



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

December 20, 2013 Government Records Council Meeting

Benjamin A. Spivak, Esq.
(On behalf of Passaic County Sheriff's
Department of Professional Association)
Complainant

Complaint No. 2010-130

v.

New Jersey Civil Service Commission
Custodian of Record

At the December 20, 2013 public meeting, the Government Records Council ("Council") considered the December 10, 2013 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that this complaint be dismissed. The Complainant's Counsel, via letter dated October 17, 2013 to the Honorable JoAnn LaSala Candido, A.L.J., copied to the Council, withdrew her complaint from the Office of Administrative Law as the parties had reached a settlement in this matter. 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 20th Day of December, 2013

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: December 23, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
December 20, 2013 Council Meeting**

Benjamin A. Spivack, Esq.
**(on behalf of Passaic County Sheriff's
Department Professional Association)¹**
Complainant

GRC Complaint No. 2010-130

v.

New Jersey Civil Service Commission²
Custodial Agency

Records Relevant to Complaint:³ Copies of all written communications concerning Passaic County Sheriff's Department employee layoffs between:

1. The New Jersey Civil Service Commission ("NJCSC") and Passaic County or the Passaic County Sheriff's Department between March 2008 and July 2008.
2. The New Jersey Department of Personnel ("NJDOPE")⁴ and Passaic County or the Passaic County Sheriff's Department between December 2007 and September 2008.
3. E-mails between Kenneth Connolly at NJDOPE and Passaic County Sheriff's Department Warden Charles Meyers between March 2008 and July 2008.

Custodian of Record: Christopher Randazzo
Request Received by Custodian: May 27, 2010
Response Made by Custodian: June 7, 2010
GRC Complaint Received: June 25, 2010

Background

September 25, 2012 Council Meeting:

At its September 25, 2012 public meeting, the Council considered the September 18, 2012 Supplemental Findings and Recommendations of the Acting Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said supplemental findings and recommendations. The Council, therefore, found that because Timothy King, Esq., filed his entry of appearance with the Council by letter dated August 29, 2012 on the third (3rd) business day following receipt of the Council's Final Decision, this matter will be transferred to the Office of Administrative Law for a threshold

¹ The Complainant is an attorney with Oxfeld Cohen, PC (Newark, NJ).

² Represented by Deputy Attorney General Lisa Dorio Ruch.

³ The GRC has separated the OPRA request into its component parts for clarification.

⁴ The New Jersey Civil Service Commission was formerly known as the New Jersey Department of Personnel.

determination as to which party Mr. King is appearing on behalf of (i.e., Mr. Spivack's estate or the Passaic County Sheriff's Department Professional Association) and the appropriate amount of the Complainant's prevailing party attorneys' fees to be awarded.

Settlement:

On May 1, 2013, the Council distributed its Interim Order to all parties. On October 17, 2013, Complainant's counsel ("Counsel") sent a letter to the Honorable JoAnn LaSala Candido, A.L.J., copied to the GRC, advising the Office of Administrative Law and the GRC that the matter had been settled between the parties and that Counsel was withdrawing the matter.

Analysis

No analysis is required.

Conclusion and Recommendations

The Executive Director respectfully recommends the Council find that this complaint be dismissed. The Complainant's Counsel, via letter dated October 17, 2013 to the Honorable JoAnn LaSala Candido, A.L.J., copied to the Council, withdrew her complaint from the Office of Administrative Law as the parties had reached a settlement in this matter. Therefore, no further adjudication is required.

Prepared By: Dawn R. SanFilippo, Esq.
Senior Counsel

Approved By: Brandon D. Minde, Esq.
Executive Director

December 10, 2013



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

INTERIM ORDER

September 25, 2012 Government Records Council Meeting

Benjamin A. Spivack, Esq.
(on behalf of Passaic County Sheriff's
Department Professional Association)
Complainant

Complaint No. 2010-130

v.

New Jersey Civil Service Commission
Custodian of Record

At the September 25, 2012 public meeting, the Government Records Council ("Council") considered the September 18, 2012 *Reconsideration* 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 because Timothy King, Esq., filed his entry of appearance with the GRC by letter dated August 29, 2012 on the third (3rd) business day following receipt of the Council's Final Decision, this matter will be transferred to the Office of Administrative Law for a threshold determination as to which party Mr. King is appearing on behalf of (i.e. Mr. Spivack's estate or the Passaic County Sheriff's Department Professional Association) and of the appropriate amount of the Complainant's prevailing party attorneys' fees to be awarded.

Interim Order Rendered by the
Government Records Council
On The 25th Day of September, 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: September 26, 2012



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Reconsideration
Supplemental Findings and Recommendations of the Executive Director
September 25, 2012 Council Meeting

Benjamin A. Spivack, Esq.
(on behalf of Passaic County Sheriff's
Department Professional Association)¹
Complainant

GRC Complaint No. 2010-130

v.

New Jersey Civil Service Commission²
Custodian of Records

Records Relevant to Complaint:³ Copies of all written communications concerning Passaic County Sheriff's Department employee layoffs between:

1. The New Jersey Civil Service Commission ("NJCSC") and Passaic County or the Passaic County Sheriff's Department between March 2008 and July 2008.
2. The New Jersey Department of Personnel ("NJDP")⁴ and Passaic County or the Passaic County Sheriff's Department between December 2007 and September 2008.
3. E-mails between Kenneth Connolly at NJDP and Passaic County Sheriff's Department Warden Charles Meyers between March 2008 and July 2008.

Request Made: May 27, 2010

Response Made: June 7, 2010

Custodian: Christopher Randazzo

GRC Complaint Filed: June 25, 2010⁵

Background

August 28, 2012

Government Records Council's ("Council") Final Decision. At its August 28, 2012 public meeting, the Council considered the August 28, 2012 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 Complainant is an attorney with Oxfeld Cohen, PC (Newark, NJ).

² Represented by DAG Lisa Dorio Ruch, on behalf of the NJ Attorney General.

³ The GRC has separated the OPRA request into its component parts for clarification.

⁴ The New Jersey Civil Service Commission was formerly known as the New Jersey Department of Personnel.

⁵ The GRC received the Denial of Access Complaint on said date.

1. The Custodian timely complied with the Council's July 31, 2012 Interim Order by providing the requested records to the Complainant's law firm as required by the Council's *in camera* review and providing certified confirmation to the GRC within the prescribed time frame to comply.
2. In the matter before the Council, the Complainant's request Items No. 1 and 2 for all written communications concerning Passaic County Sheriff's Department employee layoffs between New Jersey Civil Service Commission and Passaic County or Passaic County Sheriff's Department, and between New Jersey Department of Personnel and Passaic County or Passaic County Sheriff's Department failed to include specific identifiable persons within those state agencies, the Complainant's request fails to seek specific identifiable government records and was therefore invalid under OPRA, and the Custodian did not unlawfully deny the Complainant access to such names and addresses pursuant to N.J.S.A. 47:1A-1 because the Complainant's need for access to the employee names and addresses contained in the requested e-mails did not outweigh the Custodian's need to safeguard such names and addresses, and the e-mails responsive to the Complainant's OPRA request created between March 2008 and May 20, 2008 were exempt from disclosure under OPRA as advisory, consultative and deliberative material pursuant to N.J.S.A. 47:1A-1.1 because they were part of the agency's decision-making process for New Jersey Civil Service Commission's approval of the Passaic County Sheriff's Department layoff plan. Moreover, the Custodian timely complied with the Council's July 31, 2012 Interim Order requiring the disclosure of certain records in accordance with the Council's *in camera* review. 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. Although the Complainant is a prevailing party in this matter pursuant to 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), because the Complainant in this matter is deceased and no other counsel has entered an appearance on his behalf, the Council declines to refer this matter to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees. However, should an entry of appearance from an attorney be received by the GRC within the ten (10) business day time period for requests for reconsideration set forth at N.J.A.C. 5:105-2.10, the GRC will reconsider this issue.

August 29, 2012

Council's Final Decision distributed to the parties.

September 4, 2012

Letter from Mr. Timothy C. King, Esq., on behalf of Oxfeld Cohen, P.C. (Mr. King) to the GRC. Mr. King states that he send this letter as a notice of appearance on behalf of the Complainant in this matter. Mr. King also states as provided in the GRC's

August 28, 2012 order, the GRC will reconsider this matter pursuant to *N.J.A.C. 5:105-2.10* and refer this matter to the Office of Administrative Law (“OAL”) for the determination of reasonable prevailing party attorney’s fees.

Analysis

Whether the Council will reconsider its August 28, 2012 Final Decision?

Pursuant to *N.J.A.C. 5:105-2.10(a)*, “[t]he Council, at its own discretion, may reconsider any decision it renders.” In its August 28, 2012 Final Decision, the Council determined that “because the Complainant in this matter is deceased and no other counsel has entered an appearance on his behalf, the Council declines to refer this matter to the Office of Administrative Law for the determination of reasonable prevailing party attorney’s fees. However, should an entry of appearance from an attorney be received by the GRC within the ten (10) business day time period for requests for reconsideration set forth at *N.J.A.C. 5:105-2.10*, the GRC will reconsider this issue.”

By letter dated September 4, 2012, in response to the Council’s August 28, 2012 Final Decision, Timothy King, Esq., entered an appearance on behalf of the Complainant in this matter. The GRC received this letter on the third (3rd) business day following receipt of the Council’s Final Decision, within the ten (10) business day time period prescribed in the Decision. Thus, the Council will reconsider its Final Decision pursuant to *N.J.A.C. 5:105-2.10(a)* whether to send this matter to the Office of Administrative Law for a determination of prevailing party attorney’s fees.

Therefore, because Timothy King, Esq., filed his entry of appearance with the GRC by letter dated August 29, 2012 on the third (3rd) business day following receipt of the Council’s Final Decision, this matter will be transferred to the Office of Administrative Law for a threshold determination as to which party Mr. King is appearing on behalf of (i.e. Mr. Spivack’s estate or the Passaic County Sheriff’s Department Professional Association) and of the appropriate amount of the Complainant’s prevailing party attorneys’ fees to be awarded.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because Timothy King, Esq., filed his entry of appearance with the GRC by letter dated August 29, 2012 on the third (3rd) business day following receipt of the Council’s Final Decision, this matter will be transferred to the Office of Administrative Law for a threshold determination as to which party Mr. King is appearing on behalf of (i.e. Mr. Spivack’s estate or the Passaic County Sheriff’s Department Professional Association) and of the appropriate amount of the Complainant’s prevailing party attorneys’ fees to be awarded.

Prepared By: Harlynn A. Lack, Esq.
Case Manager

Approved By: Karyn Gordon, Esq.

Acting Executive Director

September 18, 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

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

August 28, 2012 Government Records Council Meeting

Benjamin A. Spivack
(on behalf of Passaic County Sheriff's
Department Professional Association)
Complainant

Complaint No. 2010-130

v.

New Jersey Civil Service Commission
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 voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian timely complied with the Council's July 31, 2012 Interim Order by providing the requested records to the Complainant's law firm as required by the Council's *in camera* review and providing certified confirmation to the GRC within the prescribed time frame to comply.
2. In the matter before the Council, the Complainant's request Items No. 1 and 2 for all written communications concerning Passaic County Sheriff's Department employee layoffs between New Jersey Civil Service Commission and Passaic County or Passaic County Sheriff's Department, and between New Jersey Department of Personnel and Passaic County or Passaic County Sheriff's Department failed to include specific identifiable persons within those state agencies, the Complainant's request fails to seek specific identifiable government records and was therefore invalid under OPRA, and the Custodian did not unlawfully deny the Complainant access to such names and addresses pursuant to N.J.S.A. 47:1A-1 because the Complainant's need for access to the employee names and addresses contained in the requested e-mails did not outweigh the Custodian's need to safeguard such names and addresses, and the e-mails responsive to the Complainant's OPRA request created between March 2008 and May 20, 2008 were exempt from disclosure under OPRA as advisory, consultative and deliberative material pursuant to N.J.S.A. 47:1A-1.1 because they were part of the agency's decision-making process for New Jersey Civil Service Commission's approval of the Passaic County Sheriff's Department layoff plan. Moreover, the Custodian timely complied with the Council's July 31, 2012 Interim Order requiring the disclosure of certain records in accordance with the Council's *in camera* review. 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. Although the Complainant is a prevailing party in this matter pursuant to 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), because the Complainant in this matter is deceased and no other counsel has entered an appearance on his behalf, the Council declines to refer this matter to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees. However, should an entry of appearance from an attorney be received by the GRC within the ten (10) business day time period for requests for reconsideration set forth at *N.J.A.C. 5:105-2.10*, the GRC will reconsider this issue.

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 29, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

Benjamin A. Spivack, Esq.
**(on behalf of Passaic County Sheriff's
Department Professional Association)¹**
Complainant

GRC Complaint No. 2010-130

v.

New Jersey Civil Service Commission²
Custodian of Records

Records Relevant to Complaint:³ Copies of all written communications concerning Passaic County Sheriff's Department employee layoffs between:

1. The New Jersey Civil Service Commission ("NJCSC") and Passaic County or the Passaic County Sheriff's Department between March 2008 and July 2008.
2. The New Jersey Department of Personnel ("NJDP")⁴ and Passaic County or the Passaic County Sheriff's Department between December 2007 and September 2008.
3. E-mails between Kenneth Connolly at NJDOP and Passaic County Sheriff's Department Warden Charles Meyers between March 2008 and July 2008.

Request Made: May 27, 2010

Response Made: June 7, 2010

Custodian: Christopher Randazzo

GRC Complaint Filed: June 25, 2010⁵

Background

July 31, 2012

Government Records Council's ("Council") Interim Order. At its July 31, 2012 public meeting, the Council considered the July 24, 2012 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 Complainant is an attorney with Oxfeld Cohen, PC (Newark, NJ).

² Represented by DAG Lisa Dorio Ruch, on behalf of the NJ Attorney General.

³ The GRC has separated the OPRA request into its component parts for clarification.

⁴ The New Jersey Civil Service Commission was formerly known as the New Jersey Department of Personnel.

⁵ The GRC received the Denial of Access Complaint on said date.

1. The Custodian timely complied with the Council's September 27, 2011 Interim Order by providing the records for an *in camera* review and Custodian's certified confirmation of compliance to the Executive Director within the deadline to comply with said Order.
2. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4⁶ to the Executive Director.**
3. 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.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

August 3, 2012

Council's Interim Order distributed to the parties.

August 7, 2012

Telephone call from the Custodian to the GRC informing the GRC that the Complainant in this matter is deceased. The GRC informed the Custodian to provide the subject records to the Complainant's law firm, Oxfeld Cohen, PC.

