Received: July 27, 2010

Background

September 25, 2012 Council Meeting:

At its September 25, 2012 public meeting, the Council considered the September 18, 2012 *In Camera* 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 Custodian failed to provide the GRC with nine (9) copies of the unredacted records responsive to request Item No. 2, *i.e.*, confidential informant report file for the year 2009 for an *in camera* review and has failed to provide the records responsive to request Item No. 8, *i.e.*, Passaic County Prosecutor's escrow account statements for funds held on behalf of the Passaic County Prosecutor's Office from 2009 through the present to the Complainant for an on-site inspection as well as a certified confirmation of compliance with the Council's Order in accordance with N.J. Court Rule R. 1:4-4, the Custodian has failed to comply with the Council's June 26, 2012 Interim Order.
2. The GRC is unable to determine whether the Complainant conducted an on-site inspection of the records responsive to request Item No. 8 and is also unable to determine whether the records responsive to request Item No. 2 are exempt from disclosure under OPRA. Therefore, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts, including an *in camera* examination of the requested confidential informant report file for the year 2009 responsive to request Item No. 2 to determine if said records are exempt from disclosure under OPRA. The Office of Administrative Law should also determine if the Custodian knowingly and willfully violated OPRA if found to have unlawfully denied access to the requested records. Lastly, the Office of Administrative Law should also determine if the Complainant is a prevailing party and entitled to reasonable prevailing party attorney's fees.

Procedural History:

On September 26, 2012, the Council distributed its Interim Order to all parties. On April 24, 2013, the Government Records Council ("GRC") transmitted this complaint to the Office of Administrative Law ("OAL"). On November 23, 2018, the Honorable Leslie Z. Celentano, Administrative Law Judge ("ALJ"), issued an Initial Decision in this matter. The ALJ's Initial Decision, set forth as "Exhibit A," determined that:

On March 20, 2017, [Complainant's Counsel responded] . . . and reported that as to the four issues transmitted, one had resolved by interlocutory opinion. He also advised that[:]

Because the Complainant does not wish to pursue the second and third issues, only the fourth issue remains open. Unless we receive different direction from the Court, we will file a motion for an award of reasonable attorneys' fees pursuant to the OAL Rules which the Records Custodian may oppose in due course.

No motion has been filed to date, indeed nothing further has been heard from any party in the twenty [(20)] months that have elapsed since that letter.

On September 14, 2018, the undersigned again reached out to [Complainant's] [C]ounsel, seeking the status of the case as follows:

The last status report I received in this matter in response to my inquiry, was on March 20, 2017. On that date, [Complainant's Counsel] represented that the only remaining issue was "whether the Complainant is a prevailing party entitled to fee-shifting under OPRA;" and that he would file a motion for an award of fees. Nothing has been heard from either party since that date. What is the status of this matter?

As no reply whatsoever has been received to that letter and nothing has been heard from either party in twenty months, I **FIND** that this matter should be and is hereby dismissed with prejudice.

[Id. at 2-3.]

The ALJ's Initial Decision provided the parties thirteen (13) days from mailing to submit to the GRC exceptions to the decision. The GRC received no exceptions from either party.

Analysis

Administrative Law Judge's Initial Decision

The ALJ's findings of fact are entitled to deference from the GRC because they are based upon the ALJ's determination of the credibility of the parties. "The reason for the rule is that the administrative law judge, as a finder of fact, has the greatest opportunity to observe the demeanor of the involved witnesses and, consequently, is better qualified to judge their credibility." In the Matter of the Tenure Hearing of Tyler, 236 N.J. Super. 478, 485 (App. Div. 1989) (certif. denied 121 N.J. 615 (1990)). The Appellate Division affirmed this principle, underscoring that, "under existing law, the [reviewing agency] must recognize and give due weight to the ALJ's unique position and ability to make demeanor-based judgments." Whasun Lee v. Bd. of Educ. of the Twp. of Holmdel, Docket No. A-5978-98T2 (App. Div. 2000), slip op. at 14. "When such a record,

involving lay witnesses, can support more than one factual finding, it is the ALJ's credibility findings that control, unless they are arbitrary or not based on sufficient credible evidence in the record as a whole.” Cavalieri v. Bd. of Tr. of Pub. Emp. Ret. Sys., 368 N.J. Super. 527, 537 (App. Div. 2004).

The ultimate determination of the agency and the ALJ’s recommendations must be accompanied by basic findings of fact sufficient to support them. State, Dep’t of Health v. Tegnazian, 194 N.J. Super. 435, 442-43 (App. Div. 1984). The purpose of such findings “is to enable a reviewing court to conduct an intelligent review of the administrative decision and determine if the facts upon which the order is grounded afford a reasonable basis therefor.” Id. at 443. Additionally, the sufficiency of evidence “must take into account whatever in the record fairly detracts from its weight”; the test is not for the courts to read only one side of the case and, if they find any evidence there, the action is to be sustained and the record to the contrary is to be ignored (citation omitted). St. Vincent’s Hosp. v. Finley, 154 N.J. Super. 24, 31 (App. Div. 1977).

The ALJ’s Initial Decision, set forth as “Exhibit A,” determined that:

As no reply whatsoever has been received to that letter and nothing has been heard from either party in twenty [(20)] months, I **FIND** that this matter should be and is hereby dismissed with prejudice.

[Id. at 3.]

Here, the ALJ fairly reached a conclusion that amounted to Complainant’s Counsel abandoning this complaint. Specifically, Complainant’s Counsel advised in a March 20, 2017 letter that the only remaining issue was the prevailing party fee question. Counsel further confirmed that he would submit a motion unless the OAL directed otherwise. Twenty (20) months subsequently passed without such submission. The OAL did seek a status update in September 2018, eighteen (18) months after Complainant’s Counsel advised that he would submit a motion. However, the OAL did not receive a response to its update request. Thus, the ALJ’s conclusion is aligned and consistent with the factual record. As such, the GRC is satisfied that the facts provide a reasonable basis for the ALJ’s conclusions.

Therefore, the Council should accept the ALJ’s November 23, 2018 Initial Decision concluding that “this matter should be and is hereby dismissed with prejudice.”

Conclusions and Recommendations

The Council Staff respectfully recommends the Council accept the Honorable Leslie Z. Celentano’s, Administrative Law Judge, November 23, 2018 Initial Decision concluding that “this matter should be and is hereby dismissed with prejudice.”

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

December 11, 2018



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL

OAL DKT. NO. GRC 05973-13

AGENCY DKT. NO. 2010-181

RICHARD RIVERA,

Petitioner,

v.

PASSAIC COUNTY SHERIFF'S OFFICE,

Respondent.

Walter M. Luers, Esq., for petitioner

James M. LaBianca, Esq., for respondent (Buglione, Hutton & DeYoe, LLC,
attorneys)

Record Closed: November 21, 2018

Decided: November 23, 2018

BEFORE **LESLIE Z. CELENTANO, ALJ:**

STATEMENT OF THE CASE

Petitioner, Richard Rivera, made four Open Public Records Act ("OPRA") requests seeking access to twelve categories of documents from respondent, the Passaic County Sheriff's Office, on July 15, 2010. Petitioner subsequently filed a denial-of-access complaint with the Government Records Council on July 27, 2010. The Government

Records Council (“GRC”) issued two Interim Orders culminating in transmittal of specific unresolved issues to the Office of Administrative Law (“OAL”) on April 25, 2013.

The matter was transmitted to the Office of Administrative Law (OAL) on November 26, 2013, for an in camera review of a confidential informant report file from 2009. The parties filed briefs and an Order was issued on April 25, 2014, directing respondent to submit additional information about the report and redactions. Following submission of the supplemental information sought from respondent, a subsequent Order was issued on December 24, 2014, concluding that the confidential informant report was per se exempt from OPRA. Thereafter, following issuance of the interlocutory orders, the undersigned’s judicial assistant inquired of the parties as to the status of this case. On March 20, 2017, counsel for petitioner respondent with the undersigned and reported that as to the four issues transmitted, one had resolved by interlocutory opinion. He also advised that,

...

Because the Complainant does not wish to pursue the second and third issues, only the fourth issue remains open. Unless we receive different direction from the Court, we will file a motion for an award of reasonable attorneys’ fees pursuant to the OAL Rules which the Records Custodian may oppose in due course.

No motion has been filed to date, indeed nothing further has been heard from any party in the twenty months that have elapsed since that letter.

On September 14, 2018, the undersigned again reached out to counsel, seeking the status of the case as follows:

The last status report I received in this matter in response to my inquiry, was on March 20, 2017. On that date, Mr. Luers represented that the only remaining issue was “whether the Complainant is a prevailing party entitled to fee-shifting under OPRA;” and that he would file a motion for an award of fees. Nothing has been heard from either party since that date. What is the status of this matter?

As no reply whatsoever has been received to that letter and nothing has been heard from either party in twenty months, I **FIND** that this matter should be and is hereby dismissed with prejudice.

I hereby **FILE** my initial decision with the **GOVERNMENT RECORDS COUNCIL** for consideration.

