



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
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TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

June 24, 2014 Government Records Council Meeting

Rashaun Barkley
Complainant

Complaint No.2013-244

v.

Essex County Prosecutor's Office
Custodian of Record

At the June 24, 2014 public meeting, the Government Records Council ("Council") considered the June 17, 2014 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority, adopted the entirety of said findings and recommendations. The Council, therefore, finds that the Custodian complied with the Council's April 29, 2014 Interim Order because she responded in a timely manner certifying that the plea agreements requested for an *in camera* review and arrest report required to be disclosed did not exist. Additionally, the Custodian provided simultaneous certified confirmation of compliance to the Executive Director within the prescribed time frame. Finally, because the Custodian did not unlawfully deny access to the responsive records or otherwise violate OPRA in any way, the Council should decline to address whether she knowingly and willfully denied 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 24th Day of June, 2014

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: June 26, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
June 24, 2014 Council Meeting**

**Rashaun Barkley¹
Complainant**

GRC Complaint No. 2013-244

v.

**Essex County Prosecutor's Office²
Custodial Agency**

Records Relevant to Complaint: Copies of:

1. Arrest report in State v. Alfuquan Maing, Complaint No. 950651 (Prosecutor File No. 93008286).
2. Arrest Warrant of Syhim Jackson and Alfuquan Maing in State v. Barkley, Indictment No. 1390-4-93.
3. Promis Gav[e]l in Barkley, Indictment No. 1390-4-93.
4. Promis Gav[e]l in Maing, Complaint No. 950651.
5. Plea recommendations in Barkley, Indictment No. 1390-4-93.
6. Plea recommendations in Maing, Complaint No. 950651.
7. Arrest report in State v. Jackson.³

Custodian of Record: Debra G. Simms, Esq.
Request Received by Custodian: July 18, 2013
Response Made by Custodian: July 22, 2013
GRC Complaint Received: September 3, 2013

Records Submitted for *In Camera* Examination: None.

Background

April 29, 2014 Council Meeting:

At its April 29, 2014 public meeting, the Council considered the April 22, 2014 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. The Custodian did not unlawfully deny access to the Complainant's OPRA request

¹ No legal representation listed on record.

² Represented by James Paganelli, Esq. (Newark, NJ).

³ The Complainant did not include a complaint or indictment number for this case.

- item Nos. 1 and 6 because said records were destroyed on July 10, 2009 per the Office's records retention schedule allowing for destruction of the physical file in Maing v. State, Complaint No. 950651, five (5) years after the closure of the case. N.J.S.A. 47:1A-6; JLB v. Somerset Cnty. Prosecutor's Office, GRC Complaint No. 2008-205 (June 2009). Further, the Complainant provided no competent, credible evidence supporting that the records still exist. Finally, the Council need not address any of the other exemptions raised by the Custodian because the records no longer exist.
2. Because the Custodian initially responded to the Complainant and subsequently certified in the Statement of Information that no records responsive to the Complainant's OPRA request item No. 2 exist, and because there is no evidence on record to refute the Custodian's certifications, the Custodian did not unlawfully deny access to the requested records. *See* Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
 3. Because the Complainant's request item Nos. 3 and 4 sought an automated computer system and failed to seek identifiable government records, the request is invalid under OPRA. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005), NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). Thus, the Custodian has not unlawfully denied access to these request items.
 4. Pursuant to Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), and based on the Council's decision in Morgano v. Essex Cnty. Prosecutor's Office, GRC Complaint No. 2007-156 (Interim Order dated October 29, 2008), the GRC must conduct an *in camera* review of the responsive plea agreements to determine the validity of the Custodian's assertion that the record constitutes an "inter-agency or intra-agency advisory, consultative or deliberative" material pursuant to N.J.S.A. 47:1A-1.1.
 5. **The Custodian must deliver⁴ to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see No. 4 above), a document or redaction index⁵, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,⁶ that the record provided is the record 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.**

⁴ 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.

⁵ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

⁶ "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."

