



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

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

August 28, 2012 Government Records Council Meeting

Robert A. Verry
Complainant

Complaint No. 2009-204 & 2009-205

v.

Borough of South Bound Brook (Somerset)
Custodian of Record

At the August 28, 2012 public meeting, the Government Records Council (“Council”) considered the August 21, 2012 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that these two (2) complaints be dismissed because the Complainant withdrew same via e-mail to the GRC dated August 13, 2012 (via legal counsel) because the parties have settled these matters. Therefore, no further adjudication is required.

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 28th Day of August, 2012

Robin Berg Tabakin, Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: August 30, 2012



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
August 28, 2012 Council Meeting**

**Robert A. Verry¹
Complainant**

GRC Complaint No. 2009-204 & 2009-205

v.

**Borough of South Bound Brook (Somerset)²
Custodian of Records**

Records Relevant to Complaint:

February 27, 2009 OPRA request: Copies of any and all invoices submitted by the law firm of Eric M. Bernstein & Associates, LLC for the months of October, November and December 2008.

March 12, 2009 OPRA request: Inspection of any and all invoices submitted by the law firm of Cooper & Cooper for the month of February 2009.

Request Made: February 27, 2009 and March 12, 2009

Response Made: March 12, 2009 and March 20, 2009

Custodian: Donald E. Kazar

GRC Complaint Filed: June 23, 2009³

Background

July 26, 2011

Government Records Council's ("Council") Interim Order. At its July 26, 2011 public meeting, the Council considered the July 19, 2011 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 Custodian provided the Complainant with a copy of Invoice No. 18771 dated December 2, 2008, an invoice dated December 4, 2008 and an invoice dated January 8, 2009 with redactions in accordance with the Council's May 24, 2011 Interim Order on June 1, 2011, and because the Custodian provided certified confirmation of compliance pursuant to N.J.

¹ Represented by Walter M. Luers, Esq., of the Law Offices of Walter M. Luers, LLC (Clinton, NJ).

² Represented by Francesco Taddeo, Esq. (Somerville, NJ). Previous counsel was William T. Cooper, III, Esq., of Cooper & Cooper (Somerville, NJ).

³ The GRC received the Denial of Access Complaint on said date.

Court Rule 1:4-4 to the Executive Director within the required time frame to comply with the Council's Interim Order, the Custodian has complied with the Council's May 24, 2011 Interim Order.

2. The Custodian failed to respond in writing to the Complainant's February 27, 2009 OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days resulting in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and failed to immediately grant access to the immediate access records (invoices) responsive to both of the Complainant's OPRA requests thus violating N.J.S.A. 47:1A-5.e. Further, the Custodian failed to provide a specific lawful basis for the redactions to the requested invoices thus rendering the Custodian's responses to the Complainant's February 27, 2009 and March 12, 2009 OPRA requests insufficient pursuant to N.J.S.A. 47:1A-5.g. Also, the Custodian did not fully comply with the Council's October 26, 2010 Interim Order because the Custodian's Document Index failed to include the Custodian's legal explanation or citations for the redactions made to the requested records, and the Custodian unlawfully denied the Complainant access to some of the redacted portions of the requested records. However, the Custodian timely complied with the Council's May 24, 2011 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and the Council's May 24, 2011 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, [Teeters], and [Mason]. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

July 27, 2011

Council's Interim Order distributed to the parties.

July 28, 2011

Complaint referred to the Office of Administrative Law.

August 13, 2012

E-mail from the Complainant's Counsel to the GRC attaching a letter from Counsel to the Honorable Patricia M. Kerins, Administrative Law Judge, dated August

13, 2012. Counsel states that this matter has been settled and the Complainant thus withdraws these two (2) complaints.

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that these two (2) complaints be dismissed because the Complainant withdrew same via e-mail to the GRC dated August 13, 2012 (via legal counsel) because the parties have settled these matters. Therefore, no further adjudication is required.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

August 21, 2012



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
Commissioner

INTERIM ORDER

July 26, 2011 Government Records Council Meeting

Robert A. Verry
Complainant

Complaint No. 2009-204 & 2009-205

v.

Borough of South Bound Brook (Somerset)
Custodian of Record

At the July 26, 2011 public meeting, the Government Records Council (“Council”) considered the July 19, 2011 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Custodian provided the Complainant with a copy of Invoice No. 18771 dated December 2, 2008, an invoice dated December 4, 2008 and an invoice dated January 8, 2009 with redactions in accordance with the Council’s May 24, 2011 Interim Order on June 1, 2011, and because the Custodian provided certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4 to the Executive Director within the required time frame to comply with the Council’s Interim Order, the Custodian has complied with the Council’s May 24, 2011 Interim Order.
2. The Custodian failed to respond in writing to the Complainant’s February 27, 2009 OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days resulting in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and failed to immediately grant access to the immediate access records (invoices) responsive to both of the Complainant’s OPRA requests thus violating N.J.S.A. 47:1A-5.e. Further, the Custodian failed to provide a specific lawful basis for the redactions to the requested invoices thus rendering the Custodian’s responses to the Complainant’s February 27, 2009 and March 12, 2009 OPRA requests insufficient pursuant to N.J.S.A. 47:1A-5.g. Also, the Custodian did not fully comply with the Council’s October 26, 2010 Interim Order because the Custodian’s Document Index failed to include the Custodian’s legal explanation or citations for the redactions made to the requested records, and the Custodian unlawfully denied the Complainant access to some of the redacted portions of the requested records. However, the Custodian timely complied with the Council’s May 24, 2011 Interim Order. Additionally, the evidence of record does not indicate that the Custodian’s violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded



that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and the Council's May 24, 2011 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

Interim Order Rendered by the
Government Records Council
On The 26th Day of July, 2011

Robin Berg Tabakin, Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: July 27, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
July 26, 2011 Council Meeting**

**Robert A. Verry¹
Complainant**

GRC Complaint No. 2009-204 & 2009-205

v.

**Borough of South Bound Brook (Somerset)²
Custodian of Records**

Records Relevant to Complaint:

February 27, 2009 OPRA request: Copies of any and all invoices submitted by the law firm of Eric M. Bernstein & Associates, LLC for the months of October, November and December 2008.

March 12, 2009 OPRA request: Inspection of any and all invoices submitted by the law firm of Cooper & Cooper for the month of February 2009.

Request Made: February 27, 2009 and March 12, 2009

Response Made: March 12, 2009 and March 20, 2009

Custodian: Donald E. Kazar

GRC Complaint Filed: June 23, 2009³

Background

May 24, 2011

Government Records Council's ("Council") Interim Order. At its May 24, 2011 public meeting, the Council considered the (date of FR) Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian did not fully comply with the Council's October 26, 2010 Interim Order because the Custodian's Document Index failed to include the Custodian's legal explanation or citations for the redactions made to the requested records.

¹ Represented by Walter M. Luers, Esq., of the Law Offices of Walter M. Luers, LLC (Clinton, NJ).

² Represented by Francesco Taddeo, Esq. (Somerville, NJ). Previous counsel was William T. Cooper, III, Esq., of Cooper & Cooper (Somerville, NJ).

³ The GRC received the Denial of Access Complaint on said date.

2. **The *In Camera* Examination set forth in the above table reveals the Custodian has lawfully denied access to, or redacted, portions of the records listed in the document index pursuant to N.J.S.A. 47:1A-6. However, the Custodian must disclose those portions of the requested records which were unlawfully redacted, as set forth in the above table.**
3. **The Custodian shall comply with paragraph #2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4⁴, to the Executive Director.⁵**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

May 26, 2011

Council's Interim Order distributed to the parties.

May 31, 2011

E-mail from the Custodian's Counsel to the GRC. Counsel states that he is in receipt of the Council's May 24, 2011 Interim Order and various other submissions from the GRC regarding complaints not at issue here. Counsel requests an extension of time until June 3, 2011 to submit certified compliance of the Council's order.

May 31, 2011

E-mail from the GRC to the Custodian's Counsel. The GRC states that because the last date to comply with the Council's Interim Order is June 3, 2011, no extension of time is necessary.

June 1, 2011

Custodian's response to the Council's May 24, 2011 Interim Order attaching the following:

- Invoice No. 18771 dated December 2, 2008 (for services rendered in November 2008).

⁴ "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."

⁵ 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.

- Invoice dated December 4, 2008 (for services rendered in October 2008, November 2008 and December 2008) with redactions.
- Invoice dated January 8, 2009 (for services rendered in December 2008 and January 2009) with redactions.

The Custodian certifies that the Council held in its May 24, 2011 Findings & Recommendations of the Executive Director that the Borough lawfully denied access to a majority of the records responsive to the Complainant's OPRA requests. The Custodian certifies that the Council further held that certain redactions were unlawfully made to the attached responsive records and ordered the Custodian to provide said records in accordance with the Council's Interim Order.

The Custodian certifies that pursuant to the Council's May 24, 2011 Interim Order, he is simultaneously providing a copy of the attached responsive records with the appropriate redactions to the Complainant and the GRC. The Custodian certifies that the Borough is henceforth in compliance of the Council's order.

Analysis

Whether the Custodian complied with the Council's May 24, 2011 Interim Order?

The Council's May 24, 2011 Interim Order specifically directed the Custodian to "...disclose those portions of the requested records which were unlawfully redacted ..." ordering disclosure of previously redacted portions of the following records:

- Invoice No. 18771 dated December 2, 2008 (for services rendered in November 2008).
- Invoice dated December 4, 2008 (for services rendered in October 2008, November 2008 and December 2008) with redactions.
- Invoice dated January 8, 2009 (for services rendered in December 2008 and January 2009) with redactions.