August 8, 2012

Telephone call from the GRC to Oxfeld Cohen, PC. The GRC asks if the law firm is aware of this matter and if another attorney is assigned to the matter. Oxfeld Cohen states that they will research this matter and respond to the GRC.

August 10, 2012

Custodian's response to the Council's Interim Order. The Custodian responds to the GRC via e-mail to the GRC attaching the following:

1. Certified confirmation of compliance;
2. E-mails between Charles Meyers, Passaic County Sheriff's Department and Kenneth Connolly, New Jersey Department of Personnel;
3. Fax confirmation of transmittal of documents to Oxfeld Cohen, PC.

The Custodian certifies that he provided the records set forth in the Council's *in camera* Order dated July 31, 2012 to the Oxfeld Cohen law firm on August 9, 2012.

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."
Benjamin A. Spivack, Esq., (on behalf of Passaic County Sheriff's Department Professional Association) v. NJ Civil Service Commission, 2010-130 – Supplemental Findings and Recommendations of the Executive Director 2

Analysis

Whether the Custodian complied with the Council's July 31, 2012 Interim Order?

At its July 31, 2012 meeting, the Council ordered the Custodian to provide to the Complainant copies of certain written communications (e-mails) from May 2008 to July 2008 between Kenneth Connolly, New Jersey Department of Personnel, and Charles Meyers, Passaic County Sheriff's Department, concerning Passaic County Sheriff's Department employee layoffs, consistent with the Council's *in camera* review. The Council ordered the Custodian to do so within five (5) business days of receipt of said Order.

The Council disseminated its Interim Order to the parties on August 3, 2012. Thus, the Custodian's response was due by close of business on August 10, 2012.

On August 10, 2012, the Custodian provided certified confirmation of compliance to the Executive Director that the Commission provided the records to the Complainant's law firm on August 9, 2010.

Therefore, the Custodian timely complied with the Council's July 31, 2012 Interim Order by providing the requested records to the Complainant's law firm as required by the Council's *in camera* review and providing certified confirmation to the GRC within the prescribed time frame to comply.

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 Complainant's request Items No. 1 and 2 for all written communications concerning Passaic County Sheriff's Department employee layoffs between New Jersey Civil Service Commission and Passaic County or Passaic County Sheriff's Department, and between New Jersey Department of Personnel and Passaic County or Passaic County Sheriff's Department failed to include specific identifiable persons within those state agencies, the Complainant's request fails to seek specific identifiable government records and was therefore invalid under OPRA, and the Custodian did not unlawfully deny the Complainant access to such names and addresses pursuant to N.J.S.A. 47:1A-1 because the Complainant's need for access to the employee names and addresses contained in the requested e-mails did not outweigh the Custodian's need to safeguard such names and addresses, and the e-mails responsive to the Complainant's OPRA request created between March 2008 and May 20, 2008 were exempt from disclosure under OPRA as advisory, consultative and deliberative material pursuant to N.J.S.A. 47:1A-1.1 because they were part of the agency's decision-making process for New Jersey Civil Service Commission's approval of the Passaic County Sheriff's Department layoff plan. Moreover, the Custodian timely complied with the Council's July 31, 2012 Interim Order requiring the disclosure of certain records in accordance with the Council's *in camera* review. 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 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)). In Buckhannon, the Supreme Court 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 Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because “[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties.” *Id.* at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863, but also over concern that the catalyst theory would spawn extra litigation over attorney’s fees. *Id.* at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

As the New Jersey Supreme Court noted in Mason, Buckhannon is binding only when counsel fee provisions under federal statutes are at issue. 196 N.J. at 72, *citing Teeters*, *supra*, 387 N.J. Super. at 429; *see, e.g.*, Baer v. Klagholz, 346 N.J. Super. 79 (App. Div. 2001)(applying Buckhannon to the federal Individuals with Disabilities Education Act), *cert. denied*, 174 N.J. 193 (2002). “But in interpreting New Jersey law, we look to state law precedent and the specific state statute before us. When appropriate, we depart from the reasoning of federal cases that interpret comparable federal statutes.” 196 N.J. at 73 (citations omitted).

The Mason Court then examined the catalyst theory within the context of New Jersey law, stating that:

“New Jersey law has long recognized the catalyst theory. In 1984, this Court considered the term "prevailing party" within the meaning of the federal Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C.A. § 1988. Singer v. State, 95 N.J. 487, 495, *cert. denied*, New Jersey v. Singer, 469 U.S. 832, 105 S. Ct. 121, 83 L. Ed. 2d 64 (1984). The Court adopted a two-part test espousing the catalyst theory, consistent with federal law at the time: (1) there must be "a factual causal nexus between plaintiff's litigation and the relief ultimately achieved;" in other words, plaintiff's efforts must be a "necessary and important factor in obtaining the relief," *Id.* at 494-95, 472 A.2d 138 (internal quotations and citations omitted); and (2) "it must be shown that the relief ultimately secured by plaintiffs had a basis in law," *Id.* at 495. *See also* North Bergen Rex Transport v. TLC, 158 N.J. 561, 570-71 (1999)(applying Singer fee-shifting test to commercial contract).

Also prior to Buckhannon, the Appellate Division applied the catalyst doctrine in the context of the Law Against Discrimination, N.J.S.A. 10:5-1 to -49, and the Americans with Disabilities Act, 42 U.S.C.A. §§ 12101-12213. Warrington v. Vill. Supermarket, Inc., 328 N.J. Super. 410 (App. Div. 2000). The Appellate Division explained that "[a] plaintiff is considered a prevailing party 'when actual relief on the merits of [the] claim materially alters the relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.'" *Id.* at 420 (quoting Farrar v. Hobby, 506 U.S. 103, 111-12, 113 S. Ct. 566, 573, 121 L. Ed. 2d 494, 503 (1992)); *see also* Szczepanski v. Newcomb Med. Ctr., 141 N.J. 346, 355 (1995) (noting that Hensley v. Eckerhart "generously" defines "a prevailing party [a]s one who succeeds 'on any significant issue in litigation [that] achieves some of the benefit the parties sought in bringing suit'" (quoting Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S. Ct. 1933, 1938, 76 L. Ed. 2d 40, 50 (1983))). The panel noted that the "form of the judgment is not entitled to conclusive weight"; rather, courts must look to whether a plaintiff's lawsuit acted as a catalyst that prompted defendant to take action and correct an unlawful practice. Warrington, *supra*, 328 N.J. Super. at 421. A settlement that confers the relief sought may still entitle plaintiff to attorney's fees in fee-shifting matters. *Id.* at 422.

This Court affirmed the catalyst theory again in 2001 when it applied the test to an attorney misconduct matter. Packard-Bamberger, *supra*, 167 N.J. at 444. In an OPRA matter several years later, New Jerseyans for a Death Penalty Moratorium v. New Jersey Department of Corrections, 185 N.J. 137, 143-44 (2005)(NJDPM), this Court directed the Department of Corrections to disclose records beyond those it had produced voluntarily. In ordering attorney's fees, the Court acknowledged the rationale

underlying various fee-shifting statutes: to insure that plaintiffs are able to find lawyers to represent them; to attract competent counsel to seek redress of statutory rights; and to "even the fight" when citizens challenge a public entity. *Id.* at 153.

After Buckhannon, and after the trial court's decision in this case, the Appellate Division decided Teeters. The plaintiff in Teeters requested records from the Division of Youth and Family Services (DYFS), which DYFS declined to release. 387 N.J. Super. at 424. After the GRC preliminarily found in plaintiff's favor, the parties reached a settlement agreement leaving open whether plaintiff was a "prevailing party" under OPRA. *Id.* at 426-27.

The Appellate Division declined to follow Buckhannon and held that plaintiff was a "prevailing party" entitled to reasonable attorney's fees; in line with the catalyst theory, plaintiff's complaint brought about an alteration in DYFS's position, and she received a favorable result through the settlement reached. *Id.* at 431-34. In rejecting Buckhannon, the panel noted that "New Jersey statutes have a different tone and flavor" than federal fee-shifting laws. *Id.* at 430. "Both the language of our statutes and the terms of court decisions in this State dealing with the issue of counsel fee entitlements support a more indulgent view of petitioner's claim for an attorney's fee award than was allowed by the majority in Buckhannon ... " *Id.* at 431, 904 A.2d 747. As support for this proposition, the panel surveyed OPRA, Packard-Bamberger, Warrington, and other cases.

OPRA itself contains broader language on attorney's fees than the former RTKL did. OPRA provides that "[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." N.J.S.A. 47:1A-6. Under the prior RTKL, "[a] plaintiff in whose favor such an order [requiring access to public records] issues ... may be awarded a reasonable attorney's fee not to exceed \$ 500.00." N.J.S.A. 47:1A-4 (repealed 2002). The Legislature's revisions therefore: (1) mandate, rather than permit, an award of attorney's fees to a prevailing party; and (2) eliminate the \$ 500 cap on fees and permit a reasonable, and quite likely higher, fee award. Those changes expand counsel fee awards under OPRA." (Footnote omitted.) Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 73-76 (2008).

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, pursuant to Teeters, *supra*, 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. Specifically, the Council required the Custodian to disclose certain records responsive to the Complainant's OPRA request with redactions consistent with its *in camera* review on July 31, 2012. Further, the relief ultimately achieved had a basis in law. 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.

However, in the instant matter, the Complainant is deceased. Pursuant to *N.J.A.C.* 1:1-15.2(a) and (b), official notice may be taken of judicially noticeable facts (as explained in N.J.R.E. 201 of the New Jersey Rules of Evidence), as well as of generally recognized technical or scientific facts within the specialized knowledge of the agency or the judge. The Appellate Division has held that it was appropriate for an administrative agency to take notice of an appellant's record of convictions, because judicial notice could have been taken of the records of any court in New Jersey, and appellant's record of convictions were exclusively in New Jersey. See Sanders v. Division of Motor Vehicles, 131 N.J. Super. 95 (App.Div. 1974).

The Council therefore takes judicial notice of the Complainant's obituary, published in *The Record/Herald News* on April, 19, 2012, as evidence of the Complainant's demise. Although the GRC has requested that the Complainant's law firm, Oxfeld Cohen PC, advise whether another attorney will enter an appearance in this matter, no such advice has been forthcoming. No other attorney has entered an appearance in this matter and the Passaic County Sheriff's Department Professional Association, the entity represented by the Complainant in the matter herein, has not submitted a substitution of counsel to the GRC.

Thus, the Council declines to refer this matter to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees. However, should an entry of appearance from an attorney be received by the GRC within the ten (10) business day time period for requests for reconsideration set forth at *N.J.A.C.* 5:105-2.10, the GRC will reconsider this issue.

Therefore, although the Complainant is a prevailing party in this matter pursuant to 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), because the Complainant in this matter is deceased and no other counsel has entered an appearance on his behalf, the Council declines to refer this matter to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees. However, should an entry of appearance from an attorney be received by the GRC within the ten (10) business day time period for requests for reconsideration set forth at *N.J.A.C.* 5:105-2.10, the GRC will reconsider this issue.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian timely complied with the Council's July 31, 2012 Interim Order by providing the requested records to the Complainant's law firm as required by the Council's *in camera* review and providing certified confirmation to the GRC within the prescribed time frame to comply.
2. In the matter before the Council, the Complainant's request Items No. 1 and 2 for all written communications concerning Passaic County Sheriff's Department employee layoffs between New Jersey Civil Service Commission and Passaic County or Passaic County Sheriff's Department, and between New Jersey Department of Personnel and Passaic County or Passaic County Sheriff's Department failed to include specific identifiable persons within those state agencies, the Complainant's request fails to seek specific identifiable government records and was therefore invalid under OPRA, and the Custodian did not unlawfully deny the Complainant access to such names and addresses pursuant to N.J.S.A. 47:1A-1 because the Complainant's need for access to the employee names and addresses contained in the requested e-mails did not outweigh the Custodian's need to safeguard such names and addresses, and the e-mails responsive to the Complainant's OPRA request created between March 2008 and May 20, 2008 were exempt from disclosure under OPRA as advisory, consultative and deliberative material pursuant to N.J.S.A. 47:1A-1.1 because they were part of the agency's decision-making process for New Jersey Civil Service Commission's approval of the Passaic County Sheriff's Department layoff plan. Moreover, the Custodian timely complied with the Council's July 31, 2012 Interim Order requiring the disclosure of certain records in accordance with the Council's *in camera* review. 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. Although the Complainant is a prevailing party in this matter pursuant to 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), because the Complainant in this matter is deceased and no other counsel has entered an appearance on his behalf, the Council declines to refer this matter to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees. However, should an entry of appearance from an attorney be received by the GRC within the ten (10) business day time period for requests for reconsideration set forth at N.J.A.C. 5:105-2.10, the GRC will reconsider this issue.

Prepared and

Approved By: Karyn Gordon, Esq.
Acting Executive Director

August 21, 2012



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

July 31, 2012 Government Records Council Meeting

Benjamin A. Spivack, Esq.
(on behalf of Passaic County Sheriff's
Department Professional Association)
Complainant

Complaint No. 2010-130

v.

New Jersey Civil Service Commission
Custodian of Record

At the July 31, 2012 public meeting, the Government Records Council ("Council") considered the July 24, 2012 *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 timely complied with the Council's September 27, 2011 Interim Order by providing the records for an *in camera* review and Custodian's certified confirmation of compliance to the Executive Director within the deadline to comply with said Order.
2. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the table below within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4¹ to the Executive Director.**
3. 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.
4. The Council defers analysis of whether the Complainant is a prevailing party 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."

Record or Redaction Number	Record Name/Date	Description of Record or Redaction	Custodian's Explanation/ Citation for Non-disclosure or Redactions	Findings of the In Camera Examination²
E-mails between Kenneth Connolly, NJ Civil Service Commission, and Charles Meyers, Passaic County Sheriff's Department.	E-mail from Charles Meyers to Rose Vizcarrondo dated May 23, 2008 10:23 a.m. with attachment (3 pages).	Page 1: No redactions made; Page 2: No redactions made; Page 3: Name and address of recipient redacted.	<u>N.J.S.A.</u> 47:1A-1 states that "a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy." The redactions made properly protected the confidential address of employees shown on the Individual Notices of Layoff or Demotion; such addresses are not included in the list of public information set forth at <u>N.J.S.A.</u> 47:1A-10. Also, <u>N.J.S.A.</u> 47:1A-10 provides that although the personnel or pension records of	Page 3: The material redacted comprises the name and address of an employee subject to proposed layoff or demotion. As such, the redacted material is exempt from disclosure under OPRA as advisory, consultative or deliberative ("ACD") material pursuant to <u>N.J.S.A.</u> 47:1A-1.1 and as a personnel record pursuant to <u>N.J.S.A.</u> 47:1A-10.

