State of New Jersey
GOVERNMENT RECORDS COUNCIL
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

November 18, 2014 Government Records Council Meeting

Nicole Dory, Esq. (On behalf of Shipyard Associates, L.P.) Complaint No. 2014-200
Complainant
v.
City of Hoboken (Hudson)
Custodian of Record

At the November 18, 2014 public meeting, the Government Records Council ("Council") considered the November 10, 2014 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

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

2. Because the Custodian failed to provide the Complainant with a detailed lawful basis for denying request item number 3, and failed to direct the Complainant with reasonable clarity to the specific location of the ustream video in responding to request item number 5, the Custodian's response to these two request items was insufficient. N.J.S.A. 47:1A-5(g). *See also* DeAppolonio v. Borough of Deal (Monmouth), GRC Complaint No. 2008-62 (September 2009); Rodriguez v. Kean University, GRC Complaint No. 2013-69 (March 2014).

3. Pursuant to Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the records that Councilwoman Mason determined are responsive to request item number 3, as well as an *in camera* review of any records responsive to request item number 3 that may be in the possession of Council members Castellano, Occhipinti, and Cunningham. The *in camera* review is necessary to determine if the records are government records as defined in OPRA, and if so, to determine the validity of the Custodian's assertion that the records contain ACD material exempt from access pursuant to N.J.S.A. 47:1A-1.1.

4. **The Custodian must deliver[1] to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see paragraph 3 above), a document or redaction index[2], as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,[3] that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order. If the Custodian determines that Council members Castellano, Occhipinti, and Cunningham do not have in their possession any records responsive to request item number 3, the Custodian shall also include a legal certification to that effect.**

5. The Custodian must (a) obtain any presentation materials used at the December 18, 2013 hearing, including any exhibits, Power Point presentation materials, and handouts from any Council members that may have such records in their possession, regardless of the manner in which it was distributed; and/or (b) obtain said presentation materials from Princeton Hydro, LLC and/or RCQuinn Consulting, Inc. Upon obtaining the records, if any, the Custodian shall disclose those records to the Complainant. N.J.S.A. 47:1A-5.

6. **The Custodian shall comply with paragraph 5 above within five (5) business days from receipt of the Council's Interim Order with any 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. In the event no Council members have such records in their possession, and/or the records were not made, maintained, or kept on file by a third party on behalf of the City in the course of its official business, the Custodian shall submit a legal certification to that effect in lieu of his obligation pursuant to paragraph 5 above.[4]**

7. Because the Complainant's request item number 9 is confined to a specific subject matter that was clearly and reasonably described with sufficient identifying information and was limited to particularized identifiable government records, the request is not vague, unclear, or overly broad, and the Custodian shall disclose the records responsive to said request. N.J.S.A. 47:1A-5.

8. **The Custodian shall comply with paragraph 7 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.[5]**

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[1] The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.
[2] The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.
[3] "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."
[4] See applicable footnotes in paragraph 4.
[5] See applicable footnotes in paragraph 4.

9. The Complainant's request items numbered 10 and 11 are invalid because they fail to seek identifiable government records. MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30 (App. Div. 2005), N.J. Builders Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). Thus, the Custodian did not unlawfully deny access to said request items. N.J.S.A. 47:1A-6.

10. 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.

11. 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 18th Day of November, 2014

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: November 19, 2014

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Findings and Recommendations of the Executive Director
November 18, 2014 Council Meeting

Nicole Dory, Esq. (on behalf of Shipyard Associates, L.P.)[1] **GRC Complaint No. 2014-200**
Complainant

v.

City of Hoboken[2]
Custodial Agency

Records Relevant to Complaint: [3]

