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

FINAL DECISION

January 26, 2016 Government Records Council Meeting

Harry B. Scheeler, Jr.
Complainant
v.
Galloway Township (Atlantic)
Custodian of Record

Complaint No. 2015-1 and 2015-22

At the January 26, 2016 public meeting, the Government Records Council ("Council") considered the January 19, 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 the Complainant's Counsel has failed to establish in her request for reconsideration of the Council's October 27, 2015 Final Decision that either: 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The Complainant's Counsel failed to establish that the complaint should be reconsidered based on a mistake. The Complainant's Counsel has also failed to show that the Council acted arbitrarily, capriciously, or unreasonably. Specifically, the Complainant's Counsel did not provide any new and compelling arguments to prove that the Council made a mistake in its final determination. Thus, the Complainant Counsel's request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk's Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the
Government Records Council
On The 26th Day of January, 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: January 29, 2016

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Reconsideration
Supplemental Findings and Recommendations of the Executive Director
January 26, 2016 Council Meeting

Harry B. Scheeler, Jr.[1] **GRC Complaint No. 2015-1 and 2015-22**[2]
Complainant

v.

Galloway Township (Atlantic)[3]
Custodial Agency

Records Relevant to Complaint: Electronic copies via e-mail of Galloway Township's ("Township") settlement agreement with Mr. Steve Bonanni.

Custodian of Record: Kelli Danieli
Request Received by Custodian: November 20, 2014, and December 22, 2014
Response Made by Custodian: November 20, 2014, and December 29, 2014
GRC Complaint Received: January 5, 2015, and January 29, 2015

Background

October 27, 2015 Council Meeting:

At its October 27, 2015 public meeting, the Council considered the October 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. The Custodian did not unlawfully deny access to the "Release and Settlement Agreement" at the time of the Complainant's November 20, 2014, OPRA request because the evidence supports that the Township had not yet executed and finalized a settlement at that time. N.J.S.A. 47:1A-6; Paff v. City of Union City (Hudson), GRC Complaint No. 2012-262 (August 2013); Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2012-328 (August 2013).

2. The Custodian did not unlawfully deny access to the "Release and Settlement Agreement" because, notwithstanding initially denying access to the records, she provided same to the Complainant on January 2, 2015, in response to his OPRA

[1] Represented by Candida J. Griffin, Esq., of Pashman, Stein, PC (Hackensack, NJ). The Complainant notified the GRC of Ms. Griffin's representation on October 30, 2015.
[2] The GRC has consolidated these complaints for adjudication because of the commonality of the parties and issues.
[3] Represented by Michael J. Fitzgerald, Esq., of Fitzgerald, McGroarty & Malinsky (Linwood, NJ).

request. N.J.S.A. 47:1A-6. The Council should decline to determine whether the "Release" was exempt at the time of the Complainant's December 22, 2014 OPRA request, because the issue was mooted by disclosure.

Procedural History:

On October 29, 2015, the Council distributed its Final Decision to all parties. On October 30, 2015, the Complainant stated that he intended to appeal the Council's decision but first wanted to exhaust all administrative remedies. To this end, the Complainant requested additional time to submit a request for reconsideration. On November 2, 2015, the GRC granted the Complainant's request for an extension until November 23, 2015.

On November 23, 2015, the Complainant's Counsel filed a request for reconsideration of the Council's October 27, 2015 Final Decision based on a mistake.

The Complainant's Counsel contended that the GRC erred by determining that the Custodian did not unlawfully deny access to the requested "Release." Counsel further contended that the GRC erred by determining that the "Release" was subject to the ACD exemption as a draft document. Counsel argued that the "Release" only required Mr. Bonnani's signature because no other signature blocks were included thereon. Further, Counsel asserted that Mr. Bonnani had received and cashed a settlement check prior to the Complainant's first (1st) OPRA request. Counsel argued that Mr. Bonnani's signature on the "Release" and the Township's subsequent issuance of a check proves that the "Release" was not pre-decisional in nature. Counsel also refuted that any of the evidentiary factors that the GRC relied on in making its determination outweighed the foregoing. Moreover, Counsel alleged that the Council's decisions in Paff, GRC 2012-262, and Kohn, GRC 2012-328, were inapposite to the facts of this complaint. Counsel thus requested that the GRC reconsider its decision and determine that the Custodian knowingly and willfully denied access to the responsive record.

