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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

INTERIM ORDER

May 24, 2016 Government Records Council Meeting

Leslie A. Flora (o/b/o Michael Schonzeit)
Complainant
v.
Ocean County Health Department
Custodian of Record

Complaint No. 2013-188

At the May 24, 2016 public meeting, the Government Records Council ("Council") considered the May 17, 2016 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 in consideration of the conflicting evidence in this matter, the GRC is unable to determine whether or not Assistant Custodian Alizar Zorojew unlawfully denied access to certain records ordered to be disclosed to the Complainant. As such, this complaint should be referred to the Office of Administrative Law ("OAL") for a hearing to determine whether the Assistant Custodian unlawfully denied access to certain records; to wit, the GPS reports responsive to paragraph 7 of the Council's Interim Order, and if so to order disclosure of said records. Also, this complaint should be referred to the OAL to further determine whether the Assistant Custodian knowingly and willfully violated OPRA and unreasonably denied access to the requested records under the totality of the circumstances and is therefore subject to a civil penalty pursuant to N.J.S.A. 47:1A-11. Also, the OAL should make a determination as to whether the Complainant is a prevailing party, and if so, determine and award prevailing party attorney fees pursuant to N.J.S.A. 47:1A-11.

Interim Order Rendered by the
Government Records Council
On The 24th Day of May, 2016

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 26, 2016

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Supplemental Findings and Recommendations of the Executive Director
May 24, 2016 Council Meeting

Leslie A. Flora (on behalf of Michael Schonzeit)[1] **GRC Complaint No. 2013-188**
Complainant

v.

Ocean County Health Department[2]
Custodial Agency

Records Relevant to Complaint: See Exhibit A

Custodians of Record: Victoria Miragliotta and Alizar Zorojew[3]
Requests Received by Custodian: October 2, 2012 and October 12, 2012
Response Made by Custodian: October 12, 2012
GRC Complaint Received: June 27, 2013

Background

January 30, 2015 Council Meeting:

At its January 30, 2015 public meeting, the Government Records Council ("Council") considered the January 20, 2015 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. Because OPRA contains no statute of limitations on Denial of Access Complaints filed with the GRC, there is no statute of limitations barring the GRC's adjudication of this complaint. *See* Mason v. City of Hoboken, 196 N.J. 51 (2008). *See also* N.J. Const. art. VI, § 2, P 3; Winberry v. Salisbury, 5 N.J. 240 (1950).

2. Assistant Custodian Zorojew did not bear his burden of proof that he timely responded to the Complainant's October 11, 2012 OPRA request. N.J.S.A. 47:1A-6. As such, Mr. Zorojew's failure to respond in writing to the Complainant's request, either granting access, denying access, seeking clarification, or requesting an

[1] Represented by Leslie A. Flora, Esq. (Gillette, NJ).
[2] Represented by Mathew B. Thompson, Esq., of Berry, Sahradnik, Kotzas and Benson (Toms River, NJ).
[3] OPRA defines a non-municipal agency custodian as "the officer officially designated by formal action of that agency's director or governing body. . ." N.J.S.A. 47:1A-1.1. The Custodian certified that she is the Custodian of Records and that Alizar Zorojew is the Assistant Custodian of Records for the agency. The Custodian also certified that she was out of the country at the time the agency received the Complainant's October 2, 2012 request, and that Alizar Zorojew was assigned as the Custodian of Records during that period and was therefore responsible for responding to said request.

extension of time within the statutorily mandated seven (7) business days, results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

3. Because there is no evidence that the Custodian received the Complainant's OPRA request dated October 15, 2012, that was allegedly faxed to the Custodian by the County of Ocean custodian, the Custodian did not violate OPRA by failing to respond to the request in writing within the statutorily mandated seven (7) business days pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). *See also* Bellan-Boyer v. NJ Dep't of Cmty. Affairs, GRC Complaint No. 2007-114 (October 2007).

4. The Custodian did not unlawfully deny access to records responsive to the Complainant's October 2, 2012 request item numbers 1 through 4 and 8 through 10, as well as the Complainant's October 11, 2012 request item numbers 3 through 10 and 12 because said request items do not contain all necessary criteria to be considered valid requests for correspondence. Thus, said items are overly broad and invalid. *See* MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534 (App. Div. 2005); Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010); Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order May 24, 2011).

5. Because the Complainant's request for item number 2 of the October 11, 2012 request is overly broad and fails to seek identifiable government records, the request is invalid under OPRA and the Custodian has not unlawfully denied access to the requested records. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534 (App. Div. 2005). *See also* Bent v. Stafford Police Dep't, 381 N.J. Super. 30 (App. Div. 2005); NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166 (App. Div. 2007); and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

6. Because the data for the records responsive to request item number 5 of the Complainant's October 2, 2012 request was not available online, it was reasonable for Assistant Custodian Zorojew to obtain a quote for the actual cost of extracting the data from an outside vendor capable of performing the service and providing same to the Complainant prior to incurring the cost of the service. As such, the Assistant Custodian did not unlawfully deny the Complainant access to the records responsive to request item number 5. N.J.S.A. 47:1A-5(b). *See also* O'Shea v. Pine Hill Bd. of Educ. (Camden), GRC Complaint No. 2007-192 (February 2009).

7. Because the data for the records responsive to request item number 6 of the Complainant's October 2, 2012 request was available online at the time of the Complainant's request, it was unnecessary to incur the expense for data extraction from an outside vendor; therefore the $16.25 assessed by the Assistant Custodian is unwarranted and unreasonable under OPRA. Thus, because the records were

unlawfully denied, the Custodian shall disclose said records to the Complainant electronically and without cost. N.J.S.A. 47:1A-5(b).

8. Because the agency contends that their employees should not have any expectation of privacy with respect to any communication materials, or information created, transmitted, or stored on agency-owned cell phones used by the employees, the records responsive to request item number 7 of the Complainant's October 2, 2012 request shall be disclosed without the agency-owned cell phone telephone numbers redacted unless the Custodian certifies that said telephone numbers are unlisted numbers pursuant to N.J.S.A. 47:1A-5(a).

9. Because the Complainant's request for item number 11 of the October 11, 2012 request was confined to a specific subject matter clearly and reasonably described with sufficient identifying information and was limited to particularized identifiable government records, and because the Custodian failed to provide a lawful reason for denying the request, the Custodian must disclose to the Complainant all Supervisor Vehicle Accident Reports for vehicles operated by the agency's environmental specialists, except Michael Schonzeit, for the years 2008 to October 11, 2012. *See* Burke v. Brandes, 429 N.J. Super. 169, 172, 176 (App. Div. 2012).

10. **The Custodian shall comply with paragraphs 7, 8 and 9 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, to the Executive Director. With respect to paragraph 7, if the Custodian in the certification avers that any or all agency-owned cell phone telephone numbers are unlisted, the Custodian may redact such telephone number(s) and list each such redaction on the document index.**

11. The Custodian did not unlawfully deny access to request items numbered 1, 13 and 14 of the Complainant's October 11, 2012 request because the Custodian certified that such records do not exist and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. *See* Pusterhofer v. NJ Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

12. **The Custodian shall account for the disposition of the Complainant's deposited $30.00 check, including any interest accrued thereon, in a separate certification in accordance with N.J. Court Rule 1:4-4, to the Executive Director within five (5) business days from receipt of the Council's Interim Order.**

13. 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.

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

Procedural History:

On February 3, 2015, the Council distributed its January 30, 2015 Interim Order to all parties. On February 10, 2015, the Assistant Custodian responded to the Council's Interim Order by providing certified confirmation of compliance to the Executive Director.

On February 17, 2015, the GRC informed the Complainant that paragraph 2 of the Assistant Custodian's certified confirmation of compliance appeared to contain contradictory statements with respect to disclosure of the records and asked the Complainant either to confirm receipt of the records ordered for disclosure by the Council or submit a certification to the GRC if she did not receive all of the records. On February 23, 2015, the Complainant forwarded a certification to the GRC in reply to its February 17, 2015 inquiry.

Analysis

Compliance

On January 30, 2015, the Council ordered the above-referenced compliance. On February 3, 2015, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Therefore, compliance was due on or before February 10, 2015. On February 10, 2015, the fifth (5th) business day after the agency received the Interim Order; the Assistant Custodian forwarded certified confirmation of compliance to the Executive Director.

In accordance with paragraph 10 of the Council's Interim Order, the Assistant Custodian certified that:

- With respect to paragraph 7 of the Council's Interim Order, he disclosed to the Complainant as Exhibit B of the certified confirmation of compliance reports which the Assistant Custodian averred "do completely respond to the Complainant's request." However, the Assistant Custodian then went on to state that "[t]he reports do not provide the first nineteen days of July or the month of October."

- With respect to paragraph 8 of the Council's Interim Order, the Assistant Custodian stated that he disclosed to the Complainant as Exhibit C of the certified confirmation of compliance a complete response to request item number 7.

- With respect to paragraph 9 of the Council's Interim Order, the Assistant Custodian stated that he disclosed to the Complainant as Exhibit D of the certified confirmation of compliance a complete response to request item number 11.

In accordance with paragraph 12 of the Council's Interim Order, the Assistant Custodian certified that Michael Schonzeit's check 4774 in the amount of $30.00 was deposited at Ocean First Bank. The Assistant Custodian certified that Exhibit E of the certified confirmation of compliance contains a table showing how interest was calculated on the $30.00 amount. The Assistant Custodian also certified that Exhibit F of the certified confirmation of compliance contains a copy of a transmittal letter to Michael Schonzeit forwarding a check in the amount of $30.05.

On February 23, 2015, the Complainant forwarded a certification to the GRC, wherein the Complainant averred that none of the GPS reports responsive to paragraph 7 of the Council's January 30, 2015 Interim Order were disclosed to the Complainant. The Complainant stated that all other records the Council ordered for disclosure were provided to her by the Custodian.

Therefore, to the extent that the Assistant Custodian responded to the Council's January 30, 2015 Interim Order within the five (5) business day period, he complied with the Council's Order. However, the Assistant Custodian certified that he "completely respond[ed] to the Complainant's request," and the Complainant certified that none of the GPS reports responsive to paragraph 7 of the Council's Interim Order were disclosed to her.

