



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

July 23, 2013 Government Records Council Meeting

Rickey Kurt Wassenaar
Complainant

Complaint Nos. 2012-187 and 2012-192

v.

New Jersey Department of Corrections
Custodian of Record

At the July 23, 2013 public meeting, the Government Records Council (“Council”) considered the July 16, 2013 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian has complied with the Council’s June 25, 2013 Interim Order because the Custodian provided to the Complainant all responsive records that existed and were not otherwise exempt, advised the Complainant of the appropriate copying cost for additional records and provided certified confirmation of same to the Executive Director within the required five (5) business days.
2. Although the Custodian unlawfully denied access to records responsive to the Complainant’s April 29, 2012 OPRA request item Nos. 2 and 3, the Custodian lawfully denied access to all other records and further did not unlawfully deny access to the records responsive to the Complainant’s May 11, 2012 OPRA request item Nos. 1, 2 and 3. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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 23 Day of July 2013

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: July 26, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
July 23, 2013 Council Meeting**

**Rickey Kurt Wassenaar¹
Complainant**

GRC Complaint Nos. 2012-187 and 2012-192²

v.

**New Jersey Department of Corrections³
Custodian of Records**

Records Relevant to Complaint: On-site inspection of:⁴

April 29, 2012 OPRA request:⁵

1. All memoranda and/or e-mails signed by or issued by Gary M. Lanigan, Department of Corrections (“DOC”) Commissioner, regarding the Complainant from September 15, 2011 to the present.
2. All memoranda and/or e-mails signed by or issued by Charles E. Warren, New Jersey State Prison (“NJSP”) Administrator, regarding the Complainant from September 15, 2011 to present.
3. All memoranda and/or e-mails signed by or issued by Benard J. Goodwin, Garden State Youth Correctional Facility (“GSYCF”) Administrator, regarding the Complainant from September 15, 2011 to present.
4. GSYFC staff entries in the logbooks kept at the Officer’s station in “Old Seg” from October 3, 2011 through November 15, 2011.

May 11, 2012 OPRA request:

1. All disciplinary charges, sanctions and records issued by GSYCF staff regarding the Complainant from October 3, 2011 through November 15, 2011.
2. All IRSF-101 forms (Remedy & Grievance Procedure) submitted by the Complainant at GSYCF from October 3, 2011 to the present and any staff responses.
3. All IRSF-101 forms submitted by the Complainant at NJSP from November 15, 2011 to the present and any staff responses.

¹ No legal representation listed on record.

² The GRC has consolidated these complaints for adjudication because of the commonality of the parties and issues.

³ John Falvey, Esq., Custodian of Records. No legal representation listed on record.

⁴ The Complainant’s April 29, 2012 OPRA request is the subject of GRC Complaint No. 2012-187. The Complainant’s May 11, 2012 OPRA request is the subject of GRC Complaint No. 2012-192.

⁵ The Complainant requested additional records that are not at issue in this complaint.

4. Video images of the Complainant via the left camera mounted outside of the Complainant's cell No. 9 in "Old Seg" at GSYCF on October 5, 2011, October 25, 2011 and October 28, 2011.
5. Video images of the Complainant via the right mounted camera outside of the Complainant's cell No. 9 in GSYCF on October 5, 2011 and November 1, 2011.
6. Video images of the Complainant via the right mounted camera outside of the Complainant's cell No. 1 in GSYCF on October 28, 2011 and November 1, 2011.

Request Made: April 29, 2012 and May 11, 2012

Response Made: May 15, 2012, May 18, 2012 and May 29, 2012

GRC Complaint Filed: June 18, 2012 and June 26, 2012⁶

Background

June 25, 2013 Council Meeting:

At its June 25, 2013 public meeting, the Council considered the June 18, 2013 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. Because the Complainant's April 29, 2012 OPRA request item Nos. 1, 2 and 3 contained information that may allow the Custodian to identify responsive e-mails and memoranda, the Complainant's OPRA request items are valid. *See Sandoval v. NJ State Parole Board*, GRC Complaint No. 2006-167 (Interim Order dated March 28, 2007) and *Elcavage v. West Milford Twp.*, GRC Complaint Nos. 2009-07 and 2009-08 (March 2010). Thus, the Custodian shall provide those readily identifiable records that existed at the time of the Complainant's OPRA request, if any. If the Custodian believes certain records are exempt from disclosure or that no records exist, the Custodian must legally certify to these facts.
2. The Custodian has borne his burden of proving that the records responsive to the Complainant's April 29, 2012 OPRA request item No. 4 are exempt from disclosure as "... emergency or security information or procedures for any buildings or facility which, if disclosed, would jeopardize security of the building or facility or persons therein." N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6.
3. Where the Custodian has granted access to records responsive to the Complainant's May 11, 2012 OPRA request item Nos. 1, 2 and 3 that he is unable to inspect, the Custodian should offer copies of the responsive records to the Complainant upon payment of applicable copying fees. N.J.S.A. 47:1A-5(b); *Reid v. NJ Department of Corrections*, GRC Complaint No. 2010-83 (October 2011). However, it is emphasized that the Custodian did not unlawfully deny access to these records as he granted inspection prior to the Complainant's departure from NJSP. N.J.S.A. 47:1A-6.

