



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

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TRENTON, NJ 08625-0819

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Commissioner

**FINAL DECISION**

**January 29, 2013 Government Records Council Meeting**

Andrew J. Mayer  
Complainant

Complaint No. 2008-245

v.

Borough of Tinton Falls (Monmouth)  
Custodian of Record

At the January 29, 2013 public meeting, the Government Records Council (“Council”) considered the January 22, 2013 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 accept the ALJ’s Initial Decision dated October 31, 2011, which concludes that “... since [Councilman] Skudera had no knowledge of what addresses came from the website, I further **FIND** that there is no evidence that [Councilman] Skudera knowingly and willfully violated OPRA and unreasonably denied access to the e-mail addresses.”

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 29<sup>th</sup> Day of January, 2013

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: February 6, 2013**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
January 29, 2013 Council Meeting**

**Andrew J. Mayer<sup>1</sup>**  
**Complainant**

**GRC Complaint No. 2008-245**

v.

**Borough of Tinton Falls (Monmouth)<sup>2</sup>**  
**Custodian of Records**

**Records Relevant to Complaint:** Individual e-mail addresses contained in the “Tinton Falls E-mail Newsletter” e-mail distribution list.

**Request Made:** October 3, 2008

**Response Made:** October 16, 2008

**Custodian:** Maureen Murphy<sup>3</sup>

**GRC Complaint Filed:** October 21, 2008<sup>4</sup>

**Background**

**July 27, 2010**

Government Records Council’s (“Council”) Interim Order. At its July 27, 2010 public meeting, the Council considered the July 20, 2010 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. Although Councilman Skudera provided access to the requested e-mail addresses within the five (5) business day time frame, because Councilman Skudera failed to simultaneously provide certified confirmation of his compliance to the GRC until April 26, 2010, or five (5) business days after the time frame for compliance set forth in the Council’s April 8, 2010 Interim Order expired, Councilman Skudera has failed to fully comply with the Council’s April 8, 2010 Interim Order pursuant to Jung & O’Halloran v. Borough of Roselle (Union), GRC Complaint Nos. 2007-299; 2007-307 (April 2009).
2. Based on the contested facts in this complaint, the GRC is unable to determine whether Councilman Skudera has provided all e-mail addresses collected

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Gregory S. Baxter, Esq., of Caruso & Baxter, P.A. (Shrewsbury, NJ).

<sup>3</sup> The original Custodian of record was Karen Mount Taylor. Ms. Murphy became Borough clerk on November 1, 2010.

<sup>4</sup> The GRC received the Denial of Access Complaint on said date.

between July, 2007 and September 15, 2009 via the Borough's website. Specifically, the Complainant provided documentary evidence that Councilman Skudera may have failed to provide to him all e-mail addresses ordered to be disclosed by the Council. Therefore, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts, for a determination of whether Councilman Skudera failed to provide all records responsive pursuant to the Council's April 8, 2010 Interim Order, and whether Councilman Skudera's actions in responding to the original request and the Council's Interim Order amount to a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.

**July 29, 2010**

Council's Interim Order ("Order") distributed to the parties.

**September 22, 2010**

Complaint transmitted to the Office of Administrative Law ("OAL").

**April 11, 2011**

Complaint transmitted back from the OAL because Councilman Skudera<sup>5</sup> failed to appear for a scheduled hearing on April 6, 2011.

**May 17, 2011**

E-mail from the GRC to Councilman Skudera. The GRC states that the OAL referred this complaint back to the GRC on April 11, 2011 because Councilman Skudera failed to appear at an April 6, 2011 hearing and further failed to provide a written response for his non-appearance within thirteen (13) days of notice of his failure to appear. The GRC states that it will adjudicate this complaint based on the evidence of record unless Councilman Skudera provides the GRC with a written reason to the contrary within three (3) business days.

**May 20, 2011**

E-mail from Councilman Skudera to the GRC. Councilman Skudera states that he could not attend the hearing because of work-related issues. Councilman Skudera states that he was in contact with the Administrative Law Judge's ("ALJ") chambers on the day of the hearing in an attempt to reschedule.

Councilman Skudera contends that he fully complied with the Council's April 8, 2010 Interim Order and further believes that the responsive e-mail list is not a public record under OPRA.

**May 23, 2011**

E-mail from the Complainant to the GRC. The Complainant asserts that Councilman Skudera's response shows a disregard for both the GRC and the OAL. The

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<sup>5</sup> The GRC notes that Mr. Skudera is currently the mayor for the Borough; however, the GRC will continue to refer to him as a councilman for purposes of uniformity.  
Andrew J. Mayer v. Borough of Tinton Falls (Monmouth), 2008-245 – Supplemental Findings and Recommendations of the Executive Director 2

Complainant further disputes Councilman Skudera's contention that he complied with the Council's April 8, 2010 Interim Order.

**June 20, 2011**

Complaint transmitted back to the OAL.

**December 18, 2012**

ALJ's Initial Decision. The ALJ **FINDS** that there has been no evidence presented to establish that Councilman Skudera knew or could have known that anyone used the Borough website to subscribe to his newsletter. Specifically, the ALJ states that:

"The [Complainant] has not provided any evidence that [Councilman] Skudera failed to provide any e-mail addresses that were collected on the website. The basis of [the Complainant's] belief that this occurred was that [Councilman] Skudera had up to 2,000 e-mail addresses on his distribution list and therefore, more than fourteen addresses had to have come from the website.

However, the website provides only a link to [Councilman] Skudera's address and does not collect any information. Therefore, the website could not and did not provide any e-mail addresses for anyone who had clicked ... the link.

The [Complainant] could only point to one individual who stated that she clicked onto the website to subscribe to the link. There was no physical evidence on the website or [Councilman] Skudera's e-mail of where this e-mail came from. Even with someone coming forward to testify that they personally clicked the link to subscribe to the website, there is no testimony that [Councilman] Skudera would know that the person was directed to his address through the Borough website."

The ALJ thus **FINDS** "... that there has been no evidence presented to establish that [Councilman] Skudera knew or could have known that anyone used the Borough website to subscribe to his newsletter. Accordingly, since [Councilman] Skudera had no knowledge of what addresses came from the website, I further **FIND** that there is no evidence that [Councilman] Skudera knowingly and willfully violated OPRA and unreasonably denied access to the e-mail addresses."

**Analysis**

**Whether the GRC should adopt, modify or reject the ALJ's Initial Decision dated December 18, 2012**

The Council received the ALJ's Initial Decision on December 18, 2012. The ALJ's decision notified the parties that they must submit any exceptions to the GRC within thirteen (13) days from receipt of the decision or by close of business on January 31, 2012. The GRC received no exceptions or requests for extensions of time to submit same and will move forward accordingly.

The ALJ's findings of fact are entitled to deference from the GRC because they are based upon the ALJ's determination of the credibility of the parties.

“The reason for the rule is that the administrative law judge, as a finder of fact, has the greatest opportunity to observe the demeanor of the involved witnesses and, consequently, is better qualified to judge their credibility.” In the Matter of the Tenure Hearing of Tyler, 236 N.J. Super. 478, 485 (App. Div.), *certif. denied* 121 N.J. 615 (1990). The Appellate Division affirmed this principle, underscoring that, “under existing law, the [reviewing agency] must recognize and give due weight to the ALJ's unique position and ability to make demeanor-based judgments.” Whasun Lee v. Board of Education of the Township of Holmdel, Docket No. A-5978-98T2 (App. Div. 2000), slip op. at 14. “When such a record, involving lay witnesses, can support more than one factual finding, it is the ALJ's credibility findings that control, unless they are arbitrary or not based on sufficient credible evidence in the record as a whole.” Cavaliere v. Board of Trustees of Public Employees Retirement System, 368 N.J. Super. 527, 537 (App. Div. 2004).

The ultimate determination of the agency and the ALJ's recommendations must be accompanied by basic findings of fact sufficient to support them. State, Dep't of Health v. Tegnazian, 194 N.J. Super. 435, 442-43 (App. Div. 1984). The purpose of such findings “is to enable a reviewing court to conduct an intelligent review of the administrative decision and determine if the facts upon which the order is grounded afford a reasonable basis therefor.” *Id.* at 443. Additionally, the sufficiency of evidence “must take into account whatever in the record fairly detracts from its weight”; the test is not for the courts to read only one side of the case and, if they find any evidence there, the action is to be sustained and the record to the contrary is to be ignored (citation omitted). St. Vincent's Hospital v. Finley, 154 N.J. Super. 24, 31 (App. Div. 1977).

Here, the ALJ took testimony from both parties. Councilman Skudera testified that the link on the Borough of Tinton Falls (“Borough”) website collects no data and thus there is no way of knowing which e-mails he received directly from the Borough's link. Councilman Skudera further testified that he provided the fourteen (14) e-mails based on conversations with individuals or references made in e-mails to him requesting to be entered into the newsletter list.

As part of the Complainant's testimony, the Complainant submitted a certification from Ms. Cynthia Anderson, who certified that she signed up for Councilman Skudera's e-mail list by using the Borough's website link. The Complainant further submitted e-mail letters from several people objecting to the content of certain newsletters. None of the e-mails in these submissions were provided as part of the Councilman Skudera's compliance.

Based on the testimony and evidence before the ALJ, he found that there is no evidence supporting that Councilman Skudera could have known exactly which e-mails were obtained directly from the Borough's website. The ALJ acknowledged the submissions of the Complainant, but determined that the Complainant “... failed to provide any evidence that [Councilman] Skudera obtained any specific e-mail address through the ... website.” *Id.* at pg. 7. The ALJ reasoned that “[t]he [Complainant] could

only point to one individual who stated that she clicked onto the website to subscribe to the link. There was no physical evidence on the website or [Councilman] Skudera's e-mail of where the e-mail came from." *Id.* at pg. 6. Ultimately, the ALJ's decision is supported by the requisite findings of fact.

Therefore, the GRC recommends that the Council accept the ALJ's Initial Decision dated October 31, 2011, which concludes that "... since [Councilman] Skudera had no knowledge of what addresses came from the website, I further **FIND** that there is no evidence that [Councilman] Skudera knowingly and willfully violated OPRA and unreasonably denied access to the e-mail addresses."

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council accept the ALJ's Initial Decision dated October 31, 2011, which concludes that "... since [Councilman] Skudera had no knowledge of what addresses came from the website, I further **FIND** that there is no evidence that [Councilman] Skudera knowingly and willfully violated OPRA and unreasonably denied access to the e-mail addresses."