6. The Custodian may have unlawfully denied access to the Complainant's OPRA request item No. 7 because arrest reports are government records pursuant to N.J.S.A. 47:1A-1.1 and because N.J.S.A. 47:1A-3(b) delineates the specific information contained on an arrest report which must be disclosed to the public. *See Barkley v. Essex Cnty. Prosecutor's Office*, GRC Complaint No. 2012-34 (Interim Order dated April 30, 2013). As such, the Custodian must disclose the arrest report to the Complainant or certify if no such record exists.
7. **The Custodian shall comply with item No. 6 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**
8. 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 May 1, 2014, the Council distributed its Interim Order to all parties on. On May 7, 2014, the Custodian responded to the Council's Interim Order certifying that in an effort to comply with the Interim Order, herself and her administrative assistant reviewed three (3) large boxes housing the materials for State v. Barkley, Indictment No. 1390-4-93.

Conclusion No. 4

The Custodian certified that this conclusion required production of "plea recommendations" to the GRC for an *in camera* review (Item No. 5). The Custodian affirmed that an extensive search of the file boxes revealed that no plea agreements existed; thus, she could not produce any records for review. The Custodian certified that plea offers are usually informal and verbal, as they are made prior to a formal plea agreement being reached. The Custodian certified that in Barkley, there could not have been any plea agreements because a jury tried the case. The Custodian further noted that if there was a plea offer prior to the trial, no copy exists on file.

Conclusion No. 6

The Custodian affirmed that this conclusion required disclosure of an arrest report in State v. Jackson (Item No. 7). The Custodian noted that she initially denied access based on the

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 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.

Complainant's failure to provide an indictment or complaint number. The Custodian certified that in an effort to comply with the Interim Order, she performed a search on the promis gavel computer system and found eight (8) cases relating to Syhim Jackson. The Custodian certified that one of the cases, Case No. 93008309, revealed that Mr. Jackson was a witness at the Complainant's trial after being arrested on October 8, 1993, and that the case was administratively dismissed on August 19, 1994. The Custodian affirmed that after checking the file room, it was determined that the file was destroyed on July 10, 2009. *See* Records Retention Schedule, Record Series No. 0018-0003. The Custodian certified that based on the destruction of the file, no responsive record exists.

The Custodian asserted that, when the Complainant seeks an arrest report for a case, it is incumbent upon the Complainant to provide specific identifiers and not seek general records forcing the Custodian to conduct an open-ended search. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); Reda v. Twp. of West Milford, GRC Complaint No. 2002-58 (January 2003); Asarnow v. Dep't of Labor & Workforce Dev., GRC Complaint No. 2006-24 (May 2006).

On May 22, 2014, the Complainant disputed that no records existed and requested that the GRC order an *in camera* review to determine whether the responsive records exist. The Complainant further contended that according to a March 21, 1994, letter he received from the trial prosecutor, the Essex County Prosecutor's Office negotiated plea bargains with several witnesses in the case against the Complainant. The Complainant further contended that he sought all arrest reports for Mr. Jackson and not only the ones the State destroyed. Additionally, the Complainant argued that it is highly unlikely that the arrest report in Case No. 93008309 was destroyed because it was part of his trial.

Analysis

Compliance

At its April 29, 2014 meeting, the Council ordered the Custodian to submit to the GRC nine (9) copies of plea agreements responsive to OPRA request item No. 5 for an *in camera* review. Additionally, the Council ordered the Custodian to either disclose the arrest report responsive to OPRA request item No. 7 or certify if same does not exist. The Council further required that the Custodian provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On May 1, 2014, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on May 8, 2014.

On May 7, 2014, four (4) business days after receipt of the Council's Order, the Custodian responded to the Order certifying that an extensive search yielded no records responsive to item Nos. 5 and 7. The Custodian certified that no plea agreements could be located in the Complainant's files and that the arrest report responsive to item No. 7 was destroyed as part of the destruction of the file for Case No. 93008309 on July 10, 2009.

The Complainant disputed both claims and requested that the GRC review the file *in camera* to make their own determination as to the existence of records. The Complainant provided the GRC with a letter he asserted supported that records responsive to item No. 5 existed. However, that letter only speaks to plea agreements for two (2) individuals not identified in the Complainant's request. Further, the Complainant contended item No. 7 sought all arrest reports for Mr. Jackson. However, a plain reading of the request does not support that he specifically sought all arrest reports for Mr. Jackson. Specifically, there is no indication that the Complainant's request sought all arrest reports for Mr. Jackson, but sought a specific arrest report for a specific case; “. . . State v. Jackson.”