Said Order also directed the Custodian to provide certified confirmation of compliance to the GRC's Executive Director within five (5) business days from receipt of said Order.

The Custodian's Counsel contacted the GRC on May 31, 2011 requesting an extension of time until June 3, 2011 to comply with the Council's Order. The GRC responded on the same day stating that as the last date to comply with the Council's Order was June 3, 2011, no extension of time was necessary.

On June 1, 2011, or four (4) business days after receipt of the Council's Interim Order, the Custodian provided certified confirmation of compliance with the Council's Order to the Executive Director of the GRC certifying that the Complainant was simultaneously provided a copy of the above mentioned responsive records in accordance with the Council's Order.⁶

⁶ The GRC verified that the invoices were redacted according to its May 24, 2011 Interim Order.
Robert A. Verry v. Borough of South Bound Brook (Somerset), 2009-204 & 2009-205 – Supplemental Findings and Recommendations of the Executive Director 3

Therefore, because the Custodian provided the Complainant a copy of Invoice No. 18771 dated December 2, 2008, an invoice dated December 4, 2008 and an invoice dated January 8, 2009 with redactions in accordance with the Council's May 24, 2011 Interim Order on June 1, 2011, and because the Custodian provided certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4 to the Executive Director within the required time frame to comply with the Council's Interim Order, the Custodian has complied with the Council's May 24, 2011 Interim Order.

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

OPRA states that:

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

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

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

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

In the matter before the Council, the Custodian failed to respond in writing to the Complainant's February 27, 2009 OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days resulting in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and failed to immediately

grant access to the immediate access records (invoices) responsive to both of the Complainant's OPRA requests thus violating N.J.S.A. 47:1A-5.e. Further, the Custodian failed to provide a specific lawful basis for the redactions to the requested invoices thus rendering the Custodian's responses to the Complainant's February 27, 2009 and March 12, 2009 OPRA requests insufficient pursuant to N.J.S.A. 47:1A-5.g. Also, the Custodian did not fully comply with the Council's October 26, 2010 Interim Order because the Custodian's Document Index failed to include the Custodian's legal explanation or citations for the redactions made to the requested records, and the Custodian unlawfully denied the Complainant access to some of the redacted portions of the requested records. However, the Custodian timely complied with the Council's May 24, 2011 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Whether the Complainant is a “prevailing party” pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney's fees?

OPRA provides that:

“[a] person who is denied access to a government record by the custodian of the record, at the option of the requestor, may:

- institute a proceeding to challenge the custodian's decision by filing an action in Superior Court...; or
- in lieu of filing an action in Superior Court, file a complaint with the Government Records Council...

A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.” N.J.S.A. 47:1A-6.

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the court held that a complainant is a “prevailing party” if he/she achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct. *Id.* at 432. Additionally, the court held that attorney's fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. *Id.*

In Teeters, the complainant appealed from a final decision of the Government Records Council which denied an award for attorney's fees incurred in seeking access to certain public records via two complaints she filed under the Open Public Records Act (OPRA), N.J.S.A. 47:1A-6 and N.J.S.A. 47:1A-7.f., against the Division of Youth and Family Services (“DYFS”). The records sought involved an adoption agency having falsely advertised that it was licensed in New Jersey. DYFS eventually determined that the adoption agency violated the licensing rules and reported the results of its investigation to the complainant. The complainant received the records she requested

upon entering into a settlement with DYFS. The court found that the complainant engaged in reasonable efforts to pursue her access rights to the records in question and sought attorney assistance only after her self-filed complaints and personal efforts were unavailing. *Id.* at 432. With that assistance, she achieved a favorable result that reflected an alteration of position and behavior on DYFS's part. *Id.* As a result, the complainant was a prevailing party entitled to an award of a reasonable attorney's fee. Accordingly, the Court remanded the determination of reasonable attorney's fees to the GRC for adjudication.

Additionally, the New Jersey Supreme Court has ruled on the issue of "prevailing party" attorney's fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the court discussed the catalyst theory, "which posits that a plaintiff is a 'prevailing party' if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." Mason, *supra*, at 71, (quoting Buckhannon Board & Care Home v. West Virginia Department of Health & Human Resources, 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). The court in Buckhannon stated that the phrase "prevailing party" is a legal term of art that refers to a "party in whose favor a judgment is rendered." (quoting Black's Law Dictionary 1145 (7th ed. 1999)). The court in Mason, *supra*, at 76, held that "requestors are entitled to attorney's fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) 'a factual causal nexus between plaintiff's litigation and the relief ultimately achieved'; and (2) 'that the relief ultimately secured by plaintiffs had a basis in law.'" Singer v. State, 95 N.J. 487, 495, cert denied (1984)."

In the matter before the Council, the Custodian failed to respond in writing to the Complainant's February 27, 2009 OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days resulting in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., failed to immediately grant access to the immediate access records (invoices) responsive to both of the Complainant's OPRA requests thus violating N.J.S.A. 47:1A-5.e., failed to provide a specific lawful basis for the redactions to the requested invoices thus rendering the Custodian's responses to the Complainant's February 27, 2009 and March 12, 2009 OPRA requests insufficient pursuant to N.J.S.A. 47:1A-5.g., and failed to fully comply with the Council's October 26, 2010 Interim Order because the Custodian's Document Index failed to include the Custodian's legal explanation or citations for the redactions made to the requested records, and the Custodian unlawfully denied the Complainant access to some of the redacted portions of the requested records.

Additionally, the Council's May 24, 2011 Interim Order ordered the Custodian to disclose to the Complainant three (3) of the records responsive without some redactions in accordance with the Council's *in camera* findings. The Custodian timely complied with the Council's Interim Order on June 1, 2011.

Thus, pursuant to Teeters, *supra*, and the Council's May 24, 2011 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason, *supra*, a factual causal nexus exists between the Complainant's filing

of a Denial of Access Complaint and the relief ultimately achieved. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, supra, and Mason, supra. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian provided the Complainant with a copy of Invoice No. 18771 dated December 2, 2008, an invoice dated December 4, 2008 and an invoice dated January 8, 2009 with redactions in accordance with the Council's May 24, 2011 Interim Order on June 1, 2011, and because the Custodian provided certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4 to the Executive Director within the required time frame to comply with the Council's Interim Order, the Custodian has complied with the Council's May 24, 2011 Interim Order.
2. The Custodian failed to respond in writing to the Complainant's February 27, 2009 OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days resulting in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and failed to immediately grant access to the immediate access records (invoices) responsive to both of the Complainant's OPRA requests thus violating N.J.S.A. 47:1A-5.e. Further, the Custodian failed to provide a specific lawful basis for the redactions to the requested invoices thus rendering the Custodian's responses to the Complainant's February 27, 2009 and March 12, 2009 OPRA requests insufficient pursuant to N.J.S.A. 47:1A-5.g. Also, the Custodian did not fully comply with the Council's October 26, 2010 Interim Order because the Custodian's Document Index failed to include the Custodian's legal explanation or citations for the redactions made to the requested records, and the Custodian unlawfully denied the Complainant access to some of the redacted portions of the requested records. However, the Custodian timely complied with the Council's May 24, 2011 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and the Council's May 24, 2011 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Therefore, the

Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

July 19, 2011



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

CHRIS CHRISTIE
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KIM GUADAGNO
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INTERIM ORDER

May 24, 2011 Government Records Council Meeting

Robert A. Verry
Complainant

Complaint No. 2009-204 & 2009-205

v.

Borough of South Bound Brook (Somerset)
Custodian of Record

At the May 24, 2011 public meeting, the Government Records Council ("Council") considered the April 20, 2011 *In Camera* Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian did not fully comply with the Council's October 26, 2010 Interim Order because the Custodian's Document Index failed to include the Custodian's legal explanation or citations for the redactions made to the requested records.
2. **The *In Camera* Examination set forth in the table below reveals the Custodian has lawfully denied access to, or redacted, portions of the records listed in the document index pursuant to N.J.S.A. 47:1A-6. However, the Custodian must disclose those portions of the requested records which were unlawfully redacted, as set forth in the above table.**
3. **The Custodian shall comply with paragraph #2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4¹, to the Executive Director.²**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

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

² Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

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

Record or Redaction Number	Record Name/Date	Description of Record or Redaction	Custodian's Explanation/ Citation for Non-disclosure or Redactions	Findings of the <i>In Camera</i> Examination ³
Invoice #18771	One (1) page invoice from Eric M. Bernstein & Associates, LLC dated December 2, 2008.	Second sentence of entry dated November 18, 2008. Second sentence of entry dated November 24, 2008.	Attorney-client privileged material. ⁴	Second sentence of entry dated November 18, 2008 is not exempt from disclosure pursuant to <u>N.J.S.A.</u> 47:1A-1.1 as attorney-client privileged material. The Custodian must disclose the unlawfully redacted information. Second sentence of entry dated November 24, 2008 is not exempt from disclosure pursuant to <u>N.J.S.A.</u> 47:1A-1.1 as attorney-client privileged material. The Custodian must disclose the unlawfully redacted

³ **Unless expressly identified for redaction, everything in the record shall be disclosed.** For purposes of identifying redactions, unless otherwise noted a paragraph/new paragraph begins whenever there is an indentation and/or a skipped space(s). The paragraphs are to be counted starting with the first whole paragraph in each record and continuing sequentially through the end of the record. If a record is subdivided with topic headings, renumbering of paragraphs will commence under each new topic heading. Sentences are to be counted in sequential order throughout each paragraph in each record. Each new paragraph will begin with a new sentence number. If only a portion of a sentence is to be redacted, the word in the sentence which the redaction follows or precedes, as the case may be, will be identified and set off in quotation marks. If there is any question as to the location and/or extent of the redaction, the GRC should be contacted for clarification before the record is redacted. The GRC recommends the redactor make a paper copy of the original record and manually "black out" the information on the copy with a dark colored marker, then provide a copy of the blacked-out record to the requester.