Therefore, in consideration of the conflicting evidence in this matter, the GRC is unable to determine whether or not Assistant Custodian Alizar Zorojew unlawfully denied access to certain records ordered to be disclosed to the Complainant. As such, this complaint should be referred to the Office of Administrative Law ("OAL") for a hearing to determine whether the Assistant Custodian unlawfully denied access to certain records; to wit, the GPS reports responsive to paragraph 7 of the Council's Interim Order, and if so to order disclosure of said records. Also, this complaint should be referred to the OAL to further determine whether the Assistant Custodian knowingly and willfully violated OPRA and unreasonably denied access to the requested records under the totality of the circumstances and is therefore subject to a civil penalty pursuant to N.J.S.A. 47:1A-11. Also, the OAL should make a determination as to whether the Complainant is a prevailing party, and if so, determine and award prevailing party attorney fees pursuant to N.J.S.A. 47:1A-11.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that in consideration of the conflicting evidence in this matter, the GRC is unable to determine whether or not Assistant Custodian Alizar Zorojew unlawfully denied access to certain records ordered to be disclosed to the Complainant. As such, this complaint should be referred to the Office of Administrative Law ("OAL") for a hearing to determine whether the Assistant Custodian unlawfully denied access to certain records; to wit, the GPS reports responsive to paragraph 7 of the Council's Interim Order, and if so to order disclosure of said records. Also, this complaint should be referred to the OAL to further determine whether the Assistant Custodian knowingly and willfully violated OPRA and unreasonably denied access to the requested records under the totality of the circumstances and is therefore subject to a civil penalty pursuant to N.J.S.A. 47:1A-11. Also, the OAL should make a determination as to whether the Complainant is a prevailing party, and if so, determine and award prevailing party attorney fees pursuant to N.J.S.A. 47:1A-11.

Prepared By: John E. Stewart

May 17, 2016

EXHIBIT A

EXHIBIT A-1

1. Emails and text messages sent to or from county-owned *computers* from May 1, 2011 → August 31, 2011 between:
   - -James Hayes and Victoria Miragliotta
   - -James Hayes and Matthew Cisk
   - -James Hayes and Daniel Regenye
   - -James Hayes and Ken Wenrich

2. Emails and text messages sent to or from county-owned *computers* from October 15, 2011 → November 25, 2011 between:
   - -Grant Umstadter and Victoria Miragliotta
   - -Grant Umstadter and Claudia Lewandowski
   - -Grant Umstadter and Matthew Cisk
   - -Matthew Cisk and Victoria Miragliotta
   - -Matthew Cisk and Claudia Lewandowski
   - -Claudia Lewandowski and Victoria Miragliotta
   - -Claudia Lewandowski and Lynn England
   - -Matthew Cisk and Ken Wenrich
   - -Victoria Miragliotta and Daniel Regenye
   - -Victoria Miragliotta and Ken Wenrich

3. Emails and text messages sent to or from county-owned (or subsidized) *cell phones* from October 15, 2011 → November 25, 2011 between:
   - -Grant Umstadter and Victoria Miragliotta
   - -Grant Umstadter and Claudia Lewandowski
   - -Grant Umstadter and Matthew Cisk
   - -Matthew Cisk and Victoria Miragliotta
   - -Matthew Cisk and Claudia Lewandowski
   - -Claudia Lewandowski and Victoria Miragliotta
   - -Claudia Lewandowski and Lynn England
   - -Matthew Cisk and Ken Wenrich
   - -Victoria Miragliotta and Daniel Regenye
   - -Victoria Miragliotta and Ken Wenrich

4. Notes, logs, routers and other writings that relate to Michael Schonzeit's activities and work product, were authored- in whole or in part- by Matthew Cisk, and created or modified from January 2012 – the present.

5. GPS data from cars used by environmental specialists during the following two periods:
   - -February 1, 2009 →July 1, 2009
   - -January 5, 2011 → April 5, 2011

6. GPS data from the car(s) Michael Schonzeit used during the following two periods:
   - -October 10, 2011 → October 20, 2011
   - -July 1, 2012 → September 20, 2012

7. Cell phone records from all environmental specialist employees from June 1, 2012 to the present which display the sending and receiving phone numbers, as well as the date, time and length of each conversation.

8. Emails and text messages sent to or from county-owned (or subsidized) *computers* from June 18, 2010 → April 20, 2011 between:

   -Grant Umstadter and Victoria Miragliotta
   -Grant Umstadter and Claudia Lewandowski
   -Grant Umstadter and Matthew Cisk
   -Matthew Cisk and Victoria Miragliotta
   -Matthew Cisk and Claudia Lewandowski
   -Claudia Lewandowski and Victoria Miragliotta
   -Matthew Cisk and Ken Wenrich
   -Victoria Miragliotta and Ken Wenrich
   -Victoria Miragliotta and Daniel Regenye

9. Emails and text messages sent to or from county-owned (or subsidized) *cell phones* from June 18, 2010 → April 20, 2011 between:

   -Grant Umstadter and Victoria Miragliotta
   -Grant Umstadter and Claudia Lewandowski
   -Grant Umstadter and Matthew Cisk
   -Matthew Cisk and Victoria Miragliotta
   -Matthew Cisk and Claudia Lewandowski
   -Claudia Lewandowski and Victoria Miragliotta
   -Matthew Cisk and Ken Wenrich
   -Victoria Miragliotta and Ken Wenrich
   -Victoria Miragliotta and Daniel Regenye

10. All memos and emails sent by Matthew Cisk to Michael Schonzeit from May 2011.

EXHIBIT A-2

1. Car history reports for every county-owned (or subsidized) motor vehicle that has been used by an Ocean County Health Department employee or agent from 2006 to the present.

2. All maintenance reports and other documents and records relating to diagnostic work-ups that were performed in 2008, 2009, 2010, 2011 and 2012 on a county-owned (or subsidized) motor vehicle that was used by an Ocean County Health Department employee or agent from 2008 to the present.

3. All memos, faxes (including cover sheets), emails (including attachments) and text messages sent to or from county-owned or subsidized equipment (cell phones, computers, fax machines, etc.) between Victoria Miragliotta and Andrew King (drking349@aol.com) from November 1, 2010 to the present.

4. All memos, faxes (including cover sheets), emails (including attachments) and text messages sent to or from county-owned or subsidized equipment (cell phones, computers, fax machines, etc.) from June 12, 2010 to September 1, 2010 between:

   -Victoria Miragliotta and Matthew Cisk
   -Victoria Miragliotta and John Protonentis
   -Victoria Miragliotta and Daniel Regenye
   -Victoria Miragliotta and Kathleen Phillips
   -Victoria Miragliotta and Sharon Eastwick
   -Matthew Cisk and John Protonentis
   -Matthew Cisk and Kathleen Phillips
   -John Protonentis and Daniel Regenye

5. All memos, faxes (including cover sheets), emails (including attachments) and text messages sent to or from county-owned or subsidized equipment (cell phones, computers, fax machines, etc.) from April 1, 2012 → present between:

   -Samantha Wickel (or Wicker) and Matthew Cisk
   -Samantha Wickel (or Wicker) and John Protonentis
   -Samantha Wickel (or Wicker) and Daniel Regenye
   -Samantha Wickel (or Wicker) and Victoria Miragliotta
   -Samantha Wickel(or Wicker) and Kathleen Phillips
   -Sally Wickel (or Wicker) and Matthew Cisk
   -Sally Wickel (or Wicker) and Kathleen Phillips
   -Sally Wickel (or Wicker) and Victoria Miragliotta

6. All memos, faxes (including cover sheets), emails (including attachments) and text messages sent to or from county-owned or subsidized equipment (cell phones, computers, fax machines, etc.) from March 1, 2011 → May 30, 2011 between:

   -Matthew Cisk and Karl Stine
   -Matthew Cisk and Chris Anderson
   -Matthew Cisk and Shannon Burke
   -Matthew Cisk and Mr./Ms. Wallenberg
   -Matthew Cisk and Susan Hendrix
   -Matthew Cisk and Knowal Novack Schulz

7. Emails (including attachments) and text messages sent to or from county-owned (or subsidized) *computers* from April 1, 2011 → August 31, 2011 between:

-James Hayes and John Protonentis
-James Hayes and Kathleen Phillips

8. Emails (including attachments) and text messages sent to or from county-owned (or subsidized) *cell phones* from April 1, 2011 → August 31, 2011 between:

-James Hayes and Victoria Miragliotta
-James Hayes and Matthew Cisk
-James Hayes and Daniel Regenye
-James Hayes and Ken Wenrich
-James Hayes and John Protonentis
-James Hayes and Kathleen Phillips

9. All memos, faxes (including cover sheets), emails (including attachments) and text messages sent to or from county-owned or subsidized equipment (cell phones, computers, fax machines, etc.) from October 15, 2011 → November 25, 2011 between:

-Grant Umstadter and John Protonentis
-Grant Umstadter and Kathleen Phillips
-Matthew Cisk and John Protonentis
-Matthew Cisk and Kathleen Phillips
-Ken Wenrich and John Protonentis
-Ken Wenrich and Kathleen Phillips
-Victoria Miragliotta and John Protonentis
-Victoria Miragliotta and Kathleen Phillips
-Daniel Regenye and John Protonentis
-Daniel Regenye and Kathleen Phillips

10. All memos, faxes (including cover sheets), emails (including attachments) and text messages sent to or from county-owned or subsidized equipment (cell phones, computers, fax machines, etc.) from June 18, 2010 → April 20, 2011 between:

-Grant Umstadter and John Protonentis
-Grant Umstadter and Kathleen Phillips
-Matthew Cisk and John Protonentis
-Matthew Cisk and Kathleen Phillips
-Ken Wenrich and John Protonentis
-Ken Wenrich and Kathleen Phillips
-Victoria Miragliotta and John Protonentis
-Victoria Miragliotta and Kathleen Phillips
-Daniel Regenye and John Protonentis
-Daniel Regenye and Kathleen Phillips

11. All Supervisor Vehicle Accident Reports that have been filed because of an environmental specialist's (excluding Michael Schonzeit) use of a county owned (or subsidized) motor vehicle from 2008 – present.

12. Internal reports and memos from 2005 – 2012 that have been produced by employees or agents of Ocean County, the Health Department or the Environmental Division which document, compile or analyze data on any of the following subjects:

-environmental employee productivity
-the quality and quantity of reports produced by environmental employees
-the number and type of environmental employee-produced reports sent back to the Environmental Division by NJ DEP because of a perceived inaccuracy or other insufficiency

13. Any and all settlements, releases or other legal documents drafted, approved, signed or executed by the County Health Department from 2011 to the present that concern Shelley Morgan.

14. Any and all settlements, releases or other legal documents drafted, approved, signed or executed by the County Health Department from 2009 to the present that concern Ken Wenrich.

EXHIBIT A-3

1. All memos, faxes (including cover sheets), emails (including attachments) and text messages sent to or from county owned or subsidized equipment (cell phones, computers, fax machines, etc.) between Victoria Miragliotta and Joan Sprague from August 1, 2006 to December 15, 2006.

