

FINAL DECISION

November 15, 2006 Government Records Council Meeting

Leslie Posnock, Esq.
Complainant

Complaint No. 2006-44

v.

Monmouth County Sheriff's Office
Custodian of Record

At the November 15, 2006 public meeting, the Government Records Council ("Council") considered the November 8, 2006 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 based on the Custodian's October 26, 2006 submission to GRC staff, the Custodian has complied with the Council's Interim Order by providing the Complainant with the 71 pages of documents responsive to the Complainant's OPRA request within five (5) business days from receipt of the Council's order.

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 15th Day of November, 2006

Vincent P. Maltese, Chairman
Government Records Council

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

Robin Berg Tabakin, Vice Chairman & Secretary
Government Records Council

Decision Distribution Date: November 21, 2006

**Supplemental Findings and Recommendations of the Executive Director
November 15, 2006 Council Meeting**

Leslie Posnock, Esq.¹

GRC Complaint No. 2006-44

Complainant

v.

Monmouth County Sheriff's Office – Law Enforcement²

Custodian of Records

Records Relevant to Complaint:

1. Monmouth County Correctional Institution's "Suicide Prevention and Intervention Plan" in effect in 2000,
2. Monmouth County Correctional Institution's "Suicide Prevention and Intervention Plan" in effect in 2001,
3. Monmouth County Correctional Institution's "Suicide Prevention and Intervention Plan" in effect in 2002,
4. Monmouth County Correctional Institution's "Suicide Prevention and Intervention Plan" in effect in 2003,
5. Monmouth County Correctional Institution's "Suicide Prevention and Intervention Plan" in effect in 2004,
6. Monmouth County Correctional Institution's "Suicide Prevention and Intervention Plan" in effect in 2005,
7. Monmouth County Correctional Institution's Staff Directory for 2004 and 2005,
8. All psychiatric treatment protocols and guidelines in effect at the Monmouth County Correctional Institution in 2000, 2001, 2002, 2003, 2004 and 2005,
9. Monmouth County Sheriff's Office – Department of Corrections Healthcare Services Staff Directory for 2004 and 2005,
10. Monmouth County Sheriff's Office Investigation Report of the Death of Nicholas E. Organek,
11. Monmouth County Sheriff's Office – Department of Corrections accreditation application to the National Commission on Correctional Healthcare made in 2004, including all supporting documents, addendums and exhibits,
12. Monmouth County Sheriff's Office – Department of Corrections accreditation application to the National Commission on Correctional Healthcare made in 2005, including all supporting documents, addendums and exhibits,

¹ The Complainant is an attorney at Schwartz & Posnock, Livingston, NJ.

² Represented by James Cleary, Esq., from the law offices of Cleary, Alfieri, Jones & Hoyle in Matawan, NJ.

13. The “Self-Survey Questionnaire” of the Monmouth County Sheriff’s Office – Department of Corrections submitted to the National Commission on Correctional Health Care in connection with the 2004 accreditation application,
14. Monmouth County Prosecutor’s Office Investigation Report of the Death of Nicholas E. Organek,
15. Monmouth County Sheriff’s Office Investigation Report of the Death of an Inmate on August 12, 2005, at the Monmouth County Correctional Institution,
16. Monmouth County Prosecutor’s Office Investigation Report of the Death of an Inmate on August 12, 2005, at the Monmouth County Correctional Institution,
17. Monmouth County Prosecutor’s Office “Death Sheet” pertaining to Nicholas E. Organek,
18. Observation Log of July 14 and 15, 2005, referring to observations of Nicholas E. Organek while he was an inmate in the Monmouth County Correctional Institution,
19. Observation Memorandum of July 14 and 15, 2005, referring to observations of Nicholas E. Organek while he was an inmate in the Monmouth County Correctional Institution,
20. Investigation reports of all deaths occurring in the Monmouth County Correctional Institution for the years 2000, 2001, 2002, 2003, 2004 and 2005, and
21. Reports of all suicides occurring in the Monmouth County Correctional Institution for the years 2000, 2001, 2002, 2003, 2004 and 2005.

Request Made: December 12, 2005³

Response Made: December 20, 2006⁴

Custodian: Ted Freeman

GRC Complaint filed: February 9, 2006

Background

October 19, 2006

Government Records Council’s (“Council”) Interim Order. At the October 19, 2006 public meeting, the Government Records Council (“Council”) considered the October 5, 2006 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. Pursuant to N.J.S.A. 47:1A-1.1, those documents that are not made, maintained or kept on file by the Monmouth County Sheriff’s Office

³ The Denial of Access Complaint states “James Gray,” however the agency states Ted Freeman, Undersheriff is the Custodian of Records in this Complaint.

⁴ Denial of Access complaint states January 27, 2006 and February 2, 2006.

cannot be provided in response to this request and the Custodian has not unlawfully denied access to those records.