² **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.

			any individual in the possession of a public agency, shall not be considered a government record and shall not be made available for public access an employee's "name, title, position, salary, payroll record, length of service, date of separation and the reason therefor, and the amount and type of pension received" is a government record.	
	E-mail from Charles Meyers to Kenneth Connolly and Aurus Malloy dated May 28, 2008 at 1:24 p.m. (2 pages).	Page 1: No redactions made Page 2: Name and address of recipient redacted	<u>N.J.S.A.</u> 47:1A-1; <u>N.J.S.A.</u> 47:1A-10, as set forth above.	Page 2: The material redacted comprises the name and address of an employee subject to proposed layoff or demotion. As such, the redacted material is exempt from disclosure under OPRA as ACD material pursuant to <u>N.J.S.A.</u> 47:1A-1.1 and as a personnel record pursuant to <u>N.J.S.A.</u> 47:1A-10.
	E-mail from Charles Meyers to Kenneth Connolly and Aurus Malloy dated May 28, 2008 at 1:24 p.m. (2 pages).	Page 1: No redactions made; Page 2: Name and address of recipient redacted.	<u>N.J.S.A.</u> 47:1A-1; <u>N.J.S.A.</u> 47:1A-10, as set forth above.	Page 2: The material redacted comprises the name and address of an employee subject to proposed layoff or demotion. As such, the redacted material is exempt from disclosure under OPRA as ACD material pursuant to <u>N.J.S.A.</u> 47:1A-1.1 and as a personnel record pursuant to <u>N.J.S.A.</u> 47:1A-10.
	E-mail from Charles Meyers to Kenneth	Page 1: Redacted second half of	<u>N.J.S.A.</u> 47:1A-1; <u>N.J.S.A.</u> 47:1A-10, as set forth	Page 1: Redaction made is improper because the redacted

	Connolly dated June 19, 2008 at 2:28 p.m. (2 pages).	first sentence of message; Page 2: No redactions made	above.	material contains no privileged or confidential information. The Custodian must disclose this material.
	E-mail from Charles Meyers to Kenneth Connolly dated June 30, 2008 at 4:01 p.m. (1 page).	Page 1: After the salutation "Ken," the first two words of the message were redacted.	<u>N.J.S.A.</u> 47:1A-1; <u>N.J.S.A.</u> 47:1A-10, as set forth above.	Page 1: The redacted material comprises the name of an employee who received a notice of proposed layoff or demotion. As such, the redacted material is exempt from disclosure under OPRA as ACD material pursuant to <u>N.J.S.A.</u> 47:1A-1.1 and as a personnel record pursuant to <u>N.J.S.A.</u> 47:1A-10.
	E-mail from Charles Meyers to Kenneth Connolly dated June 30, 2008 at 5:22 p.m. (2 pages).	Page 1: ³ a) First 5 words of the second sentence of the message redacted. b) Paragraph, beginning "Conversely," the following 6 word were redacted. c) In the paragraph beginning "We understand," the sentence beginning "Moreover," the words following "the addition of" have been redacted. d) In the paragraph beginning "We understand," the sentence beginning "Moreover," the	<u>N.J.S.A.</u> 47:1A-1; <u>N.J.S.A.</u> 47:1A-10, as set forth above.	Page 1: a) The redacted material comprises the name and title of an individual subject to proposed layoff or demotion. As such, the redacted material is exempt from disclosure under OPRA as ACD material pursuant to <u>N.J.S.A.</u> 47:1A-1.1 and as a personnel record pursuant to <u>N.J.S.A.</u> 47:1A-10. b) The redacted material comprises the name and title of an individual subject to proposed layoff or demotion. As such, the redacted material is exempt from disclosure under OPRA as ACD material pursuant to <u>N.J.S.A.</u> 47:1A-1.1 and as a personnel record pursuant to <u>N.J.S.A.</u> 47:1A-10. c) The redacted

³ To more easily differentiate the redactions made to the records at issue, the GRC will refer herein to sequential redactions made on one page by letter; however, such letters do not appear in the records at issue and are merely used herein as a reference guide.

		<p>word following “the removal of” have been redacted.</p> <p>e) In the paragraph beginning “Currently,” in words 1 – 6 of the last line have been redacted.</p> <p>f) All material in the box labeled “Positions Eliminated” has been redacted.</p> <p>g) All material in box labeled “CAMPS indicated seniority of police records clerks as follows” has been redacted.</p> <p>h) In the paragraph beginning “Accordingly,” words 1 – 4 of the line immediately following have been redacted.</p> <p>i) In the paragraph beginning “Accordingly,” words 9 and 10 of the line immediately following have been redacted.</p> <p>j) In the paragraph beginning “Accordingly,” words 13 to 16 in the line immediately following have been redacted.</p>	<p>material comprises the name of an individual subject to proposed layoff or demotion. As such, the redacted material is exempt from disclosure under OPRA as ACD material pursuant to <u>N.J.S.A. 47:1A-1.1</u> and as a personnel record pursuant to <u>N.J.S.A. 47:1A-10</u>.</p> <p>d) The redacted material comprises the name of an individual subject to proposed layoff or demotion. As such, the redacted material is exempt from disclosure under OPRA as ACD material pursuant to <u>N.J.S.A. 47:1A-1.1</u> and as a personnel record pursuant to <u>N.J.S.A. 47:1A-10</u>.</p> <p>e) The redacted material comprises the name and title of an individual subject to proposed layoff or demotion. As such, the redacted material is exempt from disclosure under OPRA as ACD material pursuant to <u>N.J.S.A. 47:1A-1.1</u> and as a personnel record pursuant to <u>N.J.S.A. 47:1A-10</u>.</p> <p>f) The redacted material comprises the names, titles, and effective date of individuals subject to proposed layoff or demotion, and the names of individuals who could be “bumped” by layoffs. As such, the redacted material is exempt from disclosure under OPRA</p>
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		<p>k) All material in the box labeled “Positions Eliminated/ Seniority of Displaced Persons” redacted. Page 2: No redactions made.</p>	<p>as ACD material pursuant to <u>N.J.S.A. 47:1A-1.1</u> and as a personnel record pursuant to <u>N.J.S.A. 47:1A-10</u>.</p> <p>g) The redacted material comprises the name, title and effective date of individual subject to proposed layoff or demotion. As such, the redacted material is exempt from disclosure under OPRA as ACD material pursuant to <u>N.J.S.A. 47:1A-1.1</u> and as a personnel record pursuant to <u>N.J.S.A. 47:1A-10</u>.</p> <p>h) The material redacted comprises the name and employment status of an individual subject to proposed layoff or demotion. As such, the redacted material is exempt from disclosure under OPRA as ACD material pursuant to <u>N.J.S.A. 47:1A-1.1</u> and as a personnel record pursuant to <u>N.J.S.A. 47:1A-10</u>.</p> <p>i) The material redacted comprises the name of an individual subject to proposed layoff or demotion. As such, the redacted material is exempt from disclosure under OPRA as ACD material pursuant to <u>N.J.S.A. 47:1A-1.1</u> and as a personnel record pursuant to <u>N.J.S.A. 47:1A-10</u>.</p> <p>j) The material redacted comprises the name and title of an individual subject to proposed layoff or</p>
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				<p>demotion. As such, the redacted material is exempt from disclosure under OPRA as ACD material pursuant to <u>N.J.S.A. 47:1A-1.1</u> and as a personnel record pursuant to <u>N.J.S.A. 47:1A-10</u>.</p> <p>k) The redacted material comprises the name, title, and effective date of individuals subject to proposed layoff or demotion, and the name, title, effective date and status change of persons to be displaced by such action. As such, the redacted material is exempt from disclosure under OPRA as ACD material pursuant to <u>N.J.S.A. 47:1A-1.1</u> and as a personnel record pursuant to <u>N.J.S.A. 47:1A-10</u>.</p>
	<p>E-mail from Charles Meyers to Kenneth Connolly dated July 2, 2008 at 11:52 a.m. (2 pages).</p>	<p>Page 1: a) Under the heading “Civilian Employees,” the words 1-3 of the third (3rd) paragraph immediately following such heading have been redacted; b) Under the heading “Civilian Employees,” words 1-6 of the fourth (4th) paragraph immediately following such heading have been redacted; c) Under the heading</p>	<p><u>N.J.S.A. 47:1A-1;</u> <u>N.J.S.A. 47:1A-10,</u> as set forth above.</p>	<p>Page 1: a) The redacted material comprises the name and title of an individual who was separated from employment. As such, this material is disclosable under OPRA pursuant to <u>N.J.S.A. 47:1A-10.</u> b) The redacted material comprises the name and title of an individual who was separated from employment. As such, this material is disclosable under OPRA pursuant to <u>N.J.S.A. 47:1A-10.</u> c) The redacted material comprises the name and title of an individual whose</p>

		<p>“Civilian Employees,” words 1-5 of fifth (5th) paragraph immediately following such heading have been redacted. Page 2: no redactions made.</p>		<p>proposed layoff was rescinded. As such, this material is disclosable under OPRA pursuant to <u>N.J.S.A. 47:1A-10.</u></p>
	<p>E-mail from Charles Meyers to Kenneth Connolly dated July 2, 2008 at 12:08 p.m. (2 pages).</p>	<p>Page 1: a) All material in table titled “Rescinded layoffs due to extra service based on MB position” redacted; b) All material in table titled “Rescinded layoffs due to attrition that has occurred from the time Plan approval” redacted; c) All material in table titled “Corrections Officers scheduled to be processed for layoff” redacted. Page 2: No redactions made.</p>	<p><u>N.J.S.A. 47:1A-1;</u> <u>N.J.S.A. 47:1A-10,</u> as set forth above.</p>	<p>Page 1: a) The redacted material comprises the first and last names and titles of individuals whose proposed layoffs were rescinded. As such, this material is disclosable under OPRA pursuant to <u>N.J.S.A. 47:1A-10.</u> b) The redacted material comprises first and last names and titles of individuals whose proposed layoffs were rescinded and the personnel actions that led to the rescission of the layoff. As such, this material is disclosable under OPRA pursuant to <u>N.J.S.A. 47:1A-10.</u> c) The redacted material comprises the first and last name, title and status of an individual subject to proposed layoff. As such this material is not disclosable under OPRA as ACD material pursuant to <u>N.J.S.A. 47:1A-1.1</u> and as a personnel record pursuant to <u>N.J.S.A. 47:1A-10.</u></p>
	<p>E-mail from Charles Meyers to Kenneth Connolly dated</p>	<p>Page 1: a) All material in box titled “Rescinded</p>	<p><u>N.J.S.A. 47:1A-1;</u> <u>N.J.S.A. 47:1A-10,</u> as set forth above.</p>	<p>Page 1: a) The redacted material comprises the first and last names and</p>

	July 2, 2008 at 12:46 p.m.	layoffs due to extra service based on MSB decision” redacted; b) All material in box titled “Rescinded layoffs due to attrition that has occurred from the time plan approval” redacted; c) All material in box titled “Sheriff’s Officers scheduled to be processed for layoff” redacted. Page 2: No redactions made.		titles of individuals whose proposed layoffs were rescinded. As such, this material is disclosable under OPRA pursuant to N.J.S.A. 47:1A-10. b) The redacted material comprises first and last names and titles of individuals whose proposed layoffs were rescinded and the personnel actions that led to the rescission of the layoff. As such, this material is disclosable under OPRA pursuant to N.J.S.A. 47:1A-10. c) The redacted material comprises the first and last name, title and status of an individual subject to proposed layoff. As such this material is not disclosable under OPRA as ACD material pursuant to <u>N.J.S.A. 47:1A-1.1</u> and as a personnel record pursuant to <u>N.J.S.A. 47:1A-10</u> .
	E-mail from Charles Meyers to Kenneth Connolly dated July 2, 2008 at 4:18 p.m.	Page 1: The two (2) words following “Due to the retirement of” in the first sentence after the salutation “Ken,” were redacted.	<u>N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-10</u> , as set forth above.	Page 1: The redacted material comprises the first and last name of an individual who retired from employment prior to the date of this memo. As such this material is disclosable under OPRA pursuant to N.J.S.A. 47:1A-10.
	E-mail from Charles Meyers to Kenneth Connolly dated July 2, 2008 at 4:57 p.m.	Page 1: a) All material in box titled “The following layoffs will be rescinded or processed as indicated” redacted;	<u>N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-10</u> , as set forth above.	Page 1: a) The material redacted encompasses names, “bumping” status, and proposed final action of individuals whose proposed layoffs will be rescinded. As such,

		<p>b) Words six (6) and seven (7) in the sentence beginning “Due to the retirement of” redacted.</p> <p>Page 2: No redactions made.</p>		<p>the material is exempt from disclosure under OPRA as ACD material pursuant to <u>N.J.S.A. 47:1A-1.1</u> and as personnel records pursuant to <u>N.J.S.A. 47:1A-10</u>.</p> <p>b) The redacted material comprises the first and last name of an individual who retired from employment prior to the date of this memo.</p> <p>As such this material is disclosable under OPRA pursuant to N.J.S.A. 47:1A-10.</p>
	<p>E-mail from Charles Meyers to Kenneth Connolly dated July 2, 2008 at 5:23 p.m.</p>	<p>Page 1: No redactions made.</p> <p>Page 2: No redactions made.</p> <p>Page 3:</p> <p>a) Seventh (7th) and eighth (8th) words in the first sentence of the first (1st) paragraph redacted.</p> <p>b) All contents of the box titled “Name/Final Action” redacted.</p> <p>Page 4:</p> <p>a) all contents of the box titled “Rescinded layoffs due to extra service based on MSB decision” redacted;</p> <p>b) All contents of box titled “Rescinded layoffs due to attrition that has occurred from time plan</p>	<p><u>N.J.S.A. 47:1A-1;</u> <u>N.J.S.A. 47:1A-10,</u> as set forth above.</p>	<p>Page 3:</p> <p>a) The redacted material comprises the first and last name of an individual who retired from employment prior to the date of this memo.</p> <p>As such this material is disclosable under OPRA pursuant to N.J.S.A. 47:1A-10.</p> <p>b) The redacted material comprises the names of individuals subject to rescission of layoff, demotion, or separation from service which has not occurred as of the date of the memo. As such, the material is exempt from disclosure under OPRA as ACD material pursuant to <u>N.J.S.A. 47:1A-1.1</u> and as personnel records pursuant to <u>N.J.S.A. 47:1A-10</u>.</p> <p>Page 4:</p> <p>a) The redacted material comprises the first and last names and titles of individuals whose proposed layoffs</p>

		<p>approval” redacted; c) All contents of box titled “Sheriff’s Officers scheduled to be processed for layoff” redacted; Page 5: a) Contents of box titled “Rescinded layoffs due to extras service based to MSB decision” redacted; b) Contents of box titled “Rescinded layoffs due to attrition that has occurred from time plan approval” redacted; c) Contents of box titled “Corrections Officers scheduled to be processed for layoff” redacted.</p>	<p>were rescinded. As such, this material is disclosable under OPRA pursuant to <u>N.J.S.A. 47:1A-10.</u> b) The redacted material comprises first and last names and titles of individuals whose proposed layoffs were rescinded and the personnel actions that led to the rescission of the layoff. As such, this material is disclosable under OPRA pursuant to <u>N.J.S.A. 47:1A-10.</u> c) The redacted material comprises the first and last name, title and status of an individual subject to proposed layoff. As such this material is not disclosable under OPRA as ACD material pursuant to <u>N.J.S.A. 47:1A-1.1</u> and as a personnel record pursuant to <u>N.J.S.A. 47:1A-10.</u> Page 5: a) The redacted material comprises the first and last names and titles of individuals whose proposed layoffs were rescinded. As such, this material is disclosable under OPRA pursuant to <u>N.J.S.A. 47:1A-10.</u> b) The redacted material comprises first and last names and titles of individuals whose proposed layoffs were rescinded and the personnel actions that led to the rescission of the layoff. As such, this material is disclosable under</p>
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				<p>OPRA pursuant to <u>N.J.S.A. 47:1A-10.</u> c) The redacted material comprises the first and last name, title and status of an individual subject to proposed layoff. As such this material is not disclosable under OPRA as ACD material pursuant to <u>N.J.S.A. 47:1A-1.1</u> and as a personnel record pursuant to <u>N.J.S.A. 47:1A-10.</u></p>
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Interim Order Rendered by the
Government Records Council
On The 31st Day of July, 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 3, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
July 31, 2012 Council Meeting**

Benjamin A. Spivack, Esq.
**(on behalf of Passaic County Sheriff's
Department Professional Association)¹**
Complainant

GRC Complaint No. 2010-130

v.