Counsel next argued that the Complainant should be considered a prevailing party entitled to an award of attorney's fees. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Counsel contended that the Complainant made a valid OPRA request and was unlawfully denied access to the responsive record. Counsel requested that the GRC, in reconsidering that the Custodian unlawfully denied access to the responsive record, also hold that the Complainant was a prevailing party.

Analysis

Reconsideration

Pursuant to N.J.A.C. 5:105-2.10, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. Requests must be in writing, delivered to the Council, and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. N.J.A.C. 5:105-2.10(a) – (e).

In the matter before the Council, the Complainant's Counsel filed the request for reconsideration of the Council's October 27, 2015 Final Decision on November 23, 2015, the last day of the extended deadline to submit same.

Applicable case law holds that:

> "A party should not seek reconsideration merely based upon dissatisfaction with a decision." D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D'Atria, . . . 242 N.J. Super. at 401. "Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement." Ibid.

In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

Here, the Complainant's Counsel sought reconsideration of the Council's decision largely on grounds already asserted in the Complainant's Denial of Access Complaints. Additionally, Counsel added that the "Release" could not have been in "draft" form because the Township had already decided to settle the complaint and pay Mr. Bonnani prior to any resolutions. The GRC does not find this argument compelling, as it looks to its interpretation of a finalized settlement agreement in Paff, GRC 2012-262, Kohn, GRC 2012-328, and all evidence provided as part of the initial adjudication.

Moreover, even if the GRC were to reconsider and find that the Custodian violated OPRA, the Complainant would not be considered a prevailing party, as these complaints did not bring about a change, voluntarily or otherwise, in the Custodian's conduct. Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, there is no causal nexus between the filing of these complaints and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, the Township disclosed the record prior to the filing of either complaint. *See* Knaust v. Twp. of Frankford (Sussex), GRC Complaint No. 2008-256 (September 2009).

As the moving party, the Complainant's Counsel was required to establish either of the necessary criteria set forth above: either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. *See* Cummings, 295 N.J. Super. at 384. The Complainant's Counsel failed to establish that the complaint should be reconsidered based on a mistake. The Complainant's Counsel has also failed to show that the Council acted arbitrarily, capriciously, or unreasonably. *See* D'Atria, 242 N.J. Super. at 401. Specifically, the Complainant's Counsel did

not provide any new and compelling arguments to prove that the Council made a mistake in its final determination. Thus, the Complainant Counsel's request for reconsideration should be denied. Cummings, 295 N.J. Super. at 384; D'Atria, 242 N.J. Super. at 401; Comcast, 2003 N.J. PUC at 5-6.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Complainant's Counsel has failed to establish in her request for reconsideration of the Council's October 27, 2015 Final Decision that either: 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The Complainant's Counsel failed to establish that the complaint should be reconsidered based on a mistake. The Complainant's Counsel has also failed to show that the Council acted arbitrarily, capriciously, or unreasonably. Specifically, the Complainant's Counsel did not provide any new and compelling arguments to prove that the Council made a mistake in its final determination. Thus, the Complainant Counsel's request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

Reviewed By: Joseph D. Glover
Executive Director

January 19, 2016

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

CHRIS CHRISTIE
Governor

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FINAL DECISION

October 27, 2015 Government Records Council Meeting

Harry B. Scheeler, Jr.
Complainant
v.
Galloway Township (Atlantic)
Custodian of Record

Complaint Nos. 2015-1 and 2015-22

At the October 27, 2015 public meeting, the Government Records Council ("Council") considered the October 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, finds that:

1. The Custodian did not unlawfully deny access to the "Release and Settlement Agreement" at the time of the Complainant's November 20, 2014, OPRA request because the evidence supports that the Township had not yet executed and finalized a settlement at that time. N.J.S.A. 47:1A-6; Paff v. City of Union City (Hudson), GRC Complaint No. 2012-262 (August 2013); Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2012-328 (August 2013).