2. All memos, faxes (including cover sheets), emails (including attachments) and text messages sent to or from county owned or subsidized equipment (cell phones, computers, fax machines, etc.) from April 15, 2012 to October 15, 2012 between Victoria Miragliotta and Keith Goetting, Victoria Miragliotta and Patricia Burke, Victoria Miragliotta and Antionette DePaola, Victoria Miragliotta and Mary Ann Noto.

State of New Jersey
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CHRIS CHRISTIE
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INTERIM ORDER

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1. Because OPRA contains no statute of limitations on Denial of Access Complaints filed with the GRC, and because the GRC is without authority to impose a statute of limitations where one does not exist, there is no statute of limitations barring the GRC's adjudication of this complaint. *See* Mason v. City of Hoboken, 196 N.J. 51 (2008). *See also* N.J. Const. art. VI, § 2, P 3; Winberry v. Salisbury, 5 N.J. 240 (1950).

2. Assistant Custodian Zorojew did not bear his burden of proof that he timely responded to the Complainant's October 11, 2012 OPRA request. N.J.S.A. 47:1A-6. As such, Mr. Zorojew's failure to respond in writing to the Complainant's request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

3. Because there is no evidence that the Custodian received the Complainant's OPRA request dated October 15, 2012, that was allegedly faxed to the Custodian by the County of Ocean custodian, the Custodian did not violate OPRA by failing to respond to the request in writing within the statutorily mandated seven (7) business days pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). *See also* Bellan-Boyer v. NJ Dep't of Cmty. Affairs, GRC Complaint No. 2007-114 (October 2007).

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6. Because the data for the records responsive to request item number 5 of the Complainant's October 2, 2012 request was not available online, it was reasonable for Assistant Custodian Zorojew to obtain a quote for the actual cost of extracting the data from an outside vendor capable of performing the service and providing same to the Complainant prior to incurring the cost of the service. As such, the Assistant Custodian did not unlawfully deny the Complainant access to the records responsive to request item number 5. N.J.S.A. 47:1A-5(b). *See also* O'Shea v. Pine Hill Bd. of Educ. (Camden), GRC Complaint No. 2007-192 (February 2009).

7. Because the data for the records responsive to request item number 6 of the Complainant's October 2, 2012 request was available online at the time of the Complainant's request, it was unnecessary to incur the expense for data extraction from an outside vendor; therefore the $16.25 assessed by the Assistant Custodian is unwarranted and unreasonable under OPRA. Thus, because the records were unlawfully denied, the Custodian shall disclose said records to the Complainant electronically and without cost. N.J.S.A. 47:1A-5(b).

8. Because the agency contends that their employees should not have any expectation of privacy with respect to any communication materials, or information created, transmitted, or stored on agency-owned cell phones used by the employees, the records responsive to request item number 7 of the Complainant's October 2, 2012 request shall be disclosed without the agency-owned cell phone telephone numbers redacted unless the Custodian certifies that said telephone numbers are unlisted numbers pursuant to N.J.S.A. 47:1A-5(a).

9. Because the Complainant's request for item number 11 of the October 11, 2012 request was confined to a specific subject matter clearly and reasonably described with sufficient identifying information and was limited to particularized identifiable government records, and because the Custodian failed to provide a lawful reason for denying the request, the Custodian must disclose to the Complainant all Supervisor Vehicle Accident Reports for vehicles operated by the agency's environmental specialists, except Michael Schonzeit, for the years 2008 to October 11, 2012. *See* Burke v. Brandes, 429 N.J. Super. 169, 172, 176 (App. Div. 2012).

10. **The Custodian shall comply with paragraphs 7, 8 and 9 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,[1] to the Executive Director.[2] With respect to paragraph 7, if the Custodian in the certification avers that any or all agency-owned cell phone telephone numbers are unlisted, the Custodian may redact such telephone number(s) and list each such redaction on the document index.**

11. The Custodian did not unlawfully deny access to request items numbered 1, 13 and 14 of the Complainant's October 11, 2012 request because the Custodian certified that such records do not exist and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. *See* Pusterhofer v. NJ Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

12. **The Custodian shall account for the disposition of the Complainant's deposited $30.00 check, including any interest accrued thereon, in a separate certification in accordance with N.J. Court Rule 1:4-4, to the Executive Director within five (5) business days from receipt of the Council's Interim Order.**

13. 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.

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

Interim Order Rendered by the
Government Records Council
On The 30th Day of January, 2015

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: February 3, 2015

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

[2] Satisfactory compliance requires that the Custodian deliver the 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.

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Findings and Recommendations of the Executive Director
January 30, 2015 Council Meeting

Leslie A. Flora (on behalf of Michael Schonzeit)[1] **GRC Complaint No. 2013-188**
Complainant

v.

Ocean County Health Department[2]
Custodial Agency

Records Relevant to Complaint: See Exhibit A

Custodians of Record: Victoria Miragliotta and Alizar Zorojew[3]
Requests Received by Custodian: October 2, 2012 and October 12, 2012
Response Made by Custodian: October 12, 2012
GRC Complaint Received: June 27, 2013

Background[4]

Requests and Responses:

On October 2, 2012, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the records listed in Exhibit A-1.[5] On October 12, 2012, the seventh (7th) business day following receipt of said request, the Custodian responded in writing informing the Complainant that the records responsive to request items numbered 1, 2, 3, 4, 8, 9 and 10 are denied because said records contain inter-agency or intra-agency advisory, consultative, or deliberative ("ACD") material exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. The Custodian informed the Complainant that the records responsive to request items numbered 5 and 6 would be disclosed upon receipt of a special service charge of $211.25. The Custodian also informed the Complainant that the records responsive to request item number 7 had to be redacted to remove the telephone numbers; therefore, the copying and redaction cost

[1] Represented by Leslie A. Flora, Esq. (Gillette, NJ).
[2] Represented by Mathew B. Thompson, Esq., of Berry, Sahradnik, Kotzas and Benson (Toms River, NJ).
[3] OPRA defines a non-municipal agency custodian as "…the officer officially designated by formal action of that agency's director or governing body…" N.J.S.A. 47:1A-1.1. The Custodian certified that she is the Custodian of Records and that Alizar Zorojew is the Assistant Custodian of Records for the agency. The Custodian also certified that she was out of the country at the time the agency received the Complainant's October 2, 2012 request, and that Alizar Zorojew was assigned as the Custodian of Records during that period and was therefore responsible for responding to said request.
[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.
[5] The Complainant asked that the records be delivered electronically whenever possible.

would be $1.25 based upon twenty-five (25) pages at $0.5 per page. The Custodian cited to Smith v. NJ Dep't of Corr., GRC Complaint No. 2004-163 (June 2005) as legal authority supporting redaction of the records. The Custodian informed the Complainant that the agency would not commence processing the request until the Complainant submitted written acceptance of the charges.

On October 11, 2012, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the records listed in Exhibit A-2. On October 12, 2012, the request was received by the agency; however, the Custodian did not respond to the request.

On October 15, 2012, the Complainant submitted an Open Public Records Act ("OPRA") request to the County of Ocean seeking the records listed in Exhibit A-3. The evidence of record reveals that on October 16, 2012, the custodian for the County of Ocean responded in part to the Complainant's request and faxed the balance of the Complainant's request to the Custodian. The Custodian stated that she did not receive the request.

Denial of Access Complaint:

On June 27, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant certifies that she compiled three (3) separate OPRA requests that were filed with the Ocean County Health Department Custodian. The requests are dated October 2, 2012, October 11, 2012 and October 15, 2012, and the Complainant attached copies of the three requests to the complaint as Exhibits A, C, and D, respectively.[6] The Complainant also certifies that she had a $30.00 deposit delivered to the Custodian on October 3, 2012. The Complainant further certifies that the Custodian failed to disclose any records responsive to the requests and, in addition, responded only to the October 2, 2012 request.

The Complainant asserts that the Custodian failed to disclose any records responsive to items numbered 1 through 4 and 8 through 10 of her October 2, 2012 request, alleging that the records were exempt from disclosure as ACD material. The Complainant asserts, however, that the records are not protected by the deliberative process privilege because they are neither deliberative nor pre-decisional. The Complainant states that the Department of Health does not have policy making power, and as such its employees named in the request do not engage in policy-making decisions that would be protected by the deliberative process privilege.

The Complainant states that the Custodian unlawfully charged her a $211.00 special service charge for the cost of data extraction incurred in accommodating her request for items numbered 5 and 6 of her October 2, 2012 request. The Complainant contends that OPRA allows a special service charge when accommodating a request that entails an extraordinary expenditure of time and effort; however, retrieving electronically maintained GPS data does not entail an extraordinary expenditure of time and effort. The Complainant asserts that the agency contracted with Networkfleet for access to the company's online fleet tracking system which provides

[6] Exhibits A and C are copies of official Ocean County Board of Health OPRA request forms returnable to the Ocean County Health Department. Exhibit D is a copy of an official County of Ocean OPRA request form returnable to the Office of the Clerk of the Board of Chosen Freeholders.

historical and real time GPS data. The Complainant states that the GPS data therefore is available at all times online and that accessing and exporting it is quick and easy.

The Complainant states that the Custodian unlawfully redacted the telephone numbers in item 7 of the October 2, 2012 request. The request item seeks cell phone records from all environmental specialist employees from July 1, 2012 to October 2, 2012 which displays the sending and receiving of phone numbers.

The Complainant states that the Custodian redacted the telephone numbers on the basis of satisfying the need for confidentiality pursuant to North Jersey Newspapers Co. v. Passaic Chosen Freeholders, 127 N.J. 9 (1992) cited by the Council in Smith v. Dep't of Corr., GRC Complaint No. 2004-163 (June 2005). However, the Complainant argues that the need for confidentiality only necessitates protection if, upon balanced consideration, the citizen's reasonable expectation of privacy in its personal information outweighs the public interest in disclosure. The Complainant argues that here, the public interest in disclosure outweighs the agency employees' minimal privacy interest in the telephone numbers of county-owned cell phones. In support of her argument, the Complainant references an Ocean County Board of Health document titled *Wireless Phone Agreement*. The Complainant points out that the agreement provides that cell phones are the property of the agency and that "…communications, materials or information created, transmitted, or stored using said equipment/systems are property of the Ocean County Board of Health and may be accessed by authorized Board personnel and disclosed to other individuals…" The Complainant attached a copy of the agreement signed by Michael Schonzeit on September 28, 2006 to the complaint as Exhibit F. The Complainant argues that in light of the provisions contained in the *Wireless Phone Agreement*, agency employees have little to no privacy interest in the telephone numbers of the county owned cell phones.