1. Request item number 3: Notes of Hoboken City Council members taken at the September 17, 2013, October 2, 2013, October 17, 2013, November 6, 2013, November 18, 2013, and December 18, 2013 Council hearing dates on the portion of the hearings pertaining to Hoboken Ordinance Z-253, "An Ordinance Amending Chapter 104 (Flood Damage Prevention) to Reflect Updates and Recommended (sic) by the New Jersey Department of Environmental Protection's Latest Revised Model Ordinance," Ordinance Z-263 and Ordinance Z-264.
2. Request item number 5: The presentation materials, including the exhibits, Power Point presentation, and handouts shown or distributed to the Hoboken City Council members by Princeton Hydro, LLC and RCQuinn Consulting, Inc. at the December 18, 2013 Hoboken City Council hearing.
3. Request item number 9: Reports, memorandums and notes authored by Hoboken Community Development Director Brandy Forbes discussing Ordinances Z-253, Z-263 and/or Z-264.
4. Request item number 10: Correspondence, letters, e-mails, reports, memorandums and notes discussing Ordinance Z-253, Ordinance Z-263 and/or Ordinance Z-264 authored by (a) any Hoboken City Council member; (b) Community Development Director Brandy Forbes; (c) the Hoboken Planning Board Planner; and (d) the Hoboken Planning Board Engineer.
5. Request item number 11: Correspondence, letters, e-mails, reports, memorandums and notes authored by Mayor Dawn Zimmer discussing Ordinance Z-253, Ordinance Z-263, Ordinance Z-264.[4]

Custodian of Record: James J. Farina

[1] Represented by Nicole Dory, Esq., of Connell Foley, LLP (Roseland, NJ).
[2] "Represented by Jeanne Ann McManus, Esq., of Weiner Lesniak, LLP (Parsippany, NJ).
[3] The Complainant did not specify either the format of the requested records or the means of delivery.
[4] There were other records requested that are not relevant to this complaint.

Request Received by Custodian: March 24, 2014
Response Made by Custodian: April 3, 2014
GRC Complaint Received: May 20, 2014

Background[5]

Request and Response:

On March 24, 2014, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On April 3, 2014, the eighth (8th) business day following receipt of said request, the Custodian responded in writing informing the Complainant that:

- With respect to request item number 3, several Council members have responded to the Custodian informing him that they have no records responsive to the request. However, the Custodian stated that Council members Mello, Castellano, Occhipinti, Cunningham and Mason have not yet responded back to the Custodian.
- All items are available on the ustream video of the meeting for request item number 5; however, there are no responsive records for handouts.
- With respect to request items numbered 9, 10 and 11; the request is denied because it is vague, unclear, and overly broad. The Custodian cites to MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), Bent v. Stafford Police Dep't, 381 N.J. Super. 30 (App. Div. 2005), N.J. Builders Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166 (App. Div. 2007), and several GRC decisions in support of his denial.

On this same date the Custodian sent a follow-up response to the Complainant, informing her that the City would need an extension of time until April 8, 2014 to fully respond to request item number 3 because Councilwoman Mason requested additional time to search through her files for records responsive to the request.[6] On April 8, 2014, the Custodian e-mailed the Complainant to inform her that Councilwoman Mason provided the Custodian with copies of responsive records; however none of the records are government records under OPRA. The Custodian further stated that if any of the documents were determined to be government records, they would be exempt from disclosure as advisory, consultative, or deliberative ("ACD") material.

Denial of Access Complaint:

On May 20, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserts that she filed her OPRA request on March 24, 2014 and the Custodian responded on April 8, 2014 and May 9, 2014.

[5] 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.
[6] The Custodian also addressed six other request items that are not relevant to this complaint.

The Complainant asserts that she was unlawfully denied access to the records relevant to the complaint. The Complainant states that with respect to request item number 3, she was unsatisfied with the Custodian's response that some Council members did not respond back to the Custodian confirming or denying whether they had responsive records in their possession. The Complainant states she was also dissatisfied with the Custodian's response regarding Councilwoman Mason's possession of records responsive to the request that were alleged to either not be government records or, if government records, withheld from disclosure as ACD material. The Complainant states that during the week of April 9, 2014 and May 9, 2014 she telephoned the Custodian seeking a Vaughn Index for the records alleged by the Custodian to be ACD material. The Complainant states that she was referred by the Custodian to Alyssa Proko, Esq. in the Hoboken Law Department. The Complainant also states that on May 9, 2014, she e-mailed Ms. Proko seeking the Vaughan Index but that she never received a reply. The Complainant further states that on May 9, 2014, the Custodian e-mailed the Complainant to advise her that all responsive records were provided or are publicly available, and therefore no Vaughan Index is required.

The Complainant states that she was denied access to request item number 5 because after she downloaded the videos as instructed by the City's clerical staff, she found that none of the presentation materials had been posted on the website. The Complainant asserts that there was a Power Point presentation at the December 18, 2013 meeting, and that the slides from the presentation must be disclosed, as well as any other materials presented, distributed or used at the meeting.