Prepared By: Frank F. Caruso  
Senior Case Manager

Approved By: Karyn Gordon, Esq.  
Acting Executive Director

January 22, 2013



**State of New Jersey**  
GOVERNMENT RECORDS COUNCIL  
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**CHRIS CHRISTIE**  
*Governor*

**KIM GUADAGNO**  
*Lt. Governor*

**LORI GRIFA**  
*Commissioner*

**INTERIM ORDER**

**July 27, 2010 Government Records Council Meeting**

Andrew J. Mayer  
Complainant

Complaint No. 2008-245

v.

Borough of Tinton Falls (Monmouth)  
Custodian of Record

At the July 27, 2010 public meeting, the Government Records Council (“Council”) considered the July 20, 2010 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. Although Councilman Skudera provided access to the requested e-mail addresses within the five (5) business day time frame, because Councilman Skudera failed to simultaneously provide certified confirmation of his compliance to the GRC until April 26, 2010, or five (5) business days after the time frame for compliance set forth in the Council’s April 8, 2010 Interim Order expired, Councilman Skudera has failed to fully comply with the Council’s April 8, 2010 Interim Order pursuant to Jung & O’Halloran v. Borough of Roselle (Union), GRC Complaint Nos. 2007-299; 2007-307 (April 2009).
2. Based on the contested facts in this complaint, the GRC is unable to determine whether Councilman Skudera has provided all e-mail addresses collected between July, 2007 and September 15, 2009 via the Borough’s website. Specifically, the Complainant provided documentary evidence that Councilman Skudera may have failed to provide to him all e-mail addresses ordered to be disclosed by the Council. Therefore, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts, for a determination of whether Councilman Skudera failed to provide all records responsive pursuant to the Council’s April 8, 2010 Interim Order, and whether Councilman Skudera’s actions in responding to the original request and the Council’s Interim Order amount to a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.



Interim Order Rendered by the  
Government Records Council  
On The 27<sup>th</sup> Day of July, 2010

Robin Berg Tabakin, Chair  
Government Records Council

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

Charles A. Richman, Secretary  
Government Records Council

**Decision Distribution Date: July 28, 2010**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
July 27, 2010 Council Meeting**

**Andrew J. Mayer<sup>1</sup>  
Complainant**

**GRC Complaint No. 2008-245**

v.

**Borough of Tinton Falls (Monmouth)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Individual e-mail addresses contained in the “Tinton Falls E-mail Newsletter” e-mail distribution list.

**Request Made:** October 3, 2008

**Response Made:** October 16, 2008

**Custodian:** Karen Mount-Taylor

**GRC Complaint Filed:** October 21, 2008<sup>3</sup>

**Background**

**April 8, 2010**

Government Records Council’s (“Council”) Interim Order. At its April 8, 2010 public meeting, the Council considered the April 1, 2010 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 the e-mail addresses received through a solicitation posted on the Borough’s website were received “in the course of official business,” between July, 2007 and September 15, 2009, such e-mail addresses are government records pursuant to N.J.S.A. 47:1A-1.1. and are therefore subject to OPRA.
2. Because the e-mail addresses received through the Borough’s website are a government record, and because said addresses were used by Councilman Skudera for political campaigning purposes, and because voter registration information may be disclosed to members of the public pursuant to N.J.S.A. 19:31-18.1(a), the e-mail addresses collected through the Borough’s website are subject to disclosure under OPRA. Therefore, Councilman Skudera has unlawfully denied access to the requested records and must disclose the e-mail

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Gregory S. Baxter, Esq., of Caruso & Baxter, P.A. (Shrewsbury, NJ).

<sup>3</sup> The GRC received the Denial of Access Complaint on said date.

addresses collected through the Borough's website to the Complainant.<sup>4</sup> Additionally, pursuant to N.J.S.A. 47:1A-6, Councilman Skudera failed to bear his burden of proving that the requested e-mail addresses collected through the Borough's website were exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

3. **Councilman Skudera shall comply with Item No. 2 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>5</sup> to the Executive Director.<sup>6</sup>**
4. The Council defers analysis of whether Councilman Skudera knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending Councilman Skudera's compliance with the Council's Interim Order.

#### **April 12, 2010**

Council's Interim Order distributed to the parties.

#### **April 19, 2010**

E-mail from Councilman Skudera<sup>7</sup> to the Complainant. Councilman Skudera discloses fourteen (14) e-mail addresses to the Complainant.<sup>8</sup>

#### **April 20, 2010**

E-mail from the GRC to Councilman Skudera. The GRC states that it is in receipt of Councilman Skudera's e-mail disclosing fourteen (14) e-mail addresses to the Complainant in response to the GRC's Interim Order. The GRC states that, as part of the Interim Order, Councilman Skudera was also directed to provide certified confirmation of his compliance to the GRC.

The GRC states that Councilman Skudera's April 19, 2010 e-mail to the Complainant does not constitute a legal certification which complies with N.J. Court Rule 1:4-4. The GRC requests that Councilman Skudera advise as to the status of his certification, which should have been received by the GRC on April 20, 2010.

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<sup>4</sup> The Custodian is only required to disclose those e-mail addresses collected via the Borough's website between July, 2007 and September 15, 2009.

<sup>5</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."

<sup>6</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

<sup>7</sup> The GRC notes that Councilman Skudera became mayor of the Borough at some point during the adjudication of this complaint.

<sup>8</sup> Councilman Skudera copied the GRC on this e-mail.

**April 26, 2010**

Councilman Skudera's legal certification. Councilman Skudera certifies that he supplied the requested e-mail addresses to the Complainant, copying the GRC, within the five (5) business day time frame as ordered in the Council's April 8, 2009 Interim Order.

**April 26, 2010**

E-mail from the GRC to the Complainant attaching Councilman Skudera's legal certification. The GRC requests that the Complainant advise as to whether he is satisfied with Councilman Skudera's response to the Council's Interim Order.

**April 26, 2010**

E-mail from the Complainant to the GRC. The Complainant states that he is not satisfied with Councilman Skudera's certification because it makes no claims as to the accuracy and completeness of the e-mail list provided to the Complainant. Specifically, the Complainant states that only fourteen (14) e-mails were provided by Councilman Skudera. Additionally, the Complainant states that Councilman Skudera's legal certification was not submitted to the GRC within the time frame prescribed in the GRC's Interim Order.

**May 4, 2010**

E-mail from the GRC to Councilman Skudera. The GRC requests that Councilman Skudera provide a second legal certification responding to the following:

Whether the fourteen (14) e-mail addresses provided to the Complainant on April 19, 2010 represents every e-mail address collected via the Borough's website between July, 2007 and September 15, 2009?

The GRC requests that Councilman Skudera submit the requested legal certification by May 6, 2010.

**May 6, 2010**

Councilman Skudera's legal certification. Councilman Skudera certifies that the fourteen (14) e-mail addresses provided to the Complainant on April 19, 2010 represents every e-mail address in accordance with Item No. 2 of the Council's Interim Order.

**May 7, 2010**

E-mail from the Complainant to the GRC with the following attachments:

- Tinton Falls E-mail Newsletter dated August 10, 2007.
- Tinton Falls E-mail Newsletter dated September 4, 2008.
- E-mail from Councilman Skudera to the Complainant dated October 16, 2008.

The Complainant asserts that he is troubled by the actions of Councilman Skudera. Specifically, the Complainant disputes that Councilman Skudera certified that the fourteen (14) e-mails provided represents all e-mails collected over a span of more than two (2) years. The Complainant asserts that Councilman Skudera's certification is contrary to his earlier assertion that he communicated with "thousands" of people, ostensibly through e-mail and via the "Tinton Falls E-mail Newsletter." *See* Letter brief

from Mr. Brian M. Nelson, Esq. (“Mr. Nelson”)<sup>9</sup> to Councilman Skudera. The Complainant argues that if fourteen (14) e-mail addresses was the extent of the “privacy issue” raised by Councilman Skudera, he would have advised the GRC and Complainant of such from the outset of this complaint.

The Complainant requests that the GRC order that Councilman Skudera provide the GRC with the entire list of e-mail addresses to which the “Tinton Falls E-mail Newsletter” was distributed, especially for the e-mails dated September 4, 2008 and October 16, 2008.

The Complainant avers that Councilman Skudera used the “Tinton Falls E-mail Newsletter” on September 4, 2008 to campaign for a candidate of an election. Further, the Complainant avers that Councilman Skudera used the e-mail list to send a news blast on October 16, 2008 stating that the Complainant had submitted an OPRA request for the e-mail addresses “[p]resumably ... to use ... e-mails to send spam messages ... in support of [the Complainant’s] campaign.”

The Complainant notes that Councilman Skudera has been using his official title since the first “Tinton Falls E-mail Newsletter” dated August 10, 2007. The Complainant further notes that he also solicits for e-mail addresses in his official capacity.

### Analysis

#### **Whether the Custodian complied with the Council’s April 8, 2010 Interim Order?**

The GRC first turns to the issue of whether Councilman Skudera complied with the Council’s April 8, 2010 Interim Order.

The Council’s April 8, 2010 Interim Order specifically ordered Councilman Skudera to “disclose the e-mail addresses collected through the Borough’s website to the Complainant.” Said Order also directed Councilman Skudera to provide certified confirmation of compliance to the GRC’s Executive Director within five (5) business days from receipt of said Order.

On April 19, 2010, five (5) business days after receipt of the Council’s order, Councilman Skudera e-mailed the Complainant a list of fourteen (14) e-mail addresses. Although Councilman Skudera simultaneously copied the GRC on this e-mail, he did not include a legal certification, as required by the Council’s order. The GRC e-mailed Councilman Skudera on April 20, 2010 acknowledging receipt of Councilman Skudera’s disclosure of the fourteen (14) e-mails; however, the GRC informed Councilman Skudera that such e-mail does not constitute full compliance with the Council’s Order because of the absence of certified confirmation of compliance therewith. On April 26, 2010, Councilman Skudera provided certified confirmation to the GRC that he disclosed the requested e-mail addresses to the Complainant, copying the GRC, within the five (5) business days required. However, Councilman Skudera’s certification occurred five (5)

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<sup>9</sup> Mr. Nelson represented Councilman Skudera in the instant complaint until becoming Director of Law for the Borough on July 1, 2009.  
Andrew J. Mayer v. Borough of Tinton Falls (Monmouth), 2008-245 – Supplemental Findings and Recommendations of the Executive Director

business days after the time frame for compliance set forth in the Council's April 8, 2010 Interim Order expired.