2. The Custodian should have, at least, informed the Complainant in writing that the Sherriff's Office does not hold the requested documents and directed the Complainant to contact those agencies named in the request. Therefore, the Custodian violated N.J.S.A. 47:1A-5.i., N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.h.
3. The Custodian's failure to inform the Complainant that the requested records could not be provided results in a deemed denial of access pursuant to N.J.S.A. 47:1A-5.i.
4. The Custodian has lawfully denied access to the death and suicide investigation reports held by the agency, including those that pertain to Nicholas Organek, pursuant to N.J.S.A. 47:1A-9.a. and Executive Order 26 Paragraph 4(b)1.
5. The Custodian in this case has not borne the burden of proving that providing 71 pages of documents requires an extraordinary expenditure of time and effort for his agency. Thus, the Custodian has failed to prove that a special service charge is warranted in this case pursuant to N.J.S.A. 47:1A-5.c. and N.J.S.A. 47:1A-6. Therefore, the Custodian must provide those records that are disclosable to the Complainant, charging only the statutory copying costs prescribed for in N.J.S.A. 47:1A-5.b.
- 6. The Custodian shall comply with "5." above within five (5) business days from receipt of this Interim Order and simultaneously provide certified confirmation of compliance to the Executive Director.**

October 25, 2006

Council's Interim Order distributed to the parties.

October 26, 2006

Custodian's response to the Council's Interim Order. The Custodian states that the 71 pages of documents responsive to the Complainant's OPRA request have been released and copies of these documents were provided as an attachment to this correspondence.

Analysis

Whether the Custodian complied with the Council's October 19, 2006 Interim Order?

Based on the Custodian's October 26, 2006 submission to GRC staff, the Custodian has complied with the Council's Interim Order by providing the Complainant with the 71 pages of documents responsive to the Complainant's OPRA request within five (5) business days from receipt of the Council's order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that based on the Custodian's October 26, 2006 submission to GRC staff, the Custodian has complied with the Council's Interim Order by providing the Complainant with the 71 pages of documents responsive to the Complainant's OPRA request within five (5) business days from receipt of the Council's order.

Prepared By:

Colleen C. McGann
Case Manager

Approved By:

Catherine Starghill, Esq.
Executive Director

November 8, 2006

INTERIM ORDER

October 19, 2006 Government Records Council Meeting

Leslie Posnock, Esq.
Complainant

Complaint No. 2006-44

v.

Monmouth County Sheriff's Office
Custodian of Record

At the October 19, 2006 public meeting, the Government Records Council ("Council") considered the October 5, 2006 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. Pursuant to N.J.S.A. 47:1A-1.1, those documents that are not made, maintained or kept on file by the Monmouth County Sheriff's Office cannot be provided in response to this request and the Custodian has not unlawfully denied access to those records.
2. The Custodian should have, at least, informed the Complainant in writing that the Sherriff's Office does not hold the requested documents and directed the Complainant to contact those agencies named in the request. Therefore, the Custodian violated N.J.S.A. 47:1A-5.i., N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.h.
3. The Custodian's failure to inform the Complainant that those records could not be provided results in a deemed denial of access pursuant to N.J.S.A. 47:1A-5.i.
4. The Custodian has lawfully denied access to the death and suicide investigation reports held by the agency, including those that pertain to Nicholas Organek, pursuant to N.J.S.A. 47:1A-9.a. and Executive Order 26 Paragraph 4(b)1.
5. The Custodian in this case has not born the burden of proving that providing 71 pages of documents requires an extraordinary expenditure of time and effort for his agency. Thus, the Custodian has failed to prove that a special service charge is warranted in this case pursuant to N.J.S.A. 47:1A-5.c. and N.J.S.A. 47:1A-6. Therefore, the Custodian must provide those records that are disclosable to the Complainant, charging only the statutory copying costs prescribed for in N.J.S.A. 47:1A-5.b.

- 6. The Custodian shall comply with "5." above within five (5) business days from receipt of this Interim Order and simultaneously provide certified confirmation of compliance to the Executive Director.**

Interim Order Rendered by the
Government Records Council
On The 19th Day of October, 2006

Robin Berg Tabakin, Vice Chairman & Secretary
Government Records Council

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

Government Records Council

Decision Distribution Date: October 25, 2006

**Findings and Recommendations of the Executive Director
October 19, 2006 Council Meeting**

Leslie Posnock, Esq.⁵

GRC Complaint No. 2006-44

Complainant

v.

Monmouth County Sheriff's Office – Law Enforcement⁶

Custodian of Records

Records Relevant to Complaint:

