



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Acting Commissioner

FINAL DECISION

February 28, 2012 Government Records Council Meeting

Clifford A. Harris  
Complainant

Complaint No. 2010-233

v.

New Jersey Department of Corrections  
Custodian of Record

At the February 28, 2012 public meeting, the Government Records Council (“Council”) considered the February 21, 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. Ms. Carrero’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). *See also* Castro v. New Jersey Department of Corrections, GRC Complaint No. 2009-290 (August 2010).
2. Because Ms. Carrero made the requested record available to the Complainant upon payment of the appropriate copying costs, her response is appropriate pursuant to N.J.S.A. 47:1A-5.b., Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006) and Ortiz v. New Jersey Department of Corrections, GRC Complaint No. 2007-101 (November 2008). *See also* Reid v. New Jersey Department of Corrections, GRC Complaint No. 2010-83 (Final Decision dated May 24, 2011). Moreover, the Custodian is not required to provide the requested record until receipt of payment of \$0.05. *See Paff*. Thus, Ms. Carrero lawfully denied access to the requested record.
3. Although Ms. Carrero’s failure to provide a written response to the Complainant’s OPRA request within the statutorily mandated seven (7) business days resulted in a “deemed” denial, Ms. Carrero lawfully denied access to the responsive record because the Complainant was unable to pay the appropriate copying cost. Additionally, the evidence of record does not indicate that Ms. Carrero’s technical violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that Ms. Carrero’s untimely response does not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.



This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk's Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the  
Government Records Council  
On The 28<sup>th</sup> Day of February, 2012

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Denise Parkinson Vetti, Esq., Secretary  
Government Records Council

**Decision Distribution Date: March 1, 2012**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Clifford A. Harris<sup>1</sup>  
Complainant**

**GRC Complaint No. 2010-233**

v.

**New Jersey Department of Corrections<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Copy of an arrest warrant issued for the Complainant from Elizabeth, New Jersey on November 2, 1995.<sup>3</sup>

**Request Made:** July 7, 2010

**Response Made:** July 23, 2010

**Custodian:** Deidre Fedkenheuer<sup>4</sup>

**GRC Complaint Filed:** September 3, 2010<sup>5</sup>

**Background**

**July 7, 2010**

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

**July 23, 2010**

Custodian's response to the OPRA request. The Custodian responds in writing via letter to the Complainant's OPRA request on the second (2<sup>nd</sup>) business day following receipt of such request.<sup>6</sup> The Custodian states that access to the requested record is granted. The Custodian states that the Northern State Prison ("NSP") OPRA Liaison will advise the Complainant within seven (7) business days of the appropriate copy costs incurred for any responsive records.

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

<sup>2</sup> No legal representation listed on record. Previously represented by DAG Ellen M. Hale, on behalf of the NJ Attorney General.

<sup>3</sup> The Complainant requested additional records that are not at issue in this complaint.

<sup>4</sup> Ms. Wendy Myers from DOC verbally notified the GRC on August 15, 2011 that Mr. John Falvey, Esq., replaced Ms. Deirdre Fedkenheuer as Custodian of Record.

<sup>5</sup> The GRC received the Denial of Access Complaint on said date.

<sup>6</sup> The Custodian certifies in the Statement of Information that she received the Complainant's OPRA request on July 21, 2010.

**August 17, 2010**

“OPRA Records Request Payment Notification and Authorization” form (“Authorization form”) from Ms. Wanda Carrero (“Ms. Carrero”), OPRA Liaison for NSP, to the Complainant. Ms. Carrero states that the copying cost incurred for the responsive record is \$0.05.

**August 20, 2010**

Authorization form from Ms. Carrero to the Complainant. Ms. Carrero states that access to the responsive record is denied because the Complainant’s inmate account contains insufficient funds.

**September 3, 2010**

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

- Authorization form dated August 17, 2010 with Ms. Carrero’s notes thereon dated August 20, 2010.
- Warrant History dated December 23, 2008

The Complainant states that DOC unlawfully denied access to the responsive record because he had insufficient funds to pay the copying cost associated with production of the record.