New Jersey Civil Service Commission²
Custodian of Records

Records Relevant to Complaint:³ Copies of all written communications concerning Passaic County Sheriff's Department employee layoffs between:

1. The New Jersey Civil Service Commission ("NJCSC") and Passaic County or the Passaic County Sheriff's Department between March 2008 and July 2008.
2. The New Jersey Department of Personnel ("NJDOPE")⁴ and Passaic County or the Passaic County Sheriff's Department between December 2007 and September 2008.
3. E-mails between Kenneth Connolly at NJDOPE and Passaic County Sheriff's Department Warden Charles Meyers between March 2008 and July 2008.

Request Made: May 27, 2010

Response Made: June 7, 2010

Custodian: Christopher Randazzo

GRC Complaint Filed: June 25, 2010⁵

Background

September 27, 2011

Government Records Council's Interim Order. At the September 27, 2011 public meeting, the Government Records Council ("Council") considered the September 20, 2011 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 The Complainant is an attorney with Oxfeld Cohen, PC (Newark, NJ).

² Represented by DAG Lisa Dorio Ruch, on behalf of the NJ Attorney General.

³ The GRC has separated the OPRA request into its component parts for clarification.

⁴ The New Jersey Civil Service Commission was formerly known as the New Jersey Department of Personnel.

⁵ The GRC received the Denial of Access Complaint on said date.

1. Because the Complainant's request for all written communications concerning Passaic County Sheriff's Department employee layoffs between New Jersey Civil Service Commission and Passaic County or Passaic County Sheriff's Department, and between New Jersey Department of Personnel and Passaic County or Passaic County Sheriff's Department failed to include specific identifiable persons within those state agencies, the Complainant's request fails to seek specific identifiable government records and is therefore invalid under OPRA pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).
2. Because the evidence of record indicates that the Complainant's need for access to the employee names and addresses contained in the requested e-mails between Kenneth Connolly at New Jersey Department of Personnel and Passaic County Sheriff's Department Warden Charles Meyers between March 2008 and July 2008 concerning Passaic County Sheriff's Department employee layoffs, does not outweigh the Custodian's need to safeguard such names and addresses, the Custodian did not unlawfully deny the Complainant access to such names and addresses pursuant to N.J.S.A. 47:1A-1, which states that a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy.
3. The e-mails responsive to the Complainant's OPRA request created between March 2008 and May 20, 2008 are exempt from disclosure under OPRA as advisory, consultative and deliberative material because they were part of the agency's decision-making process for New Jersey Civil Service Commission's approval of the Passaic County Sheriff's Department layoff plan. N.J.S.A. 47:1A-1.1. See Education Law Center v. NJ Department of Education, 198 N.J. 274, 966 A.2d 1054, 1069 (2009), GRC Complaint No. 2003-128 (October 2005); In Re Liquidation of Integrity Insurance Co., 165 N.J. 75 (2000).
4. Pursuant to Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005), the GRC must conduct an *in camera* review of the requested e-mails between Kenneth Connolly, New Jersey Department of Personnel, and Passaic County Sheriff's Department Warden Charles Meyers that were created between May 20, 2008 and July 2008 to determine the validity of the Custodian's assertion that these records contain deliberative information which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
5. **The Custodian must deliver⁶ to the Council in a sealed envelope nine (9) copies of the requested unredacted documents (see #4 above), a document or**

⁶ 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.

redaction index⁷, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4⁸, that the document provided is the document 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.

6. 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.
7. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

October 3, 2011

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

October 7, 2011

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

- Nine (9) copies of the unredacted versions of the e-mails between Kenneth Connolly and Charles Meyers, Passaic County Sheriff's Department Warden, from May 20, 2008 to July 2008.
- Document redaction index.

The Custodian certifies that the enclosed records are the records requested by the GRC for an *in camera* inspection.

Analysis

Whether the Custodian complied with the Council's September 27, 2011 Interim Order?

At its September 27, 2011 public meeting, the Council determined that because the Custodian asserted that the requested e-mails between Kenneth Connolly, New Jersey Department of Personnel, and Passaic County Sheriff's Department Warden Charles Meyers that were created between May 20, 2008 and July 2008 contain deliberative information which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1, the Council must determine whether the legal conclusion asserted by the Custodian is 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

⁷ The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

⁸ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

records 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.

The Custodian provided the records for an *in camera* review and the Custodian's certified confirmation of compliance to the Executive Director on October 7, 2011, the fourth (4th) business day following receipt of the Council's Interim Order.

Therefore, the Custodian timely complied with the Council's September 27, 2011 Interim Order by providing the records for an *in camera* review and Custodian's certified confirmation of compliance to the Executive Director within the deadline to comply with said Order.

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> Examination⁹
E-mails between Kenneth Connolly, NJ Civil Service	E-mail from Charles Meyers to Rose Vizcarrondo dated May 23,	Page 1: No redactions made; Page 2: No redactions	<u>N.J.S.A.</u> 47:1A-1 states that "a public agency has a responsibility and an obligation	Page 3: The material redacted comprises the name and address of an employee subject to proposed layoff or

⁹ **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.

<p>Commission, and Charles Meyers, Passaic County Sheriff's Department.</p>	<p>2008 10:23 a.m. with attachment (3 pages).</p>	<p>made; Page 3: Name and address of recipient redacted.</p>	<p>to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy." The redactions made properly protected the confidential address of employees shown on the Individual Notices of Layoff or Demotion; such addresses are not included in the list of public information set forth at <u>N.J.S.A. 47:1A-10</u>. Also, <u>N.J.S.A. 47:1A-10</u> provides that although the personnel or pension records of any individual in the possession of a public agency, shall not be considered a government record and shall not be made available for public access an employee's "name, title, position, salary, payroll record, length of service, date of separation and the reason therefor, and the amount and type of pension</p>	<p>demotion. As such, the redacted material is exempt from disclosure under OPRA as advisory, consultative or deliberative ("ACD") material pursuant to <u>N.J.S.A. 47:1A-1.1</u> and as a personnel record pursuant to <u>N.J.S.A. 47:1A-10</u>.</p>
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			received” is a government record.	
	E-mail from Charles Meyers to Kenneth Connolly and Aurus Malloy dated May 28, 2008 at 1:24 p.m. (2 pages).	Page 1: No redactions made Page 2: Name and address of recipient redacted	<u>N.J.S.A.</u> 47:1A-1; <u>N.J.S.A.</u> 47:1A-10, as set forth above.	Page 2: The material redacted comprises the name and address of an employee subject to proposed layoff or demotion. As such, the redacted material is exempt from disclosure under OPRA as ACD material pursuant to <u>N.J.S.A.</u> 47:1A-1.1 and as a personnel record pursuant to <u>N.J.S.A.</u> 47:1A-10.
	E-mail from Charles Meyers to Kenneth Connolly and Aurus Malloy dated May 28, 2008 at 1:24 p.m. (2 pages).	Page 1: No redactions made; Page 2: Name and address of recipient redacted.	<u>N.J.S.A.</u> 47:1A-1; <u>N.J.S.A.</u> 47:1A-10, as set forth above.	Page 2: The material redacted comprises the name and address of an employee subject to proposed layoff or demotion. As such, the redacted material is exempt from disclosure under OPRA as ACD material pursuant to <u>N.J.S.A.</u> 47:1A-1.1 and as a personnel record pursuant to <u>N.J.S.A.</u> 47:1A-10.
	E-mail from Charles Meyers to Kenneth Connolly dated June 19, 2008 at 2:28 p.m. (2 pages).	Page 1: Redacted second half of first sentence of message; Page 2: No redactions made	<u>N.J.S.A.</u> 47:1A-1; <u>N.J.S.A.</u> 47:1A-10, as set forth above.	Page 1: Redaction made is improper because the redacted material contains no privileged or confidential information. The Custodian must disclose this material.
	E-mail from Charles Meyers to Kenneth Connolly dated June 30, 2008 at 4:01 p.m. (1 page).	Page 1: After the salutation “Ken,” the first two words of the message were redacted.	<u>N.J.S.A.</u> 47:1A-1; <u>N.J.S.A.</u> 47:1A-10, as set forth above.	Page 1: The redacted material comprises the name of an employee who received a notice of proposed layoff or demotion. As such, the redacted material is exempt from disclosure under OPRA as ACD material pursuant to <u>N.J.S.A.</u> 47:1A-1.1 and

				as a personnel record pursuant to <u>N.J.S.A. 47:1A-10</u> .
	E-mail from Charles Meyers to Kenneth Connolly dated June 30, 2008 at 5:22 p.m. (2 pages).	<p>Page 1:¹⁰</p> <p>a) First 5 words of the second sentence of the message redacted.</p> <p>b) Paragraph, beginning “Conversely,” the following 6 word were redacted.</p> <p>c) In the paragraph beginning “We understand,” the sentence beginning “Moreover,” the words following “the addition of” have been redacted.</p> <p>d) In the paragraph beginning “We understand,” the sentence beginning “Moreover,” the word following “the removal of” have been redacted.</p> <p>e) In the paragraph beginning “Currently,” in words 1 – 6 of the last line have been redacted.</p> <p>f) All material in the box</p>	<u>N.J.S.A. 47:1A-1</u> ; <u>N.J.S.A. 47:1A-10</u> , as set forth above.	<p>Page 1:</p> <p>a) The redacted material comprises the name and title of an individual subject to proposed layoff or demotion. As such, the redacted material is exempt from disclosure under OPRA as ACD material pursuant to <u>N.J.S.A. 47:1A-1.1</u> and as a personnel record pursuant to <u>N.J.S.A. 47:1A-10</u>.</p> <p>b) The redacted material comprises the name and title of an individual subject to proposed layoff or demotion. As such, the redacted material is exempt from disclosure under OPRA as ACD material pursuant to <u>N.J.S.A. 47:1A-1.1</u> and as a personnel record pursuant to <u>N.J.S.A. 47:1A-10</u>.</p> <p>c) The redacted material comprises the name of an individual subject to proposed layoff or demotion. As such, the redacted material is exempt from disclosure under OPRA as ACD material pursuant to <u>N.J.S.A. 47:1A-1.1</u> and as a personnel record pursuant to <u>N.J.S.A. 47:1A-10</u>.</p> <p>d) The redacted</p>

¹⁰ To more easily differentiate the redactions made to the records at issue, the GRC will refer herein to sequential redactions made on one page by letter; however, such letters do not appear in the records at issue and are merely used herein as a reference guide.

		<p>labeled “Positions Eliminated” has been redacted.</p> <p>g) All material in box labeled “CAMPS indicated seniority of police records clerks as follows” has been redacted.</p> <p>h) In the paragraph beginning “Accordingly,” words 1 – 4 of the line immediately following have been redacted.</p> <p>i) In the paragraph beginning “Accordingly,” words 9 and 10 of the line immediately following have been redacted.</p> <p>j) In the paragraph beginning “Accordingly,” words 13 to 16 in the line immediately following have been redacted.</p> <p>k) All material in the box labeled “Positions Eliminated/ Seniority of Displaced Persons” redacted.</p> <p>Page 2: No redactions</p>		<p>material comprises the name of an individual subject to proposed layoff or demotion. As such, the redacted material is exempt from disclosure under OPRA as ACD material pursuant to <u>N.J.S.A. 47:1A-1.1</u> and as a personnel record pursuant to <u>N.J.S.A. 47:1A-10</u>.</p> <p>e) The redacted material comprises the name and title of an individual subject to proposed layoff or demotion. As such, the redacted material is exempt from disclosure under OPRA as ACD material pursuant to <u>N.J.S.A. 47:1A-1.1</u> and as a personnel record pursuant to <u>N.J.S.A. 47:1A-10</u>.</p> <p>f) The redacted material comprises the names, titles, and effective date of individuals subject to proposed layoff or demotion, and the names of individuals who could be “bumped” by layoffs. As such, the redacted material is exempt from disclosure under OPRA as ACD material pursuant to <u>N.J.S.A. 47:1A-1.1</u> and as a personnel record pursuant to <u>N.J.S.A. 47:1A-10</u>.</p> <p>g) The redacted material comprises the name, title and effective date of individual subject to</p>
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		made.		<p>proposed layoff or demotion. As such, the redacted material is exempt from disclosure under OPRA as ACD material pursuant to <u>N.J.S.A. 47:1A-1.1</u> and as a personnel record pursuant to <u>N.J.S.A. 47:1A-10</u>.</p> <p>h) The material redacted comprises the name and employment status of an individual subject to proposed layoff or demotion. As such, the redacted material is exempt from disclosure under OPRA as ACD material pursuant to <u>N.J.S.A. 47:1A-1.1</u> and as a personnel record pursuant to <u>N.J.S.A. 47:1A-10</u>.</p> <p>i) The material redacted comprises the name of an individual subject to proposed layoff or demotion. As such, the redacted material is exempt from disclosure under OPRA as ACD material pursuant to <u>N.J.S.A. 47:1A-1.1</u> and as a personnel record pursuant to <u>N.J.S.A. 47:1A-10</u>.</p> <p>j) The material redacted comprises the name and title of an individual subject to proposed layoff or demotion. As such, the redacted material is exempt from disclosure under OPRA as ACD material pursuant to <u>N.J.S.A. 47:1A-1.1</u> and as a personnel record pursuant to <u>N.J.S.A.</u></p>
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				47:1A-10. k) The redacted material comprises the name, title, and effective date of individuals subject to proposed layoff or demotion, and the name, title, effective date and status change of persons to be displaced by such action. As such, the redacted material is exempt from disclosure under OPRA as ACD material pursuant to <u>N.J.S.A. 47:1A-1.1</u> and as a personnel record pursuant to <u>N.J.S.A. 47:1A-10</u> .
	E-mail from Charles Meyers to Kenneth Connolly dated July 2, 2008 at 11:52 a.m. (2 pages).	Page 1: a) Under the heading “Civilian Employees,” the words 1-3 of the third (3 rd) paragraph immediately following such heading have been redacted; b) Under the heading “Civilian Employees,” words 1-6 of the fourth (4 th) paragraph immediately following such heading have been redacted; c) Under the heading “Civilian Employees,” words 1-5 of fifth (5 th) paragraph	<u>N.J.S.A. 47:1A-1</u> ; <u>N.J.S.A. 47:1A-10</u> , as set forth above.	Page 1: a) The redacted material comprises the name and title of an individual who was separated from employment. As such, this material is disclosable under OPRA pursuant to <u>N.J.S.A. 47:1A-10</u>. b) The redacted material comprises the name and title of an individual who was separated from employment. As such, this material is disclosable under OPRA pursuant to <u>N.J.S.A. 47:1A-10</u>. c) The redacted material comprises the name and title of an individual whose proposed layoff was rescinded. As such, this material is disclosable under OPRA pursuant to