⁶ The GRC received the Denial of Access Complaints on said dates.

4. **The Custodian shall comply with item Nos. 1 and 3 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 1:4-4,⁷ to the Executive Director.⁸**
5. The Custodian has borne his burden of proving a lawful denial of access to the video images responsive to the Complainant's May 11, 2012 OPRA request item Nos. 4, 5 and 6 under OPRA and New Jersey Department of Corrections' regulations. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9(a); N.J.A.C. 10A:22-2.3(a)(2), (a)(5); N.J.S.A. 47:1A-6.
6. 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.

Procedural History:

On June 26, 2013, the Council distributed its Interim Order to all parties.

Compliance:

On July 2, 2013, the Custodian responded to the Council's Interim Order. The Custodian certifies that on this day he sent to the Complainant the records responsive to the April 29, 2012 OPRA request item Nos. 2 and 3 along with a document index detailing the responsive records and applicable exemptions to those records not provided. The Custodian further certifies that no records responsive to item No. 1 exist.

The Custodian asserts that his unlawful denial of access to the Complainant's April 29, 2012 OPRA request item Nos. 1, 2 and 3 does not constitute a knowing and willful violation of OPRA. The Custodian contends that he relied on the Council's holdings in Gatson v. Bergen County Prosecutor's Office, GRC Complaint No. 2009-240 (October 2010) and Rios v. NJ Dep't of Corrections, GRC Complaint No. 2010-255 (February 2012). The Custodian further notes that he initially took the Complainant's OPRA request to mean that he would have to perform a massive search of numerous facilities to find responsive records; however, the Council's holding led the Custodian to perform a more narrow search for records. The Custodian states that this search allowed the Custodian to locate and provide responsive records to the Complainant.

The Custodian certifies that he also offered the Complainant the records responsive to the May 11, 2012 OPRA request item Nos. 1, 2 and 3 pending payment of \$9.40. The Custodian certifies that he also included a document index.

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

⁸ Satisfactory compliance requires that the Custodian deliver the records 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.

Analysis

Compliance

On June 25, 2013, the Council ordered the Custodian to provide all records responsive to the Complainant's April 29, 2012 OPRA request item Nos. 1, 2 and 3 and offer to the Complainant paper copies of the records responsive to the Complainant's May 11, 2012 OPRA request item Nos. 1, 2 and 3 for which inspection was previously granted. The Council also ordered the Custodian to provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On May 29, 2013, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. On July 2, 2013, within the prescribed time frame to respond, the Custodian provided certified confirmation of compliance to the Executive Director that he sent a letter to the Complainant providing the records responsive to the Complainant's April 29, 2012 OPRA request item Nos. 2 and 3 not otherwise exempt and advising that no records responsive to item No. 1 exist. The Custodian further certified that he advised the Complainant that the records responsive to the Complainant's May 11, 2012 OPRA request item Nos. 1, 2 and 3 could be purchased for \$9.40.

Therefore, the Custodian has complied with the Council's June 25, 2013 Interim Order because the Custodian provided to the Complainant with all responsive records that existed and were not otherwise exempt, advised the Complainant of the appropriate copying cost for additional records and provided certified confirmation of same to the Executive Director within the required five (5) business days.

Knowing & Willful

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 "... [i]f 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 the Custodian unlawfully denied access to records responsive to the Complainant's April 29, 2012 OPRA request item Nos. 2 and 3, the Custodian lawfully denied access to all other records and further did not unlawfully deny access to the records responsive to the Complainant's May 11, 2012 OPRA request item Nos. 1, 2 and 3. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian has complied with the Council's June 25, 2013 Interim Order because the Custodian provided to the Complainant all responsive records that existed and were not otherwise exempt, advised the Complainant of the appropriate copying cost for additional records and provided certified confirmation of same to the Executive Director within the required five (5) business days.
2. Although the Custodian unlawfully denied access to records responsive to the Complainant's April 29, 2012 OPRA request item Nos. 2 and 3, the Custodian lawfully denied access to all other records and further did not unlawfully deny access to the records responsive to the Complainant's May 11, 2012 OPRA request item Nos. 1, 2 and 3. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Brandon D. Minde, Esq.
Executive Director

July 16, 2013



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

June 25, 2013 Government Records Council Meeting

Rickey Kurt Wassenaar
Complainant

Complaint No. 2012-187 and 2012-192

v.