This recommended decision may be adopted, modified or rejected by the **GOVERNMENT RECORDS COUNCIL**, who by law is authorized to make a final decision in this matter. If the Government Records Council does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **EXECUTIVE DIRECTOR OF THE GOVERNMENT RECORDS COUNCIL, 101 South Broad Street, PO Box 819, Trenton, New Jersey 08625-0819**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 23, 2018

DATE



LESLIE Z. CELENTANO, ALJ

Date Received at Agency:

November 23, 2018

Date Mailed to Parties:

dr



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

September 25, 2012 Government Records Council Meeting

Richard Rivera
Complainant

Complaint No. 2010-181

v.

Passaic County Sheriff's Office
Custodian of Record

At the September 25, 2012 public meeting, the Government Records Council ("Council") considered the September 18, 2012 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Custodian failed to provide the GRC with nine (9) copies of the unredacted records responsive to request Item No. 2, *i.e.*, confidential informant report file for the year 2009 for an *in camera* review and has failed to provide the records responsive to request Item No. 8, *i.e.*, Passaic County Prosecutor's escrow account statements for funds held on behalf of the Passaic County Prosecutor's Office from 2009 through the present to the Complainant for an on-site inspection as well as a certified confirmation of compliance with the Council's Order in accordance with N.J. Court Rule 1:4-4, the Custodian has failed to comply with the Council's June 26, 2012 Interim Order.
2. The GRC is unable to determine whether the Complainant conducted an on-site inspection of the records responsive to request Item No. 8 and is also unable to determine whether the records responsive to request Item No. 2 are exempt from disclosure under OPRA. Therefore, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts, including an *in camera* examination of the requested confidential informant report file for the year 2009 responsive to request Item No. 2 to determine if said records are exempt from disclosure under OPRA. The Office of Administrative Law should also determine if the Custodian knowingly and willfully violated OPRA if found to have unlawfully denied access to the requested records. Lastly, the Office of Administrative Law should also determine if the Complainant is a prevailing party and entitled to reasonable prevailing party attorney's fees.



Interim Order Rendered by the
Government Records Council
On The 25th Day of September, 2012

Robin Berg Tabakin, Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: September 26, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Richard Rivera¹
Complainant**

GRC Complaint No. 2010-181

v.

**Passaic County Sheriff's Office²
Custodian of Records**

Records Relevant to Complaint:³

On-site inspection of the following records:

1. Arrest reports of individuals arrested by the Passaic County Sheriff's Office ("PCSO") in connection with a traffic stop for criminal infractions, not including Title 39 offenses, from July 1, 2009 to the present;
2. "Confidential Informant Report File" showing the "confidential informant number" and "monies dispersed" for the year 2009;
3. All forfeited assets received, forfeiture program reports filed on behalf of the PCSO from 2009 through the present;
4. All reallocation of property forfeiture program report forms filed on behalf of the PCSO from 2009 through the present;
5. All requests for forfeiture fund disbursements to a non-law enforcement agency and forfeiture program reports forms filed on behalf of the PCSO from 2009 through the present;
6. Law enforcement trust account statements from 2009 through the present;
7. Seized asset trust account statements from 2009 through the present;
8. Passaic County Prosecutor escrow account statements for funds held on behalf of the PCSO from 2009 through the present;
9. Vehicle asset forfeiture inventory for 2009 through the present;
10. Inventory record from 2009 through the present of direct purchases made with forfeited assets.

Copies of the following records:

11. Past records requests made by the Complainant indicating that Sheriff Speziale and command staff members received overtime and accumulated compensation time;
12. Overtime reports and requests for compensation time filed by Sheriff Speziale and command staff members, including the names of policy makers, division leaders and supervisors that received the compensation, the persons that approved such

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

² Represented by James M. Labianca, Esq., of DeYoe, Heissenbuttel, & Buglione, LLC (Wayne, NJ).

³ The Complainant filed four (4) separate OPRA requests for these records. All of these requests were the subject of the Denial of Access Complaint. However, due to the commonality of the parties and the date of the requests, the GRC refers to these requests as a single request for the purposes of this adjudication.

compensation, and the date, time, event, purpose and location for which the compensation was requested for incidents/events, from 2009 through the present.

Request Made: July 15, 2010

Response Made: July 23, 2010

Custodian: William Maer

GRC Complaint Filed: July 27, 2010⁴

Records Submitted for *In Camera* Examination: Confidential information payments for the year 2009.⁵

Background

June 26, 2012

Government Records Council's ("Council") Interim Order. At its June 26, 2012 public meeting, the Council considered the June 19, 2012 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 Custodian failed to respond immediately to the Complainant's OPRA request Item No. 12 seeking public employee overtime and requests for compensation time from 2009 through the present, the Custodian violated N.J.S.A. 47:1A-5.e. *Herron v. Township of Montclair*, GRC Complaint No. 2006-178 (February 28, 2007).
2. The Custodian's failure to grant access, deny access, request clarification or request an extension of time for request Item Nos. 4, 7, 8, 10, and 11 of the Complainant's OPRA request within the statutorily mandated seven (7) business days results in a "deemed" denial of these request Items pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and *Kelley v. Township of Rockaway (Morris)*, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
3. Because the Custodian's September 10, 2010 response failed to provide the Complainant access to the records responsive to request Item No. 3 and failed to provide another date by which the Complainant could expect access to be granted or denied, the Custodian violated N.J.S.A. 47:1A-5.i. resulting in a "deemed" denial of access to these records. *Kohn v. Township of Livingston Library (Essex)*, GRC Complaint No. 2007-124 (March 2008).
4. Because the Custodian certified to the GRC on December 14, 2011 that no records responsive to the Complainant's OPRA request for Item Nos. 5, 10

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

⁵ The Custodian provided these records only with redactions and failed to provide these records without redactions as required by the Council's June 26, 2012 Order. The Custodian also included other records responsive to the Complainant's OPRA request which the Council did not order an *in camera* review on. Richard Rivera v. Passaic County Sheriff's Office, 2010-181 – Supplemental Findings and Recommendations of the Executive Director

and 11 exist and because there is no 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. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the records responsive to request Item No. 2, confidential informant report file for the year 2009, in order to determine whether the redactions made to such record are lawful.
6. **The Custodian must deliver⁶ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 5 above), a document or redaction index⁷, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4⁸, that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
7. Because the Custodian failed to submit evidence that the records responsive to request Item No. 8 were provided to the Complainant or to provide a lawful basis for the denial of access to such records, the Custodian must make available to the Complainant for an on-site inspection all of the records that exist that are responsive to request Item No. 8, *i.e.*, Passaic County Prosecutor escrow account statements for funds held on behalf of the Passaic County Prosecutor's Office from 2009 through the present
8. **The Custodian shall comply with Item No. 7 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4⁹, to the Executive Director.¹⁰**

⁶ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

⁷ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

⁸ "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."

⁹ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

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

9. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
10. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

June 27, 2012

Council's Interim Order distributed to the parties.

July 9, 2012

Facsimile from Custodian's Counsel to the GRC. Counsel requests a thirty (30) day extension to comply with the Order in order to assemble the requisite information, create the documents and redaction logs and to prepare the necessary certification and schedule any on-site inspections.

July 11, 2012

E-mail from the GRC to Custodian's Counsel. The GRC states that upon approval from the Acting Executive Director, the GRC will grant one (1) thirty (30) day extension to comply with the Order. The GRC also states that this is the only extension it will grant to Custodian's Counsel. Lastly, the GRC states that the Custodian's compliance is due by August 8, 2012.

July 23, 2012

Letter from the Custodian to the Complainant. The Custodian states that the record responsive to request Item No. 4 and No. 6 are available for an on-site inspection. The Custodian also states that the Complainant must call the Passaic County Sheriff's Office to schedule an appointment to view these records.

August 6, 2012

Custodian's response to the Council's Interim Order attaching an e-mail from the Custodian to the Complainant dated July 23, 2012. The Custodian certifies that on July 15, 2010 he received the Complainant's OPRA request. The Custodian also certifies that he responded in writing on July 23, 2010 and informed the Complainant that access to request Item No.1 through No. 6 and No. 9 will be granted on September 10, 2010 due to the amount of research required. The Custodian also certifies that he will deliver to the GRC nine (9) copies of the unredacted confidential informant report file for the year 2009 in response to request Item No. 2.¹¹

The Custodian encloses nine (9) copies on two (2) sets of compact discs of all records the Complainant requested. The Custodian states that the Complainant did not pick up the records responsive to Item No. 6. The Custodian also states that he redacted

¹¹ The Custodian fails to include nine (9) copies of the unredacted confidential information report file for the year 2009 in response to request Item No. 2. The Custodian includes nine (9) copies of all the records responsive to the Complainant's OPRA request. The Custodian provided the confidential information reports responsive, however said reports were provided with redactions.

the bank account numbers for the rerecords responsive to request Item No. 4. The Custodian further states that he redacted the social security number, phone number, driver's license number, juvenile information, Federal Bureau Investigation number, State Bureau Investigation number and contact information from the records responsive to request Item No. 1. The Custodian further states that he redacted the bank account numbers from the records responsive to request Item No. 6. The Custodian additionally states that all information on the records responsive to request Item No. 2 is confidential.

