



**State of New Jersey**  
GOVERNMENT RECORDS COUNCIL  
101 SOUTH BROAD STREET  
PO BOX 819  
TRENTON, NJ 08625-0819

**JON S. CORZINE**  
*Governor*

**CHARLES A. RICHMAN**  
*Acting Commissioner*

**FINAL DECISION**

**November 18, 2009 Government Records Council Meeting**

Joe Ungaro  
(on behalf of The Daily Record)  
Complainant

Complaint No. 2008-115

v.

Town of Dover (Morris)  
Custodian of Record

At the November 18, 2009 public meeting, the Government Records Council (“Council”) considered the November 10, 2009 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:

1. Because the Custodian provided the Complainant with a copy of the requested record without redactions, and provided certified confirmation of compliance to the GRC’s Executive Director within five (5) business days from receipt of the Council’s Order, the Custodian has complied with the Council’s Interim Order dated September 30, 2009.
2. Although the Custodian unlawfully denied access to the requested settlement agreement, there is no evidence in the record that suggests the Custodian’s actions were more than negligent conduct, had a positive element of conscious wrongdoing, or intentional and deliberate, with knowledge of their wrongfulness. Therefore, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA. However, the Custodian’s unlawful denial of access appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

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 18<sup>th</sup> Day of November, 2009

Robin Berg Tabakin, Chair  
Government Records Council

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

Harlynn A. Lack, Secretary  
Government Records Council

**Decision Distribution Date: November 23, 2009**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
November 18, 2009 Council Meeting**

**Joe Ungaro<sup>1</sup>  
(On behalf of The Daily Record)<sup>2</sup>  
Complainant**

**GRC Complaint No. 2008-115**

v.

**Town of Dover (Morris)<sup>3</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Separation agreement between the Town of Dover and Bibi Stewart Garvin, Business Administrator, which was approved by the Board of Alderman on June 10, 2008.<sup>4</sup>

**Request Made:** June 12, 2008

**Response Made:** June 23, 2008

**Custodian:** Margaret J. Verga

**GRC Complaint Filed:** June 27, 2008<sup>5</sup>

**Background**

**September 30, 2009**

Government Records Council's ("Council") Interim Order. At its September 30, 2009 public meeting, the Council considered the September 23, 2009 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 confidential settlement agreements entered into by private parties in civil court are subject to public access pursuant to Lederman v. Prudential Life Ins. Co., 385 N.J. Super. 307 (App. Div. 2006), certif. denied, 188 N.J. 353 (2006), Asbury Park Press v. County of Monmouth and Carol Melnick, 406 N.J. Super. 1 (App. Div. 2009), and Verni v. Lanzaro, 404 N.J. Super. 16

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<sup>1</sup> Michael Scholl, on behalf of The Daily Record, actually submitted the OPRA request which is the subject of this complaint. However, Mr. Scholl is no longer an employee of The Daily Record.

<sup>2</sup> No legal representation listed on record.

<sup>3</sup> Represented by David Pennella, Esq., of Pennella & Claps (Dover, NJ).

<sup>4</sup> The Complainant requested an additional record, however, said record is not the subject of this Denial of Access Complaint.

<sup>5</sup> The GRC received the Denial of Access Complaint on said date.

(App. Div. 2008), and because OPRA does not contain any provision which exempts access to records based on confidentiality clauses, as well as because the Custodian has failed to cite to any other legal authority that would exempt the settlement agreement from public access based on the confidentiality clause, the mere fact that the requested agreement contains a confidentiality clause is not a lawful basis for a denial of access under OPRA. As such, the Custodian has failed to bear her burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6. Thus, the Custodian must disclose the requested settlement agreement to the Complainant.