The Complainant agrees to mediate this complaint.

**September 3, 2010**

Offer of Mediation sent to both parties.

**September 9, 2010**

The Custodian declines mediation.

**September 20, 2010**

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

**September 30, 2010**

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated July 7, 2010.
- Letter from the Custodian to the Complainant dated July 23, 2010.
- Authorization form dated August 17, 2010 with Ms. Carrero’s notes thereon dated August 20, 2010.<sup>7</sup>

The Custodian certifies that her search for the requested record included locating the responsive warrant.

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<sup>7</sup> The Custodian included an additional Authorization form dated August 17, 2010 that is not at issue in this complaint.  
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The Custodian also certifies that whether any records that may have been responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management is not applicable.

The Custodian certifies that she received the Complainant's OPRA request on July 21, 2010. The Custodian certifies that she responded in writing to the Complainant on July 23, 2010 advising that the NSP OPRA Liaison, Ms. Carrero, would notify him of the copying costs incurred for the requested record. The Custodian certifies that on August 17, 2010 Ms. Carrero sent the Complainant an Authorization form for \$0.05, at which time the Complainant executed same. The Custodian certifies that on August 20, 2010, Ms. Carrero determined that the Complainant had insufficient funds in his inmate account and could not pay the copy cost for the record. The Custodian certifies that to date, DOC has not received payment for the responsive record and thus has not provided same to the Complainant.

The Custodian's Counsel submits a letter brief in support of the Custodian's position. Counsel recapitulates the facts of this complaint and contends that the Complainant filed this complaint disputing DOC's pre-payment policy for OPRA fees and not DOC's denial of access.

Counsel contends that the Complainant is not entitled to a waiver of the OPRA fees because OPRA does not provide for any kind of waiver of such fees, including any instance where a requestor demonstrates their inability to pay the fees. Moreover, Counsel states that DOC Administrative code and policies require all inmates to pay OPRA fees, fines and services from their inmate accounts: "... deductions of funds identified ... shall be made to pay: 1) Court ordered payments, penalty assessments, restitution, and fines; 2) Other revenue obligations or fees..." *N.J.A.C. 10A:2-2.2(e)*. Counsel states that all commissary items must be purchased with funds from inmate accounts. Counsel states that these regulations were in force prior to OPRA's enactment and have been in use for many years.

Counsel certifies that on November 15, 2004, after the enactment of OPRA, DOC established Internal Management Procedure FMB.ACC.017 (Revised May 23, 2005)("IMP .017"). Counsel states that IMP .017, consistent with *N.J.A.C. 10A:3-6.6* et. seq. and *N.J.A.C. 10A:2-2.2(e)*, provides that a requestor must pay all costs associated with an OPRA request, payment shall be initiated through processing a DOC records request form and copying fees shall be in accordance with *N.J.A.C. 10A:1-1.4*. Counsel states that IMP .017 also provides that:

"The OPRA Liaison will then forward to the institution's Business Office the [DOC] [Authorization form]. *The inmate must have sufficient funds in his/her account to process the form for payment.* If the inmate does not have sufficient funds in his/her account, the request will be denied and returned to the inmate through the institution's OPRA liaison." (Emphasis added.) *Id.*

Counsel further states that DOC's regulations and policies are in place to provide the safety and security of the institutions and their ability to decrease money entering and exiting the facilities for illegal purposes.

Counsel thus contends that DOC has not violated OPRA by denying access to the responsive record because the Complainant failed to or is unable to pay for same. N.J.S.A. 47:1A-5.b., Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006) and Ortiz v. New Jersey Department of Corrections, GRC Complaint No. 2007-101 (November 2008). Counsel thus requests that the GRC dismiss this complaint because the Complainant failed to provide any law supporting his argument that he is entitled to a waiver of the OPRA fee.

Additionally, Counsel contends that the Complainant's dispute is with DOC's regulations and policies and not the denial of access under OPRA. Counsel thus asserts that this matter would be more properly heard by the Appellate Division, assuming the Complainant has exhausted his administrative remedies pursuant to R. 2:2-3(a).