22. Monmouth County Correctional Institution's "Suicide Prevention and Intervention Plan" in effect in 2000,
23. Monmouth County Correctional Institution's "Suicide Prevention and Intervention Plan" in effect in 2001,
24. Monmouth County Correctional Institution's "Suicide Prevention and Intervention Plan" in effect in 2002,
25. Monmouth County Correctional Institution's "Suicide Prevention and Intervention Plan" in effect in 2003,
26. Monmouth County Correctional Institution's "Suicide Prevention and Intervention Plan" in effect in 2004,
27. Monmouth County Correctional Institution's "Suicide Prevention and Intervention Plan" in effect in 2005,
28. Monmouth County Correctional Institution's Staff Directory for 2004 and 2005,
29. All psychiatric treatment protocols and guidelines in effect at the Monmouth County Correctional Institution in 2000, 2001, 2002, 2003, 2004 and 2005,
30. Monmouth County Sheriff's Office – Department of Corrections Healthcare Services Staff Directory for 2004 and 2005,
31. Monmouth County Sheriff's Office Investigation Report of the Death of Nicholas E. Organek,
32. Monmouth County Sheriff's Office – Department of Corrections accreditation application to the National Commission on Correctional Healthcare made in 2004, including all supporting documents, addendums and exhibits,
33. Monmouth County Sheriff's Office – Department of Corrections accreditation application to the National Commission on Correctional Healthcare made in 2005, including all supporting documents, addendums and exhibits,

⁵ The Complainant is an attorney at Schwartz & Posnock, Livingston, NJ.

⁶ Represented by James Cleary, Esq. from the law offices of Cleary, Alfieri, Jones & Hoyle in Matawan, NJ.

34. The “Self-Survey Questionnaire” of the Monmouth County Sheriff’s Office – Department of Corrections submitted to the National Commission on Correctional Health Care in connection with the 2004 accreditation application,
35. Monmouth County Prosecutor’s Office Investigation Report of the Death of Nicholas E. Organek,
36. Monmouth County Sheriff’s Office Investigation Report of the Death of an Inmate on August 12, 2005, at the Monmouth County Correctional Institution,
37. Monmouth County Prosecutor’s Office Investigation Report of the Death of an Inmate on August 12, 2005, at the Monmouth County Correctional Institution,
38. Monmouth County Prosecutor’s Office “Death Sheet” pertaining to Nicholas E. Organek,
39. Observation Log of July 14 and 15, 2005, referring to observations of Nicholas E. Organek while he was an inmate in the Monmouth County Correctional Institution,
40. Observation Memorandum of July 14 and 15, 2005, referring to observations of Nicholas E. Organek while he was an inmate in the Monmouth County Correctional Institution,
41. Investigation reports of all deaths occurring in the Monmouth County Correctional Institution for the years 2000, 2001, 2002, 2003, 2004 and 2005, and
42. Reports of all suicides occurring in the Monmouth County Correctional Institution for the years 2000, 2001, 2002, 2003, 2004 and 2005.

Request Made: December 12, 2005⁷

Response Made: December 20, 2006⁸

Custodian: Ted Freeman

GRC Complaint filed: February 9, 2006

Background

September 6, 2005

“Claim for Damages Against: County of Monmouth” filed on behalf of the estate of Nicholas Eliot Organek by Stanley J. Organek, Administrator Ad Prosequendum.

December 12, 2005

Complainant’s written Open Public Records Act (“OPRA”) request. The Complainant is requesting “Suicide Prevention and Intervention Plans,” staff directories, psychiatric treatment protocols and guidelines, budgets, investigation reports,

⁷ The Denial of Access Complaint states “James Gray,” however the agency states Ted Freeman, Undersheriff is the Custodian of Records in this Complaint.

⁸ Denial of Access complaint states January 27, 2006 and February 2, 2006.

accreditation applications, "Self-Survey Questionnaire", and reports of suicides relating to the Monmouth County Correctional Institution. The Complainant is also requesting a "Death Sheet," investigation reports and observation logs and memorandum pertaining to a certain named individual who was held in the Monmouth County Correctional Institution.

December 20, 2006

Custodian's response to the OPRA request. The Custodian states that the request was forwarded to him on December 14, 2006. The Custodian asserts that due to the voluminous nature of the request considerable time is required to locate and duplicate the documents requested. The Custodian estimates that there are 300 pages responsive to the request for which the statutory fees for copying will be charged. The Custodian adds that production of these documents will require a substantial amount of personnel time at an overtime fee of \$45.00 per hour. The Custodian goes on to state that he will contact the Complainant when the documents are ready and inform him of the payment required for copies and processing.

January 27, 2006

Letter from the Custodian to the Complainant. The Custodian advises the Complainant that the cost of researching, preparing and duplicating the requested documents is \$848.50 which includes a charge of \$38.50 for the duplication of 124 pages and \$810.00 for 18 hours of work at \$45.00 per hour overtime rate.

February 2, 2006

Letter from the Custodian to the Complainant. The Custodian is providing the Complainant with a second notification stating that the requested records have been prepared and revising the cost for the records. The Custodian states that that the total charge is now \$835.20, which includes a charge of \$25.25 for the duplication of 71 pages and \$810.00 for 18 hours of work at \$45.00 per hour overtime rate.

February 9, 2006

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

- September 6, 2005 "Claim for Damages Against: County of Monmouth" filed on behalf of the estate of Nicholas Eliot Organek by Stanley J. Organek, Administrator Ad Prosequendum,
- December 12, 2005 Complainant's written OPRA request,
- December 20, 2005 Custodian's response to the OPRA request,
- January 27, 2006 letter from the Custodian to the Complainant, and
- February 2, 2006 letter from the Custodian to the Complainant.

The Complainant is appealing the fee charged and requests disclosure of all documents responsive to the request.