The Complainant asserts that the Custodian knowingly and willfully violated OPRA by failing to produce any documents in response to the three OPRA requests, and by failing to respond at all to the October 11, 2012 and October 15, 2012 requests.

The Complainant asks the Council to grant access to the records responsive to her OPRA requests dated October 2, 2012, October 11, 2012 and October 15, 2012. The Complainant also seeks prevailing party attorney fees and asks the Council to impose a civil penalty against the Custodian for knowingly and willfully violating OPRA and unreasonably denying access to the requested records.

Statement of Information:

On July 17, 2013, the Custodian filed a Statement of Information ("SOI"). The Custodian certifies that she was out of the country on October 2, 2012, therefore Alizar Zorojew, the Assistant Custodian of Records, was responsible for responding to the Complainant's October 2, 2012 request. With respect to the October 11, 2012 request, the Custodian certifies that "[p]rior to my review of the Complaint, I had no knowledge of the existence of this…request." With respect to the October 15, 2012 request, the Custodian certifies that said request was directed to the County of Ocean, which is a separate and distinct entity. The

Custodian states that the County of Ocean responded to the request informing the Complainant that they did not have any of the requested records; therefore, there was no need for a response from the Custodian.

The Custodian attached to the SOI a certification dated July 16, 2013 by Adrienne Williamson. Ms. Williamson certifies that she never attended a seminar or participated in any training concerning OPRA. Ms. Williamson certifies that "[u]pon receipt of the facsimile, I reviewed the OPRA request and determined it to be an OPRA request and possibly a reminder of Ms. Flora's prior request of October 2, 2012." Ms. Williamson further certifies that she wrote a note to Mr. Zorojew stating "Nick – 2 copies of this was on the fax – I guess it's a reminder" and handed the facsimile to Mr. Zorojew. Ms. Williamson certifies that she did not advise or provide a copy of the request to the Custodian.

The Custodian also attached to the SOI a certification dated July 16, 2013 by Alizar Zorojew. Mr. Zorojew certifies that he is the Assistant Custodian of Records and at the time of the Complainant's October 2, 2012 request his "…training and experience in OPRA matters was limited." Mr. Zorojew further certifies that he determined there were records responsive to request items numbered 5 and 6, which are Global Positioning System ("GPS") data reports for certain vehicles. Mr. Zorojew certifies that he contacted the Information Technology Department from which he learned that the requested records could not be downloaded from the website because such data can only be accessed from the website for up to one year prior, and request item number 5 sought records beyond the one year period.[7] For this reason, Mr. Zorojew states that he contacted the vendor, Fleetboss Global Positioning Solutions, Inc. ("Fleetboss"), and learned that the vendor has the capability of extracting the data necessary for generating the requested records. Mr. Zorojew states that he obtained a $195.00 quote from Fleetboss for extraction of the data necessary to respond to request item number 5.[8] Mr. Zorojew further certifies that he used Fleetboss's quote to extrapolate the cost for extracting data responsive to request item number 6 and arrived at an estimate of $16.25. Mr. Zorojew certifies that the estimated special service charge for both request item number 5 and request item number 6 therefore totaled $211.25, and that he so notified the Complainant. Mr. Zorojew also certifies that he gathered the cell phone records responsive to request item number 7.

Mr. Zorojew certifies that the agency received a check from Michael Schonzeit in the amount of $30.00 on October 5, 2012; however, the check was not sufficient to satisfy the full amount of the special service charge. Mr. Zorojew further states that the check was deposited. Mr. Zorojew states that he is awaiting a response from the Complainant regarding whether she wants to deposit additional monies to satisfy the special service charge or wants to use the deposited monies toward copying charges.

Mr. Zorojew also certifies that he determined that the records responsive to request items 1, 2, 3, 4, 8, 9, and 10 are exempt from access as ACD material. Mr. Zorojew also certifies that said records are exempt from disclosure because the request is overly broad and the records

[7] Mr. Zorojew attached to the certification as Exhibit C an e-mail from Deborah Johnson of Networkfleet Customer Support dated July 16, 2013, wherein Ms. Johnson states that the agency can only access data from the website for the prior 365 day period.
[8] Mr. Zorojew attached the Fleetboss quote to the certification as Exhibit B.

evoke privacy issues, are attorney-client privileged, concern bids and vendors, or are personnel records. Mr. Zorojew also certifies the request seeks records protected under the Health Insurance Portability and Accountability Act ("HIPAA").

Mr. Zorojew further certifies that on October 12, 2012, he received correspondence from co-worker Adrienne Williamson which he assumed was a reminder from the Complainant that the response to the October 2, 2012 request was due that day. Mr. Zorojew states that after reviewing the complaint he now realizes that his assumption was incorrect because the correspondence was an OPRA request. Mr. Zorojew certifies that he reviewed the request and determined it was not only overbroad and raised privacy interests, but also sought personnel, attorney-client, and ACD material. Mr. Zorojew also certifies that the records responsive to the request are protected under HIPPA.

Mr. Zorojew certifies that he performed a "sampling" of numerous documents and e-mails requested by the Complainant. Mr. Zorojew certifies that his sampling revealed that the sampled records were subject to many various exemptions under N.J.S.A. 47:1A-1.1, as well as the personnel records exemption under N.J.S.A. 47:1A-10.

The Custodian's Counsel also submitted a brief in support of the Custodian's actions. Counsel makes several arguments in the brief:

1. Counsel first asserts that the New Jersey Supreme Court held in Mason v. City of Hoboken, 196 N.J. 51 (2008) that a challenge to a denial of access must be commenced within 45 days and that beyond that time frame a requestor's only option is mediation before the GRC. Counsel states that the Complainant waited 238 days from her last denial before filing the instant complaint; therefore, her only option would have been mediation which she refused. For this reason, Counsel argues that the complaint must be dismissed.

2. Counsel next argues that the requests are overbroad and therefore must be dismissed because they do not identify the records requested with reasonable clarity. Counsel cites MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005) and Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005) in support of his argument.

3. Counsel argues that the requested records must also be denied because they consist of ACD material pursuant to N.J.S.A. 47:1A-1.1. Counsel states that it is the intent of OPRA to exclude from the definition of a government record the types of documents that are the subject of the deliberative process privilege. Counsel cites to In Re Liquidation of Integrity Ins. Co., 165 N.J. 75 (2000) to summarize the court's definition of the deliberative process privilege. Counsel then argues that the records requested by the Complainant "…have the potential to encompass memorandums and e-mails by employees of the Defendant engaged in a frank discussion regarding the policies and procedures within the Board. These documents are clearly both Pre-Decisional…and Deliberative…"

4. The Custodian's Counsel argues that the requested records are protected from disclosure under N.J.S.A. 47:1A-10, asserting that the sheer breadth of the request embraces employee personnel communications not subject to disclosure.

5. Counsel next contends that the requested records are also exempt from disclosure under N.J.S.A. 47:1A-3(a) because the daily activities of agency employees contain numerous instances in which employees are exposed to information, that if disclosed, is inimical to the public interest.

6. Counsel also argues that the requested records are exempt as criminal investigatory records because the request seeks the production of e-mails without limitation resulting in the inclusion of records falling under the criminal investigatory records exemption pursuant to N.J.S.A. 47:1A-1.1.

7. Counsel further argues that the Complainant's request includes documents from employees concerning medical leaves and issues regarding a denial for reimbursement for medical treatment. Counsel asserts that disclosure of these documents would violate HIPAA and would also be removed from the definition of a government record pursuant to Executive Order No. 26 (McGreevey). Counsel states that these laws excluding the records from disclosure would be applicable to OPRA through operation of N.J.S.A. 47:1A-9(a).

8. Counsel argues that the special service charges are warranted for the cost of reports from a third party vendor related to the GPS records. Counsel states that the GPS records requested by the Complainant were limited by time for downloading and therefore were outside the scope of what the agency could download. Counsel contends that, as such, the actual costs to obtain the record from the vendor were properly charged by the agency.

9. Counsel next argues that the redaction of cell phone telephone numbers in a record subject to disclosure is warranted. Counsel states that "OPRA provides that certain personal identifying information is exempt from access to include 'that portion of any document which discloses…unlisted telephone number…' N.J.S.A. 47:1A-1.1." Counsel cites to Livecchia v. Borough of Mount Arlington (Morris), GRC Complaint No. 2008-80 (April 2012), in which the Council cited to Smith v. NJ Dep't of Corr., GRC Complaint No. 2004-163 (June 2005).

10. Counsel addresses the Complainant's two requests to which the Custodian failed to respond: a request dated October 11, 2012 and a request dated October 15, 2012. With respect to the October 11, 2012 request, Counsel states that Ms. Williamson, the person who received the request, and Assistant Custodian Zorojew made the incorrect assumption that the October 11, 2012 request was a reminder by the Complainant of the pending October 2, 2012 request. Counsel states that for this reason, the request was never forwarded to the Custodian. Counsel argues that Ms. Williamson and Mr. Zorojew made a mistake which may constitute negligence but that the mistake does not rise to the level of a willful conscious action.

11. Counsel concludes the brief by again stating that the complaint should be dismissed because the Complainant failed to file the complaint within 45 days of the denial. Counsel also states that the Custodian did not willfully deny the Complainant any valid request for records because the Custodian disclosed 1,800 pages of documents to the Complainant via discovery.[9]

In the document index attached to the SOI, the Custodian certifies that the records responsive to request items 1, 2, 3, 4, 8, 9, and 10 in the October 2, 2012 request are exempt from access as ACD material pursuant to N.J.S.A. 47:1A-1.1. The Custodian certifies that the records responsive to request items numbered 5 and 6 were offered in their entirety for a special service charge of $211.25, which amount represents the vendor's quote combined with Mr. Zorojew's calculated estimate. The Custodian further certifies that the records responsive to request item number 7 were made available with the phone numbers redacted for the copying cost of $1.25, which represents 25 pages at $0.5 per page. The Custodian certifies that the records responsive to request items numbered 5, 6 and 7 were not disclosed to the Complainant because the Complainant did not inform the Custodian that she was willing to pay the special service charge or copying fees for the records.