Counsel states that it is well established that the Appellate Division has exclusive jurisdiction to review the action or inaction of a State agency or officer. Pascucci v. Vagott, 71 N.J. 40, 52 (1976); Equitable Life Mortgage v. N.J. Division of Taxation, 151 N.J. Super. 232, 238 (App. Div. 1977), *certif. denied*, 75 N.J. 535 (1977). Counsel states that the intent of the rule was to avoid issues of prerogative writ practice that existed prior to the 1947 Constitution and to substitute a simple and expeditious procedure for reviewing administrative action and inaction. Joseph L. Muscarelle, Inc. v. State, by Transportation Department, 175 N.J. Super. 384, 393 (App. Div. 1980), *appeal dismissed*, 87 N.J. 321 (1981)(quoting Central R.R. Co. v. Neeld, 26 N.J. 172, 184-185 (1958), *cert. denied*, 357 U.S. 928, 78 S.Ct. 1373, 2 L.Ed.2d 1371 (1958)). Counsel states that it a "matter of constitutional imperative" that a challenge to agency action be initiated in the Appellate Division. Equitable Life, 151 N.J. Super. at 237.

Counsel states that the Commissioner of DOC has broad powers to set policy and administer the work of the department. N.J.S.A. 30:1B-6. Counsel states that under this provision, DOC promulgated regulations at N.J.A.C. 10A to include a provision for an administrative appeal process. Counsel contends that the Complainant should have appealed DOC's denial of access through the process provided by N.J.A.C. 10A. Counsel argues that the Complainant does not allege that he attempted to follow administrative remedies, rather he filed a complaint with the GRC when the correct venue to hear this complaint is the Appellate Division.

### **September 30, 2010**

Letter from the Complainant to the GRC attaching a "[DOC] Inmate Remedy System Form."<sup>8</sup>

The Complainant disputes that he had insufficient funds in his inmate account to pay for the responsive record. The Complainant states that he filed a relief request with the NSP Business Office on August 20, 2010 regarding his inmate account. The

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<sup>8</sup> The Complainant attached additional documents not relevant to the instant complaint.

Complainant states that the Business Office responded advising that the Complainant had \$1.90 in his account on August 14, 2010. The Complainant states that the Business Office further advised that money was deposited in the account on August 19, 2010 but money was also taken out on August 20, 2010; thus, the account balance as of August 26, 2010 was \$7.76.

The Complainant requests that the GRC order disclosure pursuant to N.J.S.A. 47:1A-7.c. (providing that "...a public agency shall produce documents and ensure the attendance of witnesses with respect to the council's investigation of any complaint or the holding of any hearing."").<sup>9</sup>

### **December 9, 2011**

Letter from the GRC to the current Custodian.<sup>10</sup> The GRC states that its regulations provide that "[t]he Council, acting through its Executive Director, may require custodians to submit, within prescribed time limits, additional information deemed necessary for the Council to adjudicate the complaint." *N.J.A.C. 5:105-2.4(1)*. The GRC states that it has reviewed the evidence of record in this complaint and is in need of additional information. *Id.*

The GRC states that the evidence has raised some question as to the responsive record, the number of pages that comprise the responsive record and the copying cost at issue herein. The GRC states that the Complainant's OPRA request seeks an arrest warrant from November 2, 1995; however, the original Custodian responded noting that the Complainant requested a warrant from "1005." The GRC further states that in the SOI, the original Custodian and previous Counsel identify the responsive record as "dated November 2, 2005." The GRC states that neither the original Custodian nor previous Counsel indicated the number of pages that comprised the warrant. The GRC states that the Complainant attached to his complaint a copy of an Authorization form noting that the copying cost for the responsive record was \$0.05; however, two (2) Authorization forms were attached to the SOI: one for \$0.05 and one for \$0.10. The GRC requests that the Custodian legally certify to the following:

1. What record is responsive to the Complainant's OPRA request at issue in this complaint?
2. How many pages comprise the responsive record?
3. Which Authorization form corresponds with the record at issue in this complaint?