⁴ The Custodian's reasons for non-disclosure of this record appear in a handwritten note at the bottom of the redacted record.

				information.
Invoice dated December 4, 2008	Seven (7) page invoice to Borough of South Bound Brook dated December 4, 2008	<p>Page One: Entry dated October 30, 2008: second line redacted.</p> <p>Entry dated November 10, 2008: last two words of third line redacted to “Prepare response.”</p> <p>Entry dated November 17, 2008 redacted following the words “Receipt and review e-mail.”</p> <p>Entry dated December 1, 2008 to December 3, 2008: redacted following the words “Prepare response for” through “Fax;” remainder of entry redacted following “regarding.”</p> <p>Page 2: Entry dated October 27, 2008 redacted following “receipt and review e-mail</p>	No legal basis for redactions cited in document index.	<p>Page One: Entry dated October 30, 2008: second line is not exempt from disclosure pursuant to <u>N.J.S.A.</u> 47:1A-1.1 as attorney-client privileged material. The Custodian must disclose the unlawfully redacted information.</p> <p>Entry dated November 10, 2008: last two words of third line through “Prepare response” are not exempt from disclosure pursuant to <u>N.J.S.A.</u> 47:1A-1.1 as attorney-client privileged material. The Custodian must disclose the unlawfully redacted information.</p> <p>Entry dated November 17, 2008 material following the words “Receipt and review e-mail” is exempt from disclosure pursuant to <u>N.J.S.A.</u> 47:1A-1.1 as attorney client privileged material. The Custodian’s redactions are lawful.</p> <p>Entry dated December 1, 2008 to December 3, 2008:</p>

		<p>from Dave Fisher regarding.” Entry dated November 10, 2008 redacted following the words “Receipt and review e-mails regarding.”</p> <p>Entry dated November 10, 2008, redacted following the words “Meeting with Dave Fisher and Robert Curley, Esq., regarding.”</p> <p>Entry dated November 13, 2008 redacted from the word “regarding” to “Telephone.”</p> <p>Entry dated November 14, 2008 redacted from the word “indicating” through “Receipt.”</p> <p>Page 3: No redactions made.</p> <p>Page 4: Entry dated November 12, 2008 redacted</p>		<p>material following the words “Prepare response for” through “Fax” is not exempt from disclosure pursuant to <u>N.J.S.A.</u> 47:1A-1.1 as attorney client privileged material; remainder of entry following “regarding” is also not exempt from disclosure pursuant to <u>N.J.S.A.</u> 47:1A-1.1 as attorney client privileged material. The Custodian must disclose all of the unlawfully redacted information.</p> <p>Page 2: Entry dated October 27, 2008 material following “receipt and review e-mail from Dave Fisher regarding” is exempt from disclosure pursuant to <u>N.J.S.A.</u> 47:1A-1.1 as attorney-client privileged material. The Custodian’s redactions are lawful.</p> <p>Entry dated November 10, 2008 material following the words “Receipt and review e-mails regarding” is not exempt from disclosure pursuant to <u>N.J.S.A.</u> 47:1A-1.1 as attorney-client</p>
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		<p>from “Boyle” through “Receipt;” remainder of entry following “Cruz” has been redacted.</p> <p>Entry dated November 21, 2008 redacted following “regarding.”</p> <p>Page 5: Entry dated November 24, 2008 redacted from “MJIF” through “Receipt.”</p> <p>Entry dated November 26, 2008 redacted from “Cruz” through “Review.”</p> <p>Entry dated December 1, 2008 redacted from “MJIF through “Telephone;” redacted following “Terry.”</p> <p>Page 6: No redactions made.</p> <p>Page 7: No redactions made.</p>	<p>privileged material. The Custodian must disclose the unlawfully redacted information.</p> <p>Entry dated November 10, 2008, material following the words “Meeting with Dave Fisher and Robert Curley, Esq., regarding” is exempt from disclosure pursuant to <u>N.J.S.A.</u> 47:1A-1.1 as attorney-client privileged material. The Custodian’s redactions are lawful.</p> <p>Entry dated November 13, 2008 material from the word “regarding” to “Telephone” is exempt from disclosure pursuant to <u>N.J.S.A.</u> 47:1A-1.1 as attorney-client privileged material. The Custodian’s redactions are lawful.</p> <p>Entry dated November 14, 2008 material from the word “indicating” through “Receipt” is exempt from disclosure pursuant to <u>N.J.S.A.</u> 47:1A-1.1 as attorney-client privileged material. The Custodian’s redactions are</p>
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				<p>lawful.</p> <p>Page 3: No redactions made.</p> <p>Page 4: Entry dated November 12, 2008 material from “Boyle” through “Receipt” is exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u> as attorney-client privileged material; remainder of entry following “Cruz” is exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u> as attorney-client privileged material. The Custodian’s redactions are lawful.</p> <p>Entry dated November 21, 2008 material following “regarding” is not exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u> as attorney-client privileged material. The Custodian must disclose the unlawfully redacted information.</p> <p>Page 5: Entry dated November 24, 2008 material from “MJIF” through “Receipt” is not exempt from</p>
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			<p>disclosure pursuant to <u>N.J.S.A.</u> 47:1A-1.1 as attorney-client privileged material. The Custodian must disclose the unlawfully redacted information.</p> <p>Entry dated November 26, 2008 material from “Cruz” through “Review” is not exempt from disclosure pursuant to <u>N.J.S.A.</u> 47:1A-1.1 as attorney-client privileged material. The Custodian must disclose the unlawfully redacted information.</p> <p>Entry dated December 1, 2008 material from “MJIF through “Telephone” is not exempt from disclosure pursuant to <u>N.J.S.A.</u> 47:1A-1.1 as attorney-client privileged material; material following “Terry” is exempt from disclosure pursuant to <u>N.J.S.A.</u> 47:1A-1.1 as attorney-client privileged material. The Custodian must disclose the unlawfully redacted information.</p>
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				<p>Page 6: No redactions made.</p> <p>Page 7: No redactions made.</p>
Invoice dated December 23, 2008	One (1) page invoice to Borough of South Bound Brook dated December 23, 2008.	<p>Entry dated December 11, 2008 to December 16, 2008: redacted from “first” through “Telephone;” redacted from “memo” to “and forward to Clerk Don Kazar.”</p> <p>Entry dated December 19, 2008 to December 22, 2008: redacted following “Kazar.”</p>	No legal basis for redactions cited in document index.	<p>Entry dated December 11, 2008 to December 16, 2008: material from “first” through “Telephone” is exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u> as attorney-client privileged material. Material from “memo” to “and forward to Clerk Don Kazar” is exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u> as attorney-client privileged material. The Custodian’s redactions are lawful.</p> <p>Entry dated December 19, 2008 to December 22, 2008: material following “Kazar” is exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u> as attorney-client privileged material. The Custodian’s redactions are lawful.</p>
Invoice dated January 8, 2009	Six (6) page invoice to Borough of South Bound Brook dated January 8, 2009	Page One: Entry dated December 4, 2008 redacted following “Tim Duggan,	No legal basis for redactions cited in document index.	Page One: Entry dated December 4, 2008 material following “Tim Duggan, Esq.” is exempt from disclosure pursuant