2. The Custodian did not unlawfully deny access to the "Release and Settlement Agreement" because, notwithstanding initially denying access to the records, she provided same to the Complainant on January 2, 2015, in response to his OPRA request. N.J.S.A. 47:1A-6. The Council should decline to determine whether the "Release" was exempt at the time of the Complainant's December 22, 2014 OPRA request, because the issue was mooted by disclosure.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk's Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the
Government Records Council
On The 27th Day of October, 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: October 29, 2015

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Findings and Recommendations of the Executive Director
October 27, 2015 Council Meeting

Harry B. Scheeler, Jr.[1] **GRC Complaint No. 2015-1 and 2015-22**[2]
Complainant

v.

Galloway Township (Atlantic)[3]
Custodial Agency

Records Relevant to Complaint: Electronic copies via e-mail of Galloway Township's ("Township") settlement agreement with Mr. Steve Bonanni.

Custodian of Record: Kelli Danieli
Request Received by Custodian: November 20, 2014, and December 22, 2014
Response Made by Custodian: November 20, 2014, and December 29, 2014
GRC Complaint Received: January 5, 2015, and January 29, 2015

Background[4]

Request and Response:

On November 20, 2014, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On the same day, the Custodian responded in writing, stating that the requested settlement agreement has not yet been executed.

On December 22, 2014, the Complainant submitted a second (2nd) OPRA request to the Custodian seeking the above-mentioned records.[5] On December 29, 2014, the Custodian responded, advising that the settlement agreement had not yet been executed.

On January 1, 2015, the Complainant e-mailed Custodian's Counsel, stating that an unidentified individual advised him that the Township of Galloway ("Township") released a check to Mr. Bonnani. The Complainant questioned how the Township could have sent Mr. Bonanni a check if there was no executed settlement agreement. On January 2, 2015, the Custodian responded in writing, advising the Complainant that Mr. Birchmeier advised her that

[1] No legal representation listed on record.
[2] The GRC has consolidated these complaints for adjudication because of the commonality of the parties and issues.
[3] Represented by Michael J. Fitzgerald, Esq., of Fitzgerald, McGroarty & Malinsky (Linwood, NJ).
[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 sought additional records that are not at issue in this complaint.

the settlement agreement is now final; henceforth, she was providing the "Release and Settlement Agreement," ("Release") to the Complainant.

Denial of Access Complaint:

On January 5, 2015, the Complainant filed a Denial of Access Complaint for GRC 2015-01 with the Government Records Council ("GRC"). The Complainant asserted that, notwithstanding information from an unidentified source that the Township issued a check to Mr. Bonanni, the Custodian denied him access to the responsive agreement on three (3) occasions before providing same on January 2, 2015. The Complainant contended that the date on the "Release," November 4, 2014, and the Custodian's explanation upon disclosure indicated that she intentionally withheld the record at the direction of Mr. Birchmeier.

The Complainant contended that OPRA requires a custodian to provide the specific lawful basis for denying access to records but does not permit a custodian to lie about the existence of same. Further, the Complainant stated that the Appellate Division has already held that the public has an absolute right to settlement agreements. Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506, 517 (App. Div. 2010). The Complainant also stated that pending litigation is not a lawful basis for a denial of access. Darata v. Monmouth Cnty. Bd. of Chosen Freeholders, GRC Complaint No. 2009-312 (February 2011).