August 27, 2012

Letter from the GRC to the Custodian. The GRC states that it is in receipt of the Custodian's August 6, 2012 letter. The GRC also states that based upon the records the Custodian provided, it cannot determine which records are responsive to request Item No. 2 for which the GRC must conduct an *in camera* review. The GRC further states that it is returning to the Custodian the CDs and legal certification previously provided. The GRC requests the Custodian to again review the Council's June 26, 2012 Order and provide a revised submission to the GRC in compliance with said Order within five (5) business days from receipt of this letter.

September 4, 2012

Letter from the Custodian to the GRC.¹² The Custodian states that he is responding to the GRC's letter dated August 27, 2012. The Custodian also states that the records responsive to request Item No. 6, law enforcement trust account statements from 2009 through the present, contain the same information as request Item No. 8, Passaic County Prosecutor escrow account statements for funds held on behalf of the PCSO from 2009 through the present. The Custodian further states that the Passaic County Prosecutor's Office is an independent agency and a request for records responsive to request Item No. 8 should be directed to the Prosecutor's Office. The Custodian also provides the legal basis for each redaction made to the records on August 27, 2012.

September 4, 2012

Facsimile from Custodian's Counsel to the GRC. Counsel submits a brief arguing that the records responsive to request Item No. 2 should not be provided for an *in camera* review. Counsel states that the New Jersey Supreme Court ruled in State v. Garcia, 131 N.J. 67 (1993), that under the Official Information Privilege, the State should not be forced to release the location of a concealed police surveillance location to criminal defendants. Counsel also states that if the New Jersey Supreme Court has determined that criminal defendants are not entitled to precise information regarding their criminal charges then civil plaintiffs and OPRA requestors should also not be entitled to that information.

Counsel argues that these records are also considered criminal investigatory records pursuant to N.J.S.A. 47:1A-3. Counsel also argues that this is pertinent to the instant matter because it contains a request for records of criminal matters which may be ongoing. Counsel further argues that it is fair to assume that many of these matters are

¹² The Custodian provides the GRC with nine (9) copies of CDs with the records responsive to the Complainant's OPRA request. The Custodian fails to include the unredacted confidential informant report file in response to request Item No. 2.

still in the investigation stages or being prosecuted and release of this information may jeopardize an investigation in progress. Counsel additionally argues that such information is privileged and should not be disclosed.

Counsel states that in United States v. O'Neill, 619 F.2d 222 (3rd Cir. 1980) the court conducted a balancing test because a valid claim of privilege was properly invoked. Counsel also states that the test requires the party who seek the information to show the need for it so that the court can “balance on one hand the policies which give rise to the privilege and their applicability to the facts at hand against the need for the evidence sought to be obtained in the case at hand.” Counsel argues that applying this case to the instant matter, results in the favor of confidentiality when it involves ongoing criminal investigations. Counsel states that it is not clear why the Complainant needs the requested information.

Counsel states that another test was adopted by the New Jersey Supreme Court in Burnett v. County of Bergen, 198 N.J. 408 (2009). Counsel also states that in Burnett, supra, the Court was balancing the relevant factors weighed in favor of redacting and releasing realty documents pursuant to an OPRA request, when those records contained details about ownership of various properties along with personal information about the owners such as social security numbers. Counsel further states that these relevant factors are: 1) the type of record requested; 2) the information it does or might contain; 3) the potential for harm; 4) the injury from disclosure to the relationship in which the record was generated; 5) the adequacy of safeguards to prevent unauthorized disclosure; 6) the degree of need for access; and 7) whether there is an express statutory mandate, articulated public policy or other recognized public interest militating toward access. Counsel further states that the Court in Burnett, supra, decided to release the records after redacting the social security numbers contained therein. Counsel argues that the records requested are informant records, which are confidential in nature and were never meant to be viewed by the public. Counsel also argues that there is a high probability of harm that would result if the release of these records jeopardized an investigation in progress. Counsel further argues that the balance weighs in favor of non-disclosure of the confidential informant records.

Counsel states in Rovario v. United States, 353 U.S. 53 (1957), the Court discussed another basis on which the government can withhold information, usually referred to as the informer's privilege. Counsel argues that this privilege is described as “the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law.” Counsel also argues that the informer's privilege is considered in the context of protection from discoverable information, but the underlying principles are applicable to the instant matter. Counsel further argues that releasing this information will have a chilling effect on future informants who would understandably fear having their identities exposed. Counsel argues that pursuant to this reasoning, the confidential informant report file for the year 2009 showing the confidential informant number and monies disbursed should not be subject to an *in camera* inspection.

Analysis

Whether the Custodian complied with the Council's June 26, 2012 Interim Order?

The Council's June 26, 2012 Interim Order required the Custodian to 1) deliver to the Council in a sealed envelope nine (9) copies of the requested unredacted records of the "confidential informant report file for the year 2009" for an *in camera* inspection, as well as a legal certification from the Custodian in accordance with N.J. Court Rule 1:4-4, that the records provided are the records requested by the Council for the *in camera* inspection and 2) make available to the Complainant for an on-site inspection all the records that exist that are responsive to request Item No. 8, *i.e.*, Passaic County Prosecutor's escrow account statements for funds held on behalf of the Passaic County Prosecutor's Office from 2009 through the present and simultaneously provide certified confirmation of compliance to the GRC. The Council's Order required the Custodian to comply within five (5) business days from receipt of said Interim Order.

The evidence of record indicates that Custodian's Counsel requested a thirty (30) business day extension on July 9, 2012, the seventh (7th) business day following receipt of the Council's Order. The GRC granted Counsel's request for an extension and informed him that the Custodian's compliance is due by August 8, 2012. The evidence of record also indicates that the Custodian responded to the Council's Interim Order on August 6, 2012. In response to said order the Custodian provided an e-mail from the Custodian to the Complainant dated July 23, 2012, stating that the records responsive to request Item No. 4 and No. 6 are available for an on-site inspection. The Custodian also provided the GRC with nine (9) copies of all the records responsive to the Complainant's OPRA request. However, the Custodian failed to include the *unredacted* records of the confidential informant report file for the year 2009. The Custodian also failed to provide any evidence that he made the records responsive to request Item No. 8, Passaic County Prosecutor's escrow account statements for funds held on behalf of the Passaic County Prosecutor's Office from 2009 through the present, available to the Complainant for an on-site inspection.

Therefore, because the Custodian failed to provide the GRC with nine (9) copies of the unredacted records responsive to request Item No. 2, *i.e.*, confidential informant report file for the year 2009 for an *in camera* review and has failed to provide the records responsive to request Item No. 8, *i.e.*, Passaic County Prosecutor's escrow account statements for funds held on behalf of the Passaic County Prosecutor's Office from 2009 through the present to the Complainant for an on-site inspection as well as a certified confirmation of compliance with the Council's Order in accordance with N.J. Court Rule 1:4-4, the Custodian has failed to comply with the Council's June 26, 2012 Interim Order.

The GRC contacted the Custodian on August 27, 2012 via letter informing the Custodian that based upon records he provided it is difficult to determine which records are responsive to request Item No. 2 for which the GRC must conduct an *in camera* review. The GRC further stated that it was returning the CDs and legal certification the Custodian provided. Lastly, the GRC ordered the Custodian to review the Council's

Order and to provide a revised submission to the GRC within five (5) business days from receipt of its August 27, 2012 letter.

The Custodian informed the GRC in a letter dated September 4, 2012 that the records responsive to request Item No. 6 contain the same information as request Item No. 8. The Custodian also stated that the Passaic County Prosecutor's Office is an independent agency and a request for records responsive to Item No. 8 should be directed to the Prosecutor's Office. However, the Custodian failed to certify if the Passaic County Sheriff's Office is in possession of the records responsive to request Item No. 8. The Custodian also failed to certify if the records responsive to request Item No. 6 are the same records as requested by the Complainant for Item No. 8. The Custodian also provided the GRC with nine (9) copies of CDs with all the records responsive to the Complainant's OPRA request. However, again, the Custodian failed to provide the GRC with copies of the *unredacted* records responsive to request Item No. 2, *i.e.*, confidential informant report file for the year 2009 for an *in camera* review. The Custodian provided the records responsive to request Item No. 2, with redactions. Custodian's Counsel submitted a supplemental brief on September 4, 2012 arguing that the records responsive to request Item No. 2 should not be provided for an *in camera* review. Regardless, the fact remains that the Custodian again failed to comply with the Councils' Interim Order after giving the Custodian a second (2nd) chance.