In Jung & O'Halloran v. Borough of Roselle (Union), GRC Complaint Nos. 2007-299; 2007-307 (April 2009), the Council's December 18, 2008 Interim Order ordered the custodian to comply with the Administrative Law Judge's ("ALJ") decision to provide records responsive:

“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 and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.”

The custodian in that complaint complied with the ALJ's order, but failed to provide certified confirmation to the GRC within five (5) business days. The GRC held that the custodian failed to fully comply with the Council's Interim Order based on the custodian's failure to provide certified confirmation within the five (5) business day time frame.

Therefore, although Councilman Skudera provided access to the requested e-mail addresses within the five (5) business day time frame, because the Councilman Skudera failed to simultaneously provide certified confirmation of his compliance to the GRC until April 26, 2010, or five (5) business days after the time frame for compliance set forth in the Council's April 8, 2010 Interim Order expired, Councilman Skudera has failed to fully comply with the Council's April 8, 2010 Interim Order pursuant to Jung & O'Halloran, *supra*.

The GRC next turns to the issue of whether there are contested facts regarding whether Councilman Skudera provided every e-mail collected through the Borough's website between July, 2007 and September 15, 2009.

In response to the GRC's April 26, 2010 inquiry regarding Councilman Skudera's compliance with the Council's order, the Complainant expressed dissatisfaction with the records disclosed, arguing that Councilman Skudera did not certify to the accuracy or completeness of the e-mail list provided and observing that Councilman Skudera failed to provide certified confirmation to the GRC in a timely manner.

The GRC subsequently requested on May 4, 2010 a secondary legal certification as to whether the fourteen (14) e-mail addresses disclosed to the Complainant represented every e-mail address collected through the Borough's website between July, 2007 and September 15, 2009. Councilman Skudera provided the requested certification to the GRC on May 6, 2010, certifying that the fourteen (14) e-mails represent all e-mails collected through the website.

The Complainant e-mailed the GRC on May 7, 2010 asserting that he was troubled by Councilman Skudera's second legal certification. The Complainant argued that Councilman Skudera initially claimed that he communicated with thousands of

people; however, Councilman Skudera is now certifying that he collected just fourteen (14) e-mail addresses via the Borough website over a time span of more than two (2) years. The Complainant requested that the GRC order Councilman Skudera to provide a complete list of all recipients of the “Tinton Falls E-mail Newsletter,” especially for the e-mails dated September 4, 2008 and October 16, 2008.

The Complainant attached three (3) documents (two (2) issues of the “Tinton Falls E-mail Newsletter” and one (1) e-mail to the Complainant regarding the Complainant’s OPRA request) as part of his response to the GRC dated May 7, 2010. The e-mail addresses to which the two (2) newsletters were sent, one of which belonged to the Complainant, were not included as part of the fourteen (14) e-mail addresses collected through the website. Additionally, the e-mail to the Complainant appears to be part of a broadly-disseminated e-mail utilizing Councilman Skudera’s e-mail list. The three (3) documents submitted to the GRC by the Complainant raise a question as to whether Councilman Skudera fully disclosed all e-mail addresses obtained through the solicitation on the Borough website.

Based on the contested facts in this complaint, the GRC is unable to determine whether Councilman Skudera has provided all e-mail addresses collected between July, 2007 and September 15, 2009 via the Borough’s website. Specifically, the Complainant provided documentary evidence that Councilman Skudera may have failed to provide to him all e-mail addresses ordered to be disclosed by the Council. Therefore, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts, for a determination of whether Councilman Skudera failed to provide all records responsive pursuant to the Council’s April 8, 2010 Interim Order, and whether Councilman Skudera’s actions in responding to the original request and the Council’s Interim Order amount to a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Although Councilman Skudera provided access to the requested e-mail addresses within the five (5) business day time frame, because Councilman Skudera failed to simultaneously provide certified confirmation of his compliance to the GRC until April 26, 2010, or five (5) business days after the time frame for compliance set forth in the Council’s April 8, 2010 Interim Order expired, Councilman Skudera has failed to fully comply with the Council’s April 8, 2010 Interim Order pursuant to Jung & O’Halloran v. Borough of Roselle (Union), GRC Complaint Nos. 2007-299; 2007-307 (April 2009).
2. Based on the contested facts in this complaint, the GRC is unable to determine whether Councilman Skudera has provided all e-mail addresses collected between July, 2007 and September 15, 2009 via the Borough’s website. Specifically, the Complainant provided documentary evidence that Councilman Skudera may have failed to provide to him all e-mail addresses

ordered to be disclosed by the Council. Therefore, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts, for a determination of whether Councilman Skudera failed to provide all records responsive pursuant to the Council's April 8, 2010 Interim Order, and whether Councilman Skudera's actions in responding to the original request and the Council's Interim Order amount to a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.

Prepared By: Frank F. Caruso  
Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

July 20, 2010



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

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

LORI GRIFA  
Acting Commissioner

INTERIM ORDER

April 8, 2010 Government Records Council Meeting

Andrew J. Mayer  
Complainant

Complaint No. 2008-245

v.

Borough of Tinton Falls (Monmouth)  
Custodian of Record

At the April 8, 2010 public meeting, the Government Records Council (“Council”) considered the April 1, 2010 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 e-mail addresses received through a solicitation posted on the Borough’s website were received “in the course of official business,” between July, 2007 and September 15, 2009, such e-mail addresses are government records pursuant to N.J.S.A. 47:1A-1.1. and are therefore subject to OPRA.
2. Because the e-mail addresses received through the Borough’s website are a government record, and because said addresses were used by Councilman Skudera for political campaigning purposes, and because voter registration information may be disclosed to members of the public pursuant to N.J.S.A. 19:31-18.1(a), the e-mail addresses collected through the Borough’s website are subject to disclosure under OPRA. Therefore, Councilman Skudera has unlawfully denied access to the requested records and must disclose the e-mail addresses collected through the Borough’s website to the Complainant.<sup>1</sup> Additionally, pursuant to N.J.S.A. 47:1A-6, Councilman Skudera failed to bear his burden of proving that the requested e-mail addresses collected through the Borough’s website were exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
3. **Councilman Skudera shall comply with Item No. 2 above within five (5) business days from receipt of the Council’s Interim Order and**

<sup>1</sup> The Custodian is only required to disclose those e-mail addresses collected via the Borough’s website between July, 2007 and September 15, 2009.





**simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>2</sup> to the Executive Director.<sup>3</sup>**

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

Interim Order Rendered by the  
Government Records Council  
On The 8<sup>th</sup> Day of April, 2010

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: April 13, 2010**

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<sup>2</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."

<sup>3</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
April 8, 2010 Council Meeting**

**Andrew J. Mayer<sup>1</sup>  
Complainant**

**GRC Complaint No. 2008-245**

v.

**Borough of Tinton Falls (Monmouth)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Individual e-mail addresses contained in the “Tinton Falls E-mail Newsletter” e-mail distribution list.

**Request Made:** October 3, 2008

**Response Made:** October 16, 2008

**Custodian:** Karen Mount-Taylor

**GRC Complaint Filed:** October 21, 2008<sup>3</sup>

**Background**

**October 3, 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.

**October 3, 2008**

E-mail from the Custodian to Councilman Michael Skudera (“Councilman Skudera”) attaching the Complainant’s OPRA request dated October 3, 2008. The Custodian informs Councilman Skudera that she received the attached request and has placed a hard copy of such sealed in a confidential envelope in Councilman Skudera’s mail bin. The Custodian requests that Councilman Skudera advise her when the request has been fulfilled.

**October 9, 2008**

Letter brief from Mr. Brian M. Nelson, Esq. (“Mr. Nelson”)<sup>4</sup> to Councilman Skudera. Mr. Nelson states that pursuant to Councilman Skudera’s request, he has reviewed the Complainant’s OPRA request for personal e-mail addresses of individuals contained in the “Tinton Falls E-mail Newsletter” e-mail distribution list.

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Gregory S. Baxter, Esq., of Caruso & Baxter, P.A. (Shrewsbury, NJ).

<sup>3</sup> The GRC received the Denial of Access Complaint on said date.

<sup>4</sup> Mr. Nelson represented Councilman Skudera in the instant complaint until becoming Director of Law for the Borough on July 1, 2009.

Mr. Nelson states that based on the facts presented, the requested e-mail addresses in this instance are not government records. Mr. Nelson states that disclosure of such could violate federal laws and state constitutional protections afforded to privacy interests. Mr. Nelson advises that Councilman Skudera not disclose the requested e-mail addresses regardless of the purposes for which such addresses are used.

Mr. Nelson states that Councilman Skudera has indicated that over the years, including prior to Councilman Skudera's election to the Borough governing body, Councilman Skudera has communicated with thousands of individuals in the Borough and elsewhere on a variety of issues. Mr. Nelson states that Councilman Skudera has indicated that the e-mail addresses were previously compiled through communications in which individuals expressed interest in being kept abreast of events in the Borough. Mr. Nelson states that Councilman Skudera further indicated that once he was elected to the Borough governing body, he began to send e-mails to these individuals for informative purposes and that none of the individuals have ever granted Councilman Skudera permission to circulate or share their e-mail addresses with anyone else.

Mr. Nelson contends that although OPRA does not include a specific definition for electronic mail, the statute defines a "government record" broadly and excludes twenty-one (21) categories of information from the definition. N.J.S.A. 47:1A-1.1. Additionally, Mr. Nelson states that OPRA does not limit the common law right of access to government records. N.J.S.A. 47:1A-8. Mr. Nelson avers that the Legislature took special care to balance the public's right of access with a citizen's reasonable expectation of privacy. Mr. Nelson states that the Legislature specifically tempered public access rights by providing that "a public agency *has a responsibility and an obligation to safeguard from public access a citizen's personal information ... when disclosure thereof would violate the citizen's reasonable expectation of privacy.*" (Emphasis added.) N.J.S.A. 47:1A-1. Mr. Nelson states that in Michaelson v. Gannett, 379 N.J. Super. 611, 621 (App. Div. 2005), the court specifically commented that "when the requested material appears on its face to encompass legislatively recognized confidentiality concerns, a court should presume that the release of the government record is not in the public interest."

Mr. Nelson argues that although courts in New Jersey have not specifically addressed the privacy interests of individual e-mail address, the court's rationale in State v. Reid, 194 N.J. 386, 389 (2008) can be applied to e-mail addresses similar to how the courts have applied privacy interests to telephone numbers. *See also* Gannett N.J. Partners v. City of Middlesex, 379 N.J. Super. 205, 216-17 (App. Div. 2005) and North Jersey Newspapers v. Passaic City Freeholders, 127 N.J. 9, 16-18 (1992). Mr. Nelson notes that prior to Reid, *supra*, the New Jersey Privacy Study Commission concluded in the Final Report of the New Jersey Privacy Study Commission, (December 2004) that action by legislation or regulation should be taken to provide that the release of personal identifiable information, including e-mail addresses, gathered through governmental web sites is prohibited.