The Complainant alleged that the Custodian intentionally withheld the "Release" due to "issues" while erroneously advising him that it was not "executed." The Complainant contended that Mr. Bonanni's signature date on the "Release" clearly contradicts the Custodian's responses. The Complainant argued that the Custodian's own statements and contrary evidence prove that she knowingly and willfully denied access to the "Release." The Complainant thus requested that the GRC: 1) determine that the Custodian unlawfully denied access to the "Release;" and 2) determine that the Custodian knowingly and willfully violated OPRA and is subject to the civil penalty pursuant to N.J.S.A. 47:1A-11.

Statement of Information:[6]

On January 26, 2015, the Custodian filed a Statement of Information ("SOI") for GRC 2015-01. The Custodian certified that she received the Complainant's OPRA request on November 20, 2014. The Custodian affirmed that she contacted Mr. Birchmeier, who advised that no settlement was finalized. The Custodian certified that she responded in writing on the same day, advising the Complainant that the settlement was not yet finalized. The Custodian certified that the Complainant submitted his OPRA request again on December 22, 2014, to which she responded on December 29, 2014, advising that the settlement was not finalized. The Custodian certified that on December 30, 2014, Custodian's Counsel contacted Mr. Birchmeier, who advised that the settlement was final, although he was still waiting to receive the Stipulation of Dismissal. The Custodian affirmed that, based on Mr. Birchmeier's advice, she disclosed the settlement agreement to the Complainant on January 2, 2015. The Custodian noted that the

[6] Because the GRC consolidated these complaints, it did not require the Custodian to submit separate Statements of Information for each complaint.

Township filed its "Stipulation of Dismissal" with the court on December 8, 2014, and is still awaiting a response.

The Custodian averred that the "Release" pertained to litigation with Mr. Bonanni, the former Township Manager, which included claims of defamation. The Custodian stated that, not surprisingly, the litigation was extremely contentious and adversely affected the implementation of the settlement. The Custodian affirmed that Township Council met with Mr. Birchmeier in closed session to discuss a settlement and subsequently adopted a resolution authorizing the settlement on November 11, 2014. The Custodian certified that the resolution authorized the Mayor to execute a settlement agreement (attested to by the Custodian); however, the resolution made the settlement contingent on the resolution of all issues and the complete satisfaction of all issues set forth in the litigation. The Custodian noted that Mr. Bonanni signed the "Release" on November 4, 2011, prior to the passage of the resolution, because his signature was required to begin the process of processing a payment and ultimately settling the litigation.

The Custodian stated that, almost immediately, the Township had trouble implementing a settlement based on a disagreement between the parties about the tax obligation. The Custodian affirmed that the Township ultimately cut a replacement check; however, the Chief Financial Officer ("CFO") questioned whether the Township could add the payment to the Council's bill list based on the confidentiality provision in the agreement. The Custodian noted that Custodian's Counsel rectified the issue by advising in a November 17, 2014, e-mail that Mr. Bonanni was the only party beholden to the confidentiality provision in the "Release," but that "the settlement amount and, in fact, the *settlement documents* will be public records" (emphasis added).

The Custodian asserted that, based on the circumstances presented, she lawfully denied access to the "Release" on both occasions because it was a considered advisory, consultative or deliberative ("ACD") draft document at that time. *See* N.J.S.A. 47:1A-1.1; O'Shea v. West Milford Bd. of Educ., GRC Complaint No. 2004-93;[7] Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2012-328 (August 2013). The Custodian argued that she reasonably waited for Mr. Birchmeier's approval to disclose the "Release." The Custodian asserted that the "Release," signed only by Mr. Bonanni, was not truly a settlement agreement. The Custodian noted that an agreement requires both parties' signatures and that the Township's resolution required both the Mayor and Mr. Bonanni's signature, as well as for the Custodian to attest to the Mayor's signature. The Custodian thus asserted that she reasonably denied access to the record because the "Release" only contained Mr. Bonanni's signature and Mr. Birchmeier advised her and Custodian's Counsel that the settlement was not final. The Custodian noted that she first viewed the "Release" on January 2, 2015, at the time that she sent same to the Complainant.