Thus, in the absence of the existence of the records ordered for an *in camera* review and because the Custodian certified that no arrest report responsive to item No. 7 existed, she complied with the Council's Order.

Therefore, the Custodian complied with the Council's April 29, 2014 Interim Order because she responded in a timely manner certifying that the plea agreements requested for an *in camera* review and arrest report required to be disclosed did not exist. Additionally, the Custodian provided simultaneous certified confirmation of compliance to the Executive Director within the prescribed time frame. Finally, because the Custodian did not unlawfully deny access to the responsive records or otherwise violate OPRA in any way, the Council should decline to address whether she knowingly and willfully denied access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian complied with the Council's April 29, 2014 Interim Order because she responded in a timely manner certifying that the plea agreements requested for an *in camera* review and arrest report required to be disclosed did not exist. Additionally, the Custodian provided simultaneous certified confirmation of compliance to the Executive Director within the prescribed time frame. Finally, because the Custodian did not unlawfully deny access to the responsive records or otherwise violate OPRA in any way, the Council should decline to address whether she knowingly and willfully denied access under the totality of the circumstances.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Dawn R. SanFilippo, Esq.
Acting Executive Director

June 17, 2014



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
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RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

April 29, 2014 Government Records Council Meeting

Rashaun Barkley
Complainant

Complaint No. 2013-244

v.

Essex County Prosecutor's Office
Custodian of Record

At the April 29, 2014 public meeting, the Government Records Council ("Council") considered the April 22, 2014 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 did not unlawfully deny access to the Complainant's OPRA request item Nos. 1 and 6 because said records were destroyed on July 10, 2009 per the Office's records retention schedule allowing for destruction of the physical file in Maing v. State, Complaint No. 950651, five (5) years after the closure of the case. N.J.S.A. 47:1A-6; JLB v. Somerset Cnty. Prosecutor's Office, GRC Complaint No. 2008-205 (June 2009). Further, the Complainant provided no competent, credible evidence supporting that the records still exist. Finally, the Council need not address any of the other exemptions raised by the Custodian because the records no longer exist.
2. Because the Custodian initially responded to the Complainant and subsequently certified in the Statement of Information that no records responsive to the Complainant's OPRA request item No. 2 exist, and because there is no evidence on record to refute the Custodian's certifications, the Custodian did not unlawfully deny access to the requested records. See Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
3. Because the Complainant's request item Nos. 3 and 4 sought an automated computer system and failed to seek identifiable government records, the request is invalid under OPRA. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005), NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). Thus, the Custodian has not unlawfully denied access to these request items.



4. Pursuant to Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), and based on the Council's decision in Morgano v. Essex Cnty. Prosecutor's Office, GRC Complaint No. 2007-156 (Interim Order dated October 29, 2008), the GRC must conduct an *in camera* review of the responsive plea agreements to determine the validity of the Custodian's assertion that the record constitutes an "inter-agency or intra-agency advisory, consultative or deliberative" material pursuant to N.J.S.A. 47:1A-1.1.
5. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see No. 4 above), a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,³ that the record provided is the record 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.**
6. The Custodian may have unlawfully denied access to the Complainant's OPRA request item No. 7 because arrest reports are government records pursuant to N.J.S.A. 47:1A-1.1 and because N.J.S.A. 47:1A-3(b) delineates the specific information contained on an arrest report which must be disclosed to the public. *See* Barkley v. Essex Cnty. Prosecutor's Office, GRC Complaint No. 2012-34 (Interim Order dated April 30, 2013). As such, the Custodian must disclose the arrest report to the Complainant or certify is no such record exists.
7. **The Custodian shall comply with item No. 6 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 1:4-4,⁴ to the Executive Director.⁵**
8. 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.

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.

Interim Order Rendered by the
Government Records Council
On The 29th Day of April, 2014

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: May 1, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 29, 2014 Council Meeting**

**Rashaun Barkley¹
Complainant**

GRC Complaint No. 2013-244

v.