In the document index, the Custodian stated that she did not receive the Complainant's October 11, 2012 request; therefore, she did not provide any legal explanation for denying access. The Custodian does, however, provide a general nature description of the requested records in column E, and uses this column to provide the reason why some of the requested records are not subject to disclosure. The Custodian certifies that request items 3 through 10 and 12 are variously either e-mails retained through the Outlook® e-mail platform, facsimile documents or inter-agency memoranda. The Custodian certifies that no text messages responsive to the request exist. The Custodian further certifies that request item number 2, which seeks "all maintenance reports and other documents and records relating to diagnostic work ups" performed from 2008 to 2012 on vehicles used by the agency, is overly broad because the agency maintains numerous records concerning fleet vehicle maintenance. The Custodian certifies that the records responsive to request item number 11 are vehicle accident reports which contain a detailed summary of events that transpire after an accident from the perspective of a supervisor; however, the Custodian does not provide any reason why the requested records are exempt from access. Finally, the Custodian certifies that the agency maintains no records responsive to request items numbered 1, 13 and 14.

Analysis

The brief in the SOI submitted by the Custodian's Counsel contained several arguments to justify denial of access to the requested records; however, with the exception of the requested GPS records and telephone number redactions, the arguments failed to address specific request items and/or specific denied records. For this reason, the majority of the arguments in the brief could not be properly analyzed by the GRC because the GRC did not know which record(s) was

[9] In Redden v. Cape May Cnty. Prosecutor's Office, GRC Complaint No. 2007-206 (September 2009), the Council held that "…[t]he availability of records pursuant to discovery or other court rule does not preclude the availability of the same records pursuant to OPRA. Mid-Atlantic Recycling Technologies, Inc., v. City of Vineland, 222 F.R.D. 81 (Div. NJ, 2004)."

relevant to the specific argument being made. As such, the GRC looked solely to the reason(s) asserted by the Custodian in the document index attached to the SOI for the legal explanation justifying each denial/redaction.[10] However, Counsel's argument that the complaint is barred by the statute of limitations is addressed *infra*.

Statute of Limitations

The Custodian's Counsel asserted in the SOI that the Complainant did not timely file her Denial of Access Complaint because the Complainant waited 238 days from her last denial before filing the complaint. Counsel asserted that the Supreme Court of New Jersey has held that requestors who choose to file an action to challenge a Custodian's denial must do so within forty-five (45) days. Counsel therefore states that the Complainant's only option would have been mediation, which she refused. For this reason, Counsel argues that the complaint must be dismissed.

In Mason v. City of Hoboken, 196 N.J. 51 (2008), the Supreme Court determined that the appropriate statute of limitations for filing a denial of access complaint ***in Superior Court*** was 45 days from the date of the Custodian's denial of access. The Court noted that this statute of limitations was consistent with the limitations period in actions in lieu of prerogative writs. Id. The Court further noted that "the former Right to Know Law specifically directed that litigants headed to Superior Court should proceed via an action in lieu of prerogative writs. N.J.S.A. 47:1A-4 (repealed 2002). That language does not appear in OPRA. *See* N.J.S.A. 47:1A-6." Id.

The Court also stated that:

> The Legislature plainly stated that requestors denied access to public records may file an action in Superior Court or a complaint before the GRC. N.J.S.A. 47:1A-6. Those matters "shall proceed in a summary or expedited manner." Beyond that, the Legislature specifically deferred to the Supreme Court to adopt court rules "necessary to effectuate the purposes of this act." N.J.S.A. 47:1A-12. The Legislature's action was consistent with our Constitution, which vests this Court with the authority to create procedural rules *for court practices*. *See* N.J. Const. art. VI, § 2, P 3; Winberry v. Salisbury, 5 N.J. 240, 255 (1950).

Id. at 68 (emphasis added).

The Court therefore held that "requestors who choose to file an action in Superior Court to challenge the decision of an OPRA custodian must do so within 45 days..." Id. at 70. Thus, the holding in Mason, 196 N.J. 51, is limited to Denial of Access Complaints filed in the Superior Court of New Jersey.

[10] The GRC considered Counsel's argument, as well as the reasons contained in the document index and the averments contained in Assistant Custodian Zorojew's certification when analyzing the denial of the GPS records (request items numbered 5 and 6). Additionally, the GRC considered Counsel's argument, along with the reasons contained in the document index, when analyzing the redaction of telephone numbers for request item number 7.

The New Jersey Legislature is empowered to delegate to an administrative agency the authority to promulgate rules and regulations interpreting and implementing a statute. An appellate court will defer to an agency's interpretation of a statute unless it is plainly unreasonable. The presumption of validity, however, is not without limits. If an agency's statutory interpretation is contrary to the statutory language, or if the agency's interpretation undermines the Legislature's intent, no deference is required. An appellate court's deference does not go so far as to permit an administrative agency under the guise of an administrative interpretation to give a statute any greater effect than is permitted by the statutory language. *See*, Reilly v. AAA Mid-Atlantic Ins. Co. of NJ, 194 N.J. 474 (2008). OPRA contains no statute of limitations on Denial of Access Complaints filed with the GRC. Therefore, the GRC is without authority to impose a statute of limitations where one does not exist.

Accordingly, because OPRA contains no statute of limitations on Denial of Access Complaints filed with the GRC, and because the GRC is without authority to impose a statute of limitations where one does not exist, there is no statute of limitations barring the GRC's adjudication of this complaint. *See* Mason, 196 N.J. 51. *See also* N.J. Const. art. VI, § 2, P 3; Winberry v. Salisbury, 5 N.J. 240.

Timeliness

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

With respect to the Complainant's October 11, 2012 request, OPRA Clerk Adrienne Williamson certified that she received the request on October 12, 2012 via facsimile, and "[u]pon receipt of the facsimile, I reviewed the OPRA request and determined it to be an OPRA request and possibly a reminder of Ms. Flora's prior request of October 2, 2012." Ms. Williamson further certified that she handed the fax to Assistant Custodian Zorojew. Mr. Zorojew certified that on October 12, 2012, he received the request from Ms. Williamson but assumed it was a reminder from the Complainant. Mr. Zorojew states that only after reviewing the complaint did he realize that the faxed document was not a reminder, but rather an OPRA request.

Therefore, Assistant Custodian Zorojew did not bear his burden of proof that he timely responded to the Complainant's October 11, 2012 OPRA request. N.J.S.A. 47:1A-6. As such, Mr. Zorojew's failure to respond in writing to the Complainant's request either granting access,

[11] A custodian's written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11.

With respect to the Complainant's October 15, 2012 request, the Custodian certified that said request was directed to the County of Ocean, which is a separate and distinct entity. The Complainant stated that the custodian for the County of Ocean responded to the request informing the Complainant that they did not have any of the requested records. For this reason, the Custodian certified that there was no need for a response from her. The Complainant asserted that the Custodian violated OPRA by failing to respond in a timely manner to said request.

The evidence of record reveals that although the Complainant filed two previous requests on official OPRA request forms for the Ocean County Board of Health within a ten (10) business day period prior to her October 15, 2012 request, the Complainant filed the October 15, 2012 request on an official request form for the County of Ocean.[12] The evidence of record further reveals that the custodian for the County of Ocean responded in part to the Complainant's request on October 16, 2012, but recognized that some of the items requested concerned Ocean County Health Department employees. For this reason, the custodian for the County of Ocean stated in her response that she faxed the balance of the Complainant's request to the Custodian.[13]

In Bellan-Boyer v. NJ Dep't of Cmty. Affairs, GRC Complaint No. 2007-114 (October 2007), the complainant stated that although he submitted an OPRA request to the custodian and received confirmation of a successful fax transmittal, the custodian informed him that the agency never received the complainant's OPRA request. The Council found that the custodian did not unlawfully deny access to the complainant's OPRA request because there was no proof that the custodian actually received the request.

The Superior Court articulated several disadvantages in using a fax transmission as the sole means for document delivery in Coldwell Banker Commercial/Feist & Feist Realty Corp. v. Blancke P.W. L.L.C., 368 N.J. Super. 382 (App. Div. 2004). In that matter, the court said:

> Despite the prevalent use of fax machines for business purposes…[f]axes…do not provide a means to determine the actual recipient of the fax…the recipient of a fax is always a machine, not an individual. Without further personal verification, the sender has no way of knowing that the fax was ever removed from the machine and no knowledge of which individual actually received it.

Id. at 393.

Therefore, because there is no evidence that the Custodian received the Complainant's OPRA request dated October 15, 2012, that was allegedly faxed to the Custodian by the County of Ocean custodian, the Custodian did not violate OPRA by failing to respond to the request in

[12] The October 15, 2012 request was prepared in the name of the Complainant, but signed and dated by the Complainant's client, Michael Schonzeit.
[13] There is nothing in the evidence of record to indicate that the request was also transmitted to the Custodian by any other means.

writing within the statutorily mandated seven (7) business days pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). *See also* Bellan-Boyer, GRC 2007-114.

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.

At the outset, the GRC notes that the official OPRA request form for the Ocean County Board of Health in its heading contains instructions for the requestor to complete and return the form to the Ocean County Health Department Custodian of Records. The form contains a mailing address, a fax number and three e-mail addresses, one each for Victoria Miragliotta, Alizar Zorojew, and Adrienne Williamson. By holding themselves out as OPRA administrators it is understood by the GRC, and likely by anyone requesting records, that the three named officials are equally capable of receiving and administering OPRA requests. For this reason, the GRC does not accept as mitigating factors the averments contained in the certifications of Alizar Zorojew and Adrienne Williamson, wherein they complain about their lack of OPRA training. It is incumbent upon them as county officials in a specialized job assignment to obtain that training necessary to perform their assigned duties. Such training is offered free of charge on the GRC's website, as well as through numerous seminars offered throughout the State.

October 2, 2012 request item numbers 1 through 4 and 8 through 10 and October 11, 2012 request item numbers 3 through 10 and 12

October 11, 2012 request item number 2

The Custodian certified that the records responsive to request items 1 through 4 and 8 through 10 in the October 2, 2012 request are exempt from access as ACD material pursuant to N.J.S.A. 47:1A-1.1. The Custodian did not acknowledge receiving the Complainant's October 11, 2012 request; therefore she did not provide any legal explanation for denying access to items 3 through 10 and 12 which she identified as either e-mails, fax documents or inter-agency memoranda.

The New Jersey Appellate Division has held that:

> While OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *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. at 549 (emphasis added). Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005);[14] N.J. Builders Assoc. v. N.J. 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).

Moreover, the test under MAG is whether a requested record is a specifically identifiable government record. If it is, the record is disclosable barring any exemptions to disclosure contained in OPRA. The Council established criteria deemed necessary to specifically identify an e-mail communication in Sandoval v. N.J. State Parole Bd., GRC Complaint No. 2006-167 (Interim Order March 28, 2007). In Sandoval, the complainant requested "e-mail … between [two individuals] from April 1, 2005 through June 23, 2006 [using seventeen (17) different keywords]." The custodian denied the request, claiming that it was overly broad. The Council held that "[t]he Complainant in the complaint now before the GRC requested specific e-mails *by recipient, by date range and by content*. Based on that information, the Custodian has identified [numerous] e-mails which fit the specific recipient and date range criteria Complainant requested." Id. at 16 (emphasis added).

In Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010), the Council examined what constitutes a valid request for e-mails under OPRA. The Council determined that:

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

[14] Affirming Bent v. Stafford Police Dep't, GRC Case No. 2004-78 (October 2004).

Id. at 5 (emphasis in original).

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

The facts in this case are controlled by the criteria set forth in Elcavage and Armenti. Here, the Complainant's October 2, 2012 request item numbers 1 through 4 and 8 through 10 contain a time frame and senders/recipients but no subject.[15] In the Complainant's October 11, 2012 request, item numbers 3 through 10 contain a time frame and senders/recipients but no subject. Request item number 12 contains a time frame and several subjects but no identified senders/recipients.

Therefore, the Custodian did not unlawfully deny access to records responsive to the Complainant's October 2, 2012 request item numbers 1 through 4 and 8 through 10, as well as the Complainant's October 11, 2012 request item numbers 3 through 10 and 12 because said request items do not contain all necessary criteria to be considered valid requests for correspondence. Thus, said items are overly broad and invalid. *See* MAG, 375 N.J. Super. at 534; Elcavage, GRC 2009-07; Armenti, GRC 2009-154.

Because the Complainant's October 2, 2012 request for item numbers 1 through 4 and 8 through 10 is invalid, it is unnecessary for the Council to determine whether said request items were lawfully denied as ACD material.

Request item number 2 of the Complainant's October 11, 2012 request seeks "all maintenance reports and other documents and records relating to diagnostic work ups" performed from 2008 to 2012 on vehicles used by the agency. The Custodian certified that the request is overly broad because the agency maintains numerous records concerning fleet vehicle maintenance.

Here, the request failed to identify with any specificity or particularity the governmental records sought. The Complainant's request initially sought maintenance reports for agency vehicles, which started to present as a valid request, but then it went on to seek "other documents and records *relating to* diagnostic work ups" (emphasis added).

To fulfill this type of request, the Custodian would have to research agency files for a period of almost five (5) years in an effort to locate not just maintenance reports, but also all documents and records relating to diagnostic work ups on the agency vehicles. The request also requires the Custodian to determine how specific a document must be in order to meet the criterion of "relating to" a diagnostic work up. "…OPRA does not countenance open-ended searches of an agency's files." MAG, 375 N.J. Super. 534 at 549. As such, the Complainant's request is invalid under OPRA.

[15] In request item number 4, "writings that relate to Michael Schonzeit's activities and work product" is not an identified subject. Moreover, such a request requires the Custodian to conduct research in order to locate any records responsive to the request.

Accordingly, because the Complainant's request for item number 2 of the October 11, 2012 request is overly broad and fails to seek identifiable government records, the request is invalid under OPRA and the Custodian has not unlawfully denied access to the requested records. MAG, 375 N.J. Super. 534. *See also* Bent, 381 N.J. Super. 30; New Jersey Builders, 390 N.J. Super. at 166; and Schuler, GRC 2007-151.

October 2, 2012 request item number 5

The Complainant stated that the records for both request item numbers 5 and 6 were readily attainable via online access; however, she stated that the Custodian unlawfully charged her a $211.00 special service charge for data extraction necessary to accommodate her request.

In request item number 5, the Complainant requested the GPS data for agency cars used by environmental specialists from February 1, 2009 to July 1, 2009 and from January 5, 2011 until April 5, 2011.

Assistant Custodian Zorojew certified, however, that the requested records could not be downloaded from the website because such data can only be accessed from the website for up to one year prior, and request item number 5 sought records beyond the one year period. Mr. Zorojew stated that the vendor, Fleetboss has the capability of extracting the data necessary for generating the requested records and that they quoted him $195.00 to extract the data necessary to respond to request item number 5. Mr. Zorojew stated that the charge for data extraction was provided to the Complainant prior to incurring any cost for the service.

OPRA provides that "…copies of a government record may be purchased by any person upon payment of the fee prescribed by law or regulation, or if a fee is not prescribed by law or regulation, upon payment of the actual cost of duplicating the record. N.J.S.A. 47:1A-5(b).

In O'Shea v. Pine Hill Bd. of Educ. (Camden), GRC Complaint No. 2007-192 (February 2009), the complainant requested a copy of an audio recording and charged the complainant for the duplication. The complainant objected to the fee asserting that it was excessive. However, the custodian certified that the Board of Education did not possess the capability to complete the duplication in-house and provided a cost estimate from outside vendors. The Council did not find it was unreasonable to obtain an estimate from an outside vendor for the actual cost of duplicating the record because the custodian certified that the Board lacked the equipment necessary to otherwise fulfill the complainant's request.

Here, similarly to O'Shea, Mr. Zorojew certified that the agency lacked the ability to extract the data because it was aged beyond the online access capability, which dates back a maximum of 365 days. For this reason, Mr. Zorojew stated that he obtained a quote from the GPS vendor for data extraction and charged the Complainant the actual cost for the vendor to extract the data in order to disclose the records responsive to request item number 5.[16] Mr. Zorojew stated that the Complainant failed to authorize the cost of data extraction.

[16] The actual cost was $195.00 for request item number 5, but because he addressed items numbered 5 and 6 together, Mr. Zorojew added his estimate of $16.25 for request item number 6, which resulted in a total of $211.25.

For request item number 5, the agency's ability to extract the data online for the Complainant's latest date parameter expired approximately 6 months prior to the date of request. Therefore, in view of the Council's analysis in O'Shea, it was not unreasonable for Mr. Zorojew to obtain an estimate from an outside vendor for the actual cost of data extraction. The vendor quoted $195.00 for extracting data for the records responsive to request item number 5.

Accordingly, because the data for the records responsive to request item number 5 of the Complainant's October 2, 2012 request was not available online, it was reasonable for Assistant Custodian Zorojew to obtain a quote for the actual cost of extracting the data from an outside vendor capable of performing the service and providing same to the Complainant prior to incurring the cost of the service. As such, the Assistant Custodian did not unlawfully deny the Complainant access to the records responsive to request item number 5. N.J.S.A. 47:1A-5(b). *See also* O'Shea, GRC 2007-192.

October 2, 2012 request item number 6

In request item number 6, the Complainant requested GPS data for agency cars used by Michael Schonzeit from October 10, 2011 to October 20, 2011 and from July 1, 2012 until September 20, 2012.

Mr. Zorojew certified that he used the GPS vendor's quote for request item number 5 to estimate the cost of data extraction for request item number 6, and that by doing so he arrived at an estimate of $16.25. Mr. Zorojew stated that he provided the estimate to the Complainant but that the Complainant failed to authorize the cost of data extraction.[17]

The evidence of record reveals that the agency was able to extract GPS data online one year back from the date of request, which would have been on or about October 2, 2011. The records requested in item number 6 were within the period October 10, 2011 to September 20, 2012; therefore, the data was available online at the time of the request and outside vendor assistance was unnecessary.

Accordingly, because the data for the records responsive to request item number 6 of the Complainant's October 2, 2012 request was available online at the time of the Complainant's request, it was unnecessary to incur the expense for data extraction from an outside vendor; therefore the $16.25 assessed by the Assistant Custodian is unwarranted and unreasonable under OPRA. Thus, because the records were unlawfully denied, the Custodian shall disclose said records to the Complainant electronically and without cost. N.J.S.A. 47:1A-5(b).

October 2, 2012 request item number 7

The Complainant requested cell phone records from all environmental specialist employees from June 1, 2012 until October 2, 2012, to include sending and receiving telephone numbers. The Custodian in the Document Index stated that the records responsive to the request were made available to the Complainant with the phone numbers redacted for the copying cost of

[17] The estimate was combined with the amount quoted by the vendor for item number 5 data extraction.

$1.25, which represents 25 pages at $0.5 per page. The Custodian stated that the requested records were not disclosed to the Complainant because the Complainant did not inform the Custodian that she was willing to pay the copying fees for the records.

The Custodian's Counsel argued that the redaction of cell phone telephone numbers in a record subject to disclosure is warranted. Counsel stated that per N.J.S.A. 47:1A-1.1, unlisted telephone numbers are exempt from disclosure. Counsel also cited Livecchia, GRC 2008-80, in which the Council cited to Smith, GRC 2004-163, holding that redactions of telephone numbers satisfied the need for confidentiality.

The Complainant argued that the Custodian improperly redacted the telephone numbers. The Complainant stated that the Custodian redacted the telephone numbers on the basis of satisfying a need for confidentiality; however, the Complainant argued that the need for confidentiality only necessitates protection if, upon balanced consideration, the citizen's reasonable expectation of privacy in its personal information outweighs the public interest in disclosure. The Complainant mentioned that this was emphasized in Smith, GRC 2004-163. The Complainant stated that in the instant complaint, the public interest in disclosure outweighs the employees' minimal privacy interest in the telephone numbers, and therefore the telephone numbers should be disclosed. The Complainant attached to her complaint a copy of an agency document titled *Wireless Phone Agreement*. The Complainant argued that the agreement provides that the cell phones are the property of the agency and that information created, transmitted, or stored on them may be disclosed to other individuals; therefore agency employees have little to no privacy interest in the telephone numbers.

The GRC has long held that telephone numbers may be redacted from records subject to disclosure. In Smith, GRC 2004-163 the Council considered whether the custodian unlawfully denied access to telephone numbers on the cellular telephone bills of certain agency personnel. In finding that the Custodian did not unlawfully deny access, the Council concluded:

> The Custodian should not release the itemized telephone numbers contained in the cellular telephone billing records [because]…the need for confidentiality and the privacy issues implicated weigh heavier than the public's interest in access [and] the impracticality of OPRA's requirement that prior to allowing access…custodians must redact from a record any information which discloses the unlisted telephone numbers of any person pursuant to N.J.S.A. 47:1A-5(a).

Id.

When privacy interests are at issue, the GRC employs the common law balancing test established by the New Jersey Supreme Court in Doe v. Poritz, 142 N.J. 1 (1995). The New Jersey Supreme Court has explained that OPRA's safeguard against disclosure of personal information is substantive and requires "a balancing test that weighs both the public's strong interest in disclosure with the need to safeguard from public access personal information that would violate a reasonable expectation of privacy." Burnett v. County of Bergen, 198 N.J. 408, 422-23, 427 (2009).

When "balanc[ing] OPRA's interests in privacy and access" courts consider the following factors:

> (1) the type of record requested; (2) the information it does or might contain; (3) the potential for harm in any subsequent nonconsensual disclosure; (4) the injury from disclosure to the relationship in which the record was generated; (5) the adequacy of safeguards to prevent unauthorized disclosure; (6) the degree of need for access; and (7) whether there is an express statutory mandate, articulated public policy, or other recognized public interest militating toward access.