Finally, the Custodian asserted that, even if the GRC determined that she violated OPRA, said actions were not knowing and willful. The Custodian asserted that the facts actually demonstrate that the Custodian acted in good faith by relying on legal advice in responding to the Complainant. *See* Bart v. City Paterson Hous. Auth., 403 N.J. Super. 609, 619 (App. Div. 2008).

[7] Affirmed on appeal in O'Shea v. West Milford Bd. of Educ., 391 N.J. Super. 534 (App. Div. 2007).

Amended Denial of Access Complaint:

On January 27, 2015, the Complainant amended his Denial of Access Complaint to name Custodian's Counsel and Mr. Birchmeier as parties that participated in unlawfully denying him access to the "Release." N.J.A.C. 5:105-2.3(h). The Complainant alleged OPRA provides that any public official, officer or employee found to have knowingly and willfully violated the law can be fined. N.J.S.A. 47:1A-11.

The Complainant also objected to Custodian Counsel's participation as counsel to the Custodian because he is now a named party. The Complainant contended that Custodian Counsel's representation was a conflict of interest because he actively participated in unlawfully denying access to the "Release." Specifically, the Complainant noted that the Custodian copied Custodian's Counsel on her November 20, 2014, response and at no point did he attempt to correct same. The Complainant further alleged that Custodian's Counsel also never clarified that an agreement existed but was exempt under OPRA. The Complainant argued that he did not receive the "Release" until after he alerted Custodian's Counsel to his inside knowledge of the agreement on January 1, 2015. The Complainant contended that the facts here support that the Custodian, Counsel, and Mr. Birchmeier all conspired unlawfully to withhold the responsive record.

Denial of Access Complaint:

On January 29, 2015, the Complainant filed a Denial of Access Complaint for GRC 2015-22 with the GRC. The Complainant reasserted all arguments from his Denial of Access Complaint filing for GRC 2015-01. Moreover, the Complainant alleged that the evidence of record supported that the responsive "Release" was finalized well before the December 30, 2014, date asserted by the Custodian. Specifically, the Complainant provided a copy of the check issued to Mr. Bonanni, which he cashed many weeks prior to the Complainant's second (2nd) OPRA request. The Complainant contended that the Township could not claim that the settlement agreement was still pending long after Mr. Bonanni cashed the settlement check.

Additionally, the Complainant named Custodian's Counsel and Mr. Birchmeier as parties to the complaint, noting that OPRA's knowing and willful violation applied to "[a] public official, officer, employee or custodian . . ." N.J.S.A. 47:1A-11.

Supplemental Statement of Information:

On February 5, 2015, the Custodian submitted additional letters from Mr. Birchmeier to Summit Risk Services (the Township's insurance servicing agency) and Benjamin Brenner, Esq. (Mr. Bonanni's attorney), attaching a second partial Stipulation of Dismissal filed with the court. Therein, Mr. Birchmeier confirmed that the litigation between Mr. Bonanni and the Township was concluded. The Custodian certified that these letters were not available at the time that she filed the SOI; accordingly, she was providing same to the GRC as an SOI amendment.

Amended Denial of Access Complaint Response:

On February 12, 2015, the Custodian's Counsel responded to the Complainant's Amended Denial of Access Complaint. First, Counsel objected to the Complainant's attempts to name both Mr. Birchmeier and himself as parties to the complaint. Counsel asserted that the Complainant failed to support with any factual evidence the allegation of a conspiracy to deny access to the record.

Regarding Mr. Birchmeier, Counsel stated that the Township's insurance carrier retained him for the limited purpose of representing the Township in Mr. Bonanni's litigation; however, he did not represent nor have the authority to represent the Township on OPRA matters. Counsel asserted that Mr. Birchmeier simply answered the Custodian's (and his) inquiries regarding the Complainant's OPRA requests, and the evidence does not support that he directed, instructed, or even encouraged the Custodian to deny access to the responsive record.