Therefore, the GRC is unable to determine whether the Complainant conducted an on-site inspection of the records responsive to request Item No. 8 and is also unable to determine whether the records responsive to request Item No. 2 are exempt from disclosure under OPRA. Therefore, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts, including an *in camera* examination of the requested confidential informant report file for the year 2009 responsive to request Item No. 2 to determine if said records are exempt from disclosure under OPRA. The Office of Administrative Law should also determine if the Custodian knowingly and willfully violated OPRA if found to have unlawfully denied access to the requested records. Lastly, the Office of Administrative Law should also determine if the Complainant is a prevailing party and entitled to reasonable prevailing party attorney's fees.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that

1. Because the Custodian failed to provide the GRC with nine (9) copies of the unredacted records responsive to request Item No. 2, *i.e.*, confidential informant report file for the year 2009 for an *in camera* review and has failed to provide the records responsive to request Item No. 8, *i.e.*, Passaic County Prosecutor's escrow account statements for funds held on behalf of the Passaic County Prosecutor's Office from 2009 through the present to the Complainant for an on-site inspection as well as a certified confirmation of compliance with the Council's Order in accordance with N.J. Court Rule 1:4-4, the Custodian has failed to comply with the Council's June 26, 2012 Interim Order.

2. The GRC is unable to determine whether the Complainant conducted an on-site inspection of the records responsive to request Item No. 8 and is also unable to determine whether the records responsive to request Item No. 2 are exempt from disclosure under OPRA. Therefore, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts, including an *in camera* examination of the requested confidential informant report file for the year 2009 responsive to request Item No. 2 to determine if said records are exempt from disclosure under OPRA. The Office of Administrative Law should also determine if the Custodian knowingly and willfully violated OPRA if found to have unlawfully denied access to the requested records. Lastly, the Office of Administrative Law should also determine if the Complainant is a prevailing party and entitled to reasonable prevailing party attorney's fees.

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

Approved By: Karyn Gordon, Esq.
Acting Executive Director

September 18, 2012



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

June 26, 2012 Government Records Council Meeting

Richard Rivera
Complainant

Complaint No. 2010-181

v.

Passaic County Sheriff's Office
Custodian of Record

At the June 26, 2012 public meeting, the Government Records Council ("Council") considered the June 19, 2012 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 failed to respond immediately to the Complainant's OPRA request Item No. 12 seeking public employee overtime and requests for compensation time from 2009 through the present, the Custodian violated N.J.S.A. 47:1A-5.e. Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 28, 2007).
2. The Custodian's failure to grant access, deny access, request clarification or request an extension of time for request Item Nos. 4, 7, 8, 10, and 11 of the Complainant's OPRA request within the statutorily mandated seven (7) business days results in a "deemed" denial of these request Items pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway (Morris), GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
3. Because the Custodian's September 10, 2010 response failed to provide the Complainant access to the records responsive to request Item No. 3 and failed to provide another date by which the Complainant could expect access to be granted or denied, the Custodian violated N.J.S.A. 47:1A-5.i. resulting in a "deemed" denial of access to these records. Kohn v. Township of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008).
4. Because the Custodian certified to the GRC on December 14, 2011 that no records responsive to the Complainant's OPRA request for Item Nos. 5, 10 and 11 exist and because there is no 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. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the records responsive to request Item No. 2, confidential informant report file for the year 2009, in order to determine whether the redactions made to such record are lawful.
6. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 5 above), a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4³, that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
7. Because the Custodian failed to submit evidence that the records responsive to request Item No. 8 were provided to the Complainant or to provide a lawful basis for the denial of access to such records, the Custodian must make available to the Complainant for an on-site inspection all of the records that exist that are responsive to request Item No. 8, *i.e.*, Passaic County Prosecutor escrow account statements for funds held on behalf of the Passaic County Prosecutor's Office from 2009 through the present
8. **The Custodian shall comply with Item No. 7 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4⁴, to the Executive Director.⁵**
9. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
10. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 26th Day of June, 2012

¹ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

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

³ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁴ "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."

⁵ 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.

Steven F. Ritardi, Esq., Acting 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: June 27, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 26, 2012 Council Meeting**

**Richard Rivera¹
Complainant**

GRC Complaint No. 2010-181

v.

**Passaic County Sheriff's Office²
Custodian of Records**

Records Relevant to Complaint:³

On-site inspection of the following records:

1. Arrest reports of individuals arrested by the Passaic County Sheriff's Office ("PCSO") in connection with a traffic stop for criminal infractions, not including Title 39 offenses, from July 1, 2009 to the present;
2. "Confidential Informant Report File" showing the "confidential informant number" and "monies dispersed" for the year 2009;
3. All forfeited assets received, forfeiture program reports filed on behalf of the PCSO from 2009 through the present;
4. All reallocation of property forfeiture program report forms filed on behalf of the PCSO from 2009 through the present;
5. All requests for forfeiture fund disbursements to a non-law enforcement agency and forfeiture program reports forms filed on behalf of the PCSO from 2009 through the present;
6. Law enforcement trust account statements from 2009 through the present;
7. Seized asset trust account statements from 2009 through the present;
8. Passaic County Prosecutor escrow account statements for funds held on behalf of the PCSO from 2009 through the present;
9. Vehicle asset forfeiture inventory for 2009 through the present;
10. Inventory record from 2009 through the present of direct purchases made with forfeited assets.

Copies of the following records:

11. Past records requests made by the Complainant indicating that Sheriff Speziale and command staff members received overtime and accumulated compensation time;
12. Overtime reports and requests for compensation time filed by Sheriff Speziale and command staff members, including the names of policy makers, division leaders and supervisors that received the compensation, the persons that approved such

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

² Represented by Albert C. Buglione, Esq., of DeYoe, Heissenbuttel, & Buglione, LLC (Wayne, NJ).

³ The Complainant filed four (4) separate OPRA requests for these records. All of these requests were the subject of the Denial of Access Complaint. However, due to the commonality of the parties and the date of the requests, the GRC refers to these requests as a single request for the purposes of this adjudication.

compensation, and the date, time, event, purpose and location for which the compensation was requested for incidents/events, from 2009 through the present.

Request Made: July 15, 2010

Response Made: July 23, 2010

Custodian: William Maer

GRC Complaint Filed: July 27, 2010⁴

Background

July 15, 2010

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above in an e-mail referencing OPRA. The Complainant states that he recognizes that the informants' names and addresses must be redacted from the records responsive to request Item No. 2.

July 23, 2010

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the sixth (6th) business day following receipt of such request. The Custodian states that access to the records responsive to request Item Nos. 1, 2, 3, 5, 6 and 9 will be granted on September 10, 2010 due to the amount of research required.⁵ The Custodian also states that if all of the Complainant's requests are ready before September 10, 2010, the Custodian will so notify the Complainant immediately.

July 27, 2010

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

- Complainant's OPRA request dated July 15, 2010
- Letter from the Custodian to the Complainant dated July 23, 2010

The Complainant states that he filed four (4) separate OPRA requests on July 15, 2010. The Complainant also states that the Custodian responded on July 23, 2010 informing the Complainant that the records responsive to his request would be available by September 10, 2010. The Complainant does not agree to the Custodian's requested extension of time to September 10, 2010 because some of the records responsive to his OPRA request are readily available.

The Complainant does not agree to mediate this complaint.

August 3, 2010

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

August 16, 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 an SOI on August 3,

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

⁵ The Custodian did not address the Complainant's request for Item Nos. 4, 7, 8, 10, 11 and 12.

2010 and to date has not received a response. Further, the GRC states that if the SOI is not submitted within three (3) business days, the GRC will adjudicate this complaint based solely on the information provided by the Complainant.

August 18, 2010

Letter from the Custodian's Counsel to the GRC. Counsel acknowledges receipt of the GRC's letter dated August 16, 2010. Counsel states that there was some confusion which prevented a response to the initial request for an SOI. Counsel further states that the Custodian recently forwarded the Denial of Access Complaint at issue for Counsel's review. In addition, Counsel states that the Passaic County Sheriff, Jerry Speziale, abruptly resigned recently. Lastly, Counsel states that based on the foregoing facts, Counsel requests an extension of time until August 23, 2010 to submit the SOI.

August 19, 2010

Letter from the GRC to the Custodian's Counsel. The GRC grants the request for an extension of time until August 23, 2010 to submit the SOI.

September 2, 2010⁶

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated July 15, 2010
- Letter from the Custodian to the Complainant dated July 23, 2010

The Custodian certifies that he received four (4) separate OPRA requests from the Complainant dated July 15, 2010. The Custodian argues that the Complainant's request is improper because it is voluminous and would require the Custodian to conduct research, analyze, collate and compile general information. The Custodian also argues that the Complainant's OPRA request would require the Custodian to undertake an extensive search for records responsive which is burdensome and interferes with the operation and management of the PCSO. The Custodian asserts that the Complainant's request is overly broad and the Court and the Council have held that pursuant to N.J.S.A. 47:1A-1, agencies are only required to disclose identifiable governmental records which are not otherwise exempt under OPRA.

The Custodian argues that the request for records responsive to Item No. 1, arrest reports from July 1, 2009 through the present, is obtrusive and akin to a fishing expedition. The Custodian also argues that these records are confidential and exempt from disclosure under OPRA. The Custodian argues that request Item No. 11 is burdensome and overly broad and cannot be answered in the present form. The Custodian further argues that request Item No. 12 seeking overtime reports and schedules does not specifically identify a government record because it does not identify a group of persons, and thus the Custodian should not be required to respond to this request pursuant to N.J.S.A. 47:1A-1.