		<p>Esq.”</p> <p>Entry dated December 5, 2008 redacted following “Fisher.”</p> <p>Entry dated December 8, 2008 redacted following “Tim Duggan, Esq.”</p> <p>Entry dated December 12, 2008, second line redacted following “regarding” to “Telephone” on third line; fourth line redacted following “regarding” to “Telephone;” fifth line redacted from “regarding” to “Receipt.”</p> <p>Entry dated December 16, 2008 redacted from “Robert Curley, Esq.” to “FedEx.”</p> <p>Page Two: Entry dated December 17, 2008 second line redacted following “Robert Smith, Esq.”</p>		<p>to <u>N.J.S.A.</u> 47:1A-1.1 as attorney-client privileged material.</p> <p>Entry dated December 5, 2008 material following “Fisher” is not exempt from disclosure pursuant to <u>N.J.S.A.</u> 47:1A-1.1 as attorney-client privileged material. The Custodian must disclose the unlawfully redacted information.</p> <p>Entry dated December 8, 2008 material following “Tim Duggan, Esq.” is exempt from disclosure pursuant to <u>N.J.S.A.</u> 47:1A-1.1 as attorney-client privileged material. The Custodian’s redactions are lawful.</p> <p>Entry dated December 12, 2008, material from second line following “regarding” to “Telephone” on third line is exempt from disclosure pursuant to <u>N.J.S.A.</u> 47:1A-1.1 as attorney-client privileged material. Material on fourth line following “regarding” to “Telephone” is</p>
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		<p>to end of entry.</p> <p>Page Three: Entry dated December 8, 2008 redacted from “Kazar” to end of entry.</p> <p>Entry dated December 17, 2008 redacted from “determine” to end of entry.</p> <p>Page Four: No redactions made.</p> <p>Page Five: No redactions made.</p> <p>Page Six: Entry dated December 30, 2008 redacted from “Soffner” to “Telephone.”</p> <p>Entry dated January 6, 2009 redacted from “Kazar” to end of entry.</p>	<p>exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u> as attorney-client privileged material. Material on fifth line from “regarding” to “Receipt” is exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u> as attorney-client privileged material. The Custodian’s redactions are lawful.</p> <p>Entry dated December 16, 2008 material from “Robert Curley, Esq.” to “FedEx” is exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u> as attorney-client privileged material. The Custodian’s redactions are lawful.</p> <p>Page Two: Entry dated December 17, 2008 material on second line following “Robert Smith, Esq.” to end of entry is exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u> as attorney-client privileged material. The Custodian’s redactions are lawful.</p> <p>Page Three: Entry dated</p>
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			<p>December 8, 2008 material from “Kazar” to end of entry is not exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u> as attorney-client privileged material. The Custodian must disclose the unlawfully redacted information.</p> <p>Entry dated December 17, 2008 material from “determine” to end of entry is exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u> as attorney-client privileged material. The Custodian’s redactions are lawful.</p> <p>Page Four: No redactions made.</p> <p>Page Five: No redactions made.</p> <p>Page Six: Entry dated December 30, 2008 material from “Soffner” to “Telephone” is exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u> because it contains attorney-client privileged material. The Custodian’s</p>
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				<p>redactions are lawful.</p> <p>Entry dated January 6, 2009 material from "Kazar" to end of entry is not exempt from disclosure pursuant to <u>N.J.S.A.</u> 47:1A-1.1 as attorney-client privileged material. The Custodian must disclose the unlawfully redacted information.</p>
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Interim Order Rendered by the
Government Records Council
On The 24th Day of May, 2011

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: May 26, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
May 24, 2011 Council Meeting**

**Robert A. Verry¹
Complainant**

GRC Complaint No. 2009-204 & 2009-205

v.

**Borough of South Bound Brook (Somerset)²
Custodian of Records**

Records Relevant to Complaint:

February 27, 2009 OPRA request: Copies of any and all invoices submitted by the law firm of Eric M. Bernstein & Associates, LLC for the months of October, November and December 2008.

March 12, 2009 OPRA request: Inspection of any and all invoices submitted by the law firm of Cooper & Cooper for the month of February 2009.

Request Made: February 27, 2009 and March 12, 2009

Response Made: March 12, 2009 and March 20, 2009

Custodian: Donald E. Kazar

GRC Complaint Filed: June 23, 2009³

Records Submitted for *In Camera* Examination:

- Invoice No. 18771 dated December 2, 2008.
- Invoice dated December 4, 2008.
- Invoice dated December 23, 2008.
- Invoice dated January 8, 2009.

Background

October 26, 2010

Government Records Council's Interim Order. At the October 26, 2010 public meeting, the Government Records Council ("Council") considered the September 13, 2010 Executive Director's Findings and Recommendations 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 Represented by Walter M. Luers, Esq., of the Law Offices of Walter M. Luers, LLC (Oxford, NJ).

² Represented by William T. Cooper III, Esq. (Somerville, NJ).

³ The GRC received the Denial of Access Complaint on said date.

1. The Custodian's failure to respond in writing to the Complainant's February 27, 2009 OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007). Further, because the Custodian failed to immediately grant access to the records responsive to both of the Complainant's OPRA requests, the Custodian has violated N.J.S.A. 47:1A-5.e. See Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007).

2. Because the Custodian failed to provide a specific lawful basis for the redactions to the requested invoices, the Custodian's responses to the Complainant's February 27, 2009 and March 12, 2009 OPRA requests are insufficient pursuant to N.J.S.A. 47:1A-5.g. and Renna v. Union County Improvement Authority, GRC Complaint No. 2008-86 (May 2010). See also Paff v. Borough Lavallette (Ocean), GRC Complaint No. 2007-209 (December 2008), O'Shea v. Township of West Milford (Passaic), GRC Complaint No. 2008-283 (November 2009) and Frost v. North Hudson Regional Fire & Rescue (Hudson), GRC Complaint No. 2008-198 (December 2009).

3. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the following to determine the validity of the Custodian's assertion that the record contains information which is exempt from disclosure as attorney-client privileged pursuant to N.J.S.A. 47:1A-1.1:
 - Invoice No. 18771 dated December 2, 2008 (for services rendered in November 2008) with redactions.
 - Invoice dated December 4, 2008 (for services rendered in October 2008, November 2008 and December 2008) with redactions.
 - Invoice dated December 23, 2008 (for services rendered in December 2008) with redactions.
 - Invoice dated January 8, 2009 (for services rendered in December 2008 and January 2009) with redactions.

4. **The Custodian must deliver⁴ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 3 above), a document or redaction index⁵, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4⁶, that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery**

⁴ The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

⁵ The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

⁶ "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."

must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.

5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
6. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

October 27, 2010

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

October 29, 2010

Certification of the Custodian in response to the Council's Interim Order with the following attachments:

- Invoice No. 18771 dated December 2, 2008
- Invoice dated December 4, 2008
- Invoice dated December 23, 2008
- Invoice dated January 8, 2009

The Custodian responds to the Council's October 26, 2010 Interim Order on the second (2nd) business day after receipt of the Council's Interim Order. The Custodian certifies that the attached records are being provided for an *in camera* review in compliance with the Council's Interim Order.

January 7, 2011

Telephone call from the GRC to Custodian's Counsel. The GRC informs Custodian's Counsel that the materials provided for the *in camera* review are not compliant with the Council's Interim Order. The GRC requests Custodian's Counsel to provide a package of records for the *in camera* review that complies with the Council's Interim Order.

January 10, 2011

Letter from Custodian's Counsel to the GRC, attaching a package of records for the *in camera* review that complies with the Council's Interim Order and a revised Document Index.⁷

Analysis

Whether the Custodian complied with the Council's October 26, 2010 Interim Order?

At its October 26, 2010 public meeting, the Council determined that because the Custodian has asserted that the requested records were lawfully redacted because the records

⁷ The Custodian's Document Index provided to the GRC on January 10, 2011 contained no legal explanation or citations for the redactions made to the requested records.
Robert A. Verry v. Borough of South Bound Brook (Somerset), 2009-204 & 2009-205 – *In Camera* Findings and Recommendations of the Executive Director

contain information which is exempt from disclosure as attorney-client privileged pursuant to N.J.S.A. 47:1A-1.1, the Council must determine whether the legal conclusions asserted by the Custodian are properly applied to the records at issue pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005). Therefore, the GRC must conduct an *in camera* review of the requested records to determine the validity of the Custodian's assertion that the requested record was properly denied.

The Council therefore ordered the Custodian to deliver to the Council in a sealed envelope nine (9) copies of the requested unredacted records, a document or redaction index, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery was to be received by the GRC within five (5) business days from receipt of the Council's Interim Order or on October 26, 2010.

The Custodian provided the GRC with a legal certification, the unredacted records requested for the *in camera* inspection and a redaction index on October 29, 2010. However, such materials did not comply with the Council's Interim Order, and on January 7, 2011, the GRC requested that Custodian's Counsel provide a package of materials for the *in camera* review that complied with the Interim Order. On January 10, 2011, Custodian's Counsel provided a set of redacted and unredacted records for the Council's review, as well as an updated Document Index; however, such Document Index failed to include the Custodian's legal explanation or citations for the redactions made to the requested records.

Therefore, the Custodian did not fully comply with the Council's October 26, 2010 Interim Order because the Custodian's Document Index failed to include the Custodian's legal explanation or citations for the redactions made to the requested records.

Whether the Custodian unlawfully denied the Complainant access to the requested records?

The GRC conducted an *in camera* examination on the submitted records. The results of this examination are set forth in the following table:

Record or Redaction Number	Record Name/Date	Description of Record or Redaction	Custodian's Explanation/ Citation for Non-disclosure or Redactions	Findings of the <i>In Camera</i> Examination⁸

⁸ **Unless expressly identified for redaction, everything in the record shall be disclosed.** For purposes of identifying redactions, unless otherwise noted a paragraph/new paragraph begins whenever there is an indentation and/or a skipped space(s). The paragraphs are to be counted starting with the first whole paragraph in each record and continuing sequentially through the end of the record. If a record is subdivided with topic headings, renumbering of paragraphs will commence under each new topic heading. Sentences are to be counted in sequential order throughout each paragraph in each record. Each new paragraph will begin with a Robert A. Verry v. Borough of South Bound Brook (Somerset), 2009-204 & 2009-205 – *In Camera* Findings and Recommendations 4 of the Executive Director

Invoice #18771	One (1) page invoice from Eric M. Bernstein & Associates, LLC dated December 2, 2008.	Second sentence of entry dated November 18, 2008. Second sentence of entry dated November 24, 2008.	Attorney-client privileged material. ⁹	Second sentence of entry dated November 18, 2008 is not exempt from disclosure pursuant to <u>N.J.S.A.</u> 47:1A-1.1 as attorney-client privileged material. The Custodian must disclose the unlawfully redacted information. Second sentence of entry dated November 24, 2008 is not exempt from disclosure pursuant to <u>N.J.S.A.</u> 47:1A-1.1 as attorney-client privileged material. The Custodian must disclose the unlawfully redacted information.
Invoice dated December 4, 2008	Seven (7) page invoice to Borough of South Bound Brook dated December 4, 2008	Page One: Entry dated October 30, 2008: second line redacted. Entry dated November 10, 2008: last two words of third line redacted to "Prepare response."	No legal basis for redactions cited in document index.	Page One: Entry dated October 30, 2008: second line is not exempt from disclosure pursuant to <u>N.J.S.A.</u> 47:1A-1.1 as attorney-client privileged material. The Custodian must disclose the unlawfully redacted information.

new sentence number. If only a portion of a sentence is to be redacted, the word in the sentence which the redaction follows or precedes, as the case may be, will be identified and set off in quotation marks. If there is any question as to the location and/or extent of the redaction, the GRC should be contacted for clarification before the record is redacted. The GRC recommends the redactor make a paper copy of the original record and manually "black out" the information on the copy with a dark colored marker, then provide a copy of the blacked-out record to the requester.