Mr. Nelson also argues that, as provided above, the public's right to access is not absolute. Mr. Nelson states that three (3) issues must be considered when determining whether information sought under OPRA must be disclosed: (1) whether the requested

material constitutes a public record; (2) whether the request sufficiently described the documents sought; and (3) whether the law exempts disclosure. *See Burnett v. Bergen County Clerk*, 402 N.J. Super. 319, 324 (App. Div. 2008).

Mr. Nelson asserts that the Complainant's request is for personal e-mail addresses provided directly to Councilman Skudera by way of personal contacts made over many years and not e-mail communications or the contents thereof. Mr. Nelson contends that the requested records are not government records; further, personal e-mail addresses would be exempt from disclosure even if gathered by the Borough. Mr. Nelson argues that Councilman Skudera has a legal duty to protect the individual privacy interests of those who provided e-mail addresses as such disclosure would constitute a violation of an individual's constitutional right of privacy.

**October 10, 2008**

E-mail from Ms. Maggie Pereira ("Ms. Pereira"), Borough Clerk Assistant, to Councilman Skudera. Ms. Pereira reminds Councilman Skudera that his response to the Complainant's OPRA request is due on October 14, 2008.

**October 10, 2008**

E-mail from Councilman Skudera to the Custodian attaching Mr. Nelson's letter brief dated October 9, 2008. Councilman Skudera requests that the Custodian review the attached letter.<sup>5</sup>

**October 15, 2008**

E-mail from the Complainant to the Custodian. The Complainant requests that the Custodian advise as to the status of his OPRA request.

**October 15, 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 requests an extension of one (1) day to respond to the Complainant's request because Jim Berube, Esq. ("Mr. Berube"), Director of Law, is reviewing Councilman Skudera's answer to the Complainant's request.

**October 15, 2008**

E-mail from the Complainant to the Custodian. The Complainant grants an extension of one (1) day to respond to his OPRA request.

**October 15, 2008**

E-mail from Mr. Berube to Councilman Skudera. Mr. Berube states that he is in receipt of Mr. Nelson's letter brief dated October 9, 2008. Mr. Berube states that he takes exception to the legal conclusions of Mr. Nelson. Mr. Berube further states that although Councilman Skudera may be taking Mr. Nelson's position, Mr. Nelson's letter brief does not in and of itself constitute a valid response to the Custodian's request for a response to the Complainant's OPRA request. Mr. Berube requests that Councilman Skudera

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<sup>5</sup> The Custodian forwarded Mr. Nelson's letter to Councilman Skudera dated October 9, 2008 to Jim Berube, Esq. ("Mr. Berube"), Director of Law, for his review on October 14, 2008.  
Andrew J. Mayer v. Borough of Tinton Falls (Monmouth), 2008-245 – Findings and Recommendations of the Executive Director

respond to the Custodian via e-mail indicating whether the requested records exist and if so, whether Councilman Skudera will produce such to the Custodian or decline to provide the e-mail addresses based on Mr. Nelson's advice.

Mr. Berube notes that the Custodian has requested an additional day to respond in order to wait for Councilman Skudera's response. Mr. Berube further notes that it is his opinion as Director of Law that the requested e-mail list is a public record subject to disclosure under OPRA and that he would be happy to discuss the legal basis for that opinion with Mr. Nelson.

Finally, Mr. Berube states that should the Complainant dispute Councilman Skudera's denial of access by filing a complaint with the GRC or Superior Court, Mr. Berube will not be able to represent Councilman Skudera, whose interests will be contrary to those of the Borough.

**October 16, 2008**

E-mail from Councilman Skudera to Mr. Berube. Councilman Skudera states that he stands by Mr. Nelson's legal opinion to withhold the requested e-mail addresses.

**October 16, 2008**

E-mail from the Custodian to the Complainant. The Custodian states that Councilman Skudera will not provide access to the requested e-mail addresses responsive to the Complainant's OPRA request.

**October 20, 2008**

E-mail from the Complainant to the Custodian. The Complainant requests that the Custodian provide him with a copy of the original OPRA request made to the Borough. The Complainant asks if there is a written statement available from the Borough stating the specific reasons for denying access to the requested records.

**October 20, 2008**

E-mail from the Custodian to the Complainant. The Custodian states that she will make all documentation pertaining to the Complainant's OPRA request available for pickup on October 21, 2008.<sup>6</sup>

**October 20, 2008**

Letter from the Custodian to the Complainant. The Custodian states that attached are copies of the documentation pertaining to the Complainant's OPRA request. The Custodian states that she cannot provide access to the records requested from Councilman Skudera.

**October 21, 2008**

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

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<sup>6</sup> The evidence of record indicates that the Custodian made all correspondence regarding the instant complaint available to the Complainant, including correspondence between the Borough and Councilman Skudera and correspondence between the Custodian and the Complainant.

- Complainant’s OPRA request dated October 3, 2008.
- E-mail from the Custodian to Councilman Skudera dated October 3, 2008.
- E-mail from Ms. Pereira to Councilman Skudera dated October 10, 2008.
- E-mail from Councilman Skudera to the Custodian dated October 10, 2008 attaching Mr. Nelson’s letter brief dated October 9, 2008.
- E-mail from the Complainant to the Custodian dated October 15, 2008.
- E-mail from the Custodian to the Complainant dated October 15, 2008.
- E-mail from the Complainant to the Custodian dated October 15, 2008.
- E-mail from Mr. Berube to Councilman Skudera dated October 15, 2008.
- E-mail from Councilman Skudera to Mr. Berube dated October 16, 2008.
- E-mail from the Custodian to the Complainant dated October 16, 2008.
- E-mail from the Complainant to the Custodian dated October 20, 2008.
- E-mail from the Custodian to the Complainant dated October 20, 2008.
- Letter from the Custodian to the Complainant dated October 20, 2008.
- Borough of Tinton Falls website screenshot showing where individuals may sign up for the “Tinton Falls E-mail Newsletter” dated September 5, 2008.<sup>7</sup>

The Complainant states that he submitted a request to the Custodian on October 3, 2008. The Complainant states that the Custodian responded in writing on October 16, 2008 advising that Councilman Skudera would not provide the requested e-mail addresses.

The Complainant asserts that Councilman Skudera collected e-mail addresses using Borough resources, including advertising a “newsletter on council news” on the Borough’s website. The Complainant attaches to this complaint a screenshot of the Borough’s website which shows where individuals may sign up for the newsletter e-mail distribution list. The Complainant contends that Councilman Skudera appears to write the council newsletter based on his opinions. The Complainant asserts that on September 5, 2008, Councilman Skudera used the “Tinton Falls E-mail Newsletter” to campaign for a candidate for election by including background information and highlighting the candidate’s agenda. The Complainant argues that Councilman Skudera added this information to the newsletter even though it was not discussed at the September 2, 2008 Council meeting, but excluded other issues that arose at the meeting.

Additionally, the Complainant argues that no disclaimer was ever placed on the website or included in e-mail newsletters stating that the “Tinton Falls E-mail Newsletter” does not represent the official position of the Borough of Tinton Falls. The Complainant asserts that Councilman Skudera also includes in the newsletter his title as councilman and his Borough Hall telephone number and extension as contact information, leading the reader to believe that the contents of the newsletter represent the official position of the Borough. The Complainant notes that even Mr. Berube advised Councilman Skudera that it was his opinion that the requested e-mail list is a public record subject to disclosure under OPRA.

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<sup>7</sup> The Complainant also attaches a copy of the “Tinton Falls E-mail Newsletter” dated September 4, 2008. Andrew J. Mayer v. Borough of Tinton Falls (Monmouth), 2008-245 – Findings and Recommendations of the Executive Director

Finally, the Complainant asserts that he believes it is not proper that Councilman Skudera distributed campaign material under the guise of an official council transmission using e-mail addresses obtained using the Borough's website. The Complainant asserts that the individual addresses should be made available under OPRA based on the foregoing.

The Complainant does not agree to mediate this complaint.

**December 5, 2008**

Request for the Statement of Information ("SOI") sent to the Custodian.

**December 22, 2008**

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated October 3, 2008.
- E-mail from the Custodian to Councilman Skudera dated October 3, 2008.
- E-mail from Ms. Pereira to Councilman Skudera dated October 10, 2008.
- E-mail from Councilman Skudera to the Custodian dated October 10, 2008 attaching Mr. Nelson's letter brief dated October 9, 2008.
- E-mail from the Complainant to the Custodian dated October 15, 2008.
- E-mail from the Custodian to the Complainant dated October 15, 2008.
- E-mail from the Complainant to the Custodian dated October 15, 2008.
- E-mail from Mr. Berube to Councilman Skudera dated October 15, 2008.
- E-mail from Councilman Skudera to Mr. Berube dated October 16, 2008.
- E-mail from the Custodian to the Complainant dated October 16, 2008.
- E-mail from the Complainant to the Custodian dated October 20, 2008.
- E-mail from the Custodian to the Complainant dated October 20, 2008.
- Letter from the Custodian to the Complainant dated October 20, 2008.

The Custodian certifies that her search for the requested records involved contacting Councilman Skudera because the requested records appear to be maintained on the private computer of Councilman Skudera.

Additionally, the Custodian also certifies that she does not know whether any records that may have been responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management ("DARM") because the requested e-mail addresses are not in her possession.

The Custodian certifies that she received the Complainant's OPRA request on October 3, 2008 and immediately contacted Councilman Skudera in order to obtain the requested e-mail addresses. The Custodian certifies that subsequent to Councilman Skudera's denial, the Custodian requested that Mr. Berube contact Councilman Skudera and obtain the records.

The Custodian certifies that she also requested one (1) additional day to respond to the Complainant on October 15, 2008. The Custodian certifies that she received

Councilman Skudera's refusal to provide the requested e-mail addresses on October 16, 2008 and promptly advised the Complainant of same.

The Custodian asserts that, according to the opinion of Mr. Berube determining that the requested records were subject to disclosure under OPRA, she made a diligent effort to obtain the requested e-mail addresses in order to provide same to the Complainant. The Custodian argues that the requested records were not maintained within the Borough but were in the control of Councilman Skudera.

The Custodian asserts that despite diligent attempts to secure the requested e-mail addresses, Councilman Skudera refused to provide same and the Custodian was unable to satisfy her legal obligation and should not be held liable under OPRA.