The Complainant states that the Custodian denied her access to request items numbered 9, 10 and 11 because the Custodian stated the requests were vague, unclear, and overly broad. The Complainant argues that the requests were not overly broad because the three Superior Court decisions cited by the Custodian are distinguishable on their facts from the facts in the instant complaint. Furthermore, the Complainant states that even if some portions of the requests were deemed to be vague, the Custodian should have granted access to those portions of the requests which sought identifiable records.

The Complainant seeks (1) production of any records found to be responsive to the request, (2) production of a Vaughn Index for request item number 3, and (3) prevailing party attorney fees.

Statement of Information:

On May 30, 2014, the Custodian filed a Statement of Information ("SOI"). The Custodian certifies that he received the Complainant's request of March 24, 2014 and responded in writing to the request on April 3, 2014.

Concerning request item number 3, the Custodian certifies, and attaches to the SOI proof in the form of memoranda, that Council members Bhalla, Giattino, Doyle, Russo, and Mello have responded to the Custodian informing him that they have no records responsive to the request. The Custodian certifies that Councilwoman Mason does have records responsive to the request but the Custodian certifies that those records are not government records; therefore not

subject to disclosure. The Custodian further certifies that if the records are determined to be government records, they would be exempt as ACD material because they are notes. The Custodian cites to O'Shea v. West Milford, 391 N.J. Super. 534, 538-39 (App. Div. 2007) in support of his argument. In O'Shea, the Custodian argues, the court found that requiring disclosure of a Board member's handwritten notes taken during a meeting is not required under OPRA.

The Custodian certifies that the only record responsive to request item number 5 is the publicly available video recording of the presentation. The Custodian certifies that he directed the Complainant to the video. The Custodian further certifies that "[n]o 'presentation materials' were submitted by the presenters [to him] for distribution to Council members so no such records exist."

The Custodian certifies that the Complainant's request for items numbered 9, 10 and 11 is vague, unclear, and overly broad. The Custodian certifies that like the request deemed invalid in MAG, 375 N.J. Super. 534, the Complainant's request would require him to manually review the contents and analyze large numbers of documents in order to identify whether any particular document matched the description in the request. The Custodian contends that he would then have to compile those potentially responsive documents into a sub file of the larger group of documents, and review and analyze each potentially responsive document to determine whether any were privileged. The Custodian asserts that this is the type of research he is not obligated to perform; therefore the request is not valid.

Analysis

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).[7] 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).

Here, the Complainant submitted the OPRA request to the Custodian on March 24, 2014, and the Custodian responded on April 3, 2014, which was the eighth (8th) business day following receipt of the request.

Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in

[7] 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.

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

Sufficiency of Response

OPRA provides that if a "…custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor … on the request form and promptly return it to the requestor." N.J.S.A. 47:1A-5(g). In DeAppolonio v. Borough of Deal (Monmouth), GRC Complaint No. 2008-62 (September 2009), the complainant argued that the custodian failed to provide a specific lawful basis for denying access to requested records. The GRC held that:

> Pursuant to N.J.S.A. 47:1A-5(g), a custodian must indicate the specific basis for a denial of access to government records. Moreover, the Council's decisions have repeatedly supported this statutory mandate by holding that custodians must provide a legally valid reason for any denial of access to records (citations omitted). The Council also held that for a denial of access to be in compliance with OPRA, it must be specific and must be sufficient to prove that a custodian's denial is authorized by OPRA.

Id. at 7.

Here, the Custodian responded in writing to the Complainant's request item number 3 by informing the Complainant that he requested records from the Council members and that some members replied to him while others failed to reply. By doing so, the Custodian failed to provide the Complainant with a detailed lawful basis for denying request item number 3.

In responding to request item number 5, the Custodian informed the Complainant that the requested records were available on the ustream video, but failed to instruct the Complainant how to access the video. In Rodriguez v. Kean University, GRC Complaint No. 2013-69 (March 2014), the Council provided guidance for a custodian when disclosing records online by making it clear that:

> [A] custodian shall direct a requestor, with reasonable clarity, to the specific location on the Internet where the responsive records reside. This shall include, if necessary, directions for accessing the responsive document that would be comprehensible to a reasonable person, including but not limited to providing a link to the exact location of the requested document.

Id.

Therefore, because the Custodian failed to provide the Complainant with a detailed lawful basis for denying request item number 3, and failed to direct the Complainant with reasonable clarity to the specific location of the ustream video in responding to request item

number 5, the Custodian's response to these two request items was insufficient. N.J.S.A. 47:1A-5(g). *See also* DeAppolonio, GRC 2008-62; Rodriguez, GRC 2013-69.