⁶ The Custodian did not certify to the search undertaken to locate the records responsive or whether any records responsive to the Complainant's OPRA request were destroyed in accordance with the Records Destruction Schedule established and approved by the New Jersey Department of State, Division of Archives and Records Management as is required pursuant to Paff v. NJ Department of Labor, 392 N.J. Super. 334 (App. Div. 2007).

The Custodian argues that all government records shall be subject to public access unless otherwise exempt. The Custodian also argues that criminal records and police reports are exempt under OPRA, especially when these matters are still pending. The Custodian further argues that the Complainant has effectively made a request for all criminal investigative reports that were issued from 2009 through the present. The Custodian argues that many of these matters are still pending and that there are privileges and confidentiality issues associated with these reports which prevent release of these records. See Newman v. Bentz, 2006 WL 1210684 (App. Div. 2006), Gerofsty v. Passaic County S.P.C.A., 376 N.J. Super. 405, 416-417 (App. Div. 2005), Bergen County Improvement Authority v. North Jersey Media Group, Inc., 370 N.J. Super. 204, 515-517 (App. Div. 2004, cert. denied).

The Custodian argues that OPRA is not intended to be used as a research tool to force government officials to identify and siphon information to curious individuals. The Custodian also argues that OPRA simply operates to make identifiable government records readily accessible for inspection, copying or examination pursuant to N.J.S.A. 47:1A-1. The Custodian asserts that inspection is subject to reasonable controls and the Courts have inherent power to prevent abuse and protect the public officials involved. See DeLia v. Kiernan, 119 N.J. Super. 581, 585 (App. Div. 1972). The Custodian also asserts that if a request would substantially disrupt agency operations, the custodian may deny it and attempt to reach a reasonable solution that accommodates the interests of the requestor and the agency pursuant to N.J.S.A. 47:1A-5.g.

The Custodian argues that the Federal District Courts have considered the permissible scope of requests for governmental records under the Freedom of Information Act ("FOIA"), 5 U.S.C.A. §552, and have repeatedly held that requested records must be "reasonably identified as a record not as a general request for data, information, statistics..." Krone v. Department of Justice, 628 F.2d 195, 198 (D.C. Cir. 1980). The Custodian also argues that in Krone, the request sought sentencing statistics and the Court held that the request was fatally flawed because it was so broad and general as to require the agency to review the entire record of each and every criminal case to determine whether it contained any evidence of the date, information or statistics that the applicant requested. *Id.* at 197-198. The Custodian further argues that the Court's reasoning extended even further in Borom v. Crawford, 651 F.2d 500, 501-502 (7th Cir. 1981), where the Court held that the government could not avoid disclosure of the information it possessed merely because its record keeping systems did not compile and store said information in the precise form in which it was requested. The Custodian argues that since the Complainant's request is just as overly broad as the requests denied in Krone and Borom, these requests should also be denied.

The Custodian argues that the New Jersey Appellate Division has held that OPRA should not be interpreted any differently than the Federal District Courts have interpreted FOIA. The Custodian also argues that State agencies are required to disclose only identifiable governmental records not otherwise exempt. The Custodian further argues that requests for general information to be analyzed, collated and compiled by the responding State agency are not encompassed therein. Lastly, the Custodian certifies that OPRA is not an avenue for open-ended searches of an agency's files pursuant to MAG Entertainment, LLC v. Division of Alcohol Beverage Control, 375 N.J. Super. 534, 549

(App. Div. 2005). The Custodian argues that the Complainant has made numerous open-ended requests for materials that require a wholesale analysis and search by the responding agency and the compilation of materials.

The Custodian argues that in New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), the Court held that when a request does not specifically identify records sought, the responding state agency is not required to produce the records within seven (7) business days. The Custodian argues that the Court's reasoning should be extended to the present complaint because the Complainant made an open-ended request for records and the PCSO's response would substantially disrupt its operations. The Custodian certifies that he proposed a reasonable accommodation based upon the Complainant's voluminous and open-ended request by providing the records on September 10, 2010. The Custodian argues that because the Complainant's OPRA request did not specify identifiable government records, the Custodian was within his authority to set a schedule outside of the seven (7) business day parameter. The Custodian certifies that the Complainant objected to the extension of time and instead filed this Denial of Access Complaint.

The Custodian asserts that in State v. Garcia, 131 N.J. 67 (1993), the Court held that the official information privilege applies to criminal records, police reports and investigative reports. The Custodian argues that the underlying request herein involves criminal investigatory records which may be the subject of ongoing investigations since the time frame for such request is from 2009 through the present. The Custodian also argues that it is fair to assume many of these matters are still in the investigation stages or being prosecuted. The Custodian further argues that pursuant to N.J.S.A. 47:1A-3, when the release of records that pertain to an investigation in progress by a public agency is inimical to the public interest, such request may properly be denied.

The Custodian argues that because the New Jersey Supreme Court has decided that criminal defendants are not entitled to information regarding a criminal investigation, civil litigants and OPRA requestors should not be entitled to this information. The Custodian also certifies that the Complainant is seeking copies of materials that pertain to pending criminal actions. The Custodian certifies that the Complainant is not involved in these pending criminal matters. See State v. Winne, 12 N.J. 152, 157-9 (1953) and Gerofsty v. Passaic County S.P.C.A., 376 N.J. Super. 405, 416-417 (App. Div. 2005).

Lastly, the Custodian argues that he has not acted inconsistently with N.J.S.A. 47:1A-1 and this complaint should be dismissed with prejudice.

August 24, 2010

E-mail from the Complainant's Counsel to the GRC. Counsel states that he is entering his appearance on behalf of the Complainant. Counsel also states that if the Complainant prevails, he will seek attorneys' fees pursuant to N.J.S.A. 47:1A-6.

September 10, 2010

Letter from the Custodian to the Complainant. The Custodian states that the records responsive to Complainant's request for Item Nos. 3, 4, 6, 7, and 8 are still unavailable as of the current date. The Custodian also states that he is still waiting for

these reports responsive to these requests. The Custodian further states that there are no records responsive to request Item Nos. 5 and 10. The Custodian requests the Complainant to be more specific in which records he is seeking in response to request Item No. 9.

September 10, 2010

Letter from the Custodian to the Complainant. The Custodian states that the records responsive for request Item Nos. 1, 2, 3, 6, 9 and 12 are ready for onsite inspection. The Custodian also states that the Complainant must make an appointment to review the records responsive. The Custodian further states that there are 649 pages of records responsive to request Item No. 12.

September 20, 2010⁷

E-mail from the Complainant's Counsel to the GRC, attaching the Complainant's legal certification. The Complainant certifies that on September 10, 2010 he received a letter from the Custodian denying him access to most of the records requested. The Complainant also certifies that the records responsive to request Item No. 2 are required by law to be made, maintained and kept on file and that such records contain the names, addresses, registration numbers and amounts of money paid to confidential informants. The Complainant further certifies that he requested the record responsive to Item No. 2 with the names and addresses redacted because he wants to know how much money the PCSO is paying informants. The Complainant additionally certifies that this record is not voluminous and should have been made available within seven (7) business days of his OPRA request. The Complainant certifies that the record responsive to request Item No. 2 is required to be kept by Records Series 0017-0000, which is within Records and Disposition Schedule No. M900000-0004 (Municipal Police Departments), as issued by the New Jersey Division of Archives and Records Management.

The Complainant asserts that the records responsive to request Items No. 6 and No. 7 should have been made available within seven (7) business days of his OPRA request. The Complainant also asserts that the records responsive to request Item No. 11 should have been provided within seven (7) business days because the command staff for Sheriff Speziale should not consist of more than ten (10) people.

Counsel argues that the Complainant's request requires the Custodian to search for the records responsive and not conduct research. Counsel also argues that Custodian's Counsel discusses the distinction between search and research as if the Burnett v. County of Gloucester, 415 N.J.Super. 506 (App. Div. 2010) case did not exist. Counsel further argues that in Burnett, plaintiff requested copies of "any and all settlements, releases or similar documents entered into, approved or accepted from January 1, 2006 to the present." Counsel states that that the settlement agreements requested by plaintiff were not centrally located, but rather were in possession of several parties, including defendant's insurance carrier. Counsel also states that plaintiff did not specify the specific matter for which he sought settlement agreements; rather plaintiff requested a class of documents. Counsel further states that the Appellate Division held that plaintiff's request for all settlement agreements over a two (2) year period was a request for specific records and not an open ended request for research.

⁷ Counsel also attaches a copy of Burnett v. County of Gloucester, 415 N.J.Super. 506 (App. Div. 2010).
Richard Rivera v. Passaic County Sheriff's Office, 2010-181 – Findings and Recommendations of the Executive Director

Counsel argues that Burnett is similar to the present complaint. Counsel also argues that the Complainant identified a specific type of record and a particular date range. Counsel further argues that the Complainant's OPRA request is less burdensome than the request in Burnett because the records responsive to request Item No. 1 would only be located at one agency and not located across several parties, including private third parties, as was the case in Burnett. Lastly, Counsel argues that the time frame of one year's worth of records is less than the time frame that the Appellate Division approved in Burnett.