**Essex County Prosecutor's Office²
Custodial Agency**

Records Relevant to Complaint: Copies of:

1. Arrest report in State v. Alfuquan Maing, Complaint No. 950651 (Prosecutor File No. 93008286).
2. Arrest Warrant of Syhim Jackson and Alfuquan Maing in State v. Barkley, Indictment No. 1390-4-93.
3. Promis Gav[e]l in Barkley, Indictment No. 1390-4-93.
4. Promis Gav[e]l in Maing, Complaint No. 950651.
5. Plea recommendations in Barkley, Indictment No. 1390-4-93.
6. Plea recommendations in Maing, Complaint No. 950651.
7. Arrest report in State v. Jackson.³

Custodian of Record: Debra G. Simms, Esq.
Request Received by Custodian: July 18, 2013
Response Made by Custodian: July 22, 2013
GRC Complaint Received: September 3, 2013

Background⁴

Request and Response:

On July 4, 2013, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On July 22, 2013, the second (2nd) business days after receipt of the request, the Custodian responded in writing stating that she would need fourteen (14) additional business days beyond July 29, 2013 to respond to same. On August 15, 2013, the Custodian responded to the Complainant's OPRA request as follows:

¹ No legal representation listed on record.

² Represented by James Paganelli, Esq. (Newark, NJ).

³ The Complainant did not include a complaint or indictment number for this case.

⁴ 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.

Item Nos. 1, 5 and 6:

The Custodian stated that the case against Maing was administratively dismissed on March 2, 1994 and the physical file was destroyed on July 10, 2009. *See* Records Retention Schedule, Record Series No. 0018-0003 (allowing for the destruction of a file five (5) years after its closed). The Custodian further stated that Essex County Prosecutor's Office ("ECPO") criminal files are exempt as criminal investigatory records regardless of their status. N.J.S.A. 47:1A-1.1; Janeczko v. NJ Dep't of Law & Public Safety, Div. of Criminal Justice, GRC Complaint No. 2002-79 *et seq.* (June 2004); Johnson v. NJ Div. of State Police, GRC Complaint No. 2004-46 (June 2004); Harvey v. Div. of State Police, GRC Complaint No. 2004-65 (July 2004).

Item No.2:

The Custodian stated that after searching the ECPO's files, the Custodian failed to locate arrest warrants for either Jackson or Maing. The Custodian thus stated that the request was denied on the basis that no records exist.

Item Nos. 3 and 4:

The Custodian stated that the request for plea recommendations are exempt as "inter-agency or intra-agency advisory, consultative or deliberative" ("ACD") material. N.J.S.A. 47:1A-1.1. The Custodian further stated that those request items are invalid because they fail to seek identifiable government records, but is a request setting forth the types of subject matters sought. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); Reda v. Twp. of West Milford, GRC Complaint No. 2002-58 (January 2003); Asarnow v. Dep't of Labor & Workforce Dev., GRC Complaint No. 2006-24 (May 2006).

Item No. 7:

The Custodian stated that the request is denied because it sought general information as opposed to specific government records. MAG, 375 N.J. Super. at 546; Bent, 381 N.J. Super. at 37. The Custodian noted that the request did not include an indictment or complaint number.

Denial of Access Complaint:

On September 3, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant does not submit any argument disputing the denial of access.

Supplemental Submission

On February 8, 2014, the Complainant argued that he has evidence that the requested plea offers and forms exist and are in the Custodian's possession. The Complainant asserted that the Council previously decided that these records are subject to disclosure. *See* Morgano v. Essex

Cnty. Prosecutor's Office, GRC Complaint No. 2007-156 (Interim Order dated October 29, 2008).

Statement of Information:⁵

On February 24, 2014, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on July 18, 2013, sought an extension on July 22, 2013 and responded on August 15, 2013.

Item No. 1

The Custodian affirmed that that the Maing case was administratively dismissed on March 2, 1994 and the physical file was destroyed on July 10, 2009. *See* Records Retention Schedule, Record Series No. 0018-0003. The Custodian argued that, notwithstanding this, if the records still existed they would be exempt as criminal investigatory records. N.J.S.A. 47:1A-1.1; Janezko, GRC 2002-79; Johnson, GRC 2004-46; Harvey, GRC 2004-65; Parker v. Essex Cnty. Prosecutor's Office, GRC Complaint No. 2009-225 (October 2010); Daily Journal v. Vineland Police Dep't, 351 N.J. Super. 110, 120 (App. Div. 2002)(*cert. den.* 174 N.J. 364 (2002)).