⁹ The Custodian's reasons for non-disclosure of this record appear in a handwritten note at the bottom of the redacted record.

		<p>Entry dated November 17, 2008 redacted following the words “Receipt and review e-mail.”</p> <p>Entry dated December 1, 2008 to December 3, 2008: redacted following the words “Prepare response for” through “Fax;” remainder of entry redacted following “regarding.”</p> <p>Page 2: Entry dated October 27, 2008 redacted following “receipt and review e-mail from Dave Fisher regarding.” Entry dated November 10, 2008 redacted following the words “Receipt and review e-mails regarding.”</p> <p>Entry dated</p>		<p>Entry dated November 10, 2008: last two words of third line through “Prepare response” are not exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u> as attorney-client privileged material. The Custodian must disclose the unlawfully redacted information.</p> <p>Entry dated November 17, 2008 material following the words “Receipt and review e-mail” is exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u> as attorney client privileged material. The Custodian’s redactions are lawful.</p> <p>Entry dated December 1, 2008 to December 3, 2008: material following the words “Prepare response for” through “Fax” is not exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u> as attorney client privileged material; remainder of entry following “regarding” is also not exempt from disclosure pursuant</p>
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		<p>November 10, 2008, redacted following the words “Meeting with Dave Fisher and Robert Curley, Esq., regarding.”</p> <p>Entry dated November 13, 2008 redacted from the word “regarding” to “Telephone.”</p> <p>Entry dated November 14, 2008 redacted from the word “indicating” through “Receipt.”</p> <p>Page 3: No redactions made.</p> <p>Page 4: Entry dated November 12, 2008 redacted from “Boyle” through “Receipt;” remainder of entry following “Cruz” has been redacted.</p> <p>Entry dated November 21, 2008 redacted</p>		<p>to <u>N.J.S.A.</u> 47:1A-1.1 as attorney client privileged material. The Custodian must disclose all of the unlawfully redacted information.</p> <p>Page 2: Entry dated October 27, 2008 material following “receipt and review e-mail from Dave Fisher regarding” is exempt from disclosure pursuant to <u>N.J.S.A.</u> 47:1A-1.1 as attorney-client privileged material. The Custodian’s redactions are lawful.</p> <p>Entry dated November 10, 2008 material following the words “Receipt and review e-mails regarding” is not exempt from disclosure pursuant to <u>N.J.S.A.</u> 47:1A-1.1 as attorney-client privileged material. The Custodian must disclose the unlawfully redacted information.</p> <p>Entry dated November 10, 2008, material following the words “Meeting with Dave Fisher and Robert Curley,</p>
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		<p>following “regarding.”</p> <p>Page 5: Entry dated November 24, 2008 redacted from “MJIF” through “Receipt.”</p> <p>Entry dated November 26, 2008 redacted from “Cruz” through “Review.”</p> <p>Entry dated December 1, 2008 redacted from “MJIF” through “Telephone;” redacted following “Terry.”</p> <p>Page 6: No redactions made.</p> <p>Page 7: No redactions made.</p>	<p>Esq., regarding” is exempt from disclosure pursuant to <u>N.J.S.A.</u> 47:1A-1.1 as attorney-client privileged material. The Custodian’s redactions are lawful.</p> <p>Entry dated November 13, 2008 material from the word “regarding” to “Telephone” is exempt from disclosure pursuant to <u>N.J.S.A.</u> 47:1A-1.1 as attorney-client privileged material. The Custodian’s redactions are lawful.</p> <p>Entry dated November 14, 2008 material from the word “indicating” through “Receipt” is exempt from disclosure pursuant to <u>N.J.S.A.</u> 47:1A-1.1 as attorney-client privileged material. The Custodian’s redactions are lawful.</p> <p>Page 3: No redactions made.</p> <p>Page 4: Entry dated November 12, 2008 material from “Boyle” through “Receipt” is exempt from disclosure</p>
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				<p>pursuant to <u>N.J.S.A.</u> 47:1A-1.1 as attorney-client privileged material; remainder of entry following “Cruz” is exempt from disclosure pursuant to <u>N.J.S.A.</u> 47:1A-1.1 as attorney-client privileged material. The Custodian’s redactions are lawful.</p> <p>Entry dated November 21, 2008 material following “regarding” is not exempt from disclosure pursuant to <u>N.J.S.A.</u> 47:1A-1.1 as attorney-client privileged material. The Custodian must disclose the unlawfully redacted information.</p> <p>Page 5: Entry dated November 24, 2008 material from “MJIF” through “Receipt” is not exempt from disclosure pursuant to <u>N.J.S.A.</u> 47:1A-1.1 as attorney-client privileged material. The Custodian must disclose the unlawfully redacted information.</p> <p>Entry dated</p>
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				<p>November 26, 2008 material from “Cruz” through “Review” is not exempt from disclosure pursuant to <u>N.J.S.A.</u> 47:1A-1.1 as attorney-client privileged material. The Custodian must disclose the unlawfully redacted information.</p> <p>Entry dated December 1, 2008 material from “MJIF through “Telephone” is not exempt from disclosure pursuant to <u>N.J.S.A.</u> 47:1A-1.1 as attorney-client privileged material; material following “Terry” is exempt from disclosure pursuant to <u>N.J.S.A.</u> 47:1A-1.1 as attorney-client privileged material. The Custodian must disclose the unlawfully redacted information.</p> <p>Page 6: No redactions made.</p> <p>Page 7: No redactions made.</p>
Invoice dated December 23, 2008	One (1) page invoice to Borough of South Bound Brook dated	Entry dated December 11, 2008 to December 16, 2008:	No legal basis for redactions cited in document index.	Entry dated December 11, 2008 to December 16, 2008: material from “first” through

	December 23, 2008.	redacted from “first” through “Telephone;” redacted from “memo” to “and forward to Clerk Don Kazar.” Entry dated December 19, 2008 to December 22, 2008: redacted following “Kazar.”		“Telephone” is exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u> as attorney-client privileged material. Material from “memo” to “and forward to Clerk Don Kazar” is exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u> as attorney-client privileged material. The Custodian’s redactions are lawful. Entry dated December 19, 2008 to December 22, 2008: material following “Kazar” is exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u> as attorney-client privileged material. The Custodian’s redactions are lawful.
Invoice dated January 8, 2009	Six (6) page invoice to Borough of South Bound Brook dated January 8, 2009	Page One: Entry dated December 4, 2008 redacted following “Tim Duggan, Esq.” Entry dated December 5, 2008 redacted following “Fisher.” Entry dated	No legal basis for redactions cited in document index.	Page One: Entry dated December 4, 2008 material following “Tim Duggan, Esq.” is exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u> as attorney-client privileged material. Entry dated December 5, 2008 material following “Fisher” is not exempt from

		<p>December 8, 2008 redacted following “Tim Duggan, Esq.”</p> <p>Entry dated December 12, 2008, second line redacted following “regarding” to “Telephone” on third line; fourth line redacted following “regarding” to “Telephone;” fifth line redacted from “regarding” to “Receipt.”</p> <p>Entry dated December 16, 2008 redacted from “Robert Curley, Esq.” to “FedEx.”</p> <p>Page Two: Entry dated December 17, 2008 second line redacted following “Robert Smith, Esq.” to end of entry.</p> <p>Page Three: Entry dated December 8, 2008 redacted from “Kazar”</p>		<p>disclosure pursuant to <u>N.J.S.A.</u> 47:1A-1.1 as attorney-client privileged material. The Custodian must disclose the unlawfully redacted information.</p> <p>Entry dated December 8, 2008 material following “Tim Duggan, Esq.” is exempt from disclosure pursuant to <u>N.J.S.A.</u> 47:1A-1.1 as attorney-client privileged material. The Custodian’s redactions are lawful.</p> <p>Entry dated December 12, 2008, material from second line following “regarding” to “Telephone” on third line is exempt from disclosure pursuant to <u>N.J.S.A.</u> 47:1A-1.1 as attorney-client privileged material. Material on fourth line following “regarding” to “Telephone” is exempt from disclosure pursuant to <u>N.J.S.A.</u> 47:1A-1.1 as attorney-client privileged material. Material on fifth line from “regarding” to “Receipt” is exempt</p>
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		<p>to end of entry.</p> <p>Entry dated December 17, 2008 redacted from “determine” to end of entry.</p> <p>Page Four: No redactions made.</p> <p>Page Five: No redactions made.</p> <p>Page Six: Entry dated December 30, 2008 redacted from “Soffner” to “Telephone.”</p> <p>Entry dated January 6, 2009 redacted from “Kazar” to end of entry.</p>		<p>from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u> as attorney-client privileged material. The Custodian’s redactions are lawful.</p> <p>Entry dated December 16, 2008 material from “Robert Curley, Esq.” to “FedEx” is exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u> as attorney-client privileged material. The Custodian’s redactions are lawful.</p> <p>Page Two: Entry dated December 17, 2008 material on second line following “Robert Smith, Esq.” to end of entry is exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u> as attorney-client privileged material. The Custodian’s redactions are lawful.</p> <p>Page Three: Entry dated December 8, 2008 material from “Kazar” to end of entry is not exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u> as</p>
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			<p>attorney-client privileged material. The Custodian must disclose the unlawfully redacted information.</p> <p>Entry dated December 17, 2008 material from “determine” to end of entry is exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u> as attorney-client privileged material. The Custodian’s redactions are lawful.</p> <p>Page Four: No redactions made.</p> <p>Page Five: No redactions made.</p> <p>Page Six: Entry dated December 30, 2008 material from “Soffner” to “Telephone” is exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u> because it contains attorney-client privileged material. The Custodian’s redactions are lawful.</p> <p>Entry dated January 6, 2009 material from “Kazar” to end</p>
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				of entry is not exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u> as attorney-client privileged material. The Custodian must disclose the unlawfully redacted information.
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Whether the Custodian’s actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

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

Whether the Complainant is a “prevailing party” pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney’s fees?