### **September 11, 2009**

E-mail from the GRC to the Custodian. The GRC states that it requires additional information regarding the instant complaint. Specifically, the GRC requests that the Custodian legally certify to the following:

1. Whether the Borough made, maintained, kept on file or authorized the "Tinton Falls E-mail Newsletter" composed by Councilman Skudera?
2. Whether the Borough utilizes the e-mail distribution list compiled by Councilman Skudera during the course of official business?

The GRC requests that the Custodian provide the requested legal certification by September 16, 2009.

### **September 16, 2009**

Custodian's legal certification. The Custodian certifies that the Borough did not make, maintain, keep on file or authorize any newsletter sent via e-mail, whether from Councilman Skudera or any other official of the Borough. The Custodian certifies that the only newsletters sent by the Borough are sent by US mail. The Custodian certifies that the Borough's website is not used for e-mail distribution nor is there an e-mail distribution list for the public.

The Custodian certifies that the only e-mail distribution lists that the Borough maintains are those held by Mayor, Council and department heads which are used for purposes of circulating memoranda, meeting agendas and so on. The Custodian certifies that, to the best of her knowledge, the Borough has never utilized Councilman Skudera's e-mail distribution list. Further, the Custodian certifies that the Borough is not in possession of the requested e-mail addresses and has no knowledge of the contents of same. The Custodian certifies that the Borough adopted an e-mail policy on November 25, 2008 providing each member of the governing body their own e-mail address to be used only for official Borough business.

### **September 16, 2009**

E-mail from the Complainant to the GRC with the following attachments:



- A screenshot of the Borough website showing where individuals may sign-up for the “Tinton Falls E-mail Newsletter” dated September 5, 2008 (previously provided with the Denial of Access Complaint).
- “Tinton Falls E-mail Newsletter” dated August 22, 2007.
- Resolution No. 08-363 dated November 25, 2008.

The Complainant states that attached is a screenshot of the Borough’s website showing the solicitation notice to collect e-mail addresses for Councilman Skudera’s e-mail newsletter, which appeared on the website from July, 2007 until the Borough’s new website went live on September 15, 2009. The Complainant states that he contacted the former webmaster of the Borough’s website regarding who authorized and approved the solicitation notice to be posted on the Borough’s website. The Complainant asserts that the webmaster advised that once Councilman Skudera became Borough Council President in July, 2007, he directed the webmaster to post the solicitation on the website, just as the previous Council President had done.

The Complainant contends that based on the foregoing, it appears that Councilman Skudera was acting in his official capacity when soliciting e-mail addresses for distribution of the “Tinton Falls E-mail Newsletter.” The Complainant asserts that Councilman Skudera began sending out the newsletter shortly after becoming Council President and identified himself as Council President in the initial newsletters. The Complainant contends that the presence of this solicitation notice on the Borough’s website for over two (2) years indicates that the e-mail newsletter was authorized by the Borough Council, as they are the steward of information presented on the website. The Complainant states that he has provided a copy of an early “Tinton Falls E-mail Newsletter” as an example of how Councilman Skudera used the newsletter to report in an official capacity on Council news following his appointment as Council President.

The Complainant contends that, in summary:

1. Councilman Skudera used Borough resources, including the taxpayer-funded Borough website, in order to solicit and collect e-mail addresses for the “Tinton Falls E-mail Newsletter.”
2. Councilman Skudera acted in his official capacity to have the solicitation posted on the Borough’s website.
3. Councilman Skudera sent out the newsletter in an official capacity, reporting mainly on Borough business conducted during Council meetings and identified himself as Council President in the newsletter.
4. The Borough Council authorized the posting of the solicitation on the Borough website by allowing the posting to remain on the website for over two (2) years.
5. Councilman Skudera acts as the custodian of record for the e-mail distribution list that was compiled via the solicitation notice.
6. Councilman Skudera used the e-mail address [mskudera@skudera.com](mailto:mskudera@skudera.com) because until November, 2008 there was no policy requiring Council members to use Borough e-mail addresses. Additionally, further review of the September, 2008 Borough website screenshot shows that Councilman Skudera was not the only Council member using a non-borough e-mail address to conduct Borough business.

**December 14, 2009**

E-mail from the Complainant to the GRC attaching Geier v Township of Plumsted, et als, Docket No. OCN-L-3718-09 (October 2009). The Complainant requests that the GRC review the attached Superior Court ruling with respect to its applicability in the instant complaint. The Complainant states that in Geier, the court held that an e-mail subscription listed in the municipal newsletter “Plumsted Township Alert,” is a government record subject to disclosure under OPRA. The Complainant avers that the facts in Geier are similar to those in the instant complaint. The Complainant requests that the GRC advise how the court’s holding in Geier will be applied towards the resolution of this complaint.

**January 6, 2010**

E-mail from the GRC to the Custodian. The GRC states that it has reviewed the evidence of record regarding the instant complaint and is in need of additional information. The GRC requests that the Custodian legally certify to the following:

1. Whether the Borough Information Technology Department (“IT”) or other personnel maintain or have access to the e-mail addresses submitted through the website?
2. Whether the current webmaster administering the Borough’s new website is the same webmaster that administered the previous website, which contained Councilman Skudera’s e-mail address solicitation?
3. Describe, in depth, the diligent effort undertaken by the Custodian to obtain the requested e-mail addresses (i.e., did the Custodian contact the webmaster or IT personnel in writing regarding this matter, contact Councilman Skudera in writing, etc.)

The GRC requests that the Custodian provide the requested legal certification to the GRC no later than January 11, 2010.

**January 6, 2010**

E-mail from the Custodian’s Counsel to the GRC. Counsel requests an extension until January 19, 2010 to provide the requested legal certification.

**January 6, 2010**

E-mail from the GRC to the Custodian’s Counsel. The GRC grants an extension until January 19, 2010 to provide the requested legal certification.

**January 10, 2010**

E-mail from the Complainant to the GRC attaching an e-mail chain between the Complainant and Mr. Claude Campbell (“Mr. Campbell”), past webmaster for the Borough website between September 11, 2009 and September 18, 2009.

The Complainant states that he contacted Mr. Campbell on September 11, 2009 questioning the circumstances behind how Councilman Skudera’s e-mail solicitation was posted on the Borough’s website. The Complainant states that Mr. Campbell responded on September 15, 2009, stating that Councilman Skudera asked Mr. Campbell to replace the Mr. Brendan Tobin’s (“Mr. Tobin”), former Borough Council President, newsletter

solicitation with Councilman Skudera's solicitation.<sup>8</sup> The Complainant states that on September 16, 2009 he requested confirmation that Councilman Skudera and Mr. Tobin requested that Mr. Campbell post an e-mail solicitation for a newsletter on the Borough's website. The Complainant states that on September 18, 2009 Mr. Campbell confirmed that Councilman Skudera told Mr. Campbell to replace Mr. Tobin's newsletter solicitation with Councilman Skudera's solicitation.

The Complainant contends that there is no question that Councilman Skudera, in his official position as Borough Council President, requested the placement of the solicitation for e-mail addresses on the Borough's website. Additionally, the Complainant contends that there is no doubt that Councilman Skudera is the custodian of record for the requested addresses because the solicitation directs subscription requests directly to Councilman Skudera's private e-mail address which he was openly using for official government business as evidenced by an attached screenshot of the Borough's website.<sup>9</sup>

### **January 13, 2010**

Custodian's legal certification attaching the Custodian's complete SOI previously submitted to the GRC on December 22, 2008.

The Custodian certifies that her responses to the GRC's questions are as follows:

#### **No. 1 – Borough's Access to the Requested E-mail Addresses:**

The Custodian certifies that the Borough has one (1) IT manager, Ms. Doreen D'Annunzio ("Ms. D'Annunzio"), which is a position that was created on October 1, 2009. The Custodian certifies that the Borough had no IT personnel at the time of the Complainant's OPRA request and that Mr. Campbell was volunteering as the Borough's webmaster. The Custodian certifies that the Borough possesses lists of citizens' e-mail addresses for items such as Council agendas, Zoning Board agendas, and so on. The Custodian certifies that she spoke with Mr. Campbell following receipt of the Complainant's request, at which time Mr. Campbell informed the Custodian that he did not maintain e-mail addresses for any members of Council.

The Custodian certifies that at the time of the Complainant's request, Councilman Skudera had a private e-mail account to which the Borough had no access. The Custodian certifies that Mr. Campbell informed her that the Borough did not maintain or have access to any e-mail address lists at the time of the Complainant's request.<sup>10</sup>

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<sup>8</sup> Mr. Campbell stated that he thought Councilman Skudera sent Mr. Campbell an e-mail, but Mr. Campbell was unable to locate such e-mail.

<sup>9</sup> Mr. Campbell also stated that he could not remember if Mr. Tobin requested that a solicitation be placed on the website or if he suggested that Mr. Tobin do same. Mr. Campbell remarked that he felt that the Borough website was the Council's property and they should be allowed to post whatever they feel is important.

<sup>10</sup> The Custodian certifies that the Borough maintains e-mail address lists at the present time, but those lists are not responsive to the Complainant's request. See paragraph No. 5 of the Custodian's certification dated January 13, 2010.

## **No. 2 – Posting of the e-mail newsletter solicitation on the Borough’s website:**

The Custodian certifies that the current webmaster for the website is Ms. D’Annunzio. The Custodian certifies that when Mr. Tobin was Council President, he posted an e-mail solicitation on the Borough’s website. The Custodian certifies that Mr. Campbell advised that upon becoming Borough Council President, Councilman Skudera requested that Mr. Campbell replace Mr. Tobin’s e-mail solicitation with Councilman Skudera’s solicitation. The Custodian certifies that she therefore believes the answer to the GRC’s second question is “yes, the posting of the e-mail solicitation was done at the direction of Councilman Skudera.”

Moreover, the Custodian certifies that the old Borough website maintained a general e-mail address, as well as individual addresses for members of Council. The Custodian certifies that the individual e-mail addresses were not requested by Mr. Campbell; rather, they were given to Mr. Campbell by members of Council. The Custodian certifies that at the time of the Complainant’s request, the Borough had not yet created any Borough maintained e-mail accounts for members of Council.

## **No. 3 – The search undertaken by the Custodian:**

The Custodian certifies that details of her search were reflected in the SOI.<sup>11</sup> The Custodian certifies that she did not contact Mr. Campbell regarding the Complainant’s request because he had no access to Councilman Skudera’s personal computer or private e-mail account. The Custodian certifies that contacting Mr. Campbell would have served no purpose. The Custodian certifies that she turned the matter over to Jim Berube, Esq. (“Mr. Berube”), Director of Law, in order to enlist Mr. Berube’s help because she was unable to obtain the requested e-mail addresses from Councilman Skudera after repeated attempts.