New Jersey Department of Corrections
Custodian of Record

At the June 25, 2013 public meeting, the Government Records Council ("Council") considered the June 18, 2013 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Complainant's April 29, 2012 OPRA request item Nos. 1, 2 and 3 contained information that may allow the Custodian to identify responsive e-mails and memoranda, the Complainant's OPRA request items are valid. *See Sandoval v. NJ State Parole Board*, GRC Complaint No. 2006-167 (Interim Order dated March 28, 2007) and *Elcavage v. West Milford Twp.*, GRC Complaint Nos. 2009-07 and 2009-08 (March 2010). Thus, the Custodian shall provide those readily identifiable records that existed at the time of the Complainant's OPRA request, if any. If the Custodian believes certain records are exempt from disclosure or that no records exist, the Custodian must legally certify to these facts.
2. The Custodian has borne his burden of proving that the records responsive to the Complainant's April 29, 2012 OPRA request item No. 4 are exempt from disclosure as "... emergency or security information or procedures for any buildings or facility which, if disclosed, would jeopardize security of the building or facility or persons therein." *N.J.S.A. 47:1A-1.1*; *N.J.S.A. 47:1A-6*.
3. Where the Custodian has granted access to records responsive to the Complainant's May 11, 2012 OPRA request item Nos. 1, 2 and 3 that he is unable to inspect, the Custodian should offer copies of the responsive records to the Complainant upon payment of applicable copying fees. *N.J.S.A. 47:1A-5(b)*; *Reid v. NJ Department of Corrections*, GRC Complaint No. 2010-83 (October 2011). However, it is emphasized that the Custodian did not unlawfully deny access to these records as he granted inspection prior to the Complainant's departure from NJSP. *N.J.S.A. 47:1A-6*.
4. **The Custodian shall comply with item Nos. 1 and 3 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 1:4-4,¹ to the Executive Director.²

5. The Custodian has borne his burden of proving a lawful denial of access to the video images responsive to the Complainant's May 11, 2012 OPRA request item Nos. 4, 5 and 6 under OPRA and New Jersey Department of Corrections' regulations. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9(a); *N.J.A.C. 10A:22-2.3(a)(2)*, (a)(5); N.J.S.A. 47:1A-6.
6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 25th Day of June, 2013

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

Steven Ritardi, Esq., Acting Chair
Government Records Council

Decision Distribution Date: June 26, 2013

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

² Satisfactory compliance requires that the Custodian deliver the records to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 25, 2013 Council Meeting**

**Rickey Kurt Wassenaar¹
Complainant**

GRC Complaint Nos. 2012-187 and 2012-192²

v.

**New Jersey Department of Corrections³
Custodian of Records**

Records Relevant to Complaint: On-site inspection of:⁴

April 29, 2012 OPRA request:⁵

1. All memoranda and/or e-mails signed by or issued by Gary M. Lanigan, Department of Corrections (“DOC”) Commissioner, regarding the Complainant from September 15, 2011 to the present.
2. All memoranda and/or e-mails signed by or issued by Charles E. Warren, New Jersey State Prison (“NJSP”) Administrator, regarding the Complainant from September 15, 2011 to present.
3. All memoranda and/or e-mails signed by or issued by Benard J. Goodwin, Garden State Youth Correctional Facility (“GSYCF”) Administrator, regarding the Complainant from September 15, 2011 to present.
4. GSYFC staff entries in the logbooks kept at the Officer’s station in “Old Seg” from October 3, 2011 through November 15, 2011.

May 11, 2012 OPRA request:

1. All disciplinary charges, sanctions and records issued by GSYCF staff regarding the Complainant from October 3, 2011 through November 15, 2011.
2. All IRSF-101 forms (Remedy & Grievance Procedure) submitted by the Complainant at GSYCF from October 3, 2011 to the present and any staff responses.
3. All IRSF-101 forms submitted by the Complainant at NJSP from November 15, 2011 to the present and any staff responses.

¹ No legal representation listed on record.

² The GRC has consolidated these complaints for adjudication because of the commonality of the parties and issues.

³ John Falvey, Esq., Custodian of Records. No legal representation listed on record.

⁴ The Complainant’s April 29, 2012 OPRA request is the subject of GRC Complaint No. 2012-187. The Complainant’s May 11, 2012 OPRA request is the subject of GRC Complaint No. 2012-192.

⁵ The Complainant requested additional records that are not at issue in this complaint.