Id. at 427 quoting Doe v. Poritz, 142 N.J. 1, 88 (1995).

However, in Smith, GRC 2004-163, the Council did not find it necessary to conduct the common law balancing test for access to telephone numbers because it found that "…[a] balanced consideration of the privacy interests of citizens and the public interest in disclosure of the records in question by the GRC directly mirrors that performed by the New Jersey Supreme Court in North Jersey."

Subsequently, upon reviewing the balancing test in North Jersey Newspapers, 127 N.J. 9, the Council stated:

> In conducting its balanced consideration on the side of the need for confidentiality, the Court found three problems with unrestricted access to the telephone numbers. Id. at 16-17. The Court identified one problem as the implication of privacy interests since access to the telephone numbers called is the disclosure not only of the record of the public official's calls but, inferentially, the identity of those who have called the official. The second problem the Court identified with the disclosure of the identity of such callers was that it may directly conflict with an express legislative policy or need of government…[t]he third problem identified by the Court was those times when a government official will have to make a telephone call that has an arguable claim of confidentiality…

Id.

Although the Council concluded in Smith that the telephone numbers should be redacted from the requested records based upon the outcome of the court's balancing test in North Jersey Newspapers, it went on to note that:

> [E]ven if a balanced consideration of the privacy issues and need for confidentiality with the public's need for the telephone numbers called came out on the side for disclosure, there is the practical problem with OPRA's mandate that prior to allowing access to any government record, the custodian must redact from that record any information which discloses the unlisted phone numbers of any person. N.J.S.A. 47:1A-5(a). It is not likely that any custodian could comply

> with this OPRA provision by making such redactions with accurate precision when there is a realistic chance that the custodian may miss just one unlisted telephone number.

Id.

Notwithstanding the Council's history allowing redaction of telephone numbers, in the instant complaint the content of the *Wireless Phone Agreement* provides reason to tip the balance in favor of disclosure of the agency-owned cell phone telephone numbers. The agreement, after stating that cell phones are the property of the agency, includes the following language: "[a]ny communications, materials or information created, transmitted, or stored using said equipment/systems are property of the Ocean County Board of Health and may be accessed by authorized Board personnel and disclosed to other individuals…[e]mployees using the respective equipment/systems ***should not have any expectation of privacy*** with respect to any communication materials, or information created, transmitted, or stored." (Emphasis added.)

As such, the agency manifested its awareness that any privacy interests and/or confidentiality related to the use of its cell phones may be nonexistent. For this reason, the GRC agrees with the Complainant's assertion that *employees of the Ocean County Board of Health* have little to no privacy interest in said telephone numbers.[18] However, the GRC disagrees with the Complainant that all telephone numbers contained on the requested records should be disclosed. As referenced in Smith, GRC 2004-163, access to the telephone numbers called by the agency or the telephone numbers belonging to those calling the agency raises issues of compromised privacy for the owners of those telephone numbers; therefore, they should not be disclosed.

Therefore, because the agency contends that their employees should not have any expectation of privacy with respect to any communication materials, or information created, transmitted, or stored on agency-owned cell phones used by the employees, the records responsive to request item number 7 of the Complainant's October 2, 2012 request shall be disclosed without the agency-owned cell phone telephone numbers redacted unless the Custodian certifies that said telephone numbers are unlisted numbers pursuant to N.J.S.A. 47:1A-5(a).

The GRC emphasizes that the telephone numbers called by the agency or the telephone numbers belonging to those calling the agency shall be redacted. As such, the requested records will still be subject to redaction and the Complainant shall be obligated to pay the statutorily-imposed copying costs related to making such redactions pursuant to N.J.S.A. 47:1A-5(b) and N.J.S.A. 47:1A-5(g).

October 11, 2012 request item number 11

The Complainant requested all Supervisor Vehicle Accident Reports for vehicles operated by the agency's environmental specialists for the year 2008 to date of request. The

[18] It is not a condition precedent that an employee executes the *Wireless Phone Agreement* because it is not the employee's assent to the content of the agreement, but rather the substance of the document and its concomitant policy that serves to erode any expectation of privacy interests.

Complainant specifically excluded reports filed for Michael Schonzeit from this request item. The Custodian failed to provide any lawful reason for denying this request.

The Appellate Division has found that a request for "EZ Pass benefits afforded to retirees of the Port Authority, including all…correspondence between the Office of the Governor…and the Port Authority…" to be valid under OPRA because it "was confined to a specific subject matter that was clearly and reasonably described with sufficient identifying information [and] was limited to particularized identifiable government records…rather than information generally." Burke v. Brandes, 429 N.J. Super. 169, 172, 176 (App. Div. 2012). Similarly to Burke, the Complainant's request was confined to a specific subject matter clearly and reasonably described with sufficient identifying information and was limited to particularized identifiable government records; to wit, Supervisor Accident Reports.

Accordingly, because the Complainant's request for item number 11 of the October 11, 2012 request was confined to a specific subject matter clearly and reasonably described with sufficient identifying information and was limited to particularized identifiable government records, and because the Custodian failed to provide a lawful reason for denying the request, the Custodian must disclose to the Complainant all Supervisor Vehicle Accident Reports for vehicles operated by the agency's environmental specialists, except Michael Schonzeit, for the years 2008 to October 11, 2012. *See* Burke, 429 N.J. Super. 169.

October 11, 2012 request item number 1, 13 and 14

In Pusterhofer v. NJ Dep't of Educ., GRC Complaint No. 2005-49 (July 2005), the custodian certified that no records responsive to the complainant's request for billing records existed and the complainant submitted no evidence to refute the custodian's certification regarding said records. The GRC determined that, because the custodian certified that no records responsive to the request existed and no evidence existed in the record to refute the custodian's certification, there was no unlawful denial of access to the requested records.

Here, the Custodian certified that the records responsive to request items numbered 1, 13 and 14 of the Complainant's October 11, 2012 request do not exist.

As such, the Custodian did not unlawfully deny access to request items numbered 1, 13 and 14 of the Complainant's October 11, 2012 request because the Custodian certified that such records do not exist and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. *See* Pusterhofer, GRC 2005-49.

Disposition of Funds Paid on Account

Asssistant Custodian Zorojew averred in his certification dated July 16, 2013, which was attached to the SOI, that on October 5, 2012, a check in the amount of $30.00 was delivered to the agency as a deposit toward any costs associated with the Complainant's October 2, 2013 OPRA request. Mr. Zorojew further certified that the check was deposited.

As such, the Custodian shall account for the disposition of the Complainant's deposited $30.00 check, including any interest accrued thereon, in a separate certification in accordance with N.J. Court Rule 1:4-4, to the Executive Director within five (5) business days from receipt of the Council's Interim Order.

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.

Prevailing Party Attorney's Fees

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because OPRA contains no statute of limitations on Denial of Access Complaints filed with the GRC, and because the GRC is without authority to impose a statute of limitations where one does not exist, there is no statute of limitations barring the GRC's adjudication of this complaint. *See* Mason v. City of Hoboken, 196 N.J. 51 (2008). *See also* N.J. Const. art. VI, § 2, P 3; Winberry v. Salisbury, 5 N.J. 240 (1950).

2. Assistant Custodian Zorojew did not bear his burden of proof that he timely responded to the Complainant's October 11, 2012 OPRA request. N.J.S.A. 47:1A-6. As such, Mr. Zorojew's failure to respond in writing to the Complainant's request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

3. Because there is no evidence that the Custodian received the Complainant's OPRA request dated October 15, 2012, that was allegedly faxed to the Custodian by the County of Ocean custodian, the Custodian did not violate OPRA by failing to respond to the request in writing within the statutorily mandated seven (7) business days pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). *See also* Bellan-Boyer v. NJ Dep't of Cmty. Affairs, GRC Complaint No. 2007-114 (October 2007).

4. The Custodian did not unlawfully deny access to records responsive to the Complainant's October 2, 2012 request item numbers 1 through 4 and 8 through 10, as well as the Complainant's October 11, 2012 request item numbers 3 through 10

and 12 because said request items do not contain all necessary criteria to be considered valid requests for correspondence. Thus, said items are overly broad and invalid. *See* MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534 (App. Div. 2005); Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010); Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order May 24, 2011).

5. Because the Complainant's request for item number 2 of the October 11, 2012 request is overly broad and fails to seek identifiable government records, the request is invalid under OPRA and the Custodian has not unlawfully denied access to the requested records. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534 (App. Div. 2005). *See also* Bent v. Stafford Police Dep't, 381 N.J. Super. 30 (App. Div. 2005); NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166 (App. Div. 2007); and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

6. Because the data for the records responsive to request item number 5 of the Complainant's October 2, 2012 request was not available online, it was reasonable for Assistant Custodian Zorojew to obtain a quote for the actual cost of extracting the data from an outside vendor capable of performing the service and providing same to the Complainant prior to incurring the cost of the service. As such, the Assistant Custodian did not unlawfully deny the Complainant access to the records responsive to request item number 5. N.J.S.A. 47:1A-5(b). *See also* O'Shea v. Pine Hill Bd. of Educ. (Camden), GRC Complaint No. 2007-192 (February 2009).

7. Because the data for the records responsive to request item number 6 of the Complainant's October 2, 2012 request was available online at the time of the Complainant's request, it was unnecessary to incur the expense for data extraction from an outside vendor; therefore the $16.25 assessed by the Assistant Custodian is unwarranted and unreasonable under OPRA. Thus, because the records were unlawfully denied, the Custodian shall disclose said records to the Complainant electronically and without cost. N.J.S.A. 47:1A-5(b).

8. Because the agency contends that their employees should not have any expectation of privacy with respect to any communication materials, or information created, transmitted, or stored on agency-owned cell phones used by the employees, the records responsive to request item number 7 of the Complainant's October 2, 2012 request shall be disclosed without the agency-owned cell phone telephone numbers redacted unless the Custodian certifies that said telephone numbers are unlisted numbers pursuant to N.J.S.A. 47:1A-5(a).

9. Because the Complainant's request for item number 11 of the October 11, 2012 request was confined to a specific subject matter clearly and reasonably described with sufficient identifying information and was limited to particularized identifiable government records, and because the Custodian failed to provide a lawful reason for denying the request, the Custodian must disclose to the Complainant all Supervisor

Vehicle Accident Reports for vehicles operated by the agency's environmental specialists, except Michael Schonzeit, for the years 2008 to October 11, 2012. *See* Burke v. Brandes, 429 N.J. Super. 169, 172, 176 (App. Div. 2012).