2. Because the requested settlement agreement is subject to public access pursuant to Lederman v. Prudential Life Ins. Co., 385 N.J. Super. 307 (App. Div. 2006), certif. denied, 188 N.J. 353 (2006), Asbury Park Press v. County of Monmouth and Carol Melnick, 406 N.J. Super. 1 (App. Div. 2009), and Verni v. Lanzaro, 404 N.J. Super. 16 (App. Div. 2008), the Council declines to address the Custodian's other raised exemptions.
3. **The Custodian shall comply with item # 1 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<sup>6</sup>, to the Executive Director.**
4. 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.

#### **October 5, 2009**

Council's Interim Order distributed to the parties.

#### **October 9, 2009**

E-mail from Custodian to Complainant. The Custodian states that per the Council's Interim Order, she will make the requested record available upon payment of the \$7.50 copying fee.

#### **October 13, 2009**

Custodian's response to the Council's Interim Order. The Custodian certifies that upon receipt of the Council's Interim Order, she informed the Complainant via e-mail that she would make the requested record available upon payment of the \$7.50 copying fee. The Custodian certifies that Laura Bruno, on behalf of the Complainant, picked up said record from the Custodian's office on October 13, 2009. Additionally, the Custodian certifies that she did not redact any information from said record.

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<sup>6</sup> "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."  
Joe Ungaro (on behalf of The Daily Record) v. Town of Dover (Morris), 2008-115 – Supplemental Findings and Recommendations of the Executive Director 2

## Analysis

### **Whether the Custodian complied with the Council's September 30, 2009 Interim Order?**

The Council's Interim Order dated September 30, 2009 directed the Custodian to disclose the requested settlement agreement to the Complainant and provide certified confirmation of compliance to the GRC's Executive Director within five (5) business days from receipt of the Council's Order.

On October 9, 2009, the fourth (4<sup>th</sup>) business day following the Custodian's receipt of the Council's Interim Order, the Custodian e-mailed the Complainant and made the requested record available upon payment of the \$7.50 copying fee. On October 13, 2009, the fifth (5<sup>th</sup>) business day following the Custodian's receipt of the Council's Interim Order, the Custodian provided the GRC with a legal certification in which the Custodian certified that she made the requested record available to the Complainant, without any redactions, and that the Complainant's representative picked up said record on October 13, 2009.

Therefore, because the Custodian provided the Complainant with a copy of the requested record without redactions, and provided certified confirmation of compliance to the GRC's Executive Director within five (5) business days from receipt of the Council's Order, the Custodian has complied with the Council's Interim Order dated September 30, 2009.

### **Whether the Custodian's actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?**

OPRA states that:

“[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty ...” N.J.S.A. 47:1A-11.a.

OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states:

“... If the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA]...” N.J.S.A. 47:1A-7.e.

The Custodian provided the Complainant with a written response to his OPRA request on the seventh (7<sup>th</sup>) business day after receiving said request. In the Custodian's written response, the Custodian denied access to the requested employment settlement

agreement on the basis that said agreement contains a confidentiality clause. The Council held that:

“[b]ecause confidential settlement agreements entered into by private parties in civil court are subject to public access pursuant to Lederman v. Prudential Life Ins. Co., 385 N.J. Super. 307 (App. Div. 2006), certif. denied, 188 N.J. 353 (2006), Asbury Park Press v. County of Monmouth and Carol Melnick, 406 N.J. Super. 1 (App. Div. 2009), and Verni v. Lanzaro, 404 N.J. Super. 16 (App. Div. 2008), and because OPRA does not contain any provision which exempts access to records based on confidentiality clauses, as well as because the Custodian has failed to cite to any other legal authority that would exempt the settlement agreement from public access based on the confidentiality clause, the mere fact that the requested agreement contains a confidentiality clause is not a lawful basis for a denial of access under OPRA. As such, the Custodian has failed to bear her burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6.”

Additionally, the Council ordered the Custodian to disclose the requested settlement agreement to the Complainant and provide certified confirmation of compliance to the GRC’s Executive Director within five (5) business days from receipt of the Council’s Interim Order. The Custodian complied with the Council’s Order.