Rickey Kurt Wassenaar v. New Jersey Department of Corrections, 2012-187 & 2012-192 – Findings and Recommendations of the Executive Director

4. Video images of the Complainant via the left camera mounted outside of the Complainant's cell No. 9 in "Old Seg" at GSYCF on October 5, 2011, October 25, 2011 and October 28, 2011.
5. Video images of the Complainant via the right mounted camera outside of the Complainant's cell No. 9 in GSYCF on October 5, 2011 and November 1, 2011.
6. Video images of the Complainant via the right mounted camera outside of the Complainant's cell No. 1 in GSYCF on October 28, 2011 and November 1, 2011.

Request Made: April 29, 2012 and May 11, 2012

Response Made: May 15, 2012, May 18, 2012 and May 29, 2012

GRC Complaint Filed: June 18, 2012 and June 26, 2012⁶

Background⁷

Request and Response:

April 29, 2012 OPRA request:

On April 29, 2012, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian. On May 15, 2012, the Custodian responded to said OPRA request in writing on the sixth (6th) business day after receipt of same,⁸ advising that ten (10) additional days would be necessary to respond. On May 18, 2012, the Custodian responded in writing advising the following:

1. Item Nos. 1, 2 and 3: These request items are invalid because the items require the Custodian to perform research. MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005). Additionally, according to the Office of Information Technology, the GroupWise E-mail System only retains e-mails for 90 to 110 days because of space limitations and system performance. Thus, any e-mails deleted are lost and OPRA does not require an agency to restore or recreate e-mail not readily available. Notwithstanding this fact, DOC will offer the Complainant the option of utilizing e-mail restoration to possibly obtain responsive records for a deposit of \$5,580.75. This fee represents an hourly rate of \$53.15 for restoration and search due to the voluminous nature of the request items. Subsequent to a tape restoration, each tape must be searched for the named user and all e-mails, attachments and e-mail property sheets. This process is estimated to take about 3 minutes per e-mail and the average employee sends 100 e-mails a day. In addition to restoration costs, additional charges for review, redaction and copies will apply. If the Complainant wishes to proceed, DOC requires a deposit and there is no guarantee that any disclosable e-mails will be located.

⁶ The GRC received the Denial of Access Complaints on said dates.

⁷ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

⁸ The Custodian certifies in the Statement of Information that he received the Complainant's April 29, 2012 OPRA request on May 7, 2012.

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Should the initial deposit be expended, the Complainant will be contacted to remit any additional fees.

2. Item No. 4: As previously advised on March 8, 2012, in response to a previous OPRA request, disclosure of the responsive records in their entirety poses a potential safety and security issue for NJSP. N.J.S.A. 47:1A-1.1. Thus, this item is denied.

May 11, 2012 OPRA request:

On May 11, 2012, the Complainant submitted a second (2nd) OPRA request to the Custodian. On May 29, 2012, the Custodian responded to said OPRA request in writing on the third (3rd) business day after receipt of same⁹ advising the following:

1. Item Nos. 1, 2 and 3: Access to the responsive records is granted. An OPRA Liaison at NJSP will advise of the scheduled time for on-site inspection, which will be scheduled in accordance with the safe and orderly operation of NJSP.
2. Item Nos. 4, 5, and 6: These items are denied as records or information containing emergency or security information or procedures that "... would jeopardize the security and safety of the building or facility or persons therein." N.J.S.A. 47:1A-1.1. In addition, Special Investigation Division ("SID") records are exempt from disclosure pursuant to N.J.S.A. 47:1A-9, Executive Order No. 26 (McGreevey 2002)("EO 26"), Executive Order No. 47 (Gov. Christie, 2010)("EO 47") and *N.J.A.C.* 10A:22-2.3(a)(5). Further, disclosure of SID records pertaining to an investigation might compromise investigation techniques utilized in ongoing investigations.

Denial of Access Complaint:

On June 18, 2012, the Complainant filed a Denial of Access Complaint relevant to the April 29, 2012 OPRA request with the Government Records Council ("GRC"). The Complainant asserts that the Custodian unlawfully denied access to inspection of the responsive records. The Complainant further contends that the Custodian denied "the release of" records; however, this ignores the fact that the Complainant sought on-site inspection.

The Complainant states that he previously submitted an OPRA request seeking records similar to those in his April 29, 2012 OPRA request item No. 1 and was denied because the request failed to identify specific records and staff member names. The Complainant asserts that he cured those deficiencies; however, the Custodian still denied access for the same reasons. The Complainant further argues that the Custodian failed to indicate his search for the records responsive to item No. 2. The Complainant asserts that the Custodian instead advised that responsive e-mails may have been deleted and that it would cost \$5,580.75 to retrieve records with no guarantee that DOC would locate any e-mails. The Complainant contends that DOC is required to retain e-mails for a specific period of time.