The GRC further states that the NSP OPRA Liaison signed the Authorization form; however, the signature is illegible. The GRC requests that the Custodian provide the OPRA Liaison's name and contact information to the GRC.

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<sup>9</sup> The Complainant further requests that the GRC clear DOC's database of a supposed false warrant. However, the GRC has no authority over retention practices or the validity of an agency's records. See Toscano v. NJ Department of Labor, GRC Complaint No. 2007-296 (March 2008), Van Pelt v. Edison Township Board of Education, GRC Complaint No. 2007-179 (January 2008) and Gillespie v. Newark Public Schools, GRC Complaint No. 2004-105 (November 2004).

<sup>10</sup> Ms. Wendy Myers from DOC verbally notified the GRC on August 15, 2011 that Mr. John Falvey, Esq., replaced Ms. Deirdre Fedkenheuer as Custodian of Record.  
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The GRC requests that the Custodian provide the requested legal certification by December 14, 2011.

### **December 13, 2011**

Current Custodian's legal certification. The Custodian certifies that the responsive record is a copy of a warrant issued on February 7, 1995. The Custodian certifies that the warrant is one (1) page in length. The Custodian certifies that the Authorization form relevant to the instant complaint is for \$0.05. The Custodian finally certifies that the NSP OPRA Liaison whose signature is on the Authorization form is Ms. Carrero.<sup>11</sup>

### **January 30, 2012**

Letter from the GRC to the Custodian. The GRC states that its regulations provide that "[t]he Council, acting through its Executive Director, may require custodians to submit, within prescribed time limits, additional information deemed necessary for the Council to adjudicate the complaint." *N.J.A.C. 5:105-2.4(1)*. The GRC states that it has reviewed the parties' submissions in this complaint and has determined that additional information is required.

The GRC states that attached is a copy of an "Inmate Remedy System Form" provided to the GRC by the Complainant on September 30, 2010. The GRC states that the Complainant submitted the form as evidence that he had sufficient funds to pay for the record at issue in this complaint. The GRC states that a review of the form indicates that the Complainant had \$1.90 in his account as of August 14, 2010, a deposit was made on August 19, 2010 and a withdraw was made on August 20, 2010. The GRC further states that the form also indicates that the Complainant had \$7.76 in his account as of August 26, 2010. The GRC thus requests a legal certification, pursuant to N.J. Court Rule 1:4-4, in response to the following questions:

1. On what day did Ms. Carrero submit the Authorization form to the NSP Business Office?
2. On what day did the NSP Business Office notify Ms. Carrero that the Complainant had insufficient funds?

The GRC requests that the Custodian also provide any evidence to corroborate the legal certification. The GRC requests that the Custodian provide the requested legal certification by close of business on February 2, 2012 and that submissions received after this deadline date may not be considered by the Council for adjudication.

### **February 1, 2012**

Custodian's legal certification with the following attachments:

- Inmate Trust Account Statement ("Statement") dated August 18, 2010.
- IMP .017.

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<sup>11</sup> The Complainant also submitted responses to the GRC's request for the Custodian's legal certification; however, these responses are irrelevant because the Custodian was the only party required to respond to the request.



The Custodian certifies that according to the Statement, the Complainant had a \$0.00 balance in his account on August 18, 2010. The Custodian certifies that the NSP Business Office printed the Statement and sent it to Ms. Carrero. The Custodian certifies that Ms. Carrero was advised of the insufficient funds and appropriately denied the Complainant access to the responsive record pursuant to IMP .017.

### **February 17, 2012**

Letter from the Complainant to the GRC attaching the following:

- Statement dated December 1, 2008 to June 5, 2009.
- Statement dated August 18, 2010.
- Statement dated May 15, 2011 to June 16, 2011.
- IMP .017.

The Complainant disputes the Custodian's February 1, 2012 legal certification. The Complainant contends that the printout submitted as part of the certification is not an accurate representation of the Statement given to inmates. The Complainant contends that inmates are paid on the 15<sup>th</sup> of each month and that the State removes canteen money from the accounts on the same day. The Complainant contends that he cannot understand why the Statement provided by the Custodian as part of the certification does not reflect that he had at least \$1.90 in his inmate account. The Complainant further contends that the GRC should review his account history for June, July and August 2010 instead of just August 2010.