Certain legal standards must be considered when making the determination of whether the Custodian’s actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian’s actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian’s actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian’s actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian’s actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996).

Although the Custodian unlawfully denied access to the requested settlement agreement, there is no evidence in the record that suggests the Custodian’s actions were more than negligent conduct, had a positive element of conscious wrongdoing, or intentional and deliberate, with knowledge of their wrongfulness. Therefore, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA. However, the Custodian’s unlawful denial of access appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

## **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian provided the Complainant with a copy of the requested record without redactions, and provided certified confirmation of compliance to the GRC's Executive Director within five (5) business days from receipt of the Council's Order, the Custodian has complied with the Council's Interim Order dated September 30, 2009.
  
2. Although the Custodian unlawfully denied access to the requested settlement agreement, there is no evidence in the record that suggests the Custodian's actions were more than negligent conduct, had a positive element of conscious wrongdoing, or intentional and deliberate, with knowledge of their wrongfulness. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA. However, the Custodian's unlawful denial of access appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

Prepared By: Dara Lownie  
Senior Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

November 10, 2009



**State of New Jersey**  
GOVERNMENT RECORDS COUNCIL  
101 SOUTH BROAD STREET  
PO BOX 819  
TRENTON, NJ 08625-0819

JON S. CORZINE  
Governor

CHARLES A. RICHMAN  
Acting Commissioner

**INTERIM ORDER**

**September 30, 2009 Government Records Council Meeting**

Joe Ungaro  
(on behalf of The Daily Record)  
Complainant  
v.  
Town of Dover (Morris)  
Custodian of Record

Complaint No. 2008-115

At the September 30, 2009 public meeting, the Government Records Council (“Council”) considered the September 23, 2009 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. Because confidential settlement agreements entered into by private parties in civil court are subject to public access pursuant to Lederman v. Prudential Life Ins. Co., 385 N.J. Super. 307 (App. Div. 2006), certif. denied, 188 N.J. 353 (2006), Asbury Park Press v. County of Monmouth and Carol Melnick, 406 N.J. Super. 1 (App. Div. 2009), and Verni v. Lanzaro, 404 N.J. Super. 16 (App. Div. 2008), and because OPRA does not contain any provision which exempts access to records based on confidentiality clauses, as well as because the Custodian has failed to cite to any other legal authority that would exempt the settlement agreement from public access based on the confidentiality clause, the mere fact that the requested agreement contains a confidentiality clause is not a lawful basis for a denial of access under OPRA. As such, the Custodian has failed to bear her burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6. Thus, the Custodian must disclose the requested settlement agreement to the Complainant.
2. Because the requested settlement agreement is subject to public access pursuant to Lederman v. Prudential Life Ins. Co., 385 N.J. Super. 307 (App. Div. 2006), certif. denied, 188 N.J. 353 (2006), Asbury Park Press v. County of Monmouth and Carol Melnick, 406 N.J. Super. 1 (App. Div. 2009), and Verni v. Lanzaro, 404 N.J. Super. 16 (App. Div. 2008), the Council declines to address the Custodian’s other raised exemptions.





3. **The Custodian shall comply with item # 1 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<sup>1</sup>, to the Executive Director.**
4. 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.

Interim Order Rendered by the  
Government Records Council  
On The 30<sup>th</sup> Day of September, 2009

Robin Berg Tabakin, Chair  
Government Records Council

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

Janice L. Kovach, Secretary  
Government Records Council

**Decision Distribution Date: October 5, 2009**

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<sup>1</sup> "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."