Counsel argues that criminal investigatory records are generally exempt from OPRA; however, OPRA contains important exceptions to this general rule. Counsel states that N.J.S.A. 47:1A-3.b. requires the following information regarding a pending criminal investigation to be released:

"If an arrest has been made, information as to the name, address and age of any victims unless there has not been sufficient opportunity for notification of next of kin of any victims of injury and/or death to any such victim or where the release of the names of any victim would be contrary to existing law or Court rule. In deciding the release of information as to the identity of a victim, the safety of the victim and the victim's family and integrity of any ongoing investigation, shall be considered;

If an arrest has been made, information as to the defendant's name, age, residence occupation, marital status and similar background information and, the identity of the complaining party unless the release of such information is contrary to existing law or Court Rule;

Information as to the text of any charges such as the complaint, accusation and indictment unless sealed by the court or unless the release of such information is contrary to existing law or Court rule;

Information as to the identity of the investigating and arresting personnel and agency and the length of the investigation." *Id.*

Counsel argues that the Custodian's statement that the records responsive to request Item No. 1 are "confidential and exempt from release through an OPRA request" is wrong because OPRA specifically authorizes the release of several categories of information from arrest reports. Counsel further argues that the GRC has specifically held that arrest reports must be released to the public with appropriate redactions. *See Bart v. City of Passaic*, GRC Complaint No. 2007-162 (February 2008) and *Baranoski v. Township of Hamilton*, GRC Complaint No. 2007-268 (May 2008).

Counsel argues that the Custodian has submitted no facts regarding the matters over which privilege is asserted or regarding which records are being withheld pursuant to a privilege or investigation. Counsel also argues that Custodian's Counsel does not identify any particular records that are being withheld, the reasons why they are being withheld, which investigations are being conducted and has not submitted a document index. Counsel further argues that the Custodian gave himself until September 10, 2010

to provide records but this deadline came and went and no records were provided. Lastly, Counsel argues that the GRC should find that the Custodian did not sustain his burden of proving that the denial of access was justified.

Counsel argues that access to the records responsive to request Item No. 1 should be granted with appropriate redactions. Counsel also argues that access should be granted to the records responsive to request Item No. 2 with appropriate redactions because New Jersey law requires police agencies to maintain a confidential informant report which shows the names, addresses, registration numbers and moneys paid to the confidential informants. Counsel further argues that the Complainant should have been granted access to the records responsive to request Item Nos. 3, 4, 5, 6 and 7 within seven (7) business days or upon a reasonable extension, not a two (2) month extension. Lastly, Counsel argues that request Item No. 11 is merely a request for payroll records, which are public pursuant to N.J.S.A. 47:1A-10.

October 5, 2010

Letter from the Custodian to the Complainant. The Custodian informs the Complainant that there are no records responsive for request Item No. 11.

October 25, 2010

Facsimile from Custodian's Counsel to the GRC. Counsel argues that the Complainant's OPRA request requires the Custodian to conduct research for the records responsive. Counsel also argues that in MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), the Court held that "the Custodian is not required to research her files to figure out which records, if any, might be responsive to a broad or unclear OPRA request." Counsel further argues that in Reda v. Township of West Milford (Passaic), GRC Complaint No. 2002-58 (January 2003), the Council determined that an OPRA request may be properly denied by the Custodian if it is "incumbent on the requestor to perform any correlations and analysis." Counsel additionally argues that Reda is significant in the instant complaint because the Complainant filed an OPRA request for generic records which do not correlate to any known or identifiable quantifier. Lastly, Counsel argues that the request for these records would require the Custodian to conduct research to determine which reports the Complainant is seeking.

Counsel argues that criminal investigatory records are public records but are not subject to disclosure when the records request places an undue burden on the Custodian. Counsel states that the Complainant made an OPRA request for all criminal investigative reports from 2009 through the present. Counsel also argues that many of these matters are still pending and that privileges and confidentiality associated with these records prevent their release. See Newman v. Bentz, 2006 WL1210684 (App. Div. 2006) and Gerofsty v. Passaic County S.P.C.A., 376 N.J. Super. 405, 416-417 (App. Div. 2005).

Counsel argues that the PCSO is not the proper Custodian of Records in this matter because it is unclear whether the Bergen County Prosecutor's Office has officially concluded its investigations into the arrests for which the Complainant seeks records. Counsel states that it is highly likely that many of the records the Complainant is seeking are still part of pending investigations. Counsel also states that the Bergen County

Prosecutor's Office has not clarified whether there are still ongoing investigations into the matters for which Complainant seeks records. Counsel further states that the Complainant should direct his records request to the Bergen County Prosecutor's Office.

Counsel states that the Custodian provided seven (7) pages of records responsive to request Item No. 2 to Complainant's Counsel with redactions, and that the Custodian redacted who made the payment, the confidential informant number, the recipient's signature, who witnessed the payment, who authorized the payment, corresponding voucher number and any comments or remarks. Counsel states that the records responsive to request Item Nos. 3, 4, 5, 7 and 11 will be provided to the Complainant.

November 8, 2010

Letter from the Custodian to the Complainant. The Custodian informs the Complainant that the records responsive for request Item No. 4 and No. 6 are available for on-site inspection. The Custodian also informs the Complainant that there are 190 pages for the Complainant to review.

November 29, 2010

E-mail from the Complainant's Counsel to the GRC. Counsel argues that regarding the records responsive to request Item No. 2, he is forced to assume that the Custodian has provided all reports for 2009. Counsel state that the GRC should require the Custodian to provide a certification certifying that the Custodian has provided all records responsive to request Item No. 2. Counsel argues that since there were only seven (7) pages responsive to the Complainant's request, the initial request for a forty-six (46) day extension was unreasonable. Counsel also argues that no custodial agency should be permitted a nearly seven (7) week extension to retrieve seven (7) pages of reports that are one (1) year old and not in storage or archived. Counsel further argues that the records provided were redacted but the Custodian did not provide reasons for such redactions. Counsel additionally argues that the Custodian should provide a certification and list the specific lawful basis for each redaction pursuant to Renna v. Union County Improvement Authority, GRC Complaint No. 2008-86 (March 2009). Lastly, Counsel argues that the Custodian's response to the Complainant's request for records responsive to request Item No. 2 is insufficient pursuant to N.J.S.A. 47:1A-5.g.

Counsel argues that there is no reason to redact the confidential informant number from the records responsive to request Item No. 2 because his purpose in seeking this number is to determine whether different individuals are receiving confidential informant payments and the fact that the identities of the confidential informants are protected by numbers make the redactions unnecessary. Counsel further argues that the names of public employees and their signatures are public records pursuant to N.J.S.A. 47:1A-10 and Meaders v. William Paterson University (Passaic), GRC Complaint No., 2005-131 (April 2007). Counsel argues that there is no reason to redact voucher numbers. Counsel also argues that while the remarks that have been redacted may or may not be public information that must be disclosed, the Custodian has not provided the Complainant with sufficient information to evaluate the propriety of these redactions.

Lastly, Counsel states that regarding the balance of these records, the Custodian has had over four (4) months to provide access to the records responsive but has not done so.

December 17, 2010

Letters from Custodian's Counsel to Complainant's Counsel. Custodian's Counsel provides Complainant's Counsel with the records responsive to request Item No. 7.

October 31, 2011

E-mail from the GRC to the Custodian. The GRC states that upon further review of this Denial of Access Complaint, it appears there is some conflicting information regarding the responses to the Complainant's OPRA request items. The GRC also states that to properly adjudicate this complaint, the GRC needs a legal certification as to the following:

1. Were the records responsive to request Items Nos. 1, 2, 3, 4, 6, 7, 8 and 9 ever made available to the Complainant for an on-site inspection? If so, when were such records made available for on-site inspection and if such records were not made available, why not?
2. Were copies of the records responsive to request Item Nos. 11 and 12 provided to the Complainant? If so, when were such copies provided and if such copies were not provided, why not?
3. Whether any records responsive exist for request Item Nos. 5 and 10?

The GRC requests that the legal certification be provided by November 7, 2011.

November 7, 2011

E-mail from GRC to Custodian's Counsel. The GRC grants Counsel an extension of time until November 14, 2011 to submit the Custodian's legal certification.

November 15, 2011

E-mail from Custodian's Counsel to the GRC. Counsel states that he has prepared the requested legal certification relative to this complaint and forwarded the certification to the Custodian for review. Counsel also states that as soon as he receives the executed certification, he will submit same to the GRC.