Item No. 2

The Custodian certified that she searched the case file for responsive arrest warrants relevant to Indictment No. 1390-4-93 and was unable to locate same; thus, no records exist.

Item No. 3, 4 and 7

The Custodian certified that the promis gavel is a computer system showing containing an abundance of information.

The Custodian contended that the Complainant's request item Nos. 3 and 4 seeking promis gavel in connection with Indictment No. 1390-4-93 are invalid as overly broad requests seeking general data. MAG, 375 N.J. Super. at 546; Bent, 381 N.J. Super. at 37; Asarnow, GRC 2006-24; Bart v. Passaic Cnty. Public Hous. Auth., 406 N.J. Super. 445 (App. Div. 2009). The Custodian argued that OPRA does not allow for requests seeking data, information or statistics and that Complainant's request items represent a blanket request for information. The Custodian further contended that item No. 7 seeking an arrest report in State v. Jackson, is equally invalid for the reasons set forth above.

Item No. 5 and 6

The Custodian contended that requested plea recommendations, if they existed are exempt as criminal investigatory records. The Custodian further asserted that the records would also be "inter-agency or intra-agency advisory, consultative or deliberative" ("ACD") material.

⁵ On September 25, 2013, this complaint was referred to mediation. On December 4, 2013, the complaint was referred back to the GRC for adjudication.

Finally, the Custodian contended that the request items are invalid as a blanket request for information.

The Custodian further noted that item No. 6 referred to the Maing case, which the physical file was destroyed on July 10, 2009 per the Office's retention schedule.

Analysis

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.

OPRA further provides that "[a government record] shall not include inter-agency or intra-agency advisory, consultative, or deliberative material . . . criminal investigatory records . . ." N.J.S.A. 47:1A-1.1.

In the instant complaint, the Complainant sought several records relevant to three (3) criminal cases. The Custodian provided a host of denials to the Complainant's request.

Item No. 1 and 6

In Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005), the complainant sought a copy of a telephone bill from the custodian in an effort to obtain proof that a phone call was made to him by an official from the Department of Education. The custodian provided a certification in his submission to the GRC that certified that the requested record was nonexistent and the complainant submitted no evidence to refute the custodian's certification. The Council subsequently determined that "[t]he Custodian has certified that the requested record does not exist. Therefore, the requested record cannot (sic) be released and there was no unlawful denial of access."

In JLB v. Somerset Cnty. Prosecutor's Office, GRC Complaint No. 2008-205 (June 2009), the custodian certified in the SOI that the last date on which records would have been destroyed was in 2004 and that no records existed. The Council applied its decision in Pusterhofer, in determining that the Custodian did not unlawfully deny access to the responsive records.

In the matter currently before the Council, the arrest report and plea recommendations sought in these items relate to Maing v. State, Complaint No. 950651. The Custodian initially advised the Complainant that the case file for this complaint was destroyed on July 10, 2009 in accordance with the Office's records retention schedule. The Custodian similarly certified to this fact in the SOI. Thus, similar to the Council's decision in JLB, the Custodian could not have unlawfully denied access to the responsive records.

Therefore, the Custodian did not unlawfully deny access to the Complainant's OPRA request item Nos. 1 and 6 because said records were destroyed on July 10, 2009 per the Office's records retention schedule allowing for destruction of the physical file in Maing, five (5) years after the closure of the case. N.J.S.A. 47:1A-6; JLB, GRC 2008-205. Further, the Complainant provided no competent, credible evidence supporting that the records still exist. Finally, the Council need not address any of the other exemptions raised by the Custodian because the records no longer exist.

Item No. 2

As stated above, the GRC has previously determined that a custodian did not unlawfully deny access to records that do not exist. Pusterhofer, GRC 2005-49.

Here, the Custodian responded to the Complainant on August 15, 2013 stating that no arrest warrants for Mr. Jackson or Mr. Maing could be located and thus the request item was denied because no records existed. The Custodian subsequently certified in the SOI that no records responsive existed.

Therefore, because the Custodian initially responded to the Complainant and subsequently certified in the SOI that no records responsive to the Complainant's OPRA request item No. 2 exist, and because there is no evidence on record to refute the Custodian's certifications, the Custodian did not unlawfully deny access to the requested records. *See Pusterhofer*, GRC 2005-49.