		immediately following such heading have been redacted. Page 2: no redactions made.		<u>N.J.S.A. 47:1A-10.</u>
	E-mail from Charles Meyers to Kenneth Connolly dated July 2, 2008 at 12:08 p.m. (2 pages).	Page 1: a) All material in table titled “Rescinded layoffs due to extra service based on MB position” redacted; b) All material in table titled “Rescinded layoffs due to attrition that has occurred from the time Plan approval” redacted; c) All material in table titled “Corrections Officers scheduled to be processed for layoff” redacted. Page 2: No redactions made.	<u>N.J.S.A. 47:1A-1;</u> <u>N.J.S.A. 47:1A-10,</u> as set forth above.	Page 1: a) The redacted material comprises the first and last names and titles of individuals whose proposed layoffs were rescinded. As such, this material is disclosable under OPRA pursuant to <u>N.J.S.A. 47:1A-10.</u> b) The redacted material comprises first and last names and titles of individuals whose proposed layoffs were rescinded and the personnel actions that led to the rescission of the layoff. As such, this material is disclosable under OPRA pursuant to <u>N.J.S.A. 47:1A-10.</u> c) The redacted material comprises the first and last name, title and status of an individual subject to proposed layoff. As such this material is not disclosable under OPRA as ACD material pursuant to <u>N.J.S.A. 47:1A-1.1</u> and as a personnel record pursuant to <u>N.J.S.A. 47:1A-10.</u>
	E-mail from Charles Meyers to Kenneth Connolly dated July 2, 2008 at 12:46 p.m.	Page 1: a) All material in box titled “Rescinded layoffs due to extra service	<u>N.J.S.A. 47:1A-1;</u> <u>N.J.S.A. 47:1A-10,</u> as set forth above.	Page 1: a) The redacted material comprises the first and last names and titles of individuals whose proposed layoffs

		<p>based on MSB decision” redacted;</p> <p>b) All material in box titled “Rescinded layoffs due to attrition that has occurred from the time plan approval” redacted;</p> <p>c) All material in box titled “Sheriff’s Officers scheduled to be processed for layoff” redacted.</p> <p>Page 2: No redactions made.</p>		<p>were rescinded. As such, this material is disclosable under OPRA pursuant to <u>N.J.S.A. 47:1A-10.</u></p> <p>b) The redacted material comprises first and last names and titles of individuals whose proposed layoffs were rescinded and the personnel actions that led to the rescission of the layoff. As such, this material is disclosable under OPRA pursuant to <u>N.J.S.A. 47:1A-10.</u></p> <p>c) The redacted material comprises the first and last name, title and status of an individual subject to proposed layoff. As such this material is not disclosable under OPRA as ACD material pursuant to <u>N.J.S.A. 47:1A-1.1</u> and as a personnel record pursuant to <u>N.J.S.A. 47:1A-10.</u></p>
	E-mail from Charles Meyers to Kenneth Connolly dated July 2, 2008 at 4:18 p.m.	<p>Page 1: The two (2) words following “Due to the retirement of” in the first sentence after the salutation “Ken,” were redacted.</p>	<u>N.J.S.A. 47:1A-1;</u> <u>N.J.S.A. 47:1A-10,</u> as set forth above.	<p>Page 1: The redacted material comprises the first and last name of an individual who retired from employment prior to the date of this memo. As such this material is disclosable under OPRA pursuant to <u>N.J.S.A. 47:1A-10.</u></p>
	E-mail from Charles Meyers to Kenneth Connolly dated July 2, 2008 at 4:57 p.m.	<p>Page 1:</p> <p>a) All material in box titled “The following layoffs will be rescinded or processed as indicated”</p>	<u>N.J.S.A. 47:1A-1;</u> <u>N.J.S.A. 47:1A-10,</u> as set forth above.	<p>Page 1:</p> <p>a) The material redacted encompasses names, “bumping” status, and proposed final action of individuals whose proposed layoffs will</p>

		<p>redacted;</p> <p>b) Words six (6) and seven (7) in the sentence beginning “Due to the retirement of” redacted.</p> <p>Page 2: No redactions made.</p>		<p>be rescinded. As such, the material is exempt from disclosure under OPRA as ACD material pursuant to <u>N.J.S.A. 47:1A-1.1</u> and as personnel records pursuant to <u>N.J.S.A. 47:1A-10</u>.</p> <p>b) The redacted material comprises the first and last name of an individual who retired from employment prior to the date of this memo.</p> <p>As such this material is disclosable under OPRA pursuant to <u>N.J.S.A. 47:1A-10</u>.</p>
	<p>E-mail from Charles Meyers to Kenneth Connolly dated July 2, 2008 at 5:23 p.m.</p>	<p>Page 1: No redactions made.</p> <p>Page 2: No redactions made.</p> <p>Page 3:</p> <p>a) Seventh (7th) and eighth (8th) words in the first sentence of the first (1st) paragraph redacted.</p> <p>b) All contents of the box titled “Name/Final Action” redacted.</p> <p>Page 4:</p> <p>a) all contents of the box titled “Rescinded layoffs due to extra service based on MSB decision” redacted;</p> <p>b) All contents of box titled “Rescinded</p>	<p><u>N.J.S.A. 47:1A-1;</u> <u>N.J.S.A. 47:1A-10</u>, as set forth above.</p>	<p>Page 3:</p> <p>a) The redacted material comprises the first and last name of an individual who retired from employment prior to the date of this memo.</p> <p>As such this material is disclosable under OPRA pursuant to <u>N.J.S.A. 47:1A-10</u>.</p> <p>b) The redacted material comprises the names of individuals subject to rescission of layoff, demotion, or separation from service which has not occurred as of the date of the memo. As such, the material is exempt from disclosure under OPRA as ACD material pursuant to <u>N.J.S.A. 47:1A-1.1</u> and as personnel records pursuant to <u>N.J.S.A. 47:1A-10</u>.</p> <p>Page 4:</p> <p>a) The redacted</p>

		<p>layoffs due to attrition that has occurred from time plan approval” redacted;</p> <p>c) All contents of box titled “Sheriff’s Officers scheduled to be processed for layoff” redacted;</p> <p>Page 5:</p> <p>a) Contents of box titled “Rescinded layoffs due to extras service based to MSB decision” redacted;</p> <p>b) Contents of box titled “Rescinded layoffs due to attrition that has occurred from time plan approval” redacted;</p> <p>c) Contents of box titled “Corrections Officers scheduled to be processed for layoff” redacted.</p>	<p>material comprises the first and last names and titles of individuals whose proposed layoffs were rescinded. As such, this material is disclosable under OPRA pursuant to <u>N.J.S.A. 47:1A-10.</u></p> <p>b) The redacted material comprises first and last names and titles of individuals whose proposed layoffs were rescinded and the personnel actions that led to the rescission of the layoff. As such, this material is disclosable under OPRA pursuant to <u>N.J.S.A. 47:1A-10.</u></p> <p>c) The redacted material comprises the first and last name, title and status of an individual subject to proposed layoff. As such this material is not disclosable under OPRA as ACD material pursuant to <u>N.J.S.A. 47:1A-1.1</u> and as a personnel record pursuant to <u>N.J.S.A. 47:1A-10.</u></p> <p>Page 5:</p> <p>a) The redacted material comprises the first and last names and titles of individuals whose proposed layoffs were rescinded. As such, this material is disclosable under OPRA pursuant to <u>N.J.S.A. 47:1A-10.</u></p> <p>b) The redacted material comprises first and last names and titles of individuals</p>
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				<p>whose proposed layoffs were rescinded and the personnel actions that led to the rescission of the layoff. As such, this material is disclosable under OPRA pursuant to <u>N.J.S.A. 47:1A-10.</u></p> <p>c) The redacted material comprises the first and last name, title and status of an individual subject to proposed layoff. As such this material is not disclosable under OPRA as ACD material pursuant to <u>N.J.S.A. 47:1A-1.1</u> and as a personnel record pursuant to <u>N.J.S.A. 47:1A-10.</u></p>
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Thus, the Custodian must disclose the material that is not exempt from disclosure to the Complainant.

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 timely complied with the Council’s September 27, 2011 Interim Order by providing the records for an *in camera* review and Custodian’s certified confirmation of compliance to the Executive Director within the deadline to comply with said Order.

2. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4¹¹ to the Executive Director.**
3. 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.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared and

Approved By: Karyn Gordon, Esq.
Acting Executive Director

July 24, 2012

¹¹ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."



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

September 27, 2011 Government Records Council Meeting

Benjamin A. Spivack, Esq.
(on behalf of Passaic County Sheriff's Department
Professional Association)
Complainant

Complaint No. 2010-130

v.

New Jersey Civil Service Commission
Custodian of Record

At the September 27, 2011 public meeting, the Government Records Council ("Council") considered the September 20, 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, finds that:

1. Because the Complainant's request for all written communications concerning Passaic County Sheriff's Department employee layoffs between New Jersey Civil Service Commission and Passaic County or Passaic County Sheriff's Department, and between New Jersey Department of Personnel and Passaic County or Passaic County Sheriff's Department failed to include specific identifiable persons within those state agencies, the Complainant's request fails to seek specific identifiable government records and is therefore invalid under OPRA pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).
2. Because the evidence of record indicates that the Complainant's need for access to the employee names and addresses contained in the requested e-mails between Kenneth Connolly at New Jersey Department of Personnel and Passaic County Sheriff's Department Warden Charles Meyers between March 2008 and July 2008 concerning Passaic County Sheriff's Department employee layoffs, does not outweigh the Custodian's need to safeguard such names and addresses, the Custodian did not unlawfully deny the Complainant access to such names and addresses pursuant to N.J.S.A. 47:1A-1, which states that a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy..



3. The e-mails responsive to the Complainant's OPRA request created between March 2008 and May 20, 2008 are exempt from disclosure under OPRA as advisory, consultative and deliberative material because they were part of the agency's decision-making process for New Jersey Civil Service Commission's approval of the Passaic County Sheriff's Department layoff plan. N.J.S.A. 47:1A-1.1. See Education Law Center v. NJ Department of Education, 198 N.J. 274, 966 A.2d 1054, 1069 (2009), GRC Complaint No. 2003-128 (October 2005); In Re Liquidation of Integrity Insurance Co., 165 N.J. 75 (2000).
4. Pursuant to Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005), the GRC must conduct an *in camera* review of the requested e-mails between Kenneth Connolly, New Jersey Department of Personnel, and Passaic County Sheriff's Department Warden Charles Meyers that were created between May 20, 2008 and July 2008 to determine the validity of the Custodian's assertion that these records contain deliberative information which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
5. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted documents (see #4 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 document provided is the document 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.**
6. 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.
7. 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 27th Day of September, 2011

Robin Berg Tabakin, Chair
Government Records Council

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."

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: October 3, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 27, 2011 Council Meeting**

Benjamin A. Spivack, Esq.
**(on behalf of Passaic County Sheriff's
Department Professional Association)¹**
Complainant

GRC Complaint No. 2010-130

v.

New Jersey Civil Service Commission²
Custodian of Records

Records Relevant to Complaint:³ Copies of all written communications concerning Passaic County Sheriff's Department employee layoffs between:

1. The New Jersey Civil Service Commission ("NJCSC") and Passaic County or the Passaic County Sheriff's Department between March 2008 and July 2008.
2. The New Jersey Department of Personnel ("NJDP")⁴ and Passaic County or the Passaic County Sheriff's Department between December 2007 and September 2008.
3. E-mails between Kenneth Connolly at NJDOP and Passaic County Sheriff's Department Warden Charles Meyers between March 2008 and July 2008.

Request Made: May 27, 2010

Response Made: June 7, 2010

Custodian: Christopher Randazzo

GRC Complaint Filed: June 25, 2010⁵

Background

May 27, 2010

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

June 7, 2010

Wendy Marshall's ("Ms. Marshall"), Senior Clerk Typist, response to the OPRA request. Ms. Marshall responds in writing via e-mail to the Complainant's OPRA request

¹ The Complainant is an attorney with Oxfeld Cohen, PC (Newark, NJ).

² Represented by DAG Lisa Dorio Ruch, on behalf of the NJ Attorney General.

³ The GRC has separated the OPRA request into its component parts for clarification.

⁴ The New Jersey Civil Service Commission was formerly known as the New Jersey Department of Personnel.

⁵ The GRC received the Denial of Access Complaint on said date.

on the sixth (6th) business day following receipt of such request. Ms. Marshall states that there are over 600 responsive e-mails and requests an extension of time until June 21, 2010 to review the responsive records.