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.

Request item number 3 - Notes of Hoboken City Council members taken at the September 17, 2013, October 2, 2013, October 17, 2013, November 6, 2013, November 18, 2013, and December 18, 2013 Council hearing dates on the portion of the hearings pertaining to Hoboken Ordinance Z-253, "An Ordinance Amending Chapter 104 (Flood Damage Prevention) to Reflect Updates and Recommended (sic) by the New Jersey Department of Environmental Protection's Latest Revised Model Ordinance," Ordinance Z-263 and Ordinance Z-264.

The Custodian, in a search for records responsive to this request item, certified that he contacted all of the Council members. The Custodian certified that he received a reply from Council members Bhalla, Giattino, Doyle, Russo, and Mello. The Custodian further certified that these five Council members informed the Custodian that they had no records responsive to the request. There is no evidence in the record that the Custodian attempted to obtain records from the Council members who ignored his request. Therefore, Council members Castellano, Occhipinti, and Cunningham may or may not have responsive records in their possession. The Custodian also certified that Councilwoman Mason did have records responsive to the request but that those records are not government records; therefore, they are not subject to disclosure. The Custodian further certified that if the records are determined to be government records, they would be exempt as ACD material because they consist of notes.

In Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the Council[8] dismissing the complaint by accepting the custodian's legal conclusion for the denial of access without further review. The Court stated that "OPRA contemplates the GRC's meaningful review of the basis for an agency's decision to withhold government records . . . When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers." Id. The Court also stated that:

> The statute also contemplates the GRC's *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the 'Open Public Meetings Act,' N.J.S.A. 10:4-6 to -21, it also provides that the GRC 'may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.'

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

> N.J.S.A. 47:1A-7(f). This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.

Id. at 355.

Further, the Court stated that:

> We hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal . . . There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC's obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7(f), which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.

Id.

Here, records responsive to the request are in the possession of Councilwoman Mason. There may also be records responsive to the request in the possession of Council members Castellano, Occhipinti, and Cunningham.

Therefore, pursuant to Paff, 379 N.J. Super. at 346, the GRC must conduct an *in camera* review of the records that Councilwoman Mason determined are responsive to request item number 3, as well as an *in camera* review of any records responsive to request item number 3 that may be in the possession of Council members Castellano, Occhipinti, and Cunningham. The *in camera* review is necessary to determine if the records are government records as defined in OPRA, and if so, to determine the validity of the Custodian's assertion that the records contain ACD material exempt from access pursuant to N.J.S.A. 47:1A-1.1.

Request item number 5 - The presentation materials, including the exhibits, Power Point presentation, and handouts shown or distributed to the Hoboken City Council members by Princeton Hydro, LLC and RCQuinn Consulting, Inc. at the December 18, 2013 Hoboken City Council hearing.

With respect to this request the Custodian merely directed the Complainant to the ustream video of the meeting. The Custodian informed the Complainant that all items are available on that site. Conversely, the Complainant stated that she found none of the presentation materials posted on the site. The Custodian stated in the SOI that no presentation materials were submitted by the presenters to him for distribution to the Council members, therefore no other responsive records exist. The Custodian did not properly interpret the Complainant's request. The Complainant identified the presentation materials as "exhibits, Power Point presentation, and handouts ***shown or distributed*** to the Hoboken City Council members by Princeton Hydro, LLC and RCQuinn Consulting, Inc." (Emphasis added.) As such, if any identified presentation materials were distributed to the Council members *via any channel of distribution* or shown to the Council members at the December 18, 2013 hearing, then those records are responsive to the request.

In Burnett v. County of Gloucester, 415 N.J. Super. 506 (App. Div. 2010), the court found that settlement agreements in the possession of a third party that had been made by, or on behalf of, the Board of Chosen Freeholders in the course of its official business does not excuse the agency from its obligation to produce the records under OPRA. The court went on to say, …[w]ere we to conclude otherwise, a governmental agency seeking to protect its records from scrutiny could simply delegate their creation to third parties or relinquish possession to such parties, thereby thwarting the policy of transparency that underlies OPRA." Id. at 517.