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
September 30, 2009 Council Meeting**

**Joe Ungaro<sup>1</sup>**  
**(On behalf of The Daily Record)<sup>2</sup>**  
**Complainant**

**GRC Complaint No. 2008-115**

**v.**

**Town of Dover (Morris)<sup>3</sup>**  
**Custodian of Records**

**Records Relevant to Complaint:** Separation agreement between the Town of Dover and Bibi Stewart Garvin, Business Administrator, which was approved by the Board of Alderman on June 10, 2008.<sup>4</sup>

**Request Made:** June 12, 2008

**Response Made:** June 23, 2008

**Custodian:** Margaret J. Verga

**GRC Complaint Filed:** June 27, 2008<sup>5</sup>

**Background**

**June 12, 2008**

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

**June 23, 2008**

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the seventh (7<sup>th</sup>) business day following receipt of such request. The Custodian states that access to the requested record is denied because the requested separation agreement contains a confidentiality clause.

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<sup>1</sup> Michael Scholl, on behalf of The Daily Record, actually submitted the OPRA request which is the subject of this complaint. However, Mr. Scholl is no longer an employee of The Daily Record.

<sup>2</sup> No legal representation listed on record.

<sup>3</sup> Represented by David Pennella, Esq., of Pennella & Claps (Dover, NJ).

<sup>4</sup> The Complainant requested an additional record, however, said record is not the subject of this Denial of Access Complaint.

<sup>5</sup> The GRC received the Denial of Access Complaint on said date.

**June 27, 2008**

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

- Complainant’s OPRA request dated June 12, 2008
- Custodian’s response to the OPRA request dated June 23, 2008

The Complainant states that during a telephone conversation with the Custodian on June 23, 2008, the Custodian denied the Complainant’s request for the Business Administrator’s separation agreement because said agreement contains a confidentiality clause. The Complainant states that on June 24, 2008 he picked up a letter from the Custodian dated June 23, 2008, confirming said denial.

The Complainant asserts that the separation agreement is a public record because it includes information regarding a severance package given to the Business Administrator, which is paid by public funds.

The Complainant agreed to mediate this complaint.

**July 24, 2008**

Offer of Mediation sent to Custodian.

**July 25, 2008**

Custodian’s signed Agreement to Mediate.

**July 29, 2008**

Complaint transmitted to mediation.

**August 22, 2008**

Complaint referred back to the GRC for adjudication.

**September 2, 2008**

Letter from GRC to Complainant. The GRC asks the Complainant whether he wishes to amend his Denial of Access Complaint in the event that any issues were resolved during the mediation process and no longer require adjudication.<sup>6</sup>

**September 15, 2008**

Request for the Statement of Information sent to the Custodian.

**October 7, 2008**

Letter from GRC to the Custodian. The GRC sends a letter to the Custodian indicating that the GRC provided the Custodian with a request for a Statement of Information on September 15, 2008 and to date has not received a response. Further, the GRC states that if the Statement of Information is not submitted within three (3) business days, the GRC will adjudicate this complaint based solely on the information provided by the Complainant.

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<sup>6</sup> The Complainant did not respond to the GRC’s letter.

**October 8, 2008<sup>7</sup>**

Custodian's Statement of Information ("SOI") with the Complainant's OPRA request dated June 12, 2008 attached.

The Custodian certifies that she received the Complainant's OPRA request on June 12, 2008. The Custodian certifies that she provided the Complainant with a written response to his request on June 23, 2008 in which she denied access to the requested separation agreement on the basis that said agreement contains a confidentiality clause.

The Custodian contends that the requested record is exempt from public access as a personnel record pursuant to N.J.S.A. 47:1A-10. The Custodian also asserts that N.J.S.A. 47:1A-1.1. exempts from public access:

“[i]nformation generated by or on behalf of public employers or public employees in connection with any sexual harassment complaint filed with a public employer, or with any grievance filed by or against an individual, or in connection with collective negotiations, including documents and statements of strategy or negotiating position...”

Additionally, the Custodian claims that because the requested agreement contains a confidentiality clause, the release of said agreement would be a breach of said agreement.

The Custodian also certifies that in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management ("DARM"), separation agreements are required to be maintained permanently.