Regarding himself, Counsel rejected the Complainant's theory that he had an obligation to interject into the process if the Custodian was wrong and to clarify that a record existed. Counsel asserted that, even if such an obligation existed, it surely does not amount to a knowing and willful violation. Counsel also argued that the Complainant failed to provide any evidence that he possessed actual knowledge or awareness regarding the status of the pending settlement agreement. Counsel also noted that the confusion regarding the composition of the "settlement agreement," as set forth in the resolution he composed for the Township Council and the "Release" actually exacerbated the issue of disclosure. Counsel noted that his November 17, 2014, e-mail exchange with the CFO about the confidentiality provision and reference to future "settlement documents" supported this confusion.

Additionally, Counsel contended that the Complainant failed to prove that he intentionally caused the Custodian to withhold responsive records. Counsel also asserted that it was entirely inappropriate for the Complainant to interfere with the attorney-client relationship between himself and the Township. Counsel noted that the Complainant has no knowledge of the advice provided to the Township and that any issues of incorrect advice are between the client and attorney, not a matter for the GRC.

Regarding disqualification of counsel, Counsel stated that the New Jersey Courts have recognized that disqualification of counsel should be used sparsely. O Builders and Assoc., Inc. v. Yuna Corp. of NJ, 206 N.J. 109 (2011)(*citing* Cavallaro v. Jane Jamco Prop. Mgmt., 334 N.J. Super. 557, 572 (App. Div. 2000)). Counsel reiterated that the Complainant's attempt to disqualify him was nothing more than a brazen effort to interfere in the attorney-client relationship. Further, Counsel asserted that, whether intended or not, the Complainant's claim potentially could have intimidated himself and his representation, thus imposing on the Township significant inconvenience and additional costs. *See* LoBiondo v. Schwartz, 199 N.J. 62, 113 (2009).

Counsel asserted that the evidence of record did not support that a conspiracy to deny access to the responsive record existed. Counsel asserted that the Custodian was under no obligation to disclose the responsive agreement until the settlement was finalized. Counsel noted

that the Custodian provided the responsive document to the Complainant on the seventh (7th) business day after receipt of the December 22, 2014, OPRA request (and immediately after Mr. Birchmeier advised that the litigation was finalized). Thus, Counsel requested that the GRC reject the Complainant's attempt to name Mr. Birchmeier and himself as parties to this complaint based on a lack of evidence.

Analysis

Unlawful Denial of Access

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request "with certain exceptions." N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

Initially, the parties are not disputing that settlement agreements are typically subject to disclosure.

November 20, 2014 OPRA request

In Paff v. City of Union City (Hudson), GRC Complaint No. 2012-262 (August 2013), the Council addressed the disclosability of settlements agreements and when they become finalized. There, although the custodian's response was insufficient, the Council declined to require disclosure of the requested settlement agreement because same was not finalized and completed until November 26, 2012. More specifically, plaintiffs signed the subject agreement on October 10, 2012, but the settlement agreement was not final and subject to disclosure until November 26, 2012, when a representative from the City's insurance carrier executed the form. Thus, at the point that both parties' signatures appeared on the form, the GRC was satisfied that the agreement was finalized. The Council's position on this issue was supported in Paff v. City of Union City (Hudson), GRC Complaint No. 2013-195 (Interim Order dated January 28, 2014), regarding a resubmitted request for the same agreement at issue in Paff, GRC 2012-262. There, the Council determined that the custodian unlawfully denied access to the settlement agreement because it was "finalized and executed" on November 26, 2012.