There is nothing in the evidence of record to indicate that Princeton Hydro, LLC and/or RCQuinn Consulting, Inc. were uninvited participants at the hearing; therefore, it follows that these two entities were either retained by the City to make the presentation or made the presentation at the behest of the City. In either case, it appears that their presentation materials would have been made by the presenters on behalf of the City and in the course of its official business. As such, the presentation materials would constitute government records.

Accordingly, the Custodian must (a) obtain any presentation materials used at the December 18, 2013 hearing, including any exhibits, Power Point presentation materials, and handouts from any Council members that may have such records in their possession, regardless of the manner in which it was distributed; and/or (b) obtain said presentation materials from Princeton Hydro, LLC and/or RCQuinn Consulting, Inc. Upon obtaining the records, if any, the Custodian shall disclose those records to the Complainant. N.J.S.A. 47:1A-5.

Request item number 9 - Reports, memorandums and notes authored by Hoboken Community Development Director Brandy Forbes discussing Ordinances Z-253, Z-263 and/or Z-264.

Request item number 10 - Correspondence, letters, e-mails, reports, memorandums and notes discussing Ordinance Z-253, Ordinance Z-263 and/or Ordinance Z-264 authored by (a) any Hoboken City Council member; (b) Community Development Director Brandy Forbes; (c) the Hoboken Planning Board Planner; and (d) the Hoboken Planning Board Engineer.

Request item number 11 - Correspondence, letters, e-mails, reports, memorandums and notes authored by Mayor Dawn Zimmer discussing Ordinance Z-253, Ordinance Z-263, Ordinance Z-264

The Custodian denied request items numbered 9, 10 and 11 because he asserted that the request was vague, unclear, and overly broad. The Custodian cited MAG, 375 N.J. Super. 534; Bent, 381 N.J. Super. 30; N.J. Builders Ass'n, 390 N.J. Super. 166, and several GRC decisions in support of the denial.

The New Jersey Superior Court has held that "[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records readily accessible for inspection, copying, or examination." MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005) (citing N.J.S.A. 47:1A-1) (quotations omitted). The Court reasoned that:

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

Id. at 549 (emphasis added).

The Court further held that "[u]nder OPRA, *agencies are required to disclose only 'identifiable' government records* not otherwise exempt . . . . In short, OPRA does not countenance open-ended searches of an agency's files." Id. (emphasis added). *See also* Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005), N.J. Builders Ass'n 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).

More recently, the Appellate Division has found 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, namely, correspondence with another government entity, rather than information generally." Burke v. Brandes, 429 N.J. Super. 169, 172, 176 (App. Div. 2012).

In request item number 9, the Complainant requested three specific types of records prepared by one government official identified by name and title. The request was limited to documents prepared by the official discussing three City Ordinances identified by number. Here, not unlike the facts of Burke, 429 N.J. Super. 169, the request was confined to a specific subject matter that was clearly and reasonably described with sufficient identifying information; to wit, the Ordinances, and was limited to particularized identifiable government records. The Custodian was not required to perform research because his search for the records would be restricted to specific types of records prepared by one individual discussing three clearly identified City Ordinances.

The Custodian's argument in the SOI that request item number 9 is vague, unclear, overly broad and therefore invalid is not persuasive because he addressed item numbers 9, 10 and 11 in the aggregate. If the Custodian had addressed request item number 9 separately, his argument would have been considerably weaker.

Accordingly, because the Complainant's request item number 9 is confined to a specific subject matter that was clearly and reasonably described with sufficient identifying information and was limited to particularized identifiable government records, the request is not vague,

unclear, or overly broad, and the Custodian shall disclose the records responsive to said request. N.J.S.A. 47:1A-5.

The Complainant's request item number 10 also seeks records concerning the same City Ordinances listed in request item number 9; however, this request is considerably broader in scope because it seeks correspondence, letters, e-mails, reports, memorandums and notes authored by numerous City officials discussing the Ordinances. In order to fulfill this type of request, the Custodian would have to research all City files for an undetermined period of time in an effort to locate all correspondence responsive to the request. This would be a daunting task, and one not required under the law because "…OPRA does not countenance open-ended searches of an agency's files." MAG at 549. As such, the Complainant's request is invalid under OPRA.

Moreover, with respect to the requested e-mails, the GRC established criteria deemed necessary to specifically identify an e-mail communication in Elcavage v. West Milford Township (Passaic), GRC Complaint No. 2009-07 (April 8, 2010). In Elcavage, the Council determined that "[i]n accordance with MAG, and its progeny, in order to specifically identify an e-mail the OPRA request 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) identification of the sender and/or the recipient thereof." Id.