### **February 2, 2010**

E-mail from the GRC to the Complainant. The GRC states that because a privacy interest is implicated in the instant complaint, the GRC will need to conduct a balancing test. The GRC states that the attached document includes a chart containing four (4) questions regarding the Complainant’s need for access to the requested e-mail addresses. The GRC requests that the Complainant submit his responses to the four (4) questions as soon as possible, but by no later than February 5, 2010.

### **February 5, 2010**

Letter from the Complainant to the GRC. The Complainant states that although he will cooperate with the GRC’s request to aid in conducting a balancing test, the Complainant contends that he believes the requested e-mail addresses from the e-mail distribution list should be considered public records subject to disclosure pursuant to OPRA. The Complainant again cites to the facts in Geier and Mr. Berube’s e-mail to Councilman Skudera dated October 15, 2008, in which Mr. Berube advised that the

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<sup>11</sup> The Custodian refers to Item No. 8 of the SOI, which includes various communications documenting the Custodian’s efforts to obtain the requested e-mail addresses.

requested e-mail addresses should be disclosed. The Complainant’s response to the four (4) questions follows:

<b>Need For Access Question</b>	<b>Complainant’s Response</b>
1. Why do you need the requested records?	<p>The Complainant avers that the most pressing need for the requested e-mail addresses is to allow all members of the Borough Council, including the Complainant (who was elected to Council in November, 2008), to share information on Borough Council news and events with individuals on this e-mail list. The Complainant also wishes to ascertain to which e-mail addresses and to what degree certain opinionated and biased content was distributed by Councilman Skudera.</p> <p>The Complainant avers that since the e-mail addresses contained in the distribution list were gathered using Borough resources and the “Tinton Falls E-mail Newsletter” was used on several occasions to provide only Councilman Skudera’s viewpoint and not the viewpoint of the five (5) member Borough Council collectively, and since Councilman Skudera has failed to voluntarily provide the addresses to Council, the addresses should be provided to the Complainant and other members of Borough Council as a public record.</p>
2. How important are the requested records to you?	<p>The Complainant avers that access to the requested records is extremely important. The Complainant states that the residents of the Borough that signed up for the e-mail newsletter are expecting to receive e-mail distributions containing information about Borough Council news and events from all Borough Council members. The Complainant avers that the records must be provided in order for all members of Borough Council, including himself, to present a fair and balanced viewpoint of information concerning Borough news and events to the residents.</p> <p>The Complainant reiterates that Councilman Skudera presented some biased opinions in his e-mail newsletter; therefore, it is important to obtain the e-mail addresses in order to analyze and determine to what extent Councilman Skudera has used the addresses to disseminate biased or opinionated material.</p>
3. Do you plan to redistribute the requested records?	The Complainant requests that the GRC permit him to share the e-mail addresses only with the members of the Borough Council.

<p>4. Will you use the requested records for unsolicited contact of the individuals named in the records?</p>	<p>The Complainant avers that he will not use the records for this purpose; however, e-mails regarding Borough news and events originating from members of Borough Council using the requested e-mail addresses should not be construed as unsolicited since residents had the intention of receiving such upon subscribing.</p> <p>The Complainant avers that although he understands that <u>N.J.S.A. 47:1A-1</u> provides for the safeguarding of personal information “when disclosure ... would violate the citizen’s reasonable expectation of privacy,” it seems extremely clear that disclosure in this matter does not constitute any such violation.</p>
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### Analysis

#### **Whether Councilman Skudera unlawfully denied access to the requested e-mail addresses?**

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 ...” (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 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.

First, the GRC must turn to the issue of whether the requested e-mail addresses are government records pursuant to N.J.S.A. 47:1A-1.1.

In the instant complaint, the Complainant requested the e-mail addresses collected on the Borough's website and used to distribute the "Tinton Falls E-mail Newsletter." After the Custodian sought the e-mail addresses from Councilman Skudera and after Mr. Berube rendered his opinion that the e-mail addresses should be provided to the Complainant, Councilman Skudera withheld the requested e-mail addresses from disclosure on the advice of Mr. Nelson, the Councilman's private counsel.<sup>12</sup> The Complainant filed the instant complaint, asserting that the e-mail addresses should be provided because Councilman Skudera used the Borough website for over two (2) years to compile the e-mail addresses and represented himself and the newsletter content as being that of the Borough.

Councilman Skudera denied access to the e-mail addresses based on advice given by Mr. Nelson in a letter brief dated October 9, 2008. In said letter brief, Mr. Nelson advised that the requested e-mail addresses in this instance are not government records because disclosure would constitute a violation of an individual's constitutional right of privacy. Further, Mr. Nelson advised that disclosure of the e-mail addresses could violate federal laws and state constitutional protections afforded to privacy interests. Mr. Nelson advised that Councilman Skudera not disclose the requested e-mail addresses regardless of the purposes for which the e-mail addresses are used.

Mr. Nelson averred that Councilman Skudera has indicated that over the years, including prior to Councilman Skudera's election to the Borough governing body, Councilman Skudera has communicated with thousands of individuals in the Borough and elsewhere on a variety of issues and previously compiled e-mail addresses through communications in which individuals expressed interest in being kept abreast of events in the Borough. Mr. Nelson noted that Councilman Skudera further indicated that once he was elected to the Borough's governing body, he began to send e-mails to these individuals for informative purposes and that none of the individuals have ever granted Councilman Skudera permission to circulate or share their e-mail addresses with anyone else.

The Complainant contends that Councilman Skudera collected the requested e-mail addresses by posting a "Tinton Falls E-Mail Newsletter" solicitation on the Borough's website; Councilman Skudera also included his title as Borough Council President and Borough Hall contact information in the newsletter, which had no disclaimer stating that the newsletter does not represent the official position of the Borough.

OPRA defines a government record as "any paper, written or printed book, document ... information stored or maintained electronically ... made, maintained or kept

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<sup>12</sup> The Custodian certified in the SOI and again on January 13, 2010 that Councilman Skudera had a private e-mail account for which the solicited e-mail addresses were directed and to which the Borough had no access. The Custodian further certified that Mr. Campbell informed her that the Borough did not maintain or have access to any e-mail address lists at the time of the Complainant's request.

on file in the course of his or its official business.” (Emphasis added.) N.J.S.A. 47:1A-1.1. “In other words, if the public agency or public entity has not made, maintained, kept or received a document in the course of his or its official business, a document is not a government record subject to production.” Michelson v. Wyatt and the City of Plainsfield, 379 N.J.Super. 611, 619 (App. Div. 2005)(holding that information regarding an individual’s health history is not a government record subject to public access).

E-mail addresses fit within the definition of a government record as “information stored or maintained electronically...” N.J.S.A. 47:1A-1.1. Moreover, the evidence of record shows that the e-mail addresses at issue were collected in part through the e-mail solicitation posted on the Borough’s website between July, 2007 and September 15, 2009.<sup>13</sup>

Therefore, because the e-mail addresses received through a solicitation posted on the Borough’s website were received “in the course of official business” between July, 2007 and September 15, 2009 (when the current Borough website went live), such e-mail addresses are government records pursuant to N.J.S.A. 47:1A-1.1. and are therefore subject to OPRA.

The GRC next turns to whether “the citizen’s reasonable expectation of privacy” afforded under OPRA applies to the requested e-mail addresses and whether Councilman Skudera lawfully denied access to such.

Because the requested e-mail addresses in the instant complaint invoke privacy concerns, the GRC must employ a common law balancing test set forth by the New Jersey Supreme Court. OPRA requires that government records “shall be readily accessible” to the citizens of this State, subject to certain exceptions. N.J.S.A. 47:1A-1. OPRA simultaneously requires public agencies “to safeguard from public access a citizen's personal information” when disclosure would violate a person's “reasonable expectation of privacy.” *Ibid.* OPRA specifically states that “that portion of any document which discloses the social security number, credit card number, unlisted telephone number or driver license number of any person...” is excluded from the definition of a government record except in limited circumstances. *Id.* Moreover, OPRA requires that:

“[p]rior to allowing access to any government record, the custodian thereof shall redact from that record any information which discloses the social security number, credit card number, unlisted telephone number, or driver license number of any person; except [in certain limited circumstances.]” N.J.S.A. 47:1A-5.a.

The New Jersey Supreme Court has noted that both parts of the statute are substantive and has stated that:

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<sup>13</sup> The remainder of the e-mail addresses at issue were collected personally by Councilman Skudera and maintained by him to disseminate the “Tinton Falls E-Mail Newsletter”.  
Andrew J. Mayer v. Borough of Tinton Falls (Monmouth), 2008-245 – Findings and Recommendations of the Executive Director



“Section 1 is neither a preface nor a preamble. It has no telltale “whereas” clauses that often appear in a preamble. It appears after OPRA's enactment clause, making the provision part of the body of the law. PRB Enterprises, Inc. v. S. Brunswick Planning Bd., 105 N.J. 1, 5 (1987); 1A Sutherland, *supra*, § 20:03; 2A *id.* § 47:04. Plus the very language expressed in the privacy clause reveals its substantive nature: it does not offer reasons why OPRA was adopted, as preambles typically do; instead, it focuses on the law's implementation. Specifically, it imposes an obligation on public agencies to protect against disclosure of personal information which would run contrary to reasonable privacy interests.” Burnett v. County of Bergen, 198 N.J. 408, 423 (2009).

The State Supreme Court has determined that the packaging of home addresses into a single publicly-available document containing additional personal identifiers raises privacy concerns. Doe v. Poritz, 142 N.J. 1 (1995). In Doe, the Court noted that the issue was “not whether plaintiff has a privacy interest in his address, but whether the inclusion of plaintiff's address, along with other information, implicates any privacy interest.” 142 N.J. at 83. Accordingly, the Doe Court found that although information under Megan's Law “may be available to the public, in some form or other, [that] does not mean that plaintiff has no interest in limiting its dissemination.” 142 N.J. at 84, *see also* State v. Reid, 194 N.J. 386, 389 (2008) (recognizing reasonable expectation of privacy in subscriber information under State Constitution, notwithstanding disclosure to Internet service providers); State v. McAllister, 184 N.J. 17, 25, 31-33 (2005) (recognizing reasonable expectation of privacy in bank records under State Constitution, notwithstanding disclosure to banks).