**July 21, 2009**

Letter from GRC to Custodian. The GRC requests that the Custodian provide a legal certification describing the nature of the requested separation agreement. Additionally, the GRC requests that the Custodian indicate whether the agreement is related to any sexual harassment complaint or grievance filed with the employer or in Superior Court.

**August 7, 2009**

Custodian's Certification. The Custodian certifies that the requested record is not a separation agreement, but rather a settlement agreement. The Custodian certifies that she denied the request on the basis that the record is a personnel record exempt from public access pursuant to N.J.S.A. 47:1A-10. The Custodian states that a similar exemption exists in N.J.S.A. 47:1A-1.1. regarding sexual harassments complaints, grievances, or collective negotiations. Additionally, the Custodian certifies that the settlement agreement contains a confidentiality provision and if the Custodian releases the record, it could be deemed a breach of the agreement. Further, the Custodian certifies that she acted on advice from legal counsel when responding to the OPRA request, and preparing the Statement of Information.

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<sup>7</sup> The Custodian's SOI is dated September 7, 2008 but was submitted to the GRC on October 8, 2008.

### **August 7, 2009**

Letter from GRC to Custodian. The GRC states that the Custodian failed to answer the question posed to her in the GRC's certification request dated July 21, 2009. The GRC reiterates its request for the Custodian to indicate whether the agreement is related to any sexual harassment complaint or grievance filed with the employer or in Superior Court.

### **August 10, 2009**

Custodian's Certification. The Custodian certifies that the requested record is a settlement agreement, not a separation agreement. The Custodian certifies that Bibi Stewart Garvin was not terminated or fired by the municipality. Additionally, the Custodian certifies that the settlement agreement does not relate to any sexual harassment complaint or grievance filed by the employee. The Custodian certifies that the agreement was entered into to avoid possible litigation between the parties relating to the employee's terms of office.

### **August 18, 2009**

Custodian's supplemental certification. The Custodian certifies that she provided the Complainant with information regarding payments made to Bibi Stewart Garvin. The Custodian certifies that the funds paid to Ms. Garvin have not been held confidential once they have been paid and she has provided said to the Complainant.

## **Analysis**

### **Whether the Custodian unlawfully denied access to the requested record?**

OPRA provides that:

"...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*" (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

"... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ... A government record shall not include the following information which is deemed to be confidential for the purposes of [OPRA]... information generated by or on behalf of public employers or public employees in connection

- with any sexual harassment complaint filed with a public employer or
- with any grievance filed by or against an individual or

- in connection with collective negotiations, including documents and statements of strategy or negotiating position...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

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

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

OPRA also provides that:

“...the *personnel* or *pension records* of any individual in the possession of a public agency, including but not limited to records relating to any grievance filed by or against an individual, *shall not be considered a government record* and shall not be made available for public access, *except that an individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefor, and the amount and type of any pension received shall be a government record...*” (Emphasis added). N.J.S.A. 47:1A-10.

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.

In this instant complaint, the Custodian certified that she received the Complainant’s OPRA request on June 12, 2008 and provided a written response to said request on June 23, 2008, the seventh (7<sup>th</sup>) business day after receiving said request. In the Custodian’s written response, the Custodian denied access to the requested employment separation agreement, which the Custodian clarifies in her certification dated August 7, 2009 is a settlement agreement, on the basis that said agreement contains a confidentiality clause. The Complainant argues that the agreement is a public record because it contains a severance package to be paid by public funds. Additionally, the Custodian certified on August 18, 2009 that she provided the Complainant with information regarding payments made to Bibi Stewart Garvin.