Moreover, in Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2012-328 (August 2013), the Council addressed the date on which a settlement agreement became finalized in order to determine whether the requested letter met the "inter-agency or intra-agency advisory, consultative or deliberative" ("ACD") exemption at N.J.S.A. 47:1A-1.1. There, the complainant disputed the custodian's denial, arguing that the settlement agreement was finalized on December 3, 2012, when the Mayor signed same; thus, the custodian should have provided the requested letter because it was no longer ACD in nature. It should be noted that the plaintiff signed the agreement in August 2012. The Council held that the custodian properly denied access to the letter because the agreement was not finalized at the time of the complainant's OPRA request but noted that the evidence of record did not "reveal a fully-executed agreement on December 3, 2012" because not all parties had signed the agreement. Id. at 6.

Thus, the Council's position on settlement agreements is that same are not finalized until all parties have executed the agreement. The GRC will note that, in all instances above, the settlement agreements at issue were titled "Confidential Settlement Agreement and Release" or "Settlement Agreement and Release," which is similar or exact to the title of the "Release."

Here, Mr. Bonanni signed the "Release" on November 4, 2014, prior to the Township authorizing the Mayor to settle any litigation by resolution on November 11, 2014. Additionally, the resolution does provide for conditions: 1) all outstanding litigation issues must be resolved; and 2) both the Mayor and Custodian must execute the agreement. The resolution also refers to the settlement as "proposed." The evidence reveals that, at the time of the Complainant's OPRA request, nine (9) days after passage of the resolution and sixteen (16) days after Mr. Bonanni signed the "Release," the Township had not finalized and executed a settlement agreement with Mr. Bonanni. This is consistent with the Council's prior reasoning on settlement agreements as discussed in Paff, GRC 2012-262, and Kohn, 2012-328.

Notwithstanding that the Custodian ultimately disclosed the "Release" because it was the only document memorializing a settlement, the GRC is satisfied that she reasonably would have denied access to the "Release." Specifically, the Custodian certified in the SOI that she had not seen the "Release" at the time that she disclosed same on January 2, 2015. The Custodian certified further that she believed she would have been made aware of a settlement agreement because she is required to witness the Mayor's execution of same per the November 11, 2014, resolution. Moreover, Mr. Birchmeier advised that no settlement had been reached. Further, the Custodian's Counsel's e-mail, dated November 17, 2014, also supports that the Township has not finalized a settlement agreement at that time. Finally, Mr. Birchmeier filed a partial Stipulation of Dismissal on December 8, 2014, over two (2) weeks after the Complainant's OPRA request. Contrary to the Complainant's assertion that same was final when, at the very least, Mr. Bonanni cashed the settlement check, the evidence supports that no settlement was finalized at the time of his first OPRA request.

Accordingly, the Custodian did not unlawfully deny access to the "Release" at the time of the Complainant's November 20, 2014, OPRA request because the evidence supports that the Township had not yet executed and finalized a settlement at that time. N.J.S.A. 47:1A-6; Paff, GRC 2012-262; Kohn, GRC 2012-328.

December 22, 2014 OPRA request

At the time of the Complainant's second OPRA request, both the Custodian and Custodian's Counsel were still under the impression that the Township had not executed and finalized a settlement agreement. Although Mr. Birchmeier submitted a partial Stipulation of Dismissal to the courts on December 8, 2014, the Township had not received the document as "filed" at the time of the Complainant's OPRA request. Thus, the Custodian initially denied access, stating that no settlement agreement had been executed. Mr. Birchmeier confirmed this fact to the Custodian's Counsel on December 30, 2014. However, on December 31, 2014, still within the seven (7) business day time frame, Mr. Birchmeier provided settlement documents to the Custodian and advised that the Township could consider the settlement final. On January 2,

2015, the seventh (7th) business day after receipt of the request, the Custodian disclosed the "Release" to the Complainant via e-mail.