The Complainant states that the response by the Custodian constitutes a denial of access to the requested records due to the unjustified use of 18 hours of overtime by correctional personnel at the rate of \$45.00 per hour. The Complainant asserts that the use of overtime versus correctional personnel is an attempt to deter the Complainant from obtaining the records requested. The Complainant asserts that after receiving the Custodian's December 20, 2005 letter he called and informed the Custodian that the \$45.00 per hour rate is not justified. The Complainant contends that he received no further response until the January 27, 2006 letter from the Custodian indicating the cost for duplication and charge for hours.

The Complainant takes issue with the fact that he was not advised of the number of hours required for the production of these records until after being billed. Furthermore, the Complainant states that the Custodian has not provided any justification for charging overtime or for using correctional staff rather than clerical staff for the production of the documents responsive to the request. The Complainant asserts that the 18 hours of overtime is unjustified given that the documents were easily identifiable.

The Complainant also states that he questioned the Custodian's December 20, 2005 estimate of 300 pages since the documents had yet to be retrieved at that time. The Complainant states that while the number of pages responsive to the request was reduced by 53 pages between January 27, 2006 and February 2, 2006, no explanation was given for the reduction and no claim of an exemption to those documents was indicated. The Complainant asserts that he is being charged for locating, retrieving and copying 53 pages which the Sheriff's Department has now decided should not be provided at all. The Complainant believes that the balance of the originally suggested 300 pages is likely also responsive to the request. The Complainant goes on to state that because no inventory responsive to the request has been produced, he believes that the Sheriff's Department has failed to provide all of the documents responsive to the request.

February 16, 2006

Offer of Mediation forwarded to both parties. Neither party agreed to mediate this case.

March 2, 2006

Request for Statement of Information ("SOI") sent to the Custodian. The GRC also requested the following information:

1. The volume, nature, size, number, of government records involved,
2. The period of time over which the records were received,
3. Whether some or all of the records sought are archived,
4. The amount of time required for a government employee to locate, retrieve and assemble the documents for copying,
5. The amount of time, level, rate and number, if any required to be expended by government employees to monitor the inspection or examination, and,

6. The amount of time required to return documents to their original storage place,
7. The size of the agency,
8. The number of employees available to accommodate documents requests,
9. The availability of information technology and copying capabilities,
10. What was requested,
11. The level(s) of skill necessary to accommodate the request,
12. The reason(s) that the agency employed, or intends to employ, the particular level(s) of skill above,
13. A detailed estimate categorizing the hours needed to identify, copy or prepare for inspection, produce and return the requested documents, and
14. Who in the agency will perform the work associated with each request?

March 23, 2006

Custodian's SOI with the following attachments:

- December 12, 2005 Complainant's written OPRA request,
- January 27, 2006 letter from the Custodian to the Complainant,
- February 2, 2006 letter from the Custodian to the Complainant, and
- Custodian's answers to the March 2, 2006 GRC request for information.

The Custodian states that all documents responsive to this request that are maintained by the Monmouth County Sheriff's office are disclosable upon receipt of payment of a special service charge for the production of the documents. The Custodian has provided a list of the documents responsive to the request that are maintained by the Monmouth County Sheriff's Office indicating:

Title & Date of Each Document	Number of Pages of Each Document	General Nature Description of Each Document	General Nature Description of Each Redaction Contained Therein (if applicable)	Claimed Statutory Exemption(s) and/or Privilege(s) for Each Document and/or Redaction	Explanation Why the Claimed Exemption(s) and/or Privilege(s) Applies to Each Document and/or Each Redaction
Suicide Prevention Policies 1999-2006	45 pages	Suicide Prevention Policies	None	None	None
Staff Directory from 2004-2005	2 pages	Staff Directory	None	None	None
Names and Addresses of	None	Not maintained			

Custodian of Health Care Services Directory		by Monmouth County Sherriff's Office			
Department of Corrections Health Care Budget for the years 2000-2005	15 pages	Budget	None	None	None
Name and Address of entity who has custody and control of Health Care Staff Directory	None	Not maintained by Monmouth County Sherriff's Office			
Applications for Accreditation to National Health Care Commission for 2004-2005	3 pages	Documents related to this application including the self survey questionnaire are in the possession of the National Commission of Correctional Health Care	None	None	None
Observation logs of July 14 and July 15, 2005 and observation memorandum of July 14 and July 15, 2005	4 pages	Observation log and memorandum	None	None	None
List of all inmate suicides from 2000-2005	1 pages	List of inmate suicides	None	None	None

Reports of Monmouth County Sheriff's Office investigation into death of Nicholas Organek	130 pages	Investigation reports	None	None	None
Other suicide investigation reports held by the Monmouth County Sheriff's Office		Investigation reports		Not public record pursuant to Executive Order 29 – Paragraph 4(b)(1)	

The Custodian states that the Monmouth County Sheriff's office does not hold any reports of investigations conducted by the Monmouth County Prosecutor's Office. Therefore, none of the records of the Monmouth County Prosecutor's Office requested by the Complainant can be released in response to this request.