OPRA’s purpose is “to maximize public knowledge about public affairs in order to ensure an informed citizenry.” Mason v. City of Hoboken, 196 N.J. 51, 64 (2008) (quoting Asbury Park Press v. Ocean County Prosecutor’s Office, 374 N.J. Super. 312, 329 (Law. Div. 2004)). OPRA provides that all government records are subject to public access unless specifically exempt. OPRA contains 24 specific exemptions to disclosure, none of which relate to confidentiality clauses. In fact, OPRA states that “any limitation on the right of access...shall be construed in favor of the public’s right of access...” N.J.S.A. 47:1A-1.

The fact that the parties agreed to a confidentiality clause in the record at issue in this complaint does not override the public's right to access under OPRA. See Lederman v. Prudential Life Ins. Co., 385 N.J. Super. 307, 317-18 (App. Div. 2006), certif. denied, 188 N.J. 353 (2006). See also Asbury Park Press v. County of Monmouth and Carol Melnick, 406 N.J. Super. 1 (App. Div. 2009)<sup>8</sup>; Verni v. Lanzaro, 404 N.J. Super. 16 (App. Div. 2008) (holding that the public has the right to access confidential settlement agreements which are entered into by private parties under seal in civil court).

Therefore, because confidential settlement agreements entered into by private parties in civil court are subject to public access pursuant to Lederman, *supra*, Asbury Park Press, *supra*, and Verni, *supra*, and because OPRA does not contain any provision which exempts access to records based on confidentiality clauses, as well as because the Custodian has failed to cite to any other legal authority that would exempt the settlement agreement from public access based on the confidentiality clause, the mere fact that the requested agreement contains a confidentiality clause is not a lawful basis for a denial of access under OPRA. As such, the Custodian has failed to bear her burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6. Thus, the Custodian must disclose the requested settlement agreement to the Complainant, with appropriate redactions, if any, and a detailed lawful basis for any and all redactions.

Further, because the requested settlement agreement is subject to public access pursuant to Lederman, *supra*, Asbury Park Press, *supra*, and Verni, *supra*, the Council declines to address the Custodian's other raised exemptions.

### **Whether the Custodian's actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?**

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

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Because confidential settlement agreements entered into by private parties in civil court are subject to public access pursuant to Lederman v. Prudential Life Ins. Co., 385 N.J. Super. 307 (App. Div. 2006), certif. denied, 188 N.J. 353 (2006), Asbury Park Press v. County of Monmouth and Carol Melnick, 406 N.J. Super. 1 (App. Div. 2009), and Verni v. Lanzaro, 404 N.J. Super. 16 (App. Div. 2008), and because OPRA does not contain any provision which exempts access to records based on confidentiality clauses, as well as because the Custodian has failed to cite to any other legal authority that would exempt the settlement agreement from public access based on the confidentiality

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<sup>8</sup> The court in Asbury Park Press, *supra*, held that OPRA exempts from public access settlement agreements related to sexual harassment complaints filed with the employer, rather than in Superior Court. However, the Custodian in this complaint certified that the requested agreement does not relate to any sexual harassment complaints filed with the employer or in court.

clause, the mere fact that the requested agreement contains a confidentiality clause is not a lawful basis for a denial of access under OPRA. As such, the Custodian has failed to bear her burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6. Thus, the Custodian must disclose the requested settlement agreement to the Complainant.

2. Because the requested settlement agreement is subject to public access pursuant to Lederman v. Prudential Life Ins. Co., 385 N.J. Super. 307 (App. Div. 2006), certif. denied, 188 N.J. 353 (2006), Asbury Park Press v. County of Monmouth and Carol Melnick, 406 N.J. Super. 1 (App. Div. 2009), and Verni v. Lanzaro, 404 N.J. Super. 16 (App. Div. 2008), the Council declines to address the Custodian's other raised exemptions.
3. **The Custodian shall comply with item # 1 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<sup>9</sup>, to the Executive Director.**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Dara Lownie  
Senior Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

September 23, 2009

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<sup>9</sup> "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."  
Joe Ungaro (on behalf of The Daily Record) v. Town of Dover (Morris), 2008-115 – Findings and Recommendations of the Executive Director 7