Here, it is questionable whether the Complainant adequately identified the content and/or subject of the requested e-mails by merely stating that they discussed the referenced Ordinances. However, the Complainant failed to identify the specific date or range of dates during which the e-mails were transmitted, and also failed to identify the sender and/or the recipient of said e-mails. The person who authored a communication may not necessarily have been the sender and/or the recipient, as frequently happens when a communication prepared by a third party is an attachment to an e-mail. Therefore, the Complainant's request for e-mails in item numbers 10 and 11 is also overly broad and invalid. Elcavage, 2009-07.

Request item number 11 is narrower than request item number 10 only to the extent that it seeks records authored by one named individual, rather than several. This request still seeks the same extensive types of records, and as such is invalid for the same reasons as request item number 10.

Therefore, the Complainant's request items numbered 10 and 11 are invalid because they fail to seek identifiable government records. MAG, 375 N.J. Super. 534 at 546; Bent, 381 N.J. Super. 30 at 37; N.J. Builders Ass'n, 390 N.J. Super. 166 at 180; Schuler, GRC 2007-151. Thus, the Custodian did not unlawfully deny access to said request items. N.J.S.A. 47:1A-6.

Knowing & Willful

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

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

2. Because the Custodian failed to provide the Complainant with a detailed lawful basis for denying request item number 3, and failed to direct the Complainant with reasonable clarity to the specific location of the ustream video in responding to request item number 5, the Custodian's response to these two request items was insufficient. N.J.S.A. 47:1A-5(g). *See also* DeAppolonio v. Borough of Deal (Monmouth), GRC Complaint No. 2008-62 (September 2009); Rodriguez v. Kean University, GRC Complaint No. 2013-69 (March 2014).

3. Pursuant to Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the records that Councilwoman Mason determined are responsive to request item number 3, as well as an *in camera* review of any records responsive to request item number 3 that may be in the possession of Council members Castellano, Occhipinti, and Cunningham. The *in camera* review is necessary to determine if the records are government records as defined in OPRA, and if so, to determine the validity of the Custodian's assertion that the records contain ACD material exempt from access pursuant to N.J.S.A. 47:1A-1.1.

4. **The Custodian must deliver[9] to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see paragraph 3 above), a document or redaction index[10], as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,[11] that the records provided are the**

[9] The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.
[10] The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.
[11] "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order. **If the Custodian determines that Council members Castellano, Occhipinti, and Cunningham do not have in their possession any records responsive to request item number 3, the Custodian shall also include a legal certification to that effect.**

5. The Custodian must (a) obtain any presentation materials used at the December 18, 2013 hearing, including any exhibits, Power Point presentation materials, and handouts from any Council members that may have such records in their possession, regardless of the manner in which it was distributed; and/or (b) obtain said presentation materials from Princeton Hydro, LLC and/or RCQuinn Consulting, Inc. Upon obtaining the records, if any, the Custodian shall disclose those records to the Complainant. N.J.S.A. 47:1A-5.

6. **The Custodian shall comply with paragraph 5 above within five (5) business days from receipt of the Council's Interim Order with any 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. In the event no Council members have such records in their possession, and/or the records were not made, maintained, or kept on file by a third party on behalf of the City in the course of its official business, the Custodian shall submit a legal certification to that effect in lieu of his obligation pursuant to paragraph 5 above.**[12]

7. Because the Complainant's request item number 9 is confined to a specific subject matter that was clearly and reasonably described with sufficient identifying information and was limited to particularized identifiable government records, the request is not vague, unclear, or overly broad, and the Custodian shall disclose the records responsive to said request. N.J.S.A. 47:1A-5.

8. **The Custodian shall comply with paragraph 7 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.**[13]

9. The Complainant's request items numbered 10 and 11 are invalid because they fail to seek identifiable government records. MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30 (App. Div. 2005), N.J. Builders Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166 (App. Div. 2007); Schuler v. Borough of

[12] See applicable footnotes in paragraph 4.
[13] See applicable footnotes in paragraph 4.

Bloomsbury, GRC Complaint No. 2007-151 (February 2009). Thus, the Custodian did not unlawfully deny access to said request items. N.J.S.A. 47:1A-6.

10. 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.

11. 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.
Acting Executive Director

November 10, 2014