June 7, 2010

E-mail from the Complainant to Ms. Marshall. The Complainant agrees to the extension until June 21, 2010.

June 9, 2010

E-mail from the Complainant to Ms. Marshall. The Complainant asks Ms. Marshall for the estimated copying costs associated with the requested records. The Complainant states that he is willing to pay for next day delivery of the requested records.

June 9, 2010

E-mail from Ms. Marshall to the Complainant. Ms. Marshall states that NJCSC is still reviewing the requested e-mails and will not know the copying costs until this process is complete. Ms. Marshall also states that when she has all of the responsive e-mails, she will calculate the total copying cost and inform the Complainant.

June 21, 2010

Letter from the Complainant to Mr. Warren Barclay⁶ at NJCSC. The Complainant encloses a check for \$54.30 for copying costs and overnight mailing costs as discussed previously with Ms. Marshall.

June 22, 2010

E-mail from Ms. Marshall to the Complainant. Ms. Marshall states that NJCSC is in receipt of the Complainant's check for \$54.30 and the records were sent via overnight mail to the Complainant.

June 22, 2010

Letter from the Custodian⁷ to the Complainant. The Custodian states that he is releasing the requested records in response to the Complainant's OPRA request. The Custodian also states that employees' names were redacted to protect their privacy. The Custodian further states that the addresses of the employees shown on the Individual Notices of Layoff or Demotion were also redacted. The Custodian additionally states that other specific information not responsive to the Complainant's request was also redacted. Lastly, the Custodian states that as discussed in a telephone conversation with the Complainant the previous day, it has been agreed between the parties that some of the requested records are still under review and the Custodian will contact the Complainant to advise whether these records can be disclosed and will also inform the Complainant of any appropriate copying costs.

⁶ Mr. Barclay was the previous Records Custodian and was on medical leave during the time of this OPRA request; Mr. Randazzo assumed the role of Records Custodian for the Complainant's OPRA request.

⁷ Mr. Randazzo sent this letter to the Complainant.

June 25, 2010

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

- Complainant’s OPRA request dated May 27, 2010.
- E-mail from Ms. Marshall to the Complainant dated June 7, 2010.
- E-mail from Complainant to the Ms. Marshall dated June 7, 2010.
- E-mail from the Complainant to Ms. Marshall dated June 9, 2010.
- E-mail from Ms. Marshall to the Complainant dated June 9, 2010.
- Letter from the Complainant to the Custodian dated June 21, 2010 with attachments.
- E-mail from Ms. Marshall to the Complainant dated June 22, 2010.
- Letter from the Custodian to the Complainant dated June 22, 2010.

The Complainant states that he filed an OPRA request on May 27, 2010 for written communications including e-mails from the NJCSC concerning the July 2008 employee layoffs at the Passaic County Sheriff’s Department. The Complainant also states that he received an e-mail from Ms. Marshall on June 7, 2010 requesting an extension of time until June 21, 2010 to fulfill the OPRA request. The Complainant states that he agreed to that extension of time on June 7, 2010. The Complainant further states that on June 9, 2010 he received another e-mail from Ms. Marshall informing the Complainant that the Custodian was in the process of reviewing the records responsive and would calculate the appropriate copying costs.

The Complainant states that on June 21, 2010 Ms. Marshall informed him that the copying cost and overnight delivery charge for the responsive records was \$54.30. The Complainant also states that Ms. Marshall received the Complainant’s payment of \$54.30 on June 22, 2010. The Complainant further states that on June 24, 2010 he received the records responsive consisting primarily of e-mails from the NJCSC and Charles Meyers concerning the Passaic County Sheriff’s Department employee layoffs in 2008. The Complainant states that a letter from the Custodian was included with the responsive records; the Complainant states that said letter stated that the names of the affected employees were redacted in order to protect their privacy. The Complainant states that he was not informed at any point that the names of the laid-off employees would be redacted.

The Complainant states that he contacted Ms. Marshall and the Custodian to question the redaction of the records. The Complainant also states that the Custodian informed the Complainant that the Custodian was directed to redact the records but did not indicate who instructed him to do so. The Complainant further states that he informed the Custodian that he would contact the Deputy Attorney General assigned to the NJCSC. The Complainant states that the Custodian informed the Complainant that the Custodian would also be in touch with the Deputy Attorney General.

The Complainant agrees to mediate this complaint.

July 7, 2010

Offer of Mediation sent to the Custodian.

July 9, 2010

The Custodian agrees to mediate this complaint.

October 22, 2010

The complaint is referred back to the GRC for adjudication.

October 22, 2010

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

October 28, 2010

Custodian’s SOI with the following attachments:⁸

- Complainant’s OPRA request dated May 27, 2010.
- E-mail from Ms. Marshall to the Complainant dated June 7, 2010.
- E-mail from the Complainant to Ms. Marshall dated June 7, 2010.
- E-mail from the Complainant to Ms. Marshall dated June 9, 2010.
- E-mail from Ms. Marshall to the Complainant dated June 9, 2010.
- Letter from the Complainant to Mr. Barclay dated June 21, 2010.
- Letter from the Custodian to the Complainant dated June 22, 2010.

The Custodian certifies that the Complainant filed an OPRA request on May 27, 2010 seeking copies of all written communications including e-mails between the NJCSC and Passaic County or the Passaic County Sheriff’s Department concerning employee layoffs that occurred between March 2008 and July 2008. The Custodian also certifies that Ms. Marshall requested and received an extension until June 21, 2010 to respond to the Complainant’s OPRA request.

The Custodian certifies that he forwarded records responsive to the OPRA request to the Complainant on June 22, 2010. The Custodian also certifies that the names of the affected employees and their addresses were redacted in order to protect their privacy. The Custodian further certifies that the Complainant filed a Denial of Access Complaint with the GRC on June 25, 2010.

The Custodian argues that the names and addresses of the employees affected by the potential layoffs were redacted to protect their privacy. The Custodian also argues that said names and addresses were redacted from the requested records to protect privileged communications that were part of the deliberative process in discussing the unapproved layoff plan.

⁸ The Custodian does not certify what search was undertaken to satisfy the Complainant’s records request. Furthermore, the Custodian does not certify as to when the records responsive to the Complainant’s OPRA request were destroyed in accordance with the Records Destruction Schedule established and approved by the New Jersey Department of State, Division of Archives and Records Management. Furthermore, the Custodian failed to provide a document index as required by Item No. 9 of the SOI.

Benjamin A. Spivack, Esq. (on behalf of Passaic County Sheriff’s Department Professional Association) v. New Jersey Civil Service Commission, 2010-130 – Findings and Recommendations of the Executive Director 4

The Custodian argues that the Passaic County Sheriff's Department may institute layoffs or demotions for economic, efficiency or other related reasons pursuant to *N.J.A.C. 4A:8-1.1(a), (a)(1)*. The Custodian also argues that at least 30 days prior to the issuance of layoff notices, the Passaic County Sheriff's Department must submit a layoff plan to the NJCSC. The Custodian further argues that the information detailed in this plan includes the reason for the layoffs, the projected effective date of the layoffs, sample copies of layoff notices and the projected date of issuance, the number of positions to be vacated, whether any vacant positions will be filled, a detailed explanation of all alternatives to layoffs and any pre-layoff actions that have been taken or considered pursuant to *N.J.A.C. 4A:8-1.4(a)*. The Custodian argues that upon review of this layoff plan the NJCSC may require additional information, provide assistance to the appointing authority, direct implementation of alternatives or direct necessary changes in the layoff notice pursuant to *N.J.A.C. 4A:8-1.4(d)*. The Custodian states that when the layoff plan is approved, the NJCSC must provide the affected negotiation representatives with a copy of the plan as it affects their represented employees pursuant to *N.J.A.C. 4A:8-1.4(e)*. The Custodian argues that the layoff plan becomes a public document once it is approved by the NJCSC.

The Custodian argues that the records were properly redacted to protect the privacy of the employees who were under consideration for a potential layoff. The Custodian also argues that N.J.S.A. 47:1A-10 provides that an employees' "name title, position, salary, payroll record, length of service, date of separation and the reason...and the amount and type of pension received" is a government record for the purposes of OPRA but that personnel records are not government records.

The Custodian argues that although an employee's length of service, date and reason for separation from employment is a government record, this does not include an employee being considered as a possible layoff candidate. The Custodian also argues that once the layoff plan is approved by the NJCSC, the layoff plans and the identity of the affected employees are considered government records. The Custodian further argues that identifying the potential candidates for employee layoffs in a record other than an approved layoff plan would violate such employees' reasonable expectation of privacy. The Custodian additionally argues that the employees' addresses were properly redacted because addresses were not included in the list of information considered to be a government record set forth at N.J.S.A. 47:1A-10.

The Custodian argues that the employee names and addresses were redacted as part of the NJCSC's deliberative process in discussing the not yet approved layoff plan. The Custodian argues that records used in an agency's decision making process may be protected from disclosure by the deliberative process privilege pursuant to N.J.S.A. 47:1A-1.⁹ The Custodian also argues that the mental processes of public officials by means of which governmental action is determined are beyond the scope of judicial review. State v. Mitchell, 164 N.J. Super. 198, 202 (App. Div. 1978) and New Jersey Turnpike Authority v. Sisselman, 106 N.J. Super. 358, 367 (App. Div. 1969), cert. den., 54 N.J. 565 (1960).

⁹ The correct citation is N.J.S.A. 47:1A-1.1.

November 8, 2010:

Letter from the GRC to the Custodian. The GRC requests that the Custodian respond to the following questions so that the GRC may employ the common law balancing test established by the New Jersey Supreme Court in Doe v. Poritz, 142 N.J. 1 (1995):

1. The type of record(s) requested.
2. The information the requested record(s) do or might contain.
3. The potential harm in any subsequent non-consensual disclosure of the requested record(s).
4. The injury from disclosure to the relationship in which the requested Record(s) was generated.
5. The adequacy of safeguards to prevent unauthorized disclosure.
6. Whether there is an express statutory mandate, articulated public policy or other recognized public interest militating toward access.

November 8, 2010

Letter from the GRC to the Complainant. The GRC requests that the Complainant respond to the following questions so that the GRC may employ the common law balancing test established by the New Jersey Supreme Court in Doe v. Poritz, 142 N.J. 1 (1995):

1. Why do you need the requested record(s) or information?
2. How important is the requested record(s) or information to you?
3. Do you plan to redistribute the requested record(s) or information?
4. Will you use the requested record(s) or information for unsolicited contact of the individuals named in the government record(s)?

November 9, 2010

Letter from the Complainant to the GRC. The Complainant states that the unredacted information requested herein was received via subpoena from the Passaic County Sheriff's Department.¹⁰ The Complainant also states that the redacted e-mails from the NJCSC demonstrated that there were significant e-mails between the NJDOP and the Passaic County Sheriff's Department concerning layoffs in 2008. The Complainant further states that while this information has been received, the answers to the following questions will be made as if the Complainant had not received the

¹⁰ The Complainant does not specify the legal action pursuant to which the subpoena was issued nor the date that the relevant information was received.

requested information via subpoena. The Complainant forwards the following responses to the GRC balancing test questionnaire:

Questions	Complainant's Response
Why do you need the requested records or information?	Complainant needs the information to determine whether or not there was bad faith in the layoffs initiated by the Passaic County Sheriff's Department in March 2008 and July 2008. Since e-mails were a crucial form of communication between the Department of Personnel and the Passaic County Sheriff's Department, this information is important.
How important are the requested records or information to you?	The information in the requested records is very important because the e-mail communications were a primary conduit of information between the Passaic County Sheriff's Department and the Department of Personnel and absent having these e-mails, Complainant would not have had critical information in pursuing the case for a bad faith layoff.
Do you plan to redistribute the requested records or information?	The requested information would have been used if unredacted, at an Office of Administrative Law hearing on the bad faith layoff appeal.
Will you use the requested records or information for unsolicited contact of the individuals named in the government records?	The only possible contact would have been to Kenneth Connolly from the Department of Personnel.

November 15, 2010

E-mail from the Custodian to the GRC. The Custodian forwards the following responses to the GRC's balancing test questionnaire:

Questions	Custodian's Response
The type of record requested:	Unredacted copies of all written communications including e-mails between the NJCSC and Passaic County or the Passaic County Sheriff's Department concerning layoffs of employees that occurred between March 2008 and July 2008.
The information the requested records do or might contain:	1) the names of the employees affected by the layoff proposal (redacted in order to protect their privacy), 2) the addresses of the employees shown on the draft

	Individual Notices of Layoff or Demotion (redacted because this type of information is confidential and not subject to disclosure); and 3) other specific information not responsive to this request.
The potential harm in any subsequent non-consensual disclosure of the requested records:	The potential harm in any subsequent non-consensual disclosure of the redacted portions would be the following: 1) harm to the privacy of the employee who were under consideration for potential layoffs; 2) harm from the disclosure of confidential addresses of employees shown on the draft Individual Notices of Layoff or Demotion and 3) harm from the disclosure of privileged communications that were part of the NJCSC's deliberative process in discussing an unapproved layoff plan.
The injury from disclosure to the relationship in which the requested records were generated:	The potential for injury from the disclosure to the relationship in which the requested records were generated is great. The redacted material properly protected privileged communications that were part of the NJCSC's deliberative process in discussing the unapproved layoff plan with Passaic County and the Passaic County Sheriff's Department. Records used in an agency's decision-making process, such as NJCSC's review of a proposed layoff plan, submitted by an appointing authority such as Passaic County or the Passaic County Sheriff's Department, may be protected from disclosure by the deliberative process privilege. Although the layoff plan is a public record once it is approved, but prior to such approval the NJCSC is entitled to protect from disclosure its deliberations regarding the proposed layoff plan.
The adequacy of safeguards to prevent unauthorized disclosure:	There are currently no safeguards in place that would prevent unauthorized disclosure of the redacted information if the GRC were to order disclosure of the unredacted records. There are no safeguards to prevent: 1) harm to the privacy of the employees who were under consideration at that time for potential layoff; 2) harm from disclosure of confidential addresses of employees shown on the draft Individual Notices of Layoff or Demotion; and 3)

	harm from the disclosure of privileged communications that were part of the NJCSC's deliberative process in discussing an unapproved layoff plan.
<p>Whether there is an express statutory mandate, articulated public policy or other recognized public interest militating toward access:</p>	<p>There is no express statutory mandate, articulated public policy or other recognized public interest militating toward access. All interests militate against access of the redacted portions of these records. These records were properly redacted to protect the privacy of the employees who were under consideration at that time for the potential layoff. OPRA requires the NJCSC to protect confidential personnel information in the interests of the employees' privacy. <u>N.J.S.A.</u> 47:1A-1 states that "a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate a citizen's reasonable expectation of privacy." <u>N.J.S.A.</u> 47:1A-10 provides that an employee's "name, title, position, salary, payroll record, length of service, date of separation, and the reason therefor, and the amount and type of pension received" is a government record, but that personnel records are not government records. Although an employee's length of service, date of separation from employment and reason therefor is a government record, that list does not include an employee being considered as a possible candidate for a layoff. Once the NJCSC approves a layoff plan, that plan is public as well as the identity of the employees who are to be laid off. Identifying employees as potential layoff candidates would violate an agency's duty to safeguard personal information and the employee's reasonable expectation of privacy. See <u>N.J.S.A.</u> 47:1A-1. The redactions properly protected the confidential addresses of employees shown on the Individual Notices of Layoff or Demotion; such addresses are not included in the list of public</p>

	<p>information set forth at <u>N.J.S.A. 47:1A-10</u> and thus should be treated as confidential personal information.</p> <p>Additionally, the redactions properly protected privileged communications that were part of the NJCSC’s deliberative process in discussing an unapproved layoff plan. Records used in an agency’s decision-making process, such as the NJCSC’s review of a proposed layoff plan, may be protected from disclosure by the deliberative process privilege. <i>See N.J.S.A. 47:1A-1, Education Law Center v. New Jersey Department of Education</i>, 198, <u>N.J. 274</u> (2007). Pursuant to <i>State v. Mitchell</i>, 164 <u>N.J. Super. 198</u>, (App. Div. 1978), “the mental processes of public officials by means of which governmental action is determined are beyond the scope of judicial review.” Although a layoff plan is a public record once it is approved, under OPRA the NJCSC may protect from disclosure its deliberations regarding the proposed layoff plan prior to such approval.</p>
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April 11, 2011

E-mail from the GRC to the Custodian. The GRC requests a legal certification attesting to when the Passaic County Sheriff’s Department employee layoff plan was approved. The GRC references the Custodian’s letter to the Complainant dated June 22, 2010 in which the Custodian indicated that copies of records responsive to request Item No. 3 were redacted to protect “other specific information not responsive to [the Complainant’s] request.” The GRC requests the Custodian to certify as to what specific information was redacted and why that information was redacted.