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not fully comply with the Council’s October 26, 2010 Interim Order because the Custodian’s Document Index failed to include the Custodian’s legal explanation or citations for the redactions made to the requested records.
2. **The *In Camera* Examination set forth in the above table reveals the Custodian has lawfully denied access to, or redacted, portions of the records listed in the document index pursuant to N.J.S.A. 47:1A-6. However, the Custodian must disclose those portions of the requested records which were unlawfully redacted, as set forth in the above table.**
3. **The Custodian shall comply with paragraph #2 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of**

compliance, in accordance with N.J. Court Rule 1:4-4¹⁰, to the Executive Director.¹¹

4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Karyn Gordon, Esq.
In House Counsel

Approved By: Catherine Starghill, Esq.
Executive Director

April 20, 2011

¹⁰ "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."

¹¹ 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
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

INTERIM ORDER

October 26, 2010 Government Records Council Meeting

Robert A. Verry
Complainant

Complaint No. 2009-204 & 2009-205

v.

Borough of South Bound Brook (Somerset)
Custodian of Record

At the October 26, 2010 public meeting, the Government Records Council (“Council”) considered the September 13, 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. The Custodian’s failure to respond in writing to the Complainant’s February 27, 2009 OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007). Further, because the Custodian failed to immediately grant access to the records responsive to both of the Complainant’s OPRA requests, the Custodian has violated N.J.S.A. 47:1A-5.e. See Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007).
2. Because the Custodian failed to provide a specific lawful basis for the redactions to the requested invoices, the Custodian’s responses to the Complainant’s February 27, 2009 and March 12, 2009 OPRA requests are insufficient pursuant to N.J.S.A. 47:1A-5.g. and Renna v. Union County Improvement Authority, GRC Complaint No. 2008-86 (May 2010). See also Paff v. Borough Lavallette (Ocean), GRC Complaint No. 2007-209 (December 2008), O’Shea v. Township of West Milford (Passaic), GRC Complaint No. 2008-283 (November 2009) and Frost v. North Hudson Regional Fire & Rescue (Hudson), GRC Complaint No. 2008-198 (December 2009).
3. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the following to determine the validity of the Custodian’s assertion that the record contains



information which is exempt from disclosure as attorney-client privileged pursuant to N.J.S.A. 47:1A-1.1:

- Invoice No. 18771 dated December 2, 2008 (for services rendered in November 2008) with redactions.
 - Invoice dated December 4, 2008 (for services rendered in October 2008, November 2008 and December 2008) with redactions.
 - Invoice dated December 23, 2008 (for services rendered in December 2008) with redactions.
 - Invoice dated January 8, 2009 (for services rendered in December 2008 and January 2009) with redactions.
4. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 3 above), a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4³, that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
 5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
 6. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 26th Day of October, 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: October 27, 2010

¹ The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

² The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

³ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
October 26, 2010 Council Meeting**

**Robert A. Verry¹
Complainant**

GRC Complaint No. 2009-204 & 2009-205

v.

**Borough of South Bound Brook (Somerset)²
Custodian of Records**

Records Relevant to Complaint:

February 27, 2009 OPRA request: Copies of any and all invoices submitted by the law firm of Eric M. Bernstein & Associates, LLC for the months of October, November and December 2008.

March 12, 2009 OPRA request: Inspection of any and all invoices submitted by the law firm of Cooper & Cooper for the month of February 2009.

Request Made: February 27, 2009 and March 12, 2009

Response Made: March 12, 2009 and March 20, 2009

Custodian: Donald E. Kazar

GRC Complaint Filed: June 23, 2009³

Background

February 27, 2009

Complainant's first (1st) Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

March 12, 2009

Custodian's response to the first (1st) OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the eighth (8th) business day following receipt of such request.⁴ The Custodian states that access to the requested records is granted. The Custodian states that copies of the requested records will cost \$2.25.

¹ Represented by Walter M. Luers, Esq., of the Law Offices of Walter M. Luers, LLC (Oxford, NJ).

² Represented by William T. Cooper III, Esq. (Somerville, NJ).

³ The GRC received the Denial of Access Complaint on said date.

⁴ The Custodian received the Complainant's OPRA request on March 2, 2009.

March 12, 2009

Complainant's second (2nd) OPRA request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

March 20, 2009

Custodian's response to the second (2nd) OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the sixth (6th) business day following receipt of such request. The Custodian states that access to the requested records is granted. The Custodian states that the Complainant may inspect the records responsive during business hours.

May 1, 2009

E-mail from the Complainant to the Custodian. The Complainant states that on April, 23 2009, he inspected the invoices responsive to his two (2) OPRA requests with redactions. The Complainant states that the Custodian failed to provide a redaction index or specific lawful basis for the redactions at that time. The Complainant avers that based on the amount of time between the Custodian's notification that the records were available and the inspection date, the Complainant can only conclude that the Custodian's failure to provide a redaction index is intentional. The Complainant states that he will wait three (3) days to receive a redaction index and lawful basis for the redacted material after which he will file a Denial of Access Complaint with the GRC.

The Complainant notes that if there was no lawful basis for said redactions, unredacted copies should be forwarded via U.S. mail.

May 27, 2009

E-mail from the Complainant to the Custodian. The Complainant states that despite requesting a document index from the Custodian on May 1, 2009, the Complainant has received no response from the Custodian. The Complainant states that he has provided ample time for the Custodian to respond. The Complainant states that he will be filing a Denial of Access Complaint with the GRC on June 1, 2009.

May 27, 2009

E-mail from the Complainant to the Custodian. The Complainant states that he wishes to avoid any misunderstanding that may have occurred based on his previous e-mails. The Complainant states that the Custodian redacted information in the records responsive to the Complainant's two (2) OPRA requests; N.J.S.A. 47:1A-5.g. requires that the specific lawful basis for such redactions be provided. The Complainant states that the Custodian was further required to "[specify] reliable evidence sufficient to meet a statutorily recognized basis for confidentiality." Courier News v. Hunterdon County Prosecutor's Office, 358 N.J. Super. 373 (App. Div. 2003). The Complainant states that the Custodian was also required to explain each redaction in a manner that "will enable other parties to assess the applicability of the privilege or protection." Paff v. New Jersey Department of Labor, Board of Review, 379 N.J. Super. 346, 354-55 (2005)(quoting R. 4:10-2.e.)

June 23, 2009

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

- Complainant’s first (1st) OPRA request dated February 27, 2009.
- Complainant’s second (2nd) OPRA request dated March 12, 2009.
- E-mail from the Complainant to the Custodian dated May 1, 2009.
- E-mail from the Complainant to the Custodian dated May 27, 2009.
- E-mail from the Complainant to the Custodian dated May 27, 2009.
- Records responsive to the Complainant’s February 27, 2009 OPRA request:
 - Invoice No. 18771 dated December 2, 2008 (for services rendered in November 2008) with redactions.
 - Invoice No. 18938 dated January 5, 2009 (for services rendered in December 2008).
 - Purchase Order No. 09-0005 dated January 8, 2009 (for services rendered in December 2008).
- Records responsive to the Complainant’s March 12, 2009 OPRA request:
 - Invoice dated December 4, 2008 (for services rendered in October 2008, November 2008 and December 2008) with redactions.
 - Purchase Order No. 09-0009 dated December 23, 2008.
 - Invoice dated December 23, 2008 (for services rendered in December 2008) with redactions.
 - Purchase Order dated December 23, 2008.
 - Purchase Order No. 09-0014 dated January 8, 2009.
 - Invoice dated January 8, 2009 (for services rendered in December 2008 and January 2009) with redactions.⁵

The Complainant’s Counsel states that this action is being brought because the Custodian violated OPRA by redacting information from invoices responsive to the Complainant’s two (2) OPRA requests without providing a specific lawful basis for such redactions. Counsel avers that although the Complainant made several requests for a document index, the Custodian’s failure to provide same suggests that the Custodian knowingly and willfully violated OPRA.