The Custodian also indicated, in regard to the special service charge:

1. The volume, nature, size, and number of government records involved: The Custodian states that the Warden reported the requested file to be as many as 500 pages, however review revealed that there were duplications and records not responsive to the request included in the January 27, 2006 estimate.
2. The period of time over which the records were received: 3-4 months.
3. Whether some or all of the records sought are archived: Some stored in the archive trailer outside of the facility.
4. The amount of time required for a government employee to locate, retrieve and assemble the documents for copying: 24 hours for a corrections officer and 12 hours clerical.
5. The amount of time, level, rate and number, if any required to be expended by government employees to monitor the inspection or examination: 24 hours for a corrections officer at \$36.965/hour and 4 hours clerical at \$20.175 and 8 hours clerical at \$13.08 for a total of \$1,073.76.
6. The amount of time required to return documents to their original storage place: 8 hours
7. The size of the agency: 700 personnel.
8. The number of employees available to accommodate documents requests: No one is assigned to this detail, usually done on overtime.
9. The availability of information technology and copying capabilities: Copy machine.

10. What was requested: See "Records Relevant to the Complaint."
11. The level(s) of skill necessary to accommodate the request: Corrections officer.
12. The reason(s) that the agency employed, or intends to employ, the particular level(s) of skill above: Knowledge of policy and procedures and security.
13. A detailed estimate categorizing the hours needed to identify, copy or prepare for inspection, produce and return the requested documents: No response.
14. Who in the agency will perform the work associated with each request: Whoever is available because no one is assigned permanently to this detail.

April 28, 2006

Letter from the GRC to the Custodian's counsel. The GRC requested a detailed estimate categorizing the hours needed to identify, copy or prepare for inspection, produce and return the requested documents. Additionally the Custodian is asked to provide a reason for the reduction in the number of documents made available to the Complainant between the time of the first estimate on January 27, 2006 and the second estimate on February 2, 2006. Also, the GRC requested that the Custodian provide a definitive statement as to whether or not there are any documents held by the agency responsive to the OPRA request that are not being made available to the Complainant and if so provide a lawful basis for denying access to those records.

May 5, 2006

Custodian's response to the April 28, 2006 letter from the GRC. The Custodian certifies that the Correctional Division billed for 18 hours of correctional officers' and clerical time at an *average overtime rate* of \$45.00/hour.

The Custodian states that based on this and the 124 pages responsive, the January 27, 2006 bill was a total of \$848.50:

- 18 hours at \$45.00 per hour overtime rate totaling \$810.00, plus
- \$38.50 copying charges

On February 2, 2006, this amount was reduced to \$835.20 for 71 pages after certain documents were found not to be responsive to the request:

- 18 hours at \$45.00 per hour overtime rate totaling \$810.00, plus
- \$25.20 for duplication.

The Custodian adds that when asked for an exact cost of retrieval, assembly and duplication, the Corrections Division indicated to him a total actual cost of \$1074.90 for:

- 24 hours of correctional officer time at \$36.965 per hour totaling \$887.16;
- 4 hours clerical time at a cost of \$20.175 per hour totaling \$80.70; and
- 8 hours clerical time at a cost of \$13.308 per hour totaling \$107.04.

The Custodian states that when the request was originally received he was told that a suicide investigation could be as large as 500 pages however, after review of the documents it was found that included in that estimate were duplicates and documents that were not requested. The Custodian states that the removal of one such document after a

final review of the file explains the discrepancy between the January 27, 2006 bill and the February 2, 2006 bill.

The Custodian certifies that there are additional documents responsive to the Complainant's request relating to suicides and deaths other than that of Nicholas Organek, which occurred at the Monmouth County Correctional Institution. The Custodian states that he has been advised by legal counsel that investigations of suicides and deaths of other inmates are not disclosable pursuant to N.J.S.A. 47:1A-1.1 because they are investigatory records as well as Executive Order 26 Paragraph 4(b)1. The Custodian states that, to his knowledge, there are 538 additional pages relating to suicides and deaths other than Nicholas Organek.

Analysis

Whether there was an unlawful denial of access to the documents requested on December 12, 2005?

OPRA provides 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 by [OPRA] shall be construed in favor of the public's right of access...” N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

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

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

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

OPRA indicates certain exemptions under the law for criminal investigatory records. Specifically, OPRA states:

“...*A government record shall not include the following information which is deemed to be confidential for the purposes of [OPRA]... criminal investigatory records...*[c]riminal investigatory record" means a record which is not required by law to be made, maintained or kept on file that is held by a law enforcement agency which pertains to any criminal investigation or related civil enforcement proceeding.” N.J.S.A. 47:1A-1.1.

OPRA also provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access

... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request* ... In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request* ...” (Emphasis added.) N.J.S.A. 47:1A-5.i.

Additionally, OPRA states that:

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

OPRA states:

“[a]ny officer or employee of a public agency who receives a request for access to a government record shall forward the request to the custodian of the record or *direct the requestor to the custodian of the record*.” N.J.S.A. 47:1A-5.h.