The GRC first notes that only Mr. Bonanni signed the "Release." Thus, similar to the settlement agreement in Kohn, 2012-328, it is unclear whether it actually served as the official settlement agreement at the time of disclosure. Moreover, Mr. Birchmeier did not file a second (2nd) Stipulation of Dismissal, received and filed by the courts on January 15, 2015. This filing likely signified the actual finalizing of a settlement between Mr. Bonanni and the Township, as intimated in Mr. Birchmeier's January 26, 2015, letter to all parties participating in that litigation. Notwithstanding the foregoing, and although the Custodian initially denied access to the "Release," she ultimately disclosed same to the Complainant prior to the end of the seventh (7th) business day. This disclosure also predated the filing of GRC 2015-22.

A plain reading of OPRA thus supports that the Custodian timely provided access to the record within the seven (7) business day time frame by providing access to the responsive record. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i). Although the Custodian initially denied access, the GRC is satisfied that the Custodian did not unlawfully deny access to the "Release" because she released same still within the statutorily mandated response time frame.

Accordingly, the Custodian did not unlawfully deny access to the "Release" because, notwithstanding initially denying access to the records, she provided same to the Complainant on January 2, 2015, in response to his OPRA request. N.J.S.A. 47:1A-6. The Council should decline to determine whether the "Release" was exempt at the time of the Complainant's December 22, 2014 OPRA request, because the issue was mooted by disclosure.

Raised Attorney Issues

The GRC will briefly address the issues the Complainant raised in his January 27, 2015, amended complaint for GRC 2015-01 and complaint for GRC 2015-22. Within these filings, the Complainant objected to Custodian's Counsel's representation in this complaint, requested that the GRC name Custodian's Counsel and Mr. Birchmeier as parties to this complaint, and requested that the GRC determine that both knowingly and willfully violated OPRA.

However, the evidence of record does not indicate that either the Custodian's Counsel or Mr. Birchmeier should be disqualified in this complaint. Additionally, the evidence does not support that either the Custodian's Counsel or Mr. Birchmeier should be named in this complaint. Specifically, the Complainant's accusations that both somehow conspired with the Custodian to deny access are simply not supported by the facts. In fact, the November 11, 2014, resolution, correspondence to and from the parties regarding Mr. Bonanni's settlement agreement, and various filings pertaining to the litigation support that no settlement agreement was finalized at the time of either of the Complainant's OPRA requests.

Finally, the GRC notes that the Council has already held on whether it has the authority to fine a licensed attorney in the State. Specifically, in Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-76 (June 2015), the Council rejected complainant

counsel's argument that the custodian's counsel knowingly and willfully violated OPRA. Therein, the Council stated that:

> [It] has already held that it does not have the authority to fine a licensed attorney. Blanchard v. Rahway Bd. of Educ., GRC Complaint No. 2003-57 (October 2003). The Courts have ruled that such an issue is reviewable only by the Supreme Court. N.J. Court Rule 1:20-1(a); Robertelli v. NJ Office of Attorney Ethics, 2015 N.J. Super. Unpub. LEXIS 213 (App. Div. 2015).

Id. at 7.

Based on the foregoing, the Council has no authority to fine a licensed attorney – who is not the designated custodian of records – even if the appearance of a knowing and willful violation is present, which does not appear to be the case here. However, the GRC stresses that the Council has not been tasked with determining whether a licensed attorney, who serves as the designated custodian of records, can be fined for a knowing and willful violation of OPRA.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not unlawfully deny access to the "Release and Settlement Agreement" at the time of the Complainant's November 20, 2014, OPRA request because the evidence supports that the Township had not yet executed and finalized a settlement at that time. N.J.S.A. 47:1A-6; Paff v. City of Union City (Hudson), GRC Complaint No. 2012-262 (August 2013); Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2012-328 (August 2013).

2. The Custodian did not unlawfully deny access to the "Release and Settlement Agreement" because, notwithstanding initially denying access to the records, she provided same to the Complainant on January 2, 2015, in response to his OPRA request. N.J.S.A. 47:1A-6. The Council should decline to determine whether the "Release" was exempt at the time of the Complainant's December 22, 2014 OPRA request, because the issue was mooted by disclosure.

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Executive Director

October 20, 2015