The Complainant further asserts that he signed the Authorization form believing that DOC would withdraw the money as a pre-payment credit.

### **Analysis**

#### **Whether Ms. Carrero timely responded to the Complainant's OPRA request?**

OPRA also 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 ...*” (Emphasis added.) N.J.S.A. 47:1A-5.i.

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.<sup>12</sup> Thus, a custodian’s failure to respond in writing to a complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

Moreover, in Castro v. New Jersey Department of Corrections, GRC Complaint No. 2009-290 (August 2010), the custodian responded in a timely manner advising that Mr. Cris Rodriguez (“Mr. Rodriguez”), OPRA Liaison at the Albert C. Wagener Youth Correctional Facility, would advise the complainant within seven (7) business days of the cost of any responsive records. However, Mr. Rodriguez did not respond to the Complainant in writing until September 24, 2009, or nearly two (2) months after the Custodian’s initial response. The GRC thus determined that Mr. Rodriguez’s failure to respond “within the statutorily mandated seven (7) business days” resulted in a “deemed” denial of access pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley, *supra*. *Id.* at pg. 5.

The facts of this complaint are similar to those in Castro. Specifically, the Custodian responded to the Complainant in writing on July 23, 2010 stating that the NSP OPRA Liaison would advise the Complainant within seven (7) business days of the appropriate copying cost for any responsive records. However, Ms. Carrero did not respond to the Complainant in writing until August 17, 2010, or seventeen (17) business days following the Custodian’s initial response.

Therefore, Ms. Carrero’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley, *supra*. *See also Castro*.

### **Whether Ms. Carrero unlawfully denied access to the requested record?**

OPRA provides that:

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<sup>12</sup> 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.

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

Additionally, OPRA defines a government record as:

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

OPRA provides that:

“A copy or copies of a government record may be purchased by any person upon payment of the fee prescribed by law or regulation. Except as otherwise provided by law or regulation, the fee assessed for the duplication of a government record embodied in the form of printed matter shall be:

- \$ 0.05 per letter size page or smaller, and
- \$ 0.07 per legal size page or larger.” N.J.S.A. 47:1A-5.b.

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

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

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

The Complainant filed this instant complaint stating that DOC unlawfully denied access to the responsive record because he could not pay the appropriate copying cost. The Custodian’s Counsel argued in the SOI that DOC has not violated OPRA by denying access to the responsive record because the Complainant failed to or is unable to pay for same. N.J.S.A. 47:1A-5.b, Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006) and Ortiz v. New Jersey Department of Corrections, GRC Complaint No. 2007-101 (November 2008). Counsel further argued that the denial of access was consistent with DOC’s regulations and policies. *N.J.A.C. 10A:2-2.2(e)*. and IMP .017.

The Complainant subsequently disputed the Custodian’s assertion that he did not have insufficient funds in his inmate account at the time of Ms. Carrero’s response. The Clifford A. Harris v. New Jersey Department of Corrections, 2010-233 – Findings and Recommendations of the Executive Director

Complainant provided to the GRC a “[DOC] Inmate Remedy System Form” in support of his argument. Thus, on January 30, 2012, the GRC requested that the Custodian certify to what day Ms. Carrero submitted the Authorization form to the NSO Business Office and on what day Ms. Carrero was notified that the Complainant had insufficient funds. The GRC further requested that the Custodian provide any evidence in his possession to corroborate the legal certification. The Custodian responded on February 1, 2012 certifying that the NSP Business Office found the Complainant to have insufficient funds on August 18, 2010. In support of this certification, the Custodian attached a Statement clearly showing that the Complainant had a \$0.00 balance on August 18, 2010.

The Complainant submitted additional correspondence on February 17, 2012; however, the Complainant failed to provide competent, credible evidence refuting the Custodian’s February 1, 2012 legal certification.