The Complainant contends that the Custodian failed to address the memoranda requested in item No. 3. The Complainant contends that many, if not all, of the memoranda are printed and

⁹ The Custodian certifies in the Statement of Information that he received the Complainant's May 11, 2012 OPRA request on May 23, 2012.

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posted for instructional purposes by DOC staff. The Complainant argues that the Custodian did not accurately reflect the records sought in his denial of access to item No. 4. The Complainant contends that the logbooks documented his movements and activities, as well as meal tray deliveries and diet.

On June 26, 2012, the Complainant filed a Denial of Access Complaint relevant to the May 11, 2012 OPRA request with the GRC. The Complainant disputes the Custodian's denial of access to his OPRA request item Nos. 4, 5 and 6. The Complainant contends that the Custodian failed to prove the responsive video images were the subject of a SID investigation or that disclosure of the records would jeopardize security at NJSP.

Statement of Information:

On July 26, 2012, the Custodian filed Statements of Information ("SOI") for both complaints.

April 29, 2012 OPRA request:

The Custodian certifies that he received the Complainant's OPRA request on May 7, 2012. The Custodian certifies that his search for the records at issue in item Nos. 1, 2 and 3 involved contacting the Office of Information Technology to evaluate the effort needed to locate any records if they existed. The Custodian certifies that the records at issue in item No. 4 are maintained at GSYCF.

The Custodian argues that item Nos. 1, 2 and 3 seeking memoranda and e-mails from three (3) DOC employees assigned to different DOC locations over an eight (8) month period are invalid. MAG, *supra*. The Custodian contends that regarding the memoranda, the Complainant's requests required research to locate eight (8) months of records for three (3) employees at three (3) different locations and then review of each one to determine if the memoranda sufficiently related to the Complainant. The Custodian contends that regarding the e-mails, although his denial of access was proper under MAG, *supra*, he attempted to accommodate the Complainant by charging a special service charge of \$5,580.75 to retrieve and review a possible 68,100 e-mails over the 227-day period time frame in the Complainant's OPRA request.

The Custodian further argues that his denial of access to item No. 4 was lawful. The Custodian certifies that the responsive logbooks reflect the allocation and movement of custody personnel at various times during the day, movement of prisoners and transfer of facility keys. The Custodian contends that this information must be kept confidential in order to prevent inmates from exploiting security weaknesses to plot escapes, assaults, or other prohibited activity.

May 11, 2012 OPRA request:

The Custodian certifies that he received the Complainant's OPRA request on May 23, 2012. The Custodian certifies that the records responsive to item Nos. 4, 5 and 6 are located at the SID in GSYCF.

The Custodian contends that he lawfully denied access to item Nos. 4, 5 and 6. N.J.S.A. 47:1A-1.1; N.J.A.C. 10A:22-2.3(a)(2); N.J.A.C. 10A:22-2.3(a)(5). The Custodian certifies that DOC uses video to record inmates at high risk of hurting themselves, hurting others, or being generally disruptive. The Custodian certifies that the Complainant's history of institutional charges under N.J.A.C. 10A:4-4.1 warranted use of video. The Custodian contends that disclosure of the images would reveal the times of recordings, length of recordings and potential camera blind spots that can be exploited by an inmate to carry out disruptive behavior, thus negating the purpose of the cameras. The Custodian asserts that use of cameras greatly aides in DOC's obligation to provide a safe and secure environment for inmates.

Additional Submissions:

On October 25, 2012, the Complainant sent a letter to the GRC advising that he was transferred to a new facility in New Mexico on June 20, 2012.

The Complainant disputes that the Custodian's denial of access to his April 29, 2012 OPRA request item Nos. 1, 2 and 3. The Complainant further contends that the Custodian never indicated whether he performed a search for responsive e-mails and memoranda in the Complainant's prison file. The Complainant asserts that "Sergeant Perkins" and other DOC staff informed the Complainant that his prison file contained many memoranda regarding his status. The Complainant further contends that e-mails about him from DOC officials, which may include Arizona Department of Corrections officials, were generated on September 1, September 15, September 16, September 27, October 3, October 5, October 9, October 13, October 25, October 28, November 1, November 11 and November 15, 2011.¹⁰

The Complainant argues that the Custodian erroneously denied access to the logbooks responsive to item No. 4. The Complainant contends that the logbooks sought pertained only to the Complainant from October 3 to November 15, 2011, to track the Complainant's movements, visitors, meal tray deliveries, etc. The Complainant asserts that any mention of shift changes, key transfers and staff movement is inconsequential.