The Doe Court therefore developed a seven point framework to assess government disclosure of information which implicates a privacy interest. *Id.* at 88. These factors are:

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

The Court noted that there was a strong state interest in disclosure of the home addresses of sexual offenders and an express public policy regarding the danger of recidivism which militated toward such disclosure. *Id.* at 89. The Court also noted that the degree and scope of disclosure is carefully calibrated to the need for public disclosure, and the plaintiff had a diminished privacy interest in the material sought to be disclosed.<sup>14</sup> *Id.* The

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<sup>14</sup> As stated by the Doe Court, “[f]irst, the information requested is not deserving of a particularly high degree of protection. We are not dealing with thoughts and feelings revealed in the course of psychiatric Andrew J. Mayer v. Borough of Tinton Falls (Monmouth), 2008-245 – Findings and Recommendations of the Executive Director 16

Court found that the state interest in protecting the public was legitimate and substantial, and that the state's interest in disclosure substantially outweighed the plaintiff's interest in privacy. *Id.* at 90. The Court therefore concluded that the disclosure of the plaintiff's home address, coupled with other identifying information, was permitted under the State Constitution. *Ibid.*

In Burnett, *supra*, the New Jersey Supreme Court affirmed a decision of the Appellate Division that required the redaction of Social Security numbers from otherwise publicly-filed real estate records. In so doing, the Court recognized the need to harmonize the language in sections 1 and 5 of OPRA and to balance the interests each section advances: ready access to government documents while safeguarding the citizen's reasonable expectation of privacy. *Id.* at 426. The Court noted that because Social Security numbers in the requested realty records were combined with other personal information, such as names, addresses, information on marital status, signatures, and details about one's mortgage, the combination of this information into a single, electronically available record elevated the privacy concern at stake. *Id.* The Court therefore employed the balancing test set forth in Doe and determined that "the twin aims of public access and protection of personal information weigh in favor of redacting Social Security numbers from the requested records before releasing them." *Id.* at 437. The Court was quick to point out, however, that its decision was limited to the specific facts of the case before it, and that the balancing of interests must be applied on a case by case basis. *Id.*

The Council has consistently upheld the redaction of home addresses from otherwise disclosable government records after balancing the competing interests involved. See Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110, 2003-121 (July 2004); Wilcox v. Township of West Caldwell, GRC Complaint No. 2004-28 (October 2004); Perino v. Borough of Haddon Heights, GRC Complaint No. 2004-128 (November 2004); Avin v. Borough of Oradell, et als, GRC Complaint Nos. 2004-176, -177, -178, -179, -180, -181, -182 (March 2005); Bernstein v. Borough of Allendale, et als., GRC Complaint Nos. 2004-195 & 2005-02, -06, -13, -99 (July 2005); Faulkner v. Rutgers University, GRC Complaint No. 2007-149 (May 2008); Feasel v. City of Trenton, GRC Complaint No. 2008-103 (September 2009).

The Complainant filed this action on the grounds that the e-mail addresses requested are government records subject to disclosure under OPRA. The Complainant asserted in the Denial of Access Complaint and in subsequent submissions that the requested e-mail addresses were collected via a newsletter solicitation posted on the Borough's website from July, 2007 to September 15, 2009. Moreover, the Complainant contended that Councilman Skudera included his title as Borough Council President and

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treatment ... medical information in general ... or medical information regarding HIV status .... Plaintiff, therefore, can claim only a most limited expectation of privacy in the information to be disseminated. Second, because of the public nature of the information, we cannot speak of harm either from non-consensual disclosure or damage to the relationship in which the records were generated. We neither risk exposing intimate details of plaintiff's life, like those laid bare to a psychiatrist, nor do we risk damaging a relationship like that between patient and doctor by releasing plaintiff's name, address or description. [citations omitted].” 142 N.J. at 88.

Borough Hall contact information in the e-mail newsletter and failed to include a disclaimer that the newsletter did not represent an official Borough position.

The Complainant contends that Councilman Skudera, in his September 5, 2008 newsletter, campaigned for a candidate on the November 4, 2008 ballot and included the candidate's background information and agenda in said newsletter. The Complainant argued that it is not appropriate for a member of the Borough Council to distribute campaign material under the guise of an official Borough newsletter using e-mail addresses collected from the Borough website.

Conversely, Mr. Nelson advised in a letter brief dated October 9, 2008 that Councilman Skudera had a duty to protect an individual's privacy interest and that the Legislature specifically tempered public access rights by providing that "a public agency *has a responsibility and an obligation to safeguard from public access a citizen's personal information ... when disclosure thereof would violate the citizen's reasonable expectation of privacy.*" (Emphasis added.) N.J.S.A. 47:1A-1. Mr. Nelson also advised that the e-mail addresses would be exempt from disclosure even if the Borough had compiled same. Mr. Nelson asserted that although the courts have not directly addressed the privacy interest of e-mail addresses, the court's rationale in State v. Reid, 194 N.J. 386, 389 (2008) can be applied to e-mail addresses, similar to how the courts have applied privacy interests to telephone numbers. Mr. Nelson contended that the records would be exempt from disclosure even if the Borough obtained them.

The Council will examine this issue within the framework of the seven factors set forth by the Court in Doe, supra.

The first and second Doe factors address the records requested and the type of information contained in same. The type of records requested in this complaint are individual e-mail addresses contained in the Borough of Tinton Falls E-mail Newsletter distribution list obtained through the Borough's website and maintained by Councilman Skudera in the course of government business. The information contained within the records is e-mail addresses of individuals who have expressed interest in receiving news of events in the Borough. Although the Councilman is not required by law to maintain such a distribution list, this list is a government record because it is "information stored or maintained electronically...made, maintained ... kept on file...or received" in the course of the Borough's and an officer's [Councilman Skudera] official business. N.J.S.A. 47:1A-1.1.

The third and fourth Doe factors, which address the potential for harm from disclosure, implicate some privacy concerns if individuals' e-mail addresses are subject to disclosure. A person's e-mail address is a unique personal identifier. Communication via the internet is possible only because an e-mail address distinctly identifies a person or entity. Due to its uniqueness, e-mail addresses may be likened to unlisted telephone numbers. "Electronic mail shares some features with telephonic communication, which generally is not stored in any form and is generally regarded as private...." Upon Pet. of Bd. Of County Commissioners, et al., 95 P.3d 593 (Colo. D.C. 2003); 2003 Colo. App. LEXIS 1151. As unlisted telephone numbers are exempt from disclosure under OPRA,

e-mail addresses, similarly, should be accorded a higher level of protection from disclosure under OPRA.

Although OPRA does not specifically name personal e-mail addresses among the list of personal identifiers exempt from disclosure, the statute should not be interpreted rigidly. The Court in Burnett, *supra*, found:

“[w]e likewise doubt the Legislature envisioned plaintiff’s actual request when it adopted OPRA. We recognize that ‘[i]t is frequently difficult for a draftsman of legislation to anticipate all situations and to measure his words against them. Hence cases inevitably arise in which a literal application of the language used would lead to results incompatible with the legislative design.’” Burnett, *supra*, 198 N.J. at 425, *quoting* New Capitol Bar & Grill Corp. v. Div. of Employment Sec., 25 N.J. 155, 160 (1957).

Moreover, since OPRA’s inception in 2002, advancements in computer technology facilitating disclosure of personal identifying information have been linked to an increase in instances of identity theft. The Burnett Court stated its “alarming” concern over the statistics of identity theft—nearly ten million Americans, or five percent of the country’s population, have been victimized by identity theft. Burnett, *supra*, 198 N.J. at 432.

There is also a privacy interest in non-disclosure of an individual’s e-mail address because e-mail addresses maintain an individual’s anonymity. Anonymity could be compromised if e-mail addresses are released to the public, especially when an e-mail address is contemporaneously coupled with or later used to obtain other personal identifying information such as a name and home address. It is precisely this concern for the grouping of personal identifying information that “elevates the privacy concern at stake,” and led the Doe and Burnett Courts to rule in favor of confidentiality. Doe, 142 N.J. at 83; Burnett, 198 N.J. at 436.

The Doe and Burnett decisions are consistent with the spirit of the federal CAN-SPAM Act of 2003, 15 U.S.C.S. §7701. The United States Congress enacted this legislation to combat the abuses with commercial distribution of e-mail addresses. The Act underscores the importance of e-mail, and recognizes the heightened privacy interest in non-disclosure of e-mail addresses. A post-enactment review of the law determined, in pertinent part, that “[i]ndividuals maintain a higher expectation of privacy with regard to e-mail addresses due to the nonexistence of an e-mail address directory similar to a phone book. E-mail addresses maintain anonymity, and certainly are not a matter of public record.” Erin Elizabeth Marks, *Spammers Clog In-Boxes Everywhere: Will the CAN-SPAM Act of 2003 Halt the Invasion?*, 54 Case W. Res. L. Rev. 943(Spring 2004). E-mail addresses would lose their anonymity if disclosed, thus making an individual more vulnerable to an invasion of privacy.

Furthermore, disclosure of e-mail addresses can create a heightened risk of identity theft. In determining whether an individual’s social security number should be

disclosed, the Burnett Court, as noted above, expressed particular concern for the risk of identity theft given the alarming statistics for this cybercrime in one year. Burnett, 198 N.J. 432. Similarly here, disclosure of e-mail addresses leaves individuals more exposed to spamming, phishing, and other direct “cyberassaults.” Phishing is “a scam by which an e-mail user is duped into revealing personal or confidential information which the scammer can use illicitly.” <http://www.merriam-webster.com/dictionary/phishing>. Phishing is most concerning because it is carried out through e-mail, and an unscrupulous person or organization only needs an unknowing victim’s e-mail address to “phish” for an individual’s financial and other personal information.

The problem is one of control. If public disclosure of the e-mail addresses is made, then the addresses may be accessed by any person or entity for any purpose. Mr. Nelson rightly points out in his letter brief dated October 9, 2008 that individuals who communicate with their municipality via e-mail do not anticipate that their e-mail addresses will be disseminated publicly. Thus, the risk associated with disclosure of e-mail addresses outweighs the Complainant’s interest in obtaining access to the requested e-mail addresses. The balance of Doe factors three and four, therefore, weighs in favor of non-disclosure.

The fifth Doe factor for consideration, the adequacy of safeguards to prevent unauthorized disclosure, also militates toward maintaining confidentiality of e-mail addresses. If the e-mail addresses were to be disclosed, there are no reasonable safeguards in place to protect against unauthorized dissemination of such addresses. Thus, there is nothing to prevent a bulk distribution of the e-mail addresses to other entities, which exposes individuals further to phishing, spamming and other forms of cyber security breaches.