Item No. 3 and 4

The New Jersey Appellate Division 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.*” MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005)(emphasis added). The Court reasoned that:

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

Id. at 549 (emphasis added).

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.” Id. (emphasis added). See also Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005),⁶ NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

Here, the Complainant’s OPRA request item Nos. 3 and 4 sought a “promis gavel” relevant to Maing, and Barkley. The promis gavel computer system is an automated criminal case tracking system that captures base information concerning defendants.⁷ The system is a searchable database in which only certain information is available to the public at public access terminals either on the Internet or at Superior courthouses in each County in the State. Thus, on its face, a promis gavel is not a record but a system by which basic information can be retrieved. To this end, the GRC is satisfied that these request items are invalid because they seek a system and not a record.

Therefore, because the Complainant’s request item Nos. 3 and 4 sought an automated computer system and failed to seek identifiable government records, the request is invalid under OPRA. MAG, 375 N.J. Super. at 546; Bent, 381 N.J. Super. at 37; New Jersey Builders, 390 N.J. Super. at 180; Schuler, GRC 2007-151. Thus, the Custodian has not unlawfully denied access to these request items.

Item No. 5

In Morgano v. Essex Cnty. Prosecutor’s Office, GRC Complaint No. 2007-156 (Interim Order dated October 29, 2008), the Council conducted an *in camera* review of several documents to include a plea form. Following the review, the Council determined that a majority of the plea form should be disclosed. However, the Council also held that a portion of the record contained recommendations and was thus, exempt from disclosure as ACD material. N.J.S.A. 47:1A-1.1.

Here, the Custodian initially denied access to item No. 5 stating that same was a criminal investigatory record and was also exempt as ACD material. The Custodian further stated that the Complainant’s request item was invalid. On February 8, 2014, the Complainant contended that the GRC had previously determined that plea offers and forms were subject to disclosure. Morgano, GRC 2007-156.

In Paff v. NJ Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the Council⁸ dismissing 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.” Id. The Court also stated that:

⁶ Affirming Bent v. Stafford Police Dep’t, GRC Case No. 2004-78 (October 2004).

⁷ <http://www.judiciary.state.nj.us/criminal/crpmgv1.htm>.

⁸ Paff v. NJ Dep’t of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

The 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.

Id. at 355.

Further, the Court stated that:

We hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the 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.

Id.

Therefore, pursuant to Paff, 379 N.J. Super. at 346, and based on the Council's decision in Morgano, GRC 2007-156, the GRC must conduct an *in camera* review of the responsive plea agreements to determine the validity of the Custodian's assertion that the record constitutes an ACD material pursuant to N.J.S.A. 47:1A-1.1.

Item No. 7

In Barkley v. Essex Cnty. Prosecutor's Office, GRC Complaint No. 2012-34 (Interim Order dated April 30, 2013), the custodian denied access to the complainant's request seeking, among other records, an arrest report in State v. Green, Indictment No. 4378-12-92 as a criminal investigatory record. The Council; however, noted that:

Although specific arrest information must be disclosed, the Custodian is under no duty to extract and synthesize such information from government records in order to comply with the provisions of OPRA. The Superior Court made this clear in [MAG], by noting "[OPRA] is not intended as a research tool . . . to force government officials to identify and siphon useful information." Id. at 546. Accordingly, pursuant to OPRA, this information must be disclosed in the form of a *government record* (emphasis added).

Id. at 5.

Thus, the Council determined that the because “. . . arrest reports typically contain the arrestee’s (defendant’s) name, age, residence, occupation, marital status, time and place of arrest, text of the charges, arresting agency, identity of the arresting personnel, amount of bail and whether it was posted,” they are government records subject to disclosure. Id. (citing N.J.S.A. 47:1A-3(b), Morgano, GRC 2007-156 and Bart v. City of Passaic (Passaic), GRC Complaint No. 2007-162 (Interim Order dated February 27, 2008). The Council thus held that the custodian unlawfully denied access to the responsive arrest report and ordered disclosure of same.

Further, in Goodman v. Essex Cnty. Prosecutor’s Office, GRC Complaint No. 2010-323 (April 2012), the Council further addressed requests for arrest reports that lacked reasonable identifiers to locate a responsive record. There, the Council determined that a request seeking arrest reports for two (2) individuals was invalid because the complainant failed “. . . to provide [a] range of dates . . . [a]bsent date ranges, the . . . request . . . is an overly broad and invalid blanket request.” Id. at 5-6.