The Complainant further contends that although the Custodian granted access to his May 11, 2012 OPRA request item Nos. 1, 2 and 3, the Complainant was not contacted to inspect the responsive records prior to being transferred to New Mexico on June 20, 2012. The Complainant also disputes the Custodian's SOI arguments regarding item Nos. 4, 5 and 6, claiming they are erroneous because the Complainant is no longer imprisoned by DOC.

The Complainant thus requests that the Council order the Custodian to submit all responsive records for an *in camera* review and determination as to whether the Custodian lawfully denied access to those records. The Complainant further requests that the Council sanction the Custodian for submitting a false certification and for his failure to disclose responsive records.

¹⁰ The Complainant also refers to three (3) dates in June, 2012 on which he believed responsive e-mails were created; however, these dates are after the submission of his April 29, 2012 OPRA request and are thus not at issue herein. See Blau v. Union County, GRC Complaint No. 2003-75 (January 2005)(holding that "on-going" requests are invalid OPRA and that a requestor must submit new OPRA requests for new records).

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Analysis¹¹

Unlawful Denial of Access

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.

April 29, 2012 OPRA request item Nos. 1, 2 and 3:

The New Jersey Superior Court has held that “[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records ‘readily accessible for inspection, copying, or examination.’* N.J.S.A. 47:1A-1.” (Emphasis added.) MAG, *supra*, at 546. The Court reasoned that:

“[m]ost significantly, the request failed to identify with any specificity or particularity the governmental records sought. *MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past.* Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted.” (Emphasis added.) *Id.* at 549.

The Court further held that “[u]nder OPRA, *agencies are required to disclose only ‘identifiable’ government records* not otherwise exempt ... In short, OPRA does not countenance open-ended searches of an agency's files.” (Emphasis added.) *Id.* See also Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),¹² New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

Moreover, the test under MAG then is whether a requested record is a specifically identifiable government record. If it is, the record is disclosable barring any exemptions to disclosure contained in OPRA. The Council established criteria deemed necessary to specifically identify an e-mail communication in Sandoval v. NJ State Parole Board, GRC Complaint No. 2006-167 (Interim Order dated March 28, 2007). In Sandoval, the complainant requested “e-mail ... between [two individuals] from April 1, 2005 through June 23, 2006 [using seventeen (17)

¹¹ There may be other OPRA issues in this matter; however, the Council’s analysis is based solely on the claims made in the Complainant’s Denial of Access Complaint.

¹² Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

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different keywords].” The custodian denied the request, claiming that it was overly broad. The Council held that:

The Complainant in the complaint now before the GRC requested specific e-mails *by recipient, by date range and by content*. Based on that information, the Custodian has identified [numerous] e-mails which fit the specific recipient and date range criteria Complainant requested.

Id. at 16 (Emphasis added).

In Elcavage v. West Milford Twp., GRC Complaint Nos. 2009-07 and 2009-08 (March 2010), the Council examined what constitutes a valid request for e-mails under OPRA. The Council determined that:

“In accord with MAG, supra, and its progeny, in order to specifically identify an e-mail, OPRA requests must contain (1) the content and/or subject of the e-mail, (2) the specific date or range of dates during which the e-mail was transmitted or the e-mails were transmitted, and (3) a valid e-mail request must identify the sender and/or the recipient thereof.”

Id. at 5 (Emphasis in original).

The Council has also applied the criteria set forth in Elcavage to other forms of correspondence, such as letters. See Armenti v. Robbinsville Board of Education (Mercer), GRC Complaint No. 2009-154 (Interim Order dated May 24, 2011).

Here, the Complainant’s OPRA request item Nos. 1, 2 and 3 identify the content or subject of the e-mails and memoranda (the Complainant), a specific range of dates (September 15, 2011 through April 29, 2012), and a sender and/or receiver (Commissioner Lanigan, Administrator Warren and Administrator Goodwin). Thus, these request items contain the necessary criteria to qualify as valid OPRA requests for e-mails and memoranda.

To reiterate, a valid OPRA request requires a search, not research. An OPRA request is thus only valid if the subject of the request can be readily identifiable based on the request. Whether a subject can be readily identifiable will need to be made on a case-by-case basis. When it comes to e-mails or documents stored on a computer, a simple keyword search may be sufficient to identify any records that may be responsive to a request. As to memoranda, a custodian may be required to search an appropriate file relevant to the subject. In both cases, e-mails and memoranda, a completed “subject” or “regarding” line may be sufficient to determine whether the record relates to the described subject. Again, what will be sufficient to determine a proper search will depend on how detailed the OPRA request is, and will differ on a case-by-case basis. What a custodian is not required to do, however, is to actually read through numerous e-mails and memoranda to determine if same is responsive: in other words, conduct research.