10. **The Custodian shall comply with paragraphs 7, 8 and 9 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,[19] to the Executive Director.[20] With respect to paragraph 7, if the Custodian in the certification avers that any or all agency-owned cell phone telephone numbers are unlisted, the Custodian may redact such telephone number(s) and list each such redaction on the document index.**

11. The Custodian did not unlawfully deny access to request items numbered 1, 13 and 14 of the Complainant's October 11, 2012 request because the Custodian certified that such records do not exist and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. *See* Pusterhofer v. NJ Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

12. **The Custodian shall account for the disposition of the Complainant's deposited $30.00 check, including any interest accrued thereon, in a separate certification in accordance with N.J. Court Rule 1:4-4, to the Executive Director within five (5) business days from receipt of the Council's Interim Order.**

13. 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.

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

Prepared By: John E. Stewart, Esq.

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

January 20, 2015

[19] "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."

[20] 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.

EXHIBIT A

EXHIBIT A-1

1. Emails and text messages sent to or from county-owned *computers* from May 1, 2011 → August 31, 2011 between:
   - -James Hayes and Victoria Miragliotta
   - -James Hayes and Matthew Cisk
   - -James Hayes and Daniel Regenye
   - -James Hayes and Ken Wenrich

2. Emails and text messages sent to or from county-owned *computers* from October 15, 2011 → November 25, 2011 between:
   - -Grant Umstadter and Victoria Miragliotta
   - -Grant Umstadter and Claudia Lewandowski
   - -Grant Umstadter and Matthew Cisk
   - -Matthew Cisk and Victoria Miragliotta
   - -Matthew Cisk and Claudia Lewandowski
   - -Claudia Lewandowski and Victoria Miragliotta
   - -Claudia Lewandowski and Lynn England
   - -Matthew Cisk and Ken Wenrich
   - -Victoria Miragliotta and Daniel Regenye
   - -Victoria Miragliotta and Ken Wenrich

3. Emails and text messages sent to or from county-owned (or subsidized) *cell phones* from October 15, 2011 → November 25, 2011 between:
   - -Grant Umstadter and Victoria Miragliotta
   - -Grant Umstadter and Claudia Lewandowski
   - -Grant Umstadter and Matthew Cisk
   - -Matthew Cisk and Victoria Miragliotta
   - -Matthew Cisk and Claudia Lewandowski
   - -Claudia Lewandowski and Victoria Miragliotta
   - -Claudia Lewandowski and Lynn England
   - -Matthew Cisk and Ken Wenrich
   - -Victoria Miragliotta and Daniel Regenye
   - -Victoria Miragliotta and Ken Wenrich

4. Notes, logs, routers and other writings that relate to Michael Schonzeit's activities and work product, were authored- in whole or in part- by Matthew Cisk, and created or modified from January 2012 – the present.

5. GPS data from cars used by environmental specialists during the following two periods:
   - -February 1, 2009 →July 1, 2009
   - -January 5, 2011 → April 5, 2011

6. GPS data from the car(s) Michael Schonzeit used during the following two periods:
   - -October 10, 2011 → October 20, 2011
   - -July 1, 2012 → September 20, 2012

7. Cell phone records from all environmental specialist employees from June 1, 2012 to the present which display the sending and receiving phone numbers, as well as the date, time and length of each conversation.

8. Emails and text messages sent to or from county-owned (or subsidized) *computers* from June 18, 2010 → April 20, 2011 between:

   -Grant Umstadter and Victoria Miragliotta
   -Grant Umstadter and Claudia Lewandowski
   -Grant Umstadter and Matthew Cisk
   -Matthew Cisk and Victoria Miragliotta
   -Matthew Cisk and Claudia Lewandowski
   -Claudia Lewandowski and Victoria Miragliotta
   -Matthew Cisk and Ken Wenrich
   -Victoria Miragliotta and Ken Wenrich
   -Victoria Miragliotta and Daniel Regenye

9. Emails and text messages sent to or from county-owned (or subsidized) *cell phones* from June 18, 2010 → April 20, 2011 between:

   -Grant Umstadter and Victoria Miragliotta
   -Grant Umstadter and Claudia Lewandowski
   -Grant Umstadter and Matthew Cisk
   -Matthew Cisk and Victoria Miragliotta
   -Matthew Cisk and Claudia Lewandowski
   -Claudia Lewandowski and Victoria Miragliotta
   -Matthew Cisk and Ken Wenrich
   -Victoria Miragliotta and Ken Wenrich
   -Victoria Miragliotta and Daniel Regenye

10. All memos and emails sent by Matthew Cisk to Michael Schonzeit from May 2011.

EXHIBIT A-2

1. Car history reports for every county-owned (or subsidized) motor vehicle that has been used by an Ocean County Health Department employee or agent from 2006 to the present.

2. All maintenance reports and other documents and records relating to diagnostic work-ups that were performed in 2008, 2009, 2010, 2011 and 2012 on a county-owned (or subsidized) motor vehicle that was used by an Ocean County Health Department employee or agent from 2008 to the present.

3. All memos, faxes (including cover sheets), emails (including attachments) and text messages sent to or from county-owned or subsidized equipment (cell phones, computers, fax machines, etc.) between Victoria Miragliotta and Andrew King (drking349@aol.com) from November 1, 2010 to the present.

4. All memos, faxes (including cover sheets), emails (including attachments) and text messages sent to or from county-owned or subsidized equipment (cell phones, computers, fax machines, etc.) from June 12, 2010 to September 1, 2010 between:

   -Victoria Miragliotta and Matthew Cisk
   -Victoria Miragliotta and John Protonentis
   -Victoria Miragliotta and Daniel Regenye
   -Victoria Miragliotta and Kathleen Phillips
   -Victoria Miragliotta and Sharon Eastwick
   -Matthew Cisk and John Protonentis
   -Matthew Cisk and Kathleen Phillips
   -John Protonentis and Daniel Regenye

5. All memos, faxes (including cover sheets), emails (including attachments) and text messages sent to or from county-owned or subsidized equipment (cell phones, computers, fax machines, etc.) from April 1, 2012 → present between:

   -Samantha Wickel (or Wicker) and Matthew Cisk
   -Samantha Wickel (or Wicker) and John Protonentis
   -Samantha Wickel (or Wicker) and Daniel Regenye
   -Samantha Wickel (or Wicker) and Victoria Miragliotta
   -Samantha Wickel(or Wicker) and Kathleen Phillips
   -Sally Wickel (or Wicker) and Matthew Cisk
   -Sally Wickel (or Wicker) and Kathleen Phillips
   -Sally Wickel (or Wicker) and Victoria Miragliotta

6. All memos, faxes (including cover sheets), emails (including attachments) and text messages sent to or from county-owned or subsidized equipment (cell phones, computers, fax machines, etc.) from March 1, 2011 → May 30, 2011 between:

   -Matthew Cisk and Karl Stine
   -Matthew Cisk and Chris Anderson
   -Matthew Cisk and Shannon Burke
   -Matthew Cisk and Mr./Ms. Wallenberg
   -Matthew Cisk and Susan Hendrix
   -Matthew Cisk and Knowal Novack Schulz

7. Emails (including attachments) and text messages sent to or from county-owned (or subsidized) *computers* from April 1, 2011 → August 31, 2011 between:

-James Hayes and John Protonentis
-James Hayes and Kathleen Phillips

8. Emails (including attachments) and text messages sent to or from county-owned (or subsidized) *cell phones* from April 1, 2011 → August 31, 2011 between:

-James Hayes and Victoria Miragliotta
-James Hayes and Matthew Cisk
-James Hayes and Daniel Regenye
-James Hayes and Ken Wenrich
-James Hayes and John Protonentis
-James Hayes and Kathleen Phillips

9. All memos, faxes (including cover sheets), emails (including attachments) and text messages sent to or from county-owned or subsidized equipment (cell phones, computers, fax machines, etc.) from October 15, 2011 → November 25, 2011 between:

-Grant Umstadter and John Protonentis
-Grant Umstadter and Kathleen Phillips
-Matthew Cisk and John Protonentis
-Matthew Cisk and Kathleen Phillips
-Ken Wenrich and John Protonentis
-Ken Wenrich and Kathleen Phillips
-Victoria Miragliotta and John Protonentis
-Victoria Miragliotta and Kathleen Phillips
-Daniel Regenye and John Protonentis
-Daniel Regenye and Kathleen Phillips

10. All memos, faxes (including cover sheets), emails (including attachments) and text messages sent to or from county-owned or subsidized equipment (cell phones, computers, fax machines, etc.) from June 18, 2010 → April 20, 2011 between:

-Grant Umstadter and John Protonentis
-Grant Umstadter and Kathleen Phillips
-Matthew Cisk and John Protonentis
-Matthew Cisk and Kathleen Phillips
-Ken Wenrich and John Protonentis
-Ken Wenrich and Kathleen Phillips
-Victoria Miragliotta and John Protonentis
-Victoria Miragliotta and Kathleen Phillips
-Daniel Regenye and John Protonentis
-Daniel Regenye and Kathleen Phillips

11. All Supervisor Vehicle Accident Reports that have been filed because of an environmental specialist's (excluding Michael Schonzeit) use of a county owned (or subsidized) motor vehicle from 2008 – present.

12. Internal reports and memos from 2005 – 2012 that have been produced by employees or agents of Ocean County, the Health Department or the Environmental Division which document, compile or analyze data on any of the following subjects:

-environmental employee productivity
-the quality and quantity of reports produced by environmental employees
-the number and type of environmental employee-produced reports sent back to the Environmental Division by NJ DEP because of a perceived inaccuracy or other insufficiency

13. Any and all settlements, releases or other legal documents drafted, approved, signed or executed by the County Health Department from 2011 to the present that concern Shelley Morgan.

14. Any and all settlements, releases or other legal documents drafted, approved, signed or executed by the County Health Department from 2009 to the present that concern Ken Wenrich.

EXHIBIT A-3

1. All memos, faxes (including cover sheets), emails (including attachments) and text messages sent to or from county owned or subsidized equipment (cell phones, computers, fax machines, etc.) between Victoria Miragliotta and Joan Sprague from August 1, 2006 to December 15, 2006.

2. All memos, faxes (including cover sheets), emails (including attachments) and text messages sent to or from county owned or subsidized equipment (cell phones, computers, fax machines, etc.) from April 15, 2012 to October 15, 2012 between Victoria Miragliotta and Keith Goetting, Victoria Miragliotta and Patricia Burke, Victoria Miragliotta and Antionette DePaola, Victoria Miragliotta and Mary Ann Noto.