April 13, 2011

E-mail from the Custodian to the GRC. The Custodian attaches a legal certification certifying that the Passaic Sheriff’s Department submitted a revised layoff plan dated May 14, 2008 and this revised layoff plan was approved on May 20, 2008. The Custodian certifies that the contents of other specific information that was not responsive to the Complainant’s request for Item No. 3 includes content of an e-mail discussing who would be granted Rice Bill List rights, an e-mail referring to the arrangement of a conference call, an e-mail with references to entries in the County and

Municipal Personnel System, and contents of an e-mail with the subject line “Housekeeping Items.”¹¹

April 13, 2011

E-mail from the Complainant to the GRC. The Complainant responds to the Custodian’s certification dated April 13, 2011. The Complainant states that the content of almost every e-mail provided to the Complainant was redacted. The Complainant also states that because the responsive e-mails were so heavily redacted, these e-mails were useless. The Complainant further states that the only purpose of these e-mails was to demonstrate the number of e-mails sent between Passaic County and the NJCSC.

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*...a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy; and nothing contained in [OPRA] ...shall be construed as affecting in any way the common law right of access to any record, including but not limited to criminal investigatory records of a law enforcement agency.” (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 ... The terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material.” (Emphasis added.) N.J.S.A. 47:1A-1.1.

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

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

OPRA further provides that:

¹¹ The Custodian failed to provide a document index specifying the redactions made and the basis therefor. Benjamin A. Spivack, Esq. (on behalf of Passaic County Sheriff’s Department Professional Association) v. New Jersey Civil Service Commission, 2010-130 – Findings and Recommendations of the Executive Director 11

“The provisions of [OPRA] shall not abrogate or erode any executive or legislative privilege or grant of confidentiality heretofore established or recognized by the Constitution of this State, statute, court rule or judicial case law, which privilege or grant of confidentiality may duly be claimed to restrict public access to a public record or government record.” N.J.S.A. 47:1A-9.b.

OPRA also provides that:

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

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

The evidence of record indicates that the Complainant made an OPRA request on May 27, 2010 seeking written communications concerning Passaic County Sheriff's Department employee layoffs between: 1) NJCSC and Passaic County or the Passaic County Sheriff's Department between March and July 2008; 2) NJDOP and Passaic County or Passaic County Sheriff's Department between December 2007 to September 2008; and 3) e-mails between Kenneth Connolly, employee of the NJDOP, and Warden Charles Meyers from the Passaic County Sheriff's Department between March 2008 and July 2008. The evidence of record also indicates that on behalf of the Custodian, Ms. Meyers responded to the OPRA request in writing on the sixth (6th) business day requesting an extension to respond until June 21, 2010 because 600 responsive e-mails had to be reviewed.

The evidence of record further indicates that Ms. Marshall provided the Complainant copies of e-mails responsive to request Item No. 3 on June 21, 2010 but redacted the names and addresses of the affected employees in order to protect their privacy. The evidence of record also shows that the Custodian redacted other specific information not responsive to the Complainant's request in a letter to the Complainant dated June 22, 2010.

The GRC first examines to whether request Items No. 1 and No. 2 are valid under OPRA.

In the instant complaint, the Complainant's OPRA request sought copies of all written communications concerning Passaic County Sheriff's Department employee layoffs between 1) NJCSC and Passaic County or the Passaic County Sheriff's Department between March 2008 and July 2008 and 2) NJDOP and Passaic County or the Passaic County Sheriff's Department between December 2007 and September 2008.

The Complainant's request for Items No. 1 and No. 2 are invalid under OPRA because the request does not specifically identify those persons within those state and county agencies who might have received or sent the requested written communication, and the request is therefore overly broad and unclear. The New Jersey Superior Court has held that "[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records 'readily accessible for inspection, copying, or examination.'* N.J.S.A. 47:1A-1." (Emphasis added.) MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005). The Court further held that "[u]nder OPRA, agencies are required to disclose only 'identifiable' government records not otherwise exempt ... In short, OPRA does not countenance open-ended searches of an agency's files." (Emphasis added.) *Id.* at 549.

In determining that MAG Entertainment's request for "all documents or records" from the Division of Alcoholic Beverage Control pertaining to selective enforcement was invalid under OPRA, the Appellate Division noted that:

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

Further, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),¹² the Superior Court references MAG in that the Court held that a requestor must specifically describe the document sought because OPRA operates to make identifiable government records "accessible." "As such, a proper request under OPRA must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting all of an agency's documents."¹³

¹² Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

¹³ As stated in Bent, *supra*.

Additionally, in New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J.Super. 166, 180 (App. Div. 2007) the court cited MAG by stating that "...when a request is 'complex' because it fails to specifically identify the documents sought, then that request is not 'encompassed' by OPRA..." The court also quoted N.J.S.A. 47:1A-5.g in that "[i]f a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency." The court further stated that "...the Legislature would not expect or want courts to require more persuasive proof of the substantiality of a disruption to agency operations than the agency's need to...generate new records..."

Furthermore, in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009) the Council held that "[b]ecause the Complainant's OPRA requests # 2-5 are not requests for identifiable government records, the requests are invalid and the Custodian has not unlawfully denied access to the requested records pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005)."

Accordingly, because the Complainant's request for all written communications concerning Passaic County Sheriff's Department employee layoffs between NJCSC and Passaic County or Passaic County Sheriff's Department, and between NJDOP and Passaic County or Passaic County Sheriff's Department failed to include specific identifiable persons within those state agencies, the Complainant's request fails to seek specific identifiable government records and is therefore invalid under OPRA pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J.Super. 30, 37 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J.Super. 166 (App. Div. 2007), and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

The GRC next turns to whether the Custodian properly redacted the names and addresses of individuals affected by the proposed layoffs from the records responsive to request Item No. 3.

In the instant complaint, the Complainant received e-mails responsive to request Item No. 3, but the Custodian redacted from such records the names and addresses of the affected employees in order to protect their privacy. The Complainant contends that the redacted information is needed to determine whether or not there was bad faith in the layoffs initiated by the Passaic County Sheriff's Department for the possible pursuit of a legal case.

The Custodian asserted that the names of the affected employees were redacted from the responsive e-mails to protect their privacy pursuant to N.J.S.A. 47:1A-1 and N.J.S.A. 47:1A-10. The Custodian argued that although an employee's length of service, date of separation from employment and reason therefor is a government record under N.J.S.A. 47:1A-10, that list does not include an employee being considered as a possible

candidate for a layoff. The Custodian further argued that once the NJCSC approves a layoff plan, that plan is public as well as the identity of the employees who are to be laid off. The Custodian argued that identifying employees as potential layoff candidates would violate an agency's duty to safeguard personal information and the employee's reasonable expectation of privacy. See N.J.S.A. 47:1A-1. The Custodian also argued that the addresses of the affected employees were redacted because employee addresses are not included in the list of public information set forth at N.J.S.A. 47:1A-10 and thus should be treated as confidential personal information.

N.J.S.A. 47:1A-1 states in pertinent part that a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy. Moreover, N.J.S.A. 47:1A-9.b. states that OPRA shall not "abrogate or erode any executive or legislative privilege or grant of confidentiality heretofore established or recognized by ... judicial case law, which privilege or grant of confidentiality may duly be claimed to restrict public access to a public record or government record."

In Merino v. Ho-Ho-Kus, GRC Complaint 2003-110 (February 2004), the Council first addressed the citizen's reasonable expectation of privacy pursuant to N.J.S.A. 47:1A-1 and found that the New Jersey Superior Court, Appellate Division, held that the GRC must enforce OPRA's declaration in N.J.S.A. 47:1A-1, that "a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy." Serrano v. South Brunswick Twp., 358 N.J. Super. 352, 368-69 (App. Div. 2003). See also National Archives and Records Administration v. Favish, 541 U.S. 157, 124 S.Ct. 1570 (U.S. March 30, 2004) (personal privacy interests are protected under FOIA).

The New Jersey Supreme Court has indicated that, as a general matter, the public disclosure of an individual's home address "does implicate privacy interests." Doe v. Poritz, 142 N.J. 1, 82 (1995). The Court specifically noted that such privacy interests are affected where disclosure of a person's address results in unsolicited contact. The Court quoted with approval a federal court decision that indicated that significant privacy concerns are raised where disclosure of the address "can invite unsolicited contact or intrusion based on the additional revealed information." *Id.* (citing Aronson v. Internal Revenue Service, 767 F. Supp. 378, 389 n. 14 (D. Mass. 1991)). The Supreme Court concluded that the privacy interest in a home address must be balanced against the interest in disclosure. It stated that the following factors should be considered:

1. The type of record requested;
2. The information it does or might contain;
3. The potential for harm in any subsequent nonconsensual disclosure;
4. The injury from disclosure to the relationship in which the record was generated;
5. The adequacy of safeguards to prevent unauthorized disclosure;
6. The degree of need for access;

7. Whether there is an express statutory mandate, articulated public policy or other recognized public interest militating toward access [*Id.* at 87-88].

The foregoing criteria was applied accordingly by the Court in exercising its discretion as to whether the privacy interests of the individuals named in the summonses are outweighed by any factors militating in favor of disclosure of the addresses. New Jersey courts have previously held that a citizen has a reasonable expectation of privacy in his or her home address. In Gannett New Jersey Partners LP v. County of Middlesex, 379 N.J. Super. 205 (App. Div. 2005), a news organization sought grand jury subpoenas served by a federal grand jury on the Office of the Governor and certain documents responsive to those subpoenas. *Id.* at 213. In rendering its decision, the court emphasized that the custodian and the court must delve into state and federal statutes and regulations to determine if the information is considered confidential and whether access to the information is inimical to the public interest or the individual interests of the persons about whom information is sought, particularly when those entities or individuals have not received notice of the request and are unable to express their privacy concerns. *Id.* at 213-14.

The court specifically rejected the news organization's request for a county freeholder's computer index of addresses and telephone numbers, stating that public officials have a right of confidentiality regarding individuals with whom they have spoken. *Id.* at 217. In doing so, the court noted that the New Jersey Supreme Court's decision in North Jersey Newspapers Co. v. Passaic County Bd. of Chosen Freeholders, 127 N.J. 9 (1992), was dispositive, inasmuch as the New Jersey Supreme Court had found that the identities and telephone numbers of persons who call and are called by public officials are protected by an expectation of privacy. *Id.*, citing North Jersey Newspapers, 127 N.J. at 16-18.

Moreover, the GRC has consistently held that home addresses are appropriately redacted from government records pursuant to N.J.S.A. 47:1A-1, which states that a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy. *See*, Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (July 2004)(home address was appropriately redacted from copies of moving violations issued by a police officer as well as copies of that officer's training records and records of complaints or internal reprimands); Perino v. Borough of Haddon Heights, GRC Complaint No. 2004-128 (November 2004)(name, home address and telephone number appropriately redacted from a noise complaint filed with the Police Department due to potential harm of unsolicited contact); Avin v. Borough of Oradell, GRC Complaint No. 2004-176 (March 2005)(homeowners' names and addresses appropriately redacted from list of homeowners who applied for a fire or burglar alarm permit); Bernstein v. Borough of Park Ridge, GRC Complaint No. 2005-99 (July 2005)(names and addresses of dog license owners appropriately redacted due to potential for unsolicited contact, intrusion or potential harm that may result); Paff v. Warren County Office of the Prosecutor, GRC Complaint No. 2007-167 (February 2008)(name and address of a crime victim appropriately redacted due to privacy concerns). *See also*, Faulkner v. Rutgers University, GRC Complaint No. 2007-149 (May

2008)(Custodian did not unlawfully deny the complainant access to names and addresses of Rutgers University football and basketball season ticket holders based on the citizen's reasonable expectation of privacy in that information).

Additionally, in Feasel v. City of Trenton (Mercer), GRC Complaint No. 2008-103 (April 2009), the Council addressed the disclosability under OPRA of names and addresses contained in payroll records. The Complainant, a Union representative, sought disclosure of certified payroll records from Marshall Industries of Trenton for the work they performed for the City of Trenton between June, 2005 and August, 2007. The Complainant asserts that because Local 9 and the Construction Trades Council, labor organizations with which the Complainant was affiliated, had the statutory right to enforce violations of the New Jersey Prevailing Wage Act, and a statutory right to gain access to certified payroll records, they had an interest in detecting violations under the Act pursuant to OPRA requests. The Council engaged in the Poritz balancing test and determined that the Complainant's need for access did not outweigh the Custodian's need to safeguard the requested personal information contained in the certified payroll records. The Council noted that the release of the employee names and addresses may result in unsolicited contact between the Complainant and the individuals whose names and addresses are being requested. Therefore, the Council determined that the Custodian did not unlawfully deny the Complainant access to the names and addresses contained in the requested certified payroll records pursuant to N.J.S.A. 47:1A-1.