December 14, 2011

E-mail from the Custodian's Counsel to the GRC attaching the Custodian's legal certification. The Custodian certifies that he responded to the Complainant's OPRA request on July 23, 2010 requesting an extension of time until September 10, 2010 to respond to the Complainant's request for Item Nos. 1, 2, 3, 5, 6 and 9. The Custodian also certifies that on September 10, 2010 he provided written notification to the Complainant that there are no records responsive to request Item Nos. 5 and 10. The Custodian further certifies that in that same letter, he advised the Complainant that his request for Item No. 9 was not specific. The Custodian certifies that he was still in the process of attempting to find and obtain the records responsive for request Item Nos. 3, 6, 7 and 8. The Custodian also certifies that on September 10, 2010, he provided written

notification to the Complainant that the records responsive to request Item Nos. 1, 2, 3, 6, 9 and 12 were ready and available for an onsite inspection.⁸

The Custodian certifies that on October 5, 2010 he provided written notification to the Complainant that there were no records responsive to the Complainant's request for Item No. 11. The Custodian also certifies that on October 25, 2010, Custodian's Counsel provided written notification to the GRC regarding the legal position relative to certain requests.

The Custodian argues that Custodian's Counsel contended that the records responsive to request Item No. 1 required the Custodian to search for records and therefore the request was invalid pursuant to Burnett v. County of Gloucester, 415 N.J.Super. 506 (App. Div. 2010). The Custodian argues that the records responsive to request Item No. 1 are criminal investigatory pursuant to Newman v. Bentz, 2006 WL1210684 (App. Div. 2006) and Gerofsty v. Passaic County S.P.C.A., 376 N.J. Super. 405, 416-417 (App. Div. 2005). The Custodian also certifies that on October 25, 2010 records responsive to request Item No. 2 were provided in redacted form and provided to Complainant's Counsel. The Custodian further certifies that he informed the Complainant in writing on November 8, 2010 that the records responsive to request Item No. 4 and No. 6 were available for on-site inspection. Lastly, the Custodian certifies that on December 17, 2010 Custodian's Counsel provided copies of all records responsive to request Item No. 7 to Complainant's Counsel.

Analysis

Whether the Custodian timely responded to the Complainant's OPRA request?

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.

⁸ The Custodian made the records responsive to request Item No. 4 available for on-site inspection on November 8, 2010. The Custodian also provided the records responsive to request Item No. 7 to Complainant's Counsel on December 17, 2010. Lastly, the Custodian does not certify when he made the records responsive to request Item No. 8 available to the Complainant for on-site inspection.

OPRA provides that:

“[i]mmediate access ordinarily shall be granted to ... public employee overtime and salary information.” N.J.S.A. 47:1A-5.e.

OPRA provides that:

“[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof ...” N.J.S.A. 47:1A-5.g.

Further, OPRA provides that:

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

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

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

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. 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 matter before the Council, the Complainant filed his OPRA request on July 15, 2010, seeking, among other things, overtime reports and requests for compensation time from 2009 through the present (Item No. 12). The Custodian responded on July 23, 2010, the sixth (6th) business day following receipt of said request, seeking an extension of time to September 10, 2010 to grant or deny access to request Items No. 1, 2, 3, 5, 6 and 9. However, the Custodian failed to respond immediately to the Complainant’s request Item No. 12 for overtime reports.

Public employee overtime and salary information is subject to immediate access under OPRA. N.J.S.A. 47:1A-5.e. Moreover, the Council has previously held that a custodian must respond immediately to an OPRA request for immediate access records. *See Herron v. Township of Montclair*, GRC Complaint No. 2006-178 (February 28, 2007)(the “immediate access language of OPRA (N.J.S.A. 47:1A-5.e.) suggests that the Custodian was still obligated to immediately notify the Complainant...”).

Therefore, because the Custodian failed to respond immediately to the Complainant’s OPRA request Item No. 12 seeking public employee overtime and requests for compensation time from 2009 through the present, the Custodian violated N.J.S.A. 47:1A-5.e. *Herron, supra.*

Additionally, OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.⁹ Thus, a custodian’s failure to respond in writing to a complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and *Kelley v. Township of Rockaway (Morris)*, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

The Custodian’s July 23, 2010 request for an extension failed to specifically address request Item Nos. 4, 7, 8, 10, and 11. Thus, the Custodian was required to respond in writing grant or deny access to these request items within seven (7) business days because he did not seek an extension of time for these items. However, the Custodian failed to do so and thus, these request items are “deemed” denied pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.

Therefore, the Custodian’s failure to grant access, deny access, request clarification or request an extension of time for request Item Nos. 4, 7, 8, 10, and 11 of the Complainant’s OPRA request within the statutorily mandated seven (7) business days results in a “deemed” denial of these request Items pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and *Kelley, supra.*¹⁰

Moreover, OPRA provides that a custodian may request an extension of time to respond to the Complainant’s OPRA request, but that a specific date for when the Custodian will respond must be provided. N.J.S.A. 47:1A-5.i. OPRA further provides

⁹ It is the GRC’s position that a custodian’s written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA.

¹⁰ The Council declines to address whether the Custodian’s July 23, 2010 response was insufficient because the request for Items No. 4, 7, 8, 10, and 11 was deemed denied.

that should the custodian fail to provide a response on that specific date, “access shall be deemed denied.” N.J.S.A. 47:1A-5.i.

In Kohn v. Township of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008), the custodian responded in writing on the fifth (5th) business day after receipt of the complainant’s March 19, 2007, OPRA request, seeking an extension of time until April 20, 2007 to fulfill the complainant’s OPRA request. However, the custodian responded on April 20, 2007, stating that the requested records would be provided later in the week, and the evidence of record showed that no records were provided until May 31, 2007. The Council held that:

“[t]he Custodian properly requested an extension of time to provide the requested records to the Complainant by requesting such extension in writing within the statutorily mandated seven (7) business days pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. ... however ... [b]ecause the Custodian failed to provide the Complainant access to the requested records by the extension date anticipated by the Custodian, the Custodian violated N.J.S.A. 47:1A-5.i. resulting in a ‘deemed’ denial of access to the records.” *Id.*

In the matter before the Council, as in Kohn, supra, the Custodian responded in writing to the Complainant’s July 15, 2010 OPRA request in a timely manner requesting an extension of time to September 10, 2010 for request Item Nos. 1, 2, 3, 5, 6 and 9; thus, the Custodian’s written response granting or denying access to request Item Nos. 1, 2, 3, 5, 6 and 9 was due by September 10, 2010. The Custodian’s September 10, 2010 response, however, failed to provide the Complainant access to the records responsive to request Item No. 3 and failed to provide another date by which the Complainant could expect access to be granted or denied.¹¹

Therefore, because the Custodian’s September 10, 2010 response failed to provide the Complainant access to the records responsive to request Item No. 3 and failed to provide another date by which the Complainant could expect access to be granted or denied, the Custodian violated N.J.S.A. 47:1A-5.i. resulting in a “deemed” denial of access to these records. Kohn, supra.

The Council notes that the Complainant filed the instant Denial of Access Complaint on July 27, 2010, well before the expiration of the Custodian’s extension to respond to request Item Nos. 1, 2, 3, 5, 6 and 9 on September 10, 2010. However, because the Custodian’s July 23, 2010 request for an extension failed to address all request Items, resulting in a deemed denial of those items as discussed *infra*, and because the Custodian’s September 10, 2010 response similarly failed to address all request Items, this Complaint is not unripe. *See, e.g., Verry v. Borough of South Bound Brook (Somerset)*, GRC Complaint No. 2010-175 (September, 2011).

¹¹ The Custodian failed to address request Item Nos. 4, 7, 8, 10, 11 and 12.

Whether records exist which are responsive to the Complainant's request Item Nos. 5, 10 and 11?

The Custodian certified to the GRC on December 14, 2011 that no records exist which are responsive for request Items No. 5, No. 10 and No. 11. The Complainant has submitted no 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 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 that the custodian did not unlawfully deny access to the requested records because the custodian certified that no records responsive to the request existed.

Therefore, because the Custodian certified to the GRC on December 14, 2011 that no records responsive to the Complainant's OPRA request for Item Nos. 5, 10 and 11 exist and because there is no 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 must conduct an *in camera* examination of the confidential informant reports responsive to request Item No. 2?

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 the following information which is deemed to be confidential ... criminal investigatory records ...* 'Criminal investigatory record' means 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. ..." (Emphasis added.) N.J.S.A. 47:1A-1.1.

In the instant complaint, the Custodian made available on September 10, 2010 for an on-site inspection the records responsive to request Item No. 2, confidential informant reports. The evidence of record also indicates that Custodian's Counsel provided Complainant's Counsel with copies of such records on October 25, 2010 with redactions of 1) the name of who made the payment; 2) the confidential informant number; 3) recipient's signature; 4) investigator's signature; 5) who witnessed the payment; 6) who approved the payment; 7) corresponding voucher number; and 8) any remarks on the confidential informant report. However, the Custodian did not identify the specific legal basis for such redactions.

Complainant's Counsel argued that there is no lawful basis to redact the confidential informant number from the records responsive to request Item No. 2. Counsel also argued that the Complainant's interest in obtaining the confidential informant numbers is to determine whether different individuals are receiving confidential informant payments and further argued that because the identities of the confidential informants are protected by numbers, redactions are unnecessary. Counsel argued that the names of public employees and their signatures are public records pursuant to N.J.S.A. 47:1A-10. Counsel additionally argued that there is no lawful basis to redact voucher numbers.

In Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the Complainant appealed a final decision of the GRC¹² in which the GRC dismissed the complaint by accepting the Custodian's legal conclusion for the denial of access without further review. The Court stated that:

"OPRA contemplates the GRC's meaningful review of the basis for an agency's decision to withhold government records...When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers."

The Court also stated that:

"[t]he statute also contemplates the GRC's *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the 'Open Public Meetings Act,' N.J.S.A. 10:4-6 to -21, it also provides that the GRC 'may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.' N.J.S.A. 47:1A-7.f. This provision would be unnecessary if the Legislature did not intend to permit *in camera* review."

Further, the Court stated that:

"[w]e hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the

¹² Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005).
Richard Rivera v. Passaic County Sheriff's Office, 2010-181 – Findings and Recommendations of the Executive Director

appeal...There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC's obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7.f., which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption."

Therefore, pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the records responsive to request Item No. 2, confidential informant report file for the year 2009, in order to determine whether the redactions made to such record are lawful.

Whether the Custodian must make the records responsive for request Item No. 8 available for an on-site inspection?

On December 14, 2011, the Custodian certified to the GRC that he informed the Complainant in writing on September 10, 2010 that the records responsive to request Item No. 3 were available for on-site inspection. The Custodian also certified that he informed the Complainant on November 8, 2010 that the records responsive to request Item No. 6 were available for on-site inspection. The Custodian further certified that he provided copies of all records responsive to request Item No. 7 to Complainant's Counsel on December 17, 2010.

However, the Custodian submitted no evidence that he provided the Complainant with the requested on-site inspection of the records responsive to request Item No. 8, Passaic County Prosecutor escrow account statements for funds held on behalf of the PCSO from 2009 through the present in response to request Item No. 8 and provided no lawful basis for the denial of access to such records. Thus, the Custodian failed to bear his burden of proof that access to such records was lawfully denied. N.J.S.A. 47:1A-6.

Therefore, because the Custodian failed to submit evidence that the records responsive to request Item No. 8 were provided to the Complainant or to provide a lawful basis for the denial of access to such records, the Custodian must make available to the Complainant for an on-site inspection all of the records that exist that are responsive to request Item No. 8, *i.e.*, Passaic County Prosecutor escrow account statements for funds held on behalf of the PCSO from 2009 through the present.

Whether the Complainant's OPRA request constitutes a substantial disruption of the operations of the Passaic County Sheriff's Office?

OPRA provides that:

"[i]f a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency." N.J.S.A. 47:1A-5.g.

The Custodian argued in the SOI that the Complainant's OPRA requests are voluminous, open-ended and would substantially disrupt the operations of the agency. The Custodian certified in the SOI that he attempted to reach a reasonable accommodation of the request with the Complainant by requesting an extension of time until September 10, 2010.

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

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

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

Moreover, in Caggiano, supra, the complainant's seven (7) page, fifty nine (59) item request sought access to voluminous records from the Borough of Stanhope. The custodian responded in writing to the complainant within seven (7) business days of receiving the request and alerted the complainant that the custodian required additional time to respond to the voluminous OPRA request. The custodian advised the complainant that she could not reasonably keep up with his ongoing submission of OPRA requests without substantially disrupting the functioning of her office. The evidence of record

indicated that the custodian attempted to reach a mutually-agreeable solution to balance the complainant's right to access government records with the custodian's need to manage her job responsibilities without substantial disruption.

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

A review of the Complainant's OPRA request in light of the above cases discloses that the Complainant's OPRA request herein is materially different from the requests at issue in Dittrich, supra, Vessio, supra, and Caggiano, supra. The Complainant's twelve (12) item request herein seeks ten (10) types of records generated over a three (3) year time span. The Custodian has provided no evidence to support his contention that responding to the Complainant's OPRA request would substantially disrupt the business of the PCSO. Nor has the Custodian provided evidence that he attempted to reach a reasonable solution with the Complainant that accommodates the interests of the Complainant and the agency prior to the denial of the Complainant's request as required by N.J.S.A. 47:1A-5.g. Unilaterally requesting an extension of time to disclose the requested records, is not an attempt to reach a reasonable accommodation with the Complainant.

Thus, the evidence of record does not support a conclusion that the Complainant's OPRA request represents a substantial disruption of the business of the PCSO. *See Dittrich, supra*, *Vessio, supra*, and *Caggiano, supra*. Moreover, the Custodian failed to bear his burden of proof under N.J.S.A. 47: 1A-6 that he attempted to reach a reasonable solution with the Complainant that accommodates the interests of the Complainant and the agency prior to the denial of the Complainant's request as required by N.J.S.A. 47:1A-5.g.

Moreover, the Custodian's argument that the Complainant's request is overly broad and unclear is undercut by the evidence: the Custodian provided access to all of the requested records except request Item No. 8 and those for which no records responsive existed, Item Nos. 5, 10 and 11.

In Bond v. Borough of Washington (Warren), GRC Complaint No. 2009-324 (Final Decision dated March 29, 2011), the complainant requested "all proposals submitted for the position of ... solicitor." The custodian responded stating that three (3) records responsive had been identified but that access to same was denied. The GRC noted that:

"... while the Complainant's OPRA request on its face is overly broad and unclear due to the absence of a specific time period within which the Custodian could narrow her search ... the Complainant's OPRA request

was sufficient for the Custodian to identify the responsive records ... Additionally, the Custodian responded to the Complainant's OPRA request identifying three (3) proposals as responsive: the Custodian's response is an indication that she needed no additional information to identify the records responsive to the Complainant's OPRA request." *Id.* at pg. 15. *See also* Darata v. Monmouth County Board of Chosen Freeholders, GRC Complaint No. 2009-312 (Interim order dated February 24, 2011). *See also*, Verry v. Borough of South Bound Brook (Somerset), 2010-302 (January 2012).

The Council further recognizes Gannett v. County of Middlesex, 379 N.J. Super. 205 (App. Div. 2005), in which the Court held that although Gannett's request was improper and Middlesex County could have refused to produce any records responsive but instead Middlesex County provided Gannett with most of the records responsive to the request. Gannett brought action against County of Middlesex seeking disclosure of the remainder of the records responsive. The Court held that "[s]uch a voluntary disclosure of most of the documents sought by Gannett and refusal to release the remaining documents solely on confidentiality grounds constituted a waiver of whatever right the County may have had to deny Gannett's entire OPRA request on the ground that it was improper." *Id.* at 213.

Therefore, the Council declines to address the Custodian's contention that the Complainant's OPRA request was overly broad and unclear and was therefore invalid and/or posed a substantial disruption to the business of the PCSO because the Custodian granted access to records responsive to request Item Nos. 1, 2, 3, 4, 6, 7, 9 and 12 and indicated that he needed additional information to identify the records responsive to the Complainant's OPRA request. Bond, *supra*, Darata, *supra*, Verry, *supra*. *See also*, Gannett, *supra*.

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

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Whether the Complainant is a "prevailing party" pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney's fees?

The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian failed to respond immediately to the Complainant's OPRA request Item No. 12 seeking public employee overtime and requests for

compensation time from 2009 through the present, the Custodian violated N.J.S.A. 47:1A-5.e. *Herron v. Township of Montclair*, GRC Complaint No. 2006-178 (February 28, 2007).

2. The Custodian's failure to grant access, deny access, request clarification or request an extension of time for request Item Nos. 4, 7, 8, 10, and 11 of the Complainant's OPRA request within the statutorily mandated seven (7) business days results in a "deemed" denial of these request Items pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and *Kelley v. Township of Rockaway (Morris)*, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
3. Because the Custodian's September 10, 2010 response failed to provide the Complainant access to the records responsive to request Item No. 3 and failed to provide another date by which the Complainant could expect access to be granted or denied, the Custodian violated N.J.S.A. 47:1A-5.i. resulting in a "deemed" denial of access to these records. *Kohn v. Township of Livingston Library (Essex)*, GRC Complaint No. 2007-124 (March 2008).
4. Because the Custodian certified to the GRC on December 14, 2011 that no records responsive to the Complainant's OPRA request for Item Nos. 5, 10 and 11 exist and because there is no 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. Pursuant to *Paff v. NJ Department of Labor, Board of Review*, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the records responsive to request Item No. 2, confidential informant report file for the year 2009, in order to determine whether the redactions made to such record are lawful.
6. **The Custodian must deliver¹³ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 5 above), a document or redaction index¹⁴, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4¹⁵, that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**

¹³ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

¹⁴ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

¹⁵ "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."

7. Because the Custodian failed to submit evidence that the records responsive to request Item No. 8 were provided to the Complainant or to provide a lawful basis for the denial of access to such records, the Custodian must make available to the Complainant for an on-site inspection all of the records that exist that are responsive to request Item No. 8, *i.e.*, Passaic County Prosecutor escrow account statements for funds held on behalf of the Passaic County Prosecutor's Office from 2009 through the present
8. **The Custodian shall comply with Item No. 7 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4¹⁶, to the Executive Director.¹⁷**
9. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
10. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

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

Approved By: Karyn Gordon, Esq.
Acting Executive Director

June 19, 2012

¹⁶ "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."

¹⁷ 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.