Pursuant to OPRA, any agency defined as a public agency pursuant to N.J.S.A. 47:1A-1.1, must respond to requests for government records made pursuant to the statute. Further, OPRA provides that requestors must pay the appropriate copying cost for paper copies of the records requested. N.J.S.A. 47:1A-5.b. In Paff, supra, the custodian responded to the complainant’s February 6, 2005 OPRA request stating that the requested record would be available upon payment of copying costs. The Council held that:

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

Moreover, in Ortiz v. New Jersey Department of Corrections, GRC Complaint No. 2007-101 (November 2008), the Council referred to Paff, supra, in reaffirming that the custodian was “not required to release the requested records until payment is received...” *Id.* at pg. 8. The Council subsequently held in Leak v. Union County Prosecutor’s Office, GRC Complaint No. 2007-148 (June 2009) that the custodian had complied in part with the Council’s February 25, 2009 Interim Order “by advising that the requested records would be provided upon payment of copying costs ... pursuant to N.J.S.A. 47:1A-5.b., [Paff, supra], and Mejias v. New Jersey Department of Corrections, GRC Complaint No. 2007-181 (July 2008).” *Id.* at pg. 4 (Council’s June 11, 2009 Supplemental Findings & Recommendations of the Executive Direction).

In the instant complaint, the evidence of record indicates that Ms. Carrero offered the requested record to the Complainant conditioned upon payment of the appropriate copying cost. Thus, Ms. Carrero was under no obligation to provide the record at issue in this complaint until receipt of the appropriate copying fees pursuant to Paff, supra, and Ortiz, supra.

Although the Complainant disputed Ms. Carrero’s claim that his inmate account was insufficient and provided a copy of the “[DOC] Inmate Remedy Form” in support of his argument, the Custodian provided a legal certification and corroborating evidence to indicate that the Complainant’s inmate account contained insufficient funds at the time that Ms. Carrero submitted the Authorization form for payment. Moreover, the

Complainant failed to submit any competent credible evidence to refute said legal certification. Thus, access to the responsive record was properly denied.

Therefore, because Ms. Carrero made the requested record available to the Complainant upon payment of the appropriate copying costs, her response is appropriate pursuant to N.J.S.A. 47:1A-5.b., Paff and Ortiz. *See also Reid v. New Jersey Department of Corrections*, GRC Complaint No. 2010-83 (Final Decision dated May 24, 2011). Moreover, the Custodian is not required to provide the requested record until receipt of payment of \$0.05. *See Paff*. Thus, Ms. Carrero lawfully denied access to the requested record.

The GRC declines to address Counsel's argument that the Complainant's dispute with DOC regulations and policies should have been brought before the Appellate Division.

**Whether Ms. Carrero's untimely response rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?**

OPRA states that:

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

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

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

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

negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996).

Although Ms. Carrero's failure to provide a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business days resulted in a "deemed" denial, Ms. Carrero lawfully denied access to the responsive record because the Complainant was unable to pay the appropriate copying cost. Additionally, the evidence of record does not indicate that Ms. Carrero's technical violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that Ms. Carrero's untimely response does not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Ms. Carrero's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). *See also* Castro v. New Jersey Department of Corrections, GRC Complaint No. 2009-290 (August 2010).
2. Because Ms. Carrero made the requested record available to the Complainant upon payment of the appropriate copying costs, her response is appropriate pursuant to N.J.S.A. 47:1A-5.b., Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006) and Ortiz v. New Jersey Department of Corrections, GRC Complaint No. 2007-101 (November 2008). *See also* Reid v. New Jersey Department of Corrections, GRC Complaint No. 2010-83 (Final Decision dated May 24, 2011). Moreover, the Custodian is not required to provide the requested record until receipt of payment of \$0.05. *See* Paff. Thus, Ms. Carrero lawfully denied access to the requested record.
3. Although Ms. Carrero's failure to provide a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business days resulted in a "deemed" denial, Ms. Carrero lawfully denied access to the responsive record because the Complainant was unable to pay the appropriate copying cost. Additionally, the evidence of record does not indicate that Ms. Carrero's technical violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that Ms. Carrero's untimely response does not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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Executive Director

February 21, 2012