OPRA also states that:

“[t]he provisions of this act, [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.

Executive Order 26 Paragraph 4 Section b.1 states:

“the following records shall not be considered to be government records subject to public access pursuant to [OPRA]... [i]nformation concerning individuals as follows... [i]nformation relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation...” (McGreevey 2002)

The Complainant states that due to the discrepancy between the January 27, 2006 bill and the second bill on February 2, 2006 and because no inventory of documents responsive to the request has been produced, he believes that the Sheriff’s Department has failed to make available all of the documents responsive to the request.

Based on the Custodian’s certification, the following documents are not made, maintained or kept on file by the Monmouth County Sheriff’s Office and therefore cannot be provided in response to this request:

- Names and Addresses of Custodian of Health Care Services Directory,
- Name and Address of entity who has custody and control of Health Care Staff Directory,
- Applications for Accreditation to National Health Care Commission for 2004-2005,
- Monmouth County Prosecutor's Office Investigation Report of the Death of Nicholas E. Organek,
- Monmouth County Prosecutor's Office Investigation Report of the Death of an Inmate on August 12, 2005, at the Monmouth County Correctional Institution, and
- Monmouth County Prosecutor's Office "Death Sheet" pertaining to Nicholas E. Organek.

Although there was no unlawful denial of access to these records, the Custodian did not inform the Complainant in writing that these records were not being provided in response to this request as required pursuant to N.J.S.A. 47:1A-5.i. and N.J.S.A. 47:1A-5.g. The Custodian should have, at least, informed the Complainant that the Sherriff's Office does not hold the requested documents and directed the Complainant to contact those agencies named in the request. (N.J.S.A. 47:1A-5.h.) As such, the Custodian violated N.J.S.A. 47:1A-5.i., N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.h. In Deluca v. Town of Guttenburg, GRC Case No. 2006-25 (May 2006), the GRC found that the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to provide the Complainant with a written response to the OPRA request within the statutorily mandated seven (7) business days therefore creating a "deemed" denial, despite the fact that there are no records responsive to the request. Therefore, based on N.J.S.A. 47:1A-5.i. and the GRC decision in DeLuca, the Custodian's failure to respond to the request in writing within the statutorily mandated seven (7) business days results in a deemed denial of access.

The only other documents that the Custodian certifies cannot be released are those relating to the suicides and deaths of inmates other than Nicholas Organek. The Custodian states that to his knowledge there are 538 additional pages relating to suicides and deaths other than Nicholas Organek that are not being provided. The Custodian states that he has been advised by legal counsel that investigations of suicides and deaths of inmates are not disclosable pursuant to Executive Order 26 Paragraph 4(b)1. The Custodian also states that the records are exempt from disclosure as investigatory records pursuant to N.J.S.A. 47:1A-1.1.

The Custodian asserts that the requested documents relating to the suicides of inmates at the correctional institution would be exempt from access as investigatory records pursuant to N.J.S.A. 47:1A-1.1. However, N.J.S.A. 47:1A-1.1 only exempts those records defined as criminal investigatory records and the Custodian has failed to identify the requested records as that which relate to any criminal investigation or related civil enforcement proceeding. Therefore, the exemption for criminal investigatory records does not apply to the requested documents relating to suicides and deaths.

However, the Custodian goes on to state that investigations of suicides and deaths of inmates are also not disclosable pursuant to Executive Order 26 Paragraph 4(b)1. OPRA provides that if there is any other law, statute or Executive Order that exempts documents from disclosure that exemption from disclosure would preempt OPRA. Executive Order 26 provides that information which discloses the medical, psychiatric or psychological history, diagnosis, treatment or evaluation of an individual is not subject to public access. Death and suicide investigation reports held by the Monmouth County Sherriff's Office would contain information that specifically discloses that information which Executive Order 26 deems confidential. Therefore, the Custodian has lawfully denied access to the death and suicide investigation reports held by the agency pursuant to N.J.S.A. 47:1A-9a and Executive Order 26 Paragraph 4(b)1.

Additionally, the Custodian has offered the Complainant copies of death and suicide investigation reports as they pertain to Nicholas Organek. (Documents provided with this complaint indicate that the Complainant acts as legal representation for the estate of Nicholas Organek in “Claim for Damages Against: County of Monmouth” filed on behalf of the estate of Nicholas Eliot Organek.) While OPRA states that “any limitations on the right of access accorded by [OPRA], shall be construed in favor of the public's right of access” (N.J.S.A. 47:1A-1.), it should be noted that the exemption to disclosure under OPRA applies to the records of Nicholas Organek as well. There is no exception in either OPRA or Executive Order 26 allowing for the disclosure of these documents to the public. There may be other laws under which these records can be disclosed to the Complainant but pursuant to N.J.S.A. 47:1A-9.a. and Executive Order 26 Paragraph 4(b)1, the death and suicide investigation reports relating to Nicholas Organek should not be disclosed.