Accordingly, because the Complainant’s April 29, 2012 OPRA request item Nos. 1, 2 and 3 contained information that may allow the Custodian to identify responsive e-mails and

memoranda, the Complainant's OPRA request items are valid. See Sandoval, *supra*, and Elcavage, *supra*. Thus, the Custodian shall provide those readily identifiable records that existed at the time of the Complainant's OPRA request, if any. If the Custodian believes certain records are exempt from disclosure or that no records exist, the Custodian must legally certify to these facts.

The GRC notes that the Council should decline to address the special service charge issue as a custodian is not required to provide records that do not exist or were destroyed prior to submission of an OPRA request. See Hardrick v. Hamilton Township School District Atlantic, GRC Complaint No. 2009-172 (January 2010).

April 29, 2012 OPRA request item No. 4:

OPRA provides that:

A government record shall not include the following information which is deemed to be confidential ... emergency or security information or procedures for any buildings or facility which, if disclosed, would jeopardize security of the building or facility or persons therein.

N.J.S.A. 47:1A-1.1.

In Fischer v. NJ Department of Corrections, GRC Complaint No. 2005-171 (February 2006), the complainant requested "existing policies/post orders" for an area of East State Jersey Prison, noting that he is an employee of that area. The custodian denied access to the records noting that the records constituted emergency and security information "... which, if disclosed, jeopardize security of the building or facility or persons therein ..." The Council agreed, holding that "...regardless of whether the Complainant is an employee of the department, the records are not disclosable pursuant to OPRA." *Id.* See also Durham v. NJ Dept. of Corrections, GRC Complaint No. 2012-35 (March 2013)(holding that daily schedules of NJSP custody staff are exempt from disclosure).

Similar to its holding in Durham, *supra*, the GRC is satisfied that disclosure of the records at issue here could pose a significant risk to the safe and secure operation of the NJSP for the reasons expressed by the Custodian. An inmate seeking to exploit facility weaknesses to plot escapes, assaults, or other prohibited activity would be given an advantage by having intimate knowledge of the daily assignment of personnel, movement of inmates, and staff allocation conducive to planning these actions accordingly. Additionally, whether any of the logbook entries refer to the Complainant is of no moment. See Lobosco v. NJ Dep't of Health & Human Services, Div. of Certificate of Need & Healthcare Facility Licensure, GRC Complaint No. 2010-64 (October 2010)(*citing Cicero v. NJ Dep't of Children & Family Services, Division of Child Behavioral Health Services*, GRC Complaint No. 2009-201 (August 2010) in holding that the identity of a requestor is not a consideration when deciding whether an exemption to disclosure applies to a government record requested pursuant to OPRA except for those specific provisions set forth at N.J.S.A. 47:1A-2.2. and N.J.S.A. 47:1A-10). Thus, the responsive records are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

Therefore, the Custodian has borne his burden of proving that the records responsive to the Complainant's April 29, 2012 OPRA request item No. 4 are exempt from disclosure as "... emergency or security information or procedures for any buildings or facility which, if disclosed, would jeopardize security of the building or facility or persons therein." N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6.

May 11, 2012 OPRA request item Nos. 1, 2 and 3:

OPRA mandates that "government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access accorded [under OPRA] ... shall be construed in favor of the public's right of access." Libertarian Party of Cent. New Jersey v. Murphy, 384 N.J. Super. 136, 139. (App. Div. 2006)(citing N.J.S.A. 47:1A-1). Additionally, "[t]he purpose of OPRA 'is to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process.'" Times of Trenton Publ'g Corp. v. Lafayette Yard Cmty. Dev. Corp., 183 N.J. 519, 535 (2005)(quoting Asbury Park Press v. Ocean County Prosecutor's Office, 374 N.J. Super. 312, 329 (Law Div. 2004)).

Here, the Custodian granted access to inspection of the responsive records; however, the Complainant was moved to a correctional facility in New Mexico prior to inspecting said records. This fact pattern presents a novel issue for the Council. Specifically, the Custodian has not denied access to any records; however, due to the Complainant's current incarceration in New Mexico, he cannot easily inspect the responsive records since he is no longer held at NJSP.

Based on OPRA's purpose to maximize the public's access to government records, the Council can construct a reasonable solution to comport with this purpose. Specifically, where the Custodian has granted access to records responsive to the Complainant's May 11, 2012 OPRA request item Nos. 1, 2 and 3 that he is unable to inspect, the Custodian should offer copies of the responsive records to the Complainant upon payment of applicable copying fees. N.J.S.A. 47:1A-5(b); Reid v. NJ Department of Corrections, GRC Complaint No. 2010-83 (October 2011). However, it is emphasized that the Custodian did not unlawfully deny access to these records as he granted inspection prior to the Complainant's departure from NJSP. N.J.S.A. 47:1A-6.