Complainant’s OPRA request dated February 27, 2009:

Counsel states that the Complainant submitted an OPRA request to the Custodian on February 27, 2009. Counsel states that on April 23, 2009, the Complainant inspected the responsive records which contained redactions. Counsel states that the Complainant e-mailed the Custodian on May 1, 2009 requesting a redaction index including the lawful basis for the redactions made to the responsive invoices. Counsel states that the Complainant made two (2) additional attempts to obtain a document index via e-mail; however, the Custodian never responded.

⁵ The GRC notes that the evidence of record shows that the parties agree that the records provided by the Custodian in response to the Complainant’s March 12, 2009 OPRA request are, in fact, the records which are responsive to said request, notwithstanding the disparity between the date parameters set forth in the request and those records ultimately provided.

Complainant's OPRA request dated March 12, 2009:

Counsel states that the Complainant submitted an OPRA request to the Custodian on March 12, 2009.⁶ Counsel states that on April 23, 2009, the Complainant inspected the responsive records which contained redactions. Counsel states that the Complainant e-mailed the Custodian on May 1, 2009 requesting a redaction index including the lawful basis for redactions made to Invoice No. 18771. Counsel states that the Complainant made two (2) additional attempts via e-mail to obtain a document index; however, the Custodian never responded.

Counsel argues that merely redacting information with no explanation is a violation of N.J.S.A. 47:1A-5.g., which provides that the Custodian “shall indicate the specific basis” for a denial of access. Counsel states that the court in Courier News v. Hunterdon County Prosecutor's Office, 358 N.J. Super. 373 (App. Div. 2003) held that, “[u]nder OPRA, a public agency seeking to restrict the public's right of access to government records must produce specific reliable evidence sufficient to meet a statutorily recognized basis for confidentiality.” *Id.* at 382-83. *See also Seacoast Builders Corp. v. Rutgers*, 358, N.J. Super. 524, 547-48 (App. Div. 2003)(holding that the party claiming the privilege is required “to produce a specific explanation of why each document is privileged or immune from discovery, which must include a comprehensive presentation of all factual grounds and legal analyses in a non-conclusory fashion.”).

Counsel states that a past holding of an Illinois court is instructive in the instant complaint:

“... in meeting its burden, the public body may not simply treat the words “attorney-client privilege” or “legal advice” as some talisman, the mere utterance of which magically casts [a] spell of secrecy over the documents at issue. Rather, the public body can meet its burden only by providing some *objective* indicia that the exemption is applicable under the circumstances.” (Emphasis added.) Illinois Education Association v. Illinois State Board of Education, 791 N.E. 2d 522 (Ill. 2003).

Counsel argues that the Custodian in this complaint has employed the same practice criticized by the Illinois Education Association court. Counsel argues that the Custodian has used “attorney-client privilege” as if it were in and of itself a sufficient justification for making the redactions.

Additionally, Counsel contends that, assuming that the Borough claims that the attorney-client privilege insulates the redacted matter from the public, the Appellate Division has ruled that invoices for legal services are generally *not* insulated by attorney-client privilege. *See Hunterdon County Policeman's Benevolent Association Local 188 v. Township of Franklin*, 286 N.J. Super. 389, 294 (App. Div. 1996). Counsel argues that legal fee invoices are only privileged to the extent that they reveal client secrets or

⁶ Counsel asserts that the Complainant requested invoices submitted by the law firm of Cooper & Cooper for months January 2009 and February 2009; however, the copy of the OPRA request submitted by the Complainant identifies invoices for February 2009.

strategy. Counsel asserts that mundane statements such as “conference call with client” or “review and digest Smith disposition” are not privileged. Counsel states that the Hunterdon County court noted that “[i]n the experience of this court, [attorney billings] will contain a few word description of the general category of the work performed, the number of hours required to perform the work, the date of the performance and the total cost to the client.” *Id.* (quoting lower court).

Counsel avers that the attorney-client privilege is not absolute and “is to be strictly limited to the purposes for which it exists, i.e., the need for consultation between attorney and client without fear of public disclosure.” State v. Humphreys, 89 N.J. Super. 322, 325 (App. Div. 1965). Counsel states that only communications between an attorney and client “in the course of the relationship and in professional confidence, are privileged[.]” N.J.S.A. 2A:84A-20. Counsel states that the privilege is limited to “those situations in which lawful legal advice is the object of the relationship.” In Re: Gonnella, 283 N.J. Super. 509, 512 (Law Div. 1989).

Counsel argues that a similar narrow construction of the attorney-client privilege exemption is required under OPRA. Counsel avers that the Legislature intended for OPRA to be construed in favor of public access:

“... government records shall be readily accessible ... any limitations on the right of access accorded by [OPRA], shall be construed in favor of the public's right of access ... all government records shall be subject to public access unless exempt from such access by: [OPRA]; any other statute; resolution of either or both houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law, federal regulation, or federal order ...” (Emphasis added.) N.J.S.A. 47:1A-1.

Counsel asserts that based on the Legislature’s intent, a public agency asserting the attorney-client privilege has the burden of proving that each requirement for the existence of the privilege has been satisfied: “[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. Counsel alleges that the Custodian in this complaint has failed to bear his burden of proving that the attorney-client privilege exemption applies to the redacted material. Counsel argues that based on the foregoing, the Custodian has violated OPRA by not providing a specific lawful basis for the redactions contained within the records responsive to the Complainant’s two (2) OPRA requests.

Counsel requests that the GRC investigate this denial of access, determine that the Complainant was unlawfully denied access to the redacted information, whether the Custodian’s violations amount to a knowing and willful violation under OPRA and determine that the Complainant is a prevailing party entitled to reasonable attorney’s fees pursuant to N.J.S.A. 47:1A-6.

The Complainant agrees to mediate this complaint.⁷

July 14, 2009

E-mail from the GRC to the Complainant's Counsel. The GRC states that the Complainant indicated in both complaints that he was interested in mediation; however, neither complaint contained an executed mediation agreement. The GRC requests that Counsel advise whether the Complainant wishes to engage in mediation regarding these two (2) complaints.

July 14, 2009

E-mail from the Complainant's Counsel to the GRC. Counsel states that he believes that the Complainant did not want to engage in mediation, but would confirm with the Complainant and advise.

July 29, 2009

E-mail from the GRC to the Complainant's Counsel. The GRC states that Counsel has not responded regarding whether the Complainant wishes to engage in mediation. The GRC requests that Counsel advise as to the status of this complaint.

July 29, 2009

E-mail from the Complainant's Counsel to the GRC. Counsel states that the Complainant wishes to decline mediation.

July 30, 2009

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

August 6, 2009

E-mail from the Custodian to the GRC. The Custodian requests an extension of time until August 12, 2009 to submit the requested SOI.

August 6, 2009

E-mail from the GRC to the Custodian. The GRC grants an extension of time until August 12, 2009 to submit the requested SOI.

August 12, 2009

Custodian's SOI with the following attachments:

- Complainant's first (1st) OPRA request dated February 27, 2009.
- Complainant's second (2nd) OPRA request dated March 12, 2009.
- Records responsive to the Complainant's February 27, 2009 OPRA request:
 - Invoice No. 18771 dated December 2, 2008 (for services rendered in November 2008) with redactions.
 - Invoice No. 18938 dated January 5, 2009 (for services rendered in December 2008).

⁷ The Complainant indicated that he was interested in mediation regarding these two (2) complaints, but did not include an executed mediation agreement form in the Denial of Access Complaint.

- Purchase Order No. 09-0005 dated January 8, 2009 (for services rendered in December 2008).
- Records responsive to the Complainant's March 12, 2009 OPRA request:
 - Invoice dated December 4, 2008 (for services rendered in October 2008, November 2008 and December 2008) with redactions.
 - Purchase Order No. 09-0009 dated December 23, 2008.
 - Invoice dated December 23, 2008 (for services rendered in December 2008) with redactions.
 - Purchase Order dated December 23, 2008.
 - Purchase Order No. 09-0014 dated January 8, 2009.
 - Invoice dated January 8, 2009 (for services rendered in December 2008 and January 2009) with redactions.
- Redaction index for the records responsive to the Complainant's March 12, 2009 OPRA request.

The Custodian certifies that no records 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").⁸

Complainant's OPRA request dated February 27, 2009:

The Custodian certifies that he received the Complainant's OPRA request on March 2, 2009. The Custodian contends that he responded in a timely manner to the Complainant's request providing access to three (3) records.

The Custodian certifies that Invoice No. 18771 contained limited redactions of information that is considered to be exempt under OPRA as attorney-client privileged information.

Complainant's OPRA request dated March 12, 2009:

The Custodian certifies that he received the Complainant's OPRA request on March 12, 2009. The Custodian contends that he responded in a timely manner providing access to six (6) records.

The Custodian certifies that the records provided were reviewed by the attorneys who submitted them. The Custodian asserts that upon belief, it was assumed that the limited redactions contained in the records provided to the Complainant were based upon the attorney-client privilege exemption. The Custodian certifies that Counsel provided as part of the SOI a redaction index of the records responsive to the Complainant's March 12, 2009 OPRA request for review by the GRC.

July 16, 2010

E-mail from the GRC to the Custodian. The GRC states that it needs additional information. The GRC states that the Custodian asserted in the SOI that he responded in

⁸ The Custodian did not certify to the search undertaken.

a timely manner to the Complainant's two (2) OPRA requests; however, there is no evidence in the record to prove this assertion. The GRC requests the following:

- Provide a copy of the written correspondence memorializing the Custodian's written response to the Complainant's two (2) OPRA requests. If no correspondence exists, please certify to the manner in which the Custodian responded to the Complainant.