Based on the Custodian’s certification and pursuant to N.J.S.A. 47:1A-1.1, those documents that are not made, maintained or kept on file by the Monmouth County Sheriff’s Office cannot be provided in response to this request. However, the Custodian should have, at least, informed the Complainant in writing that the Sherriff’s Office does not hold the requested documents and directed the Complainant to contact those agencies named in the request. (N.J.S.A. 47:1A-5.h.) Therefore, the Custodian violated N.J.S.A. 47:1A-5.i. and N.J.S.A. 47:1A-5.g. and

the Custodian's failure to inform the Complainant that these records could not be provided results in a deemed denial of access.

Also, the Custodian has lawfully denied access to the death and suicide investigation reports held by the agency, including those that pertain to Nicholas Organek, pursuant to N.J.S.A. 47:1A-9.a. and Executive Order 26 Paragraph 4(b)1.

Whether the Custodian's special service charge of \$810.00 is reasonable pursuant to N.J.S.A. 47:1A-5.c.?

OPRA states:

“[a] copy or copies of a government record may be purchased by any person upon payment of the fee prescribed by law... Except as otherwise provided by law or regulation, the fee assessed for the duplication of a government record embodied in the form of printed matter shall not exceed the following: first page to tenth page, \$ 0.75 per page; eleventh page to twentieth page, \$ 0.50 per page; all pages over twenty, \$ 0.25 per page. The actual cost of duplicating the record shall be the cost of materials and supplies used to make a copy of the record, but shall not include the cost of labor or other overhead expenses associated with making the copy except as provided for in subsection c. of this section. (Emphasis added.) N.J.S.A. 47:1A-5.b.

OPRA provides that:

“[w]henver the...volume of a government record embodied in the form of printed matter to be...copied pursuant to [OPRA] is such that the record...involves an extraordinary expenditure of time and effort to accommodate the request, the public agency may charge, in addition to the actual cost of duplicating the record, a special service charge that shall be reasonable and shall be based upon the actual direct cost of providing the copy or copies...The requestor shall have the opportunity to review and object to the charge prior to it being incurred.” (Emphasis added.) N.J.S.A. 47:1A-5.c.

The Custodian states that documents maintained by the Monmouth County Sheriff's office responsive to this request that are disclosable will be provided to the

Complainant upon receipt of payment of a special service charge for the production of the documents. The Custodian certifies that the Correctional Division supplied an estimate of 18 hours for correctional officers' and clerical time at an *average overtime rate* of \$45.00/hour.

The Complainant states that the response by the Custodian constitutes a denial of access to the requested records due to the unjustified use of 18 hours of overtime by correctional personnel at the rate of \$45.00 per hour. The Complainant asserts that the use of an overtime rate for correctional personnel is an attempt to deter the Complainant from obtaining the records requested. The Complainant asserts that after receiving the Custodian's December 20, 2005 letter, he called and informed the Custodian that the \$45.00 per hour rate is not justified.

The GRC has established criteria for analyzing the assessment of a special service charge in Fisher v. Division of Law and Public Safety, Case No. 2004-55 (December 2004). The factors considered in the Fisher case provided the basis for the analysis in this case. The factors considered in the case at hand are as follows:

Questions asked by GRC Staff	Certification provided by County of Passaic
The volume, nature, size, number of government records involved	The Custodian states that the Warden reported the requested file to be as many as 500 pages, however review revealed that

	there were duplications and records not responsive to the request included in the January 27, 2006 estimate. The Custodian asserts that there are 71 pages that can be released in response to this request.
The period of time over which the records were received	3-4 months
Whether some or all of the records sought are archived	Some stored in the archive trailer outside of the facility.
The amount of time required for a government employee to locate, retrieve, and assemble the documents for copying	24 hours for a corrections officer and 12 hours clerical.
The amount of time, level, rate and number, if any required to be expended by government employees to monitor the inspection or examination	24 hours for a corrections officer at \$36.965/hour and 4 hours clerical at \$20.175 and 8 hours clerical at \$13.08 for a total of \$1,073.76.
The amount of time required to return documents to their original storage place	8 hours
The size of the agency	700 employees
The number of employees available to accommodate document requests	No one is assigned to this detail, usually done on overtime.
The availability of information technology and copying abilities	Copy machine.
What was requested	See "Records Relevant to the Complaint."
The level(s) of skill necessary to accommodate the request	Corrections officer and clerical.
The reason(s) that the agency employed, or intends to employ, the particular level(s) of skill above	Knowledge of policy and procedures and security.
A detailed estimate categorizing the hours needed to identify, copy or prepare for inspection, produce and return the requested documents	<p>The Custodian states the original bill January 27, 2006 included 124 pages responsive and the bill was a total of \$848.50:</p> <ul style="list-style-type: none"> • 18 hours at \$45.00 per hour overtime rate totaling \$810.00, plus • \$38.50 copying charges <p>On February 2, 2006, this amount was reduced to \$835.20 for 71 pages after certain</p>

	<p>documents were found not to be responsive to the request:</p> <ul style="list-style-type: none"> • 18 hours at \$45.00 per hour overtime rate totaling \$810.00, plus • \$25.20 for duplication. <p>The Custodian adds that when asked for an exact cost of retrieval, assembly and duplication, the Corrections Division indicated to him a total actual cost of \$1,074.90 for:</p> <ul style="list-style-type: none"> • 24 hours of correctional officer time at \$36.965 per hour totaling \$887.16; • 4 hours clerical time at a cost of \$20.175 per hour totaling \$80.70; and 8 hours clerical time at a cost of \$13.308 per hour totaling \$107.04.
Who in the agency will perform the work associated with each request	Whoever is available because no one is assigned permanently to this duty.