In upholding the redaction of social security numbers from otherwise public land title records, the New Jersey Supreme Court stated that the privacy provision set forth at N.J.S.A. 47:1A-1 "is neither a preface nor a preamble." Rather, "the very language expressed in the privacy clause reveals its substantive nature; it does not offer reasons why OPRA was adopted, as preambles typically do; instead, it focuses on the law's implementation. ... Specifically, it imposes an obligation on public agencies to protect against disclosure of personal information which would run contrary to reasonable privacy interests." Burnett v. County of Bergen, 198 N.J. 408, 423 (2009).

In the matter before the Council, the records requested by Complainant are e-mails between Kenneth Connolly at NJDOP and Passaic County Sheriff's Department Warden Charles Meyers between March 2008 and July 2008 concerning Passaic County Sheriff's Department employee layoffs. These records contain the names and addresses of individuals who were under consideration for termination from their employment through layoffs. The Complainant, an attorney representing the Passaic County Sheriff's Association, asserted that he needs the information to determine whether the layoffs initiated by the Passaic County Sheriff's Department in March 2008 and July 2008 were done so in bad faith. The Custodian asserted that the non-consensual disclosure of the redacted portions of the requested e-mails would harm the privacy of the employees who were under consideration for potential layoffs. The Custodian further asserted that there are no sufficient safeguards in place to prevent unauthorized disclosure of employee names and addresses should the redacted information be disclosed to the Complainant.

As the Council noted in Feasel, *supra*, the potential harm that could result from the disclosure of names and home addresses of workers includes "misappropriation by marketers, creditors, solicitors and commercial advertisers, eroding the employees'

expectation of privacy[.]” Sheet Metal Workers Int’l Ass’n, Local Union No. 19 v. United States Dep’t of Veteran’s Affairs, 135 F. 3d 891 (3d Cir. 1998), as well as harassment by various entities. John Does & PKF-Mark III, Inc. v. City of Trenton Dep’t of Pub. Works - Water Div., 565 F. Supp. 2d 560, 562, 564, 567- 68, 570-71 (D.N.J. 2008). Neither the Complainant nor the labor organizations with which he is affiliated have an express statutory mandate to enforce wage laws. The enforcement of wage laws is within the jurisdiction of the New Jersey Department of Labor. N.J.S.A. 34:11-56.34. Less intrusive means for obtaining information pertaining to wage and hour compliance is available to the Complainant, as was articulated in Sheet Metal Workers, *supra*, and in PKF, *supra*. As the court noted in PKF, once the personal information at issue is released, there is nothing to stop others from obtaining it to harass the affected employees. PKF, *supra*, 565 F. Supp.2d at 571.

The Council notes that this matter is distinguishable from the Appellate Division’s decision to disclose names and home addresses of dog owners Atlantic County Society for the Prevention of Cruelty to Animals (ACSPCA) v. City of Absecon, (2009 WL 1562967 (N.J. Super. A.D.)). In this case, the Plaintiff requested a list of all licensed dog owners in the city. The Plaintiff stated that it sought the information “to assist in its animal cruelty enforcement efforts...[and] to solicit charitable contributions from the public.” *Id.* at 1. The Appellate Division noted that the Plaintiff was charged with “enforcing all laws and ordinances enacted for the protection of animals and to promote the interests of and protect and care for animals within the State.” *Id.* at 1. The Appellate Division also conducted the privacy balancing test as in the present complaint and determined that the facts of the case favored disclosure of the names and addresses of individuals who possessed dog licenses.

The Appellate Division’s decision in ACSPCA *supra*, is different from the present complaint. As noted by the court, the ACSPCA has express statutory authority to assist in animal cruelty enforcement efforts. In the instant complaint, the Complainant has no statutory authority to enforce the layoff process.

The evidence of record, therefore, shows that, similar to the U.S. District Court’s holding in PKF, *supra*, the Complainant’s need for access does not outweigh the Custodian’s need to safeguard such names and addresses contained in the requested e-mails between Kenneth Connolly at NJDOP and Passaic County Sheriff’s Department Warden Charles Meyers between March 2008 and July 2008 concerning Passaic County Sheriff’s Department employee layoffs. Furthermore, the evidence of record indicates that there are no safeguards to prevent harm to those named employees and their addresses affected by the potential layoff plan; the release of the employee names and addresses may result in unsolicited contact between the Complainant and the individuals whose names and addresses are being requested.

Therefore, because the evidence of record indicates that the Complainant’s need for access to the employee names and addresses contained in the requested e-mails between Kenneth Connolly at NJDOP and Passaic County Sheriff’s Department Warden Charles Meyers between March 2008 and July 2008 concerning Passaic County Sheriff’s Department employee layoffs, does not outweigh the Custodian’s need to safeguard such names and addresses, the Custodian did not unlawfully deny the Complainant access to

such names and addresses pursuant to N.J.S.A. 47:1A-1, which states that a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy.

In the matter before the Council, the Custodian certified in the SOI that he also redacted portions of the records responsive because the e-mails contained privileged communications that were part of the NJCSC's deliberative process in discussing an unapproved layoff plan. The Custodian further certified in the SOI that once a layoff plan is approved, it becomes a public record, but prior to such approval, the Custodian is entitled to protect from disclosure its deliberations regarding the proposed layoff plan.

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 GRC¹⁴ 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."

¹⁴ Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005). Benjamin A. Spivack, Esq. (on behalf of Passaic County Sheriff's Department Professional Association) v. New Jersey Civil Service Commission, 2010-130 – Findings and Recommendations of the Executive Director

The Complainant's request Item No. 3 sought e-mails between Kenneth Connolly at NJDOP and Passaic County Sheriff's Department Warden Charles Meyers between March 2008 and July 2008 regarding the Passaic County Sheriff's Department layoffs. The Custodian certified to the GRC on April 13, 2011 that the NJCSC approved the Passaic County Sheriff's Department layoff plan on May 20, 2008. Thus, not all of the requested e-mails were created before the NJCSC's approval of the Passaic County Sheriff's Department layoff plan.

OPRA excludes from the definition of a government record "inter-agency or intra-agency advisory, consultative or deliberative material." N.J.S.A. 47:1A-1.1. It is evident that this phrase is intended to exclude from the definition of a government record the types of documents that are the subject of the "deliberative process privilege."

In O'Shea v. West Milford Board of Education, GRC Complaint No. 2004-93 (April 2006), the Council stated that "neither the statute nor the courts have defined the terms... 'advisory, consultative, or deliberative' in the context of the public records law. The Council looks to an analogous concept, the deliberative process privilege, for guidance in the implementation of OPRA's ACD exemption. Both the ACD exemption and the deliberative process privilege enable a governmental entity to shield from disclosure material that is pre-decisional and deliberative in nature. Deliberative material contains opinions, recommendations, or advice about agency policies. In Re the Liquidation of Integrity Insurance Company, 165 N.J. 75, 88 (2000); In re Readoption With Amendments of Death Penalty Regulations, 182 N.J.149 (App. Div. 2004).

The deliberative process privilege is a doctrine that permits government agencies to withhold documents that reflect advisory opinions, recommendations and deliberations submitted as part of a process by which governmental decisions and policies are formulated. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150, 95 S. Ct. 1504, 1516, 44 L. Ed. 2d 29, 47 (1975). Specifically, the New Jersey Supreme Court has ruled that a record that contains or involves factual components is entitled to deliberative-process protection under the exemption in OPRA when it was used in decision-making process *and* its disclosure would reveal deliberations that occurred during that process. Education Law Center v. NJ Department of Education, 198 N.J. 274, 966 A.2d 1054, 1069 (2009). This long-recognized privilege is rooted in the concept that the sovereign has an interest in protecting the integrity of its deliberations. The earliest federal case adopting the privilege is Kaiser Alum. & Chem. Corp. v. United States, 157 F. Supp. 939 (1958). The privilege and its rationale were subsequently adopted by the federal district courts and circuit courts of appeal. United States v. Farley, 11 F.3d 1385, 1389 (7th Cir.1993).

The deliberative process privilege was discussed at length in In Re Liquidation of Integrity Insurance Co., 165 N.J. 75 (2000). There, the court addressed the question of whether the Commissioner of Insurance, acting in the capacity of Liquidator of a regulated entity, could protect certain records from disclosure which she claimed contained opinions, recommendations or advice regarding agency policy. *Id.* at 81. The court adopted a qualified deliberative process privilege based upon the holding of McClain v. College Hospital, 99 N.J. 346 (1985), Liquidation of Integrity, *supra*, 165 N.J. at 88. In doing so, the court noted that:

“[a] document must meet two requirements for the deliberative process privilege to apply. First, it must have been generated before the adoption of an agency's policy or decision. In other words, it must be pre-decisional. ... Second, the document must be deliberative in nature, containing opinions, recommendations, or advice about agency policies. ... Purely factual material that does not reflect deliberative processes is not protected. ... Once the government demonstrates that the subject materials meet those threshold requirements, the privilege comes into play. In such circumstances, the government's interest in candor is the "preponderating policy" and, prior to considering specific questions of application, the balance is said to have been struck in favor of non-disclosure.” (Citations omitted.) *Id.* at 84-85.

The court further set out procedural guidelines based upon those discussed in McClain:

“[t]he initial burden falls on the state agency to show that the documents it seeks to shield are pre-decisional and deliberative in nature (containing opinions, recommendations, or advice about agency policies). Once the deliberative nature of the documents is established, there is a presumption against disclosure. The burden then falls on the party seeking discovery to show that his or her compelling or substantial need for the materials overrides the government's interest in non-disclosure. Among the considerations are the importance of the evidence to the movant, its availability from other sources, and the effect of disclosure on frank and independent discussion of contemplated government policies.” In Re Liquidation of Integrity, *supra*, 165 N.J. at 88, *citing McClain*, *supra*, 99 N.J. at 361-62.

In In Re Liquidation of Integrity, *supra*, 165 N.J. at 84-5, the judiciary set forth the legal standard for applying the deliberative process privilege as follows:

- (1) The initial burden falls on the government agency to establish that matters are both *pre-decisional* and *deliberative*.
 - a. Pre-decisional means that the records were generated before an agency adopted or reached its decision or policy.
 - b. Deliberative means that the record contains opinions, recommendations, or advice about agency policies or decisions.
 - i. Deliberative materials do not include purely factual materials.
 - ii. Where factual information is contained in a record that is deliberative, such information must be produced so long as the factual material can be separated from its deliberative context.

- c. The exemption covers recommendations, draft documents, proposals, suggestions, and other subjective documents *which reflect the personal opinions of the writer rather than the policy of the agency.*
 - d. Documents which are protected by the privilege are those which *would inaccurately reflect or prematurely disclose the views of the agency, suggesting as agency position that which is only a personal position.*
 - e. To test whether disclosure of a document is likely to adversely affect the purposes of the privilege, courts ask themselves *whether the document is so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communications within the agency.*
- (2) Please note that if an *in camera* inspection were conducted by the courts, the process would include the following:

Once it has been determined that a record is deliberative, there is a presumption against disclosure and the party seeking the document has the burden of establishing his or her compelling or substantial need for the record.

- a. That burden can be met by a showing of:
 - i. the importance of the information to the requesting party,
 - ii. its availability from other sources **and**
 - iii. the effect of disclosure on frank and independent discussion of contemplated government policies.

Therefore, the e-mails responsive to the Complainant's OPRA request created between March 2008 and May 20, 2008 are exempt from disclosure under OPRA as ACD material because they were part of the agency's decision-making process for NJCSC's approval of the Passaic County Sheriff's Department layoff plan. N.J.S.A. 47:1A-1.1; *See Education Law Center, supra*; Liquidation of Integrity, supra.

Furthermore, pursuant to Paff, supra, the GRC must conduct an *in-camera* review of the requested e-mails between Kenneth Connolly, NJDOP, and Passaic County Sheriff's Department Warden Charles Meyers that were created between May 20, 2008 and July 2008 to determine the validity of the Custodian's assertion that these records contain deliberative information which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

Whether the Custodian’s denial of access to the requested records rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

The Council defers analysis of whether 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. Because the Complainant’s request for all written communications concerning Passaic County Sheriff’s Department employee layoffs between New Jersey Civil Service Commission and Passaic County or Passaic County Sheriff’s Department, and between New Jersey Department of Personnel and Passaic County or Passaic County Sheriff’s Department failed to include specific identifiable persons within those state agencies, the Complainant’s request fails to seek specific identifiable government records and is therefore invalid under OPRA pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).
2. Because the evidence of record indicates that the Complainant’s need for access to the employee names and addresses contained in the requested e-mails between Kenneth Connolly at New Jersey Department of Personnel and Passaic County Sheriff’s Department Warden Charles Meyers between March 2008 and July 2008 concerning Passaic County Sheriff’s Department employee layoffs, does not outweigh the Custodian’s need to safeguard such names and addresses, the Custodian did not unlawfully deny the Complainant access to such names and addresses pursuant to N.J.S.A. 47:1A-1, which states that a public agency has a responsibility and an obligation to safeguard from public access a citizen’s personal information with which it has been entrusted when disclosure thereof would violate the citizen’s reasonable expectation of privacy..
3. The e-mails responsive to the Complainant’s OPRA request created between March 2008 and May 20, 2008 are exempt from disclosure under OPRA as advisory, consultative and deliberative material because they were part of the

agency's decision-making process for New Jersey Civil Service Commission's approval of the Passaic County Sheriff's Department layoff plan. N.J.S.A. 47:1A-1.1. See Education Law Center v. NJ Department of Education, 198 N.J. 274, 966 A.2d 1054, 1069 (2009), GRC Complaint No. 2003-128 (October 2005); In Re Liquidation of Integrity Insurance Co., 165 N.J. 75 (2000).

4. Pursuant to Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005), the GRC must conduct an *in camera* review of the requested e-mails between Kenneth Connolly, New Jersey Department of Personnel, and Passaic County Sheriff's Department Warden Charles Meyers that were created between May 20, 2008 and July 2008 to determine the validity of the Custodian's assertion that these records contain deliberative information which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
5. **The Custodian must deliver¹⁵ to the Council in a sealed envelope nine (9) copies of the requested unredacted documents (see #4 above), a document or redaction index¹⁶, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4¹⁷, that the document provided is the document 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.**
6. 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.
7. 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: Harlynn A. Lack, Esq.
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

September 20, 2011

¹⁵ 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.

¹⁶ The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

¹⁷ "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."