May 11, 2012 OPRA request item Nos. 4, 5 and 6:

OPRA provides that:

A government record shall not include the following information which is deemed to be confidential ... emergency or security information or procedures for any buildings or facility which, if disclosed, would jeopardize security of the building or facility or persons therein.

N.J.S.A. 47:1A-1.1.

OPRA further provides that:

The provisions of [OPRA] shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to [OPRA]; any other statute; resolution of either or both Houses of the Legislature; *regulation promulgated under the authority of any statute or Executive Order* of the Governor; Executive Order of the Governor; Rules of Court; any federal law; federal regulation; or federal order.

N.J.S.A. 47:1A-9(a)(Emphasis added).

DOC's promulgated regulations provide that:

[T]he following records shall not be considered government records subject to public access ... [SID] investigations records and reports, provided that redaction of information would be insufficient to protect the safety of any person or the safe and secure operation of a correctional facility ... [a] report or record relating to an identified individual, which, if disclosed, would jeopardize the safety of any person or the safe and secure operation of the correctional facility or other designated place of confinement ...

N.J.A.C. 10A:22-2.3(a)(2) and *(a)(5)*.

Here, the Complainant disputed the Custodian's denial of access arguing that the Custodian failed to prove that the responsive video images were the subject of an SID investigation the disclosure of which would jeopardize security at NJSP. In the SOI, the Custodian certified that the Complainant was placed under video surveillance due to a history of institutional charges. The Custodian contended that disclosure of any of the records, currently in the possession of SID in GSYCF, would negate the purpose of the cameras for various reasons.

The GRC is satisfied that disclosure of the responsive records are exempt for the reasons cited by the Custodian. As previously noted, regardless of the fact that the images may show the Complainant, disclosure of these records would clearly identify an individual and further reveal techniques of DOC's video surveillance program. The GRC is further satisfied that disclosure of the video images could be utilized to circumvent DOC's video surveillance program.

Thus, the Custodian has borne his burden of proving a lawful denial of access to the video images responsive to the Complainant's May 11, 2012 OPRA request item Nos. 4, 5 and 6 under OPRA and DOC regulations. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9(a); *N.J.A.C. 10A:22-2.3(a)(2)*, *(a)(5)*; N.J.S.A. 47:1A-6.

Knowing & Willful

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Complainant's April 29, 2012 OPRA request item Nos. 1, 2 and 3 contained information that may allow the Custodian to identify responsive e-mails and memoranda, the Complainant's OPRA request items are valid. See Sandoval v. NJ State Parole Board, GRC Complaint No. 2006-167 (Interim Order dated March 28, 2007) and Elcavage v. West Milford Twp., GRC Complaint Nos. 2009-07 and 2009-08 (March 2010). Thus, the Custodian shall provide those readily identifiable records that existed at the time of the Complainant's OPRA request, if any. If the Custodian believes certain records are exempt from disclosure or that no records exist, the Custodian must legally certify to these facts.
2. The Custodian has borne his burden of proving that the records responsive to the Complainant's April 29, 2012 OPRA request item No. 4 are exempt from disclosure as "... emergency or security information or procedures for any buildings or facility which, if disclosed, would jeopardize security of the building or facility or persons therein." N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6.
3. Where the Custodian has granted access to records responsive to the Complainant's May 11, 2012 OPRA request item Nos. 1, 2 and 3 that he is unable to inspect, the Custodian should offer copies of the responsive records to the Complainant upon payment of applicable copying fees. N.J.S.A. 47:1A-5(b); Reid v. NJ Department of Corrections, GRC Complaint No. 2010-83 (October 2011). However, it is emphasized that the Custodian did not unlawfully deny access to these records as he granted inspection prior to the Complainant's departure from NJSP. N.J.S.A. 47:1A-6.
4. **The Custodian shall comply with item Nos. 1 and 3 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 1:4-4,¹³ to the Executive Director.¹⁴**
5. The Custodian has borne his burden of proving a lawful denial of access to the video images responsive to the Complainant's May 11, 2012 OPRA request item Nos. 4, 5 and 6 under OPRA and New Jersey Department of Corrections' regulations. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9(a); N.J.A.C. 10A:22-2.3(a)(2), (a)(5); N.J.S.A. 47:1A-6.

¹³ "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."

¹⁴ Satisfactory compliance requires that the Custodian deliver the records 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.

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6. 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.

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Approved By: Brandon D. Minde, Esq.
Executive Director

June 18, 2013