OPRA states that a special service charge can be imposed in addition to the actual cost of duplicating the record when production of the documents involves an extraordinary expenditure of time and effort to accommodate the request. (N.J.S.A. 47:1A-5.c.). Further OPRA provides that the special service charge must be reasonable and based upon the actual direct cost of providing the copy or copies. (N.J.S.A. 47:1A-5.c.) The Custodian charged the Complainant the average of the overtime rate for the two levels of personnel used to fulfill the OPRA request. There is no indication in OPRA that a Custodian is permitted to charge overtime for the production of documents, even in the case of an extraordinary amount of time and effort. In Loder v. County of Passaic, 2005-161 (January 2006), the GRC states that “the special service charge should only reflect the hours spent providing the actual copies and the *hourly rate* (minus fringe benefits) of appropriate personnel applied.” (Emphasis added.)

While the Custodian indicates that this charge is being imposed because there is no one who normally fulfills this type of request, OPRA states that the Custodian is charged with the responsibility to fulfill OPRA requests (N.J.S.A. 47:1A-1.1) thereby “assigning” the Custodian to this duty. OPRA does not permit Custodian’s to charge overtime for the production of the records requests. Therefore, the Custodian has not justified charging an overtime rate for the fulfillment of this request.

In Courier Post v. Lenape Regional High School District, 360 N.J. Super. 191, 204 (Law Div. 2002), the Appellate Division held that it would be appropriate to

calculate the hourly wage rates of the clerical and professional staff involved in satisfying a request and multiplying those figures by the total hours spent, if the Custodian can prove that the professional level of human resource was needed to fulfill the request. The Custodian in this case states that both correctional officer and clerical staff are necessary to fulfill this request but does not provide an explanation for the use of this level of staff. Simply stating that it is necessary for a correctional officer to complete this request because of their knowledge of policy and for security without explaining why this knowledge is necessary for the fulfillment of the request is insufficient.

Additionally, in Fisher v. Division of Law, GRC Case No. 2004-55 (February 2005), the Council found that a special service charge was warranted because personnel was required to review approximately 15,540 documents received over as much as 21 months, expend between 52.5 and 88.5 personnel hours (attorney and secretarial time included) to satisfy the request. The Custodian in this case has not born the burden of proving that providing 71 pages of documents requires an extraordinary expenditure of time and effort for his agency. Thus, the Custodian has failed to prove that a special service charge is warranted in this case pursuant to N.J.S.A. 47:1A-5.c. and N.J.S.A. 47:1A-6.

The Custodian in this case has not born the burden of proving that providing 71 pages of documents requires an extraordinary expenditure of time and effort for his agency. Thus, the Custodian has failed to prove that a special service charge is warranted in this case pursuant to N.J.S.A. 47:1A-5.c. and N.J.S.A. 47:1A-6. Therefore, the Custodian must provide those records that are disclosable to the Complainant, charging only the statutory copying costs prescribed for in N.J.S.A. 47:1A-5.b.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

7. Pursuant to N.J.S.A. 47:1A-1.1, those documents that are not made, maintained or kept on file by the Monmouth County Sheriff's Office cannot be provided in response to this request and the Custodian has not unlawfully denied access to those records.
8. The Custodian should have, at least, informed the Complainant in writing that the Sherriff's Office does not hold the requested documents and directed the Complainant to contact those agencies named in the request. Therefore, the Custodian violated N.J.S.A. 47:1A-5.i., N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.h.
9. The Custodian's failure to inform the Complainant that those records could not be provided results in a deemed denial of access pursuant to N.J.S.A. 47:1A-5.i.
10. The Custodian has lawfully denied access to the death and suicide investigation reports held by the agency, including those that pertain to Nicholas Organek, pursuant to N.J.S.A. 47:1A-9.a. and Executive Order 26 Paragraph 4(b)1.

11. The Custodian in this case has not born the burden of proving that providing 71 pages of documents requires an extraordinary expenditure of time and effort for his agency. Thus, the Custodian has failed to prove that a special service charge is warranted in this case pursuant to N.J.S.A. 47:1A-5.c. and N.J.S.A. 47:1A-6. Therefore, the Custodian must provide those records that are disclosable to the Complainant, charging only the statutory copying costs prescribed for in N.J.S.A. 47:1A-5.b.
- 12. The Custodian shall comply with "5." above within five (5) business days from receipt of this Interim Order and simultaneously provide certified confirmation of compliance to the Executive Director.**

Prepared By:

Colleen C. McGann
Case Manager

Approved By:

Catherine Starghill, Esq.
Executive Director

October 5, 2006