The sixth Doe factor, assessing the degree of need for access, turns on a very specific set of facts exclusive to the instant complaint. Although OPRA does not require a statement of the requestor’s need for a particular record, the GRC needed evidence of same in order to properly weigh this factor. In the Denial of Access Complaint, the Complainant raises the issue that Councilman Skudera used Borough resources, specifically the Borough website, to collect e-mail addresses for dissemination of the “Tinton Falls E-mail Newsletter” and subsequently included campaign propaganda for only one candidate without alerting subscribers to the fact the e-mail newsletter did not represent an official position of the Borough.

The Complainant also provided the GRC with a recent unpublished ruling of the Superior Court of New Jersey, Geier v Township of Plumsted, et als, Docket No. OCN-L-3718-09 (October 2009), and asserted that the facts in Geier are nearly identical to the facts of the instant complaint. In Geier, the plaintiff, a write-in candidate in the Township Committee race in the Township of Plumsted (“Township”), sought a free e-mail alert list to which citizens could subscribe and receive information regarding the Township. Defendants denied access to the e-mail list, arguing that individuals have a privacy interest in their personal information especially where individuals risk unsolicited contact.

The court noted that while the plaintiff correctly stated that the reason for requesting the e-mail list is irrelevant, he nonetheless argued in favor of disclosure of the requested e-mail list as follows:

“(1) bring crucial facts to the attention of the voting public in order to have those facts considered by the voters prior to election day, (2) to counteract the propaganda disseminated to the e-mail addresses accumulated by the defendants in the same electronic communication format that the said recipients expect and obviously want to receive ... (4) otherwise overcome the Township’s efforts to hinder plaintiff in his election strategy and effort to communicate with persons who have indicated either dissatisfaction with the existing officials or regime in office or who have suffered injuries as a result of the alleged wrongdoing by defendant ...” *Id.* at page 4.

Plaintiff cited to Oregon Natural Desert Association v. Bibles, 83 F. 3d 1168 (9<sup>th</sup> Cir. Or. 1996), Department of Defense v. FLRA, 510 U.S. 487 (1994) and New Jersey Foundation for Open Government v. Government Records Council, (citation omitted),<sup>15</sup> in support of his argument.

Conversely, defendants argued that the plaintiff failed to offer proof that the denial of access to the requested e-mail address list would cause irreparable harm, specifically, that the e-mail list contains less than 400 addresses while there are about 4,000 registered voters. Defendants contended that individuals who submitted their e-mail addresses for inclusion on the requested list have a privacy interest, especially when the release of said list invited unsolicited contact. Defendants further argued that e-mail addresses are similar to other “personal identifiers” (*i.e.*, social security numbers, unlisted telephone numbers, etc.) that are expressly prohibited from disclosure pursuant to N.J.S.A. 47:1A-1.1.

The court noted that although the plaintiff had access to voter mailing lists and could reach registered voters through regular mail, the court nonetheless found that the “issue of irreparable harm begs the question as to whether the e-mail subscription list is an open public record.” *Id.* at page 5. After conducting a common law balancing test, the court determined that:

“... the legislative goals of public access and the safeguarding of personal information militate in favor of the release of the subscribers e-mail addresses ... The court makes this finding despite the attenuated public interest that is served by the release of the subscriber list. The core concern of OPRA of transparency in government is served by the availability of the newsletter itself to the public. However, as noted by the court in the Burnett case, the finding in this case is limited to these facts. Under a different scenario, it is conceivable that one’s ... e-mail could be

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<sup>15</sup> Plaintiff’s characterization that this case was an unpublished opinion in which the court ordered disclosure of e-mail addresses of those who had filed complaints with the GRC is in error. No ruling on this case occurred; however, the GRC did release the e-mail addresses at issue based on the status of the GRC as a quasi-judicial agency.

protected from public access. The court's decision was based upon the original pleadings, certifications and oral argument ..." *Id.* at page 8.

In the matter before the Council, the Complainant submitted responses to four (4) questions regarding his need for access on February 5, 2010. The Complainant averred that he believed the court's decision in Geier was sufficient to prove that the records should be disclosed; however, the Complainant asserted that his need for access is to obtain the e-mail addresses to ascertain which specific e-mail addresses and to what degree Councilman Skudera sent seemingly opinionated and biased content via the "Tinton Falls E-mail Newsletter." The Complainant averred that the information sought is important because he, as a member of Borough Council, and the other members of Council should have the ability to provide fair and balanced views of Council news and events. Further, the Complainant stated that he would only share the information with members of Borough Council, if permitted by the GRC to do so. Finally, the Complainant averred that there could be no unsolicited contact to the e-mail addresses if information is being sent to the e-mail accounts by members of Council because the residents of the Borough subscribed to a newsletter for exactly this type of information.

In considering how the Doe factors of the instant complaint weigh on the Complainant's need for access, the GRC acknowledges that the instant complaint is presented within a narrowly construed window of political activity. Specifically, the Complainant argued that Councilman Skudera used the requested e-mail addresses to disseminate political campaign propaganda for one candidate in the "Tinton Falls E-mail Newsletter" dated September 5, 2008. Further, the Complainant averred that his need for access concerned determining who received the campaign material and using the e-mail addresses to provide a fair and balanced view of Borough news and events.

The State of New Jersey has addressed the issue of disclosing records based on their importance during an election. Specifically, Title 19 provides that:

"[t]he county clerk in all counties shall cause copies of registry lists ... to be printed, and shall furnish to any voter applying for same such copies ..." N.J.S.A. 19:31-18.1(a).

Moreover, Title 19 carries penalties for the misuse of voter registration records:

"[n]o person shall use voter registration lists or copies thereof prepared pursuant to this section as a basis for commercial or charitable solicitation of the voters listed thereon. Any person making such use of such lists or copies thereof shall be a disorderly person, and shall be punished by a fine not exceeding \$500.00." N.J.S.A. 19:31-18.1(c).

In the limited circumstances surrounding the instant complaint, specifically that the requested e-mail addresses were collected via the Borough's website and used to disseminate political campaign material for only one candidate running for election on November 4, 2008, the GRC agrees with the Law Division's decision in Geier. Further, the Complainant's need for access centers around the distribution of campaign material,

which affords the placement of emphasis on a citizen's right to voter registration information under Title 19, which also carries penalties for misuse of such. Thus, the degree of need for access weighs in favor of the Complainant.

The final factor under the Doe test is "whether there is an express statutory mandate, articulated public policy, or other recognized public interest" in favor of public access. Doe, supra, 142 N.J. at 88. As discussed above, the federal government emphasized the strong public policy for confidentiality of e-mail addresses in enacting the CAN-SPAM Act of 2003. In addition, the Court in Burnett, supra, cited the Identity Theft Prevention Act, N.J.S.A. 56:11-45 *et seq.*, to express its concern for limiting access to social security numbers "whenever possible." Burnett, 198 N.J. at 436. Conversely, the New Jersey legislature enacted Title 19 to allow citizens to receive voter registration information for limited purposes. N.J.S.A. 19:31-18.1(c) Further, Title 19 makes personally identifiable information available for the exclusive purpose of candidates reaching voters.

As discussed above, there is sufficient concern here to limit access to individuals' home e-mail addresses, particularly when the information is combined with other personal identifying information. However, in the narrowly construed window of political activity, the recognized public interest shifts to statutory mandate. Specifically, the Complainant, then a citizen (and candidate) and now a member of Borough Council, stated that Councilman Skudera used the e-mail addresses to disseminate campaign material in an e-mail newsletter. Further, the Complainant averred that his need for access entailed using the e-mail addresses to see who had received what he deemed to be opinionated and biased newsletters and to enable the Borough Council to provide a fair and balanced view of Council news and events.

Moreover, N.J.S.A. 19:31-18.1(a) allows a member of the public to obtain voter information and contains safeguards for the misuse of such types of records pursuant to N.J.S.A. 19:31-18.1(c). Finally, the Complainant's valid point that residents subscribed to an e-mail newsletter disseminating Borough Council news and events further tips the scales towards disclosure being in the public interest within the confines of this complaint. Thus, the expressed public policy interest in access to individuals' personal e-mail addresses outweighs the public interest limiting access.

Therefore, because the e-mail addresses collected through the Borough's website are a government record, and because said addresses were used by Councilman Skudera for political campaigning purposes, and because voter registration information may be disclosed to members of the public pursuant to N.J.S.A. 19:31-18.1(a), the e-mail addresses collected through the Borough's website are subject to disclosure under OPRA. Therefore, Councilman Skudera has unlawfully denied access to the requested records and must disclose the e-mail addresses collected through the Borough's website to the Complainant.<sup>16</sup> Additionally, pursuant to N.J.S.A. 47:1A-6, Councilman Skudera failed to bear his burden of proving that the requested e-mail addresses collected through the Borough's website were exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

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<sup>16</sup> The Councilman Skudera is only required to disclose those e-mail addresses collected via the Borough's website between July, 2007 and September 15, 2009.



**Whether Councilman Skudera's denial of access to the requested e-mail addresses rises 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 Councilman Skudera knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending Councilman Skudera's compliance with the Council's Interim Order.

**Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Because the e-mail addresses received through a solicitation posted on the Borough's website were received "in the course of official business," between July, 2007 and September 15, 2009, such e-mail addresses are government records pursuant to N.J.S.A. 47:1A-1.1. and are therefore subject to OPRA.
2. Because the e-mail addresses received through the Borough's website are a government record, and because said addresses were used by Councilman Skudera for political campaigning purposes, and because voter registration information may be disclosed to members of the public pursuant to N.J.S.A. 19:31-18.1(a), the e-mail addresses collected through the Borough's website are subject to disclosure under OPRA. Therefore, Councilman Skudera has unlawfully denied access to the requested records and must disclose the e-mail addresses collected through the Borough's website to the Complainant.<sup>17</sup> Additionally, pursuant to N.J.S.A. 47:1A-6, Councilman Skudera failed to bear his burden of proving that the requested e-mail addresses collected through the Borough's website were exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
3. **Councilman Skudera shall comply with Item No. 2 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>18</sup> to the Executive Director.<sup>19</sup>**
4. The Council defers analysis of whether Councilman Skudera knowingly and willfully violated OPRA and unreasonably denied access under the totality of

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<sup>17</sup> The Custodian is only required to disclose those e-mail addresses collected via the Borough's website between July, 2007 and September 15, 2009.

<sup>18</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."

<sup>19</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

the circumstances pending Councilman Skudera's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso  
Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

April 1, 2010