Here, the Complainant sought an arrest report in State v. Jackson. The Custodian denied access to the record as an overly broad request for information. MAG, 375 N.J. Super. at 546; Bent, 381 N.J. Super. at 37. The Custodian reiterated this denial in the SOI. However, as in Barkley, GRC 2012-34, the Council has determined that an arrest report is a government record subject to disclosure. Additionally, this request item departs from the request item in Goodman, 2010-323 because it contains a case name.

Therefore, the Custodian may have unlawfully denied access to request item No. 7 because arrest reports are government records pursuant to N.J.S.A. 47:1A-1.1 and because N.J.S.A. 47:1A-3(b) delineates the specific information contained on an arrest report which must be disclosed to the public. *See* Barkley, GRC 2012-34. As such, the Custodian must disclose the arrest report to the Complainant or certify is no such record exists.

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. The Custodian did not unlawfully deny access to the Complainant’s OPRA request item Nos. 1 and 6 because said records were destroyed on July 10, 2009 per the Office’s records retention schedule allowing for destruction of the physical file in Maining v. State, Complaint No. 950651, five (5) years after the closure of the case. N.J.S.A. 47:1A-6; JLB v. Somerset Cnty. Prosecutor’s Office, GRC Complaint No. 2008-205 (June 2009). Further, the Complainant provided no competent, credible evidence supporting that the records still exist. Finally, the Council need not address

any of the other exemptions raised by the Custodian because the records no longer exist.

2. Because the Custodian initially responded to the Complainant and subsequently certified in the Statement of Information that no records responsive to the Complainant's OPRA request item No. 2 exist, and because there is no evidence on record to refute the Custodian's certifications, the Custodian did not unlawfully deny access to the requested records. *See Pusterhofer v. N.J. Dep't of Educ.*, GRC Complaint No. 2005-49 (July 2005).
3. Because the Complainant's request item Nos. 3 and 4 sought an automated computer system and failed to seek identifiable government records, the request is invalid under OPRA. *MAG Entm't, LLC v. Div. of ABC*, 375 N.J. Super. 534, 546 (App. Div. 2005); *Bent v. Stafford Police Dep't*, 381 N.J. Super. 30, 37 (App. Div. 2005), *NJ Builders Assoc. v. NJ Council on Affordable Hous.*, 390 N.J. Super. 166, 180 (App. Div. 2007); *Schuler v. Borough of Bloomsbury*, GRC Complaint No. 2007-151 (February 2009). Thus, the Custodian has not unlawfully denied access to these request items.
4. Pursuant to *Paff v. NJ Dep't of Labor, Bd. of Review*, 379 N.J. Super. 346 (App. Div. 2005), and based on the Council's decision in *Morgano v. Essex Cnty. Prosecutor's Office*, GRC Complaint No. 2007-156 (Interim Order dated October 29, 2008), the GRC must conduct an *in camera* review of the responsive plea agreements to determine the validity of the Custodian's assertion that the record constitutes an "inter-agency or intra-agency advisory, consultative or deliberative" material pursuant to N.J.S.A. 47:1A-1.1.
5. **The Custodian must deliver⁹ to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see No. 4 above), a document or redaction index¹⁰, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,¹¹ that the record provided is the record 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.**
6. The Custodian may have unlawfully denied access to the Complainant's OPRA request item No. 7 because arrest reports are government records pursuant to N.J.S.A. 47:1A-1.1 and because N.J.S.A. 47:1A-3(b) delineates the specific information contained on an arrest report which must be disclosed to the public. *See Barkley v. Essex Cnty. Prosecutor's Office*, GRC Complaint No. 2012-34 (Interim Order dated

⁹ 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.

¹⁰ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

¹¹ "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."

April 30, 2013). As such, the Custodian must disclose the arrest report to the Complainant or certify if no such record exists.

7. **The Custodian shall comply with item No. 6 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 1:4-4,¹² to the Executive Director.¹³**
8. 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.

Prepared By: Frank F. Caruso
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Approved By: Dawn R. SanFilippo, Esq.
Senior Counsel

April 22, 2014

¹² "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."

¹³ 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.