The GRC requests that the Custodian submit the requested documentation or legal certification by July 21, 2010.

July 20, 2010

E-mail from the Custodian's Counsel to the GRC. Counsel requests an extension until July 30, 2010 to respond to the GRC's request for additional information.

July 23, 2010

E-mail from the GRC to the Custodian's Counsel. The GRC grants an extension until July 30, 2010 to provide the requested information.

July 29, 2010

Custodian's legal certification.⁹

July 29, 2010

E-mail from the GRC to the Custodian's Counsel. The GRC states that it is in receipt of Custodian's legal certification; however, same pertains to a complaint not relevant to the instant complaint. The GRC states that it is requesting additional information in regard to the two (2) complaints now at issue. The GRC again requests that the Custodian provide documentation of his timely response to the Complainant's two (2) OPRA requests or provide legal certification of the manner in which the Custodian responded to the Complainant. The GRC requests that the Custodian submit the requested documentation or legal certification by July 30, 2010.

July 30, 2010

Custodian's legal certification with the following attachments:

- Letter from the Custodian to the Complainant dated March 12, 2009.
- Letter from the Custodian to the Complainant dated March 20, 2009.

The Custodian certifies that he responded in writing to the Complainant's first (1st) OPRA request on March 12, 2009 stating that the records responsive were available for pick-up at a copying cost of \$2.25. The Custodian certifies that the Complainant retrieved said records at a later date.

Further, the Custodian certifies that he responded in writing to the Complainant's second (2nd) OPRA request on March 20, 2009 stating that the records responsive were

⁹ The Custodian provided a legal certification pertaining to the facts of a complaint not relevant to the instant complaints.
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available for inspection. The Custodian certifies that the Complainant inspected the records on April 23, 2009 and scanned them with a portable scanner.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

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

Additionally, OPRA defines a government record as:

“... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ... A government record *shall not include* the following information which is deemed to be confidential ... *any record within the attorney-client privilege*. This paragraph *shall not be construed as exempting from access attorney or consultant bills or invoices except that such bills or invoices may be redacted to remove any information protected by the attorney-client privilege ...*” (Emphasis added.) N.J.S.A. 47:1A-1.1.

Further, OPRA provides that:

“*[i]mmediate access ordinarily shall be granted to budgets, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information.*” (Emphasis added.) N.J.S.A. 47:1A-5.e.

OPRA also provides that:

“*[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof. If the custodian of a government record asserts that part of a particular record is exempt from public access pursuant to [OPRA], the custodian shall delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and shall promptly permit access to the remainder of the record.*” N.J.S.A. 47:1A-5.g.

Moreover, OPRA provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request* ... In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request* ...” (Emphasis added.) N.J.S.A. 47:1A-5.i.

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.

The GRC first turns to the issue of whether the Custodian responded in a timely manner to the Complainant’s two (2) OPRA requests.

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.¹⁰ Thus, a custodian’s failure to respond in writing to a complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

Further, the invoices requested in the instant complaints are specifically classified as “immediate access” records pursuant to N.J.S.A. 47:1A-5.e. In Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007), the GRC held that the “immediate access language of OPRA (N.J.S.A. 47:1A-5.e.) suggests that the Custodian was still obligated to immediately notify the Complainant...” Inasmuch as OPRA

¹⁰ It is the GRC’s position that a custodian’s written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA.

requires a custodian to respond within a statutorily required time frame, when immediate access records are requested, a custodian should immediately respond to the request for those records, granting or denying access, requesting additional time to respond or requesting clarification of the request.

In this complaint, although the Custodian responded in writing to the Complainant's March 12, 2009 OPRA request within the statutorily mandated seven (7) business days, the Custodian responded in writing to the Complainant's February 27, 2009 OPRA request eight (8) business days after receipt of said request. Further, the Custodian failed to respond to both of the Complainant's OPRA requests immediately, as is required for the invoices requested pursuant to N.J.S.A. 47:1A-5.e.

Therefore, the Custodian's failure to respond in writing to the Complainant's February 27, 2009 OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley, supra. Further, because the Custodian failed to immediately grant access to the invoices responsive to both of the Complainant's OPRA requests, the Custodian has violated N.J.S.A. 47:1A-5.e. See Herron, supra.

Moreover, the Complainant's Counsel argues in the Denial of Access Complaint that redacting information from a government record without providing a specific lawful basis for said redactions is a violation of N.J.S.A. 47:1A-5.g. The Complainant's Counsel cited to several cases in which courts held that a claim of privilege must be supported by a sufficient lawful explanation. The Complainant's Counsel also argued that the Custodian failed to bear his burden of proving that the redactions were proper. N.J.S.A. 47:1A-6.

The issue of providing a specific lawful basis for redactions at the time of the denial has been ruled on previously by the Council. In Renna v. Union County Improvement Authority, GRC Complaint No. 2008-86 (May 2010), the custodian provided the complainant with invoices responsive to the complainant's OPRA request stating that information was redacted. The complainant filed a Denial of Access Complaint arguing that the custodian has violated OPRA by failing to provide a specific lawful basis for the redactions made to the responsive invoices. The Council, noting that N.J.S.A. 47:1A-5.g. requires a custodian of record to "indicate the specific basis" for noncompliance, held that:

"... although the Recording Secretary granted access to the requested attorney bills within the statutorily mandated seven (7) business days, the Secretary failed to provide the Complainant with the specific legal basis for the redactions. As such, the Secretary's response to the Complainant's request is insufficient pursuant to N.J.S.A. 47:1A-5.g."

The facts of this complaint are similar to Renna in that the Custodian in this matter provided access to the requested invoices with redactions, however, the Custodian herein failed to provide a specific lawful basis for same.

Therefore, because the Custodian failed to provide a specific lawful basis for the redactions to the requested invoices, the Custodian's responses to the Complainant's February 27, 2009 and March 12, 2009 OPRA requests are insufficient pursuant to N.J.S.A. 47:1A-5.g. and Renna, supra. See also Paff v. Borough Lavallette (Ocean), GRC Complaint No. 2007-209 (December 2008), O'Shea v. Township of West Milford (Passaic), GRC Complaint No. 2008-283 (November 2009) and Frost v. North Hudson Regional Fire & Rescue (Hudson), GRC Complaint No. 2008-198 (December 2009).

The GRC next turns to the issue of whether the Custodian unlawfully denied access to the redacted portions of the invoices provided.

In Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the Complainant appealed a final decision of the GRC¹¹ in which the GRC dismissed the complaint by accepting the Custodian's legal conclusion for the denial of access without further review. The court stated that:

"OPRA contemplates the GRC's meaningful review of the basis for an agency's decision to withhold government records...When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers."

The court also stated that:

"[t]he statute also contemplates the GRC's *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the 'Open Public Meetings Act,' N.J.S.A. 10:4-6 to -21, it also provides that the GRC 'may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.' N.J.S.A. 47:1A-7f. This provision would be unnecessary if the Legislature did not intend to permit *in camera* review."

Further, the court stated that:

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

¹¹ Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005). Robert A. Verry v. Borough of South Bound Brook (Somerset), 2009-204 & 2009-205 – Findings and Recommendations of the Executive Director

Therefore, pursuant to Paff, *supra*, the GRC must conduct an *in camera* review of the following to determine the validity of the Custodian's assertion that the record contains information which is exempt from disclosure as attorney-client privileged pursuant to N.J.S.A. 47:1A-1.1:

- Invoice No. 18771 dated December 2, 2008 (for services rendered in November 2008) with redactions.
- Invoice dated December 4, 2008 (for services rendered in October 2008, November 2008 and December 2008) with redactions.
- Invoice dated December 23, 2008 (for services rendered in December 2008) with redactions.
- Invoice dated January 8, 2009 (for services rendered in December 2008 and January 2009) with redactions.

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

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

Whether the Complainant is a "prevailing party" pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney's fees?

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian's failure to respond in writing to the Complainant's February 27, 2009 OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007). Further, because the Custodian failed to immediately grant access to the records responsive to both of the Complainant's OPRA requests, the Custodian has violated N.J.S.A. 47:1A-5.e. See Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007).
2. Because the Custodian failed to provide a specific lawful basis for the redactions to the requested invoices, the Custodian's responses to the Complainant's February 27, 2009 and March 12, 2009 OPRA requests are insufficient pursuant to N.J.S.A. 47:1A-5.g. and Renna v. Union County Improvement Authority, GRC Complaint No. 2008-86 (May 2010). See also Paff v. Borough Lavallette (Ocean), GRC Complaint No. 2007-209

(December 2008), O'Shea v. Township of West Milford (Passaic), GRC Complaint No. 2008-283 (November 2009) *and* Frost v. North Hudson Regional Fire & Rescue (Hudson), GRC Complaint No. 2008-198 (December 2009).

3. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the following to determine the validity of the Custodian's assertion that the record contains information which is exempt from disclosure as attorney-client privileged pursuant to N.J.S.A. 47:1A-1.1:
 - Invoice No. 18771 dated December 2, 2008 (for services rendered in November 2008) with redactions.
 - Invoice dated December 4, 2008 (for services rendered in October 2008, November 2008 and December 2008) with redactions.
 - Invoice dated December 23, 2008 (for services rendered in December 2008) with redactions.
 - Invoice dated January 8, 2009 (for services rendered in December 2008 and January 2009) with redactions.
4. **The Custodian must deliver¹² to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 3 above), a document or redaction index¹³, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4¹⁴, that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
6. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

¹² The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

¹³ The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

¹⁴ "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."

September 13, 2010