



**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**  
*Acting Commissioner*

**FINAL DECISION**

**May 29, 2012 Government Records Council Meeting**

Robert A. Verry  
Complainant

Complaint No. 2010-302

v.

Borough of South Bound Brook (Somerset)  
Custodian of Record

At the May 29, 2012 public meeting, the Government Records Council (“Council”) considered the May 22, 2012 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian timely complied with the Council’s April 25, 2012 Interim Order by providing access to the requested records with the redactions specified in the Council’s Order to the Complainant via facsimile and simultaneously providing certified confirmation to the GRC within the extended time frame to comply.
2. Although the Custodian unlawfully denied access to the requested records pursuant to N.J.S.A. 47:1A-6. because same contain information that was not exempt from disclosure as attorney-client privileged material pursuant to N.J.S.A. 47:1A-1.1., the Custodian timely complied with both the Council’s January 31, 2012 and April 25, 2012 Interim Orders. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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



Final Decision Rendered by the  
Government Records Council  
On The 29<sup>th</sup> Day of May, 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: June 4, 2012**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
May 29, 2012 Council Meeting**

**Robert A. Verry<sup>1</sup>  
Complainant**

**GRC Complaint No. 2010-302**

v.

**Borough of South Bound Brook (Somerset)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Copies of the following correspondence reflected on Custodian Counsel's September 8, 2010 invoice:

1. Correspondence to Police Committee Re: negotiations dated August 20, 2010.
2. Correspondence to Mayor dated August 25, 2010.
3. Correspondence to Mayor dated August 26, 2010.
4. Correspondence to Councilman Ormosi dated August 28, 2010.
5. Correspondence to Councilman Quinlan Re: DPW dated August 29, 2010.<sup>3</sup>

**Request Made:** September 21, 2010

**Response Made:** September 29, 2010

**Custodian:** Donald E. Kazar

**GRC Complaint Filed:** November 12, 2010<sup>4</sup>

**Background**

**April 25, 2012**

Government Records Council's ("Council") Interim Order. At its April 25, 2012 public meeting, the Council considered the April 18, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian provided the GRC with a legal certification and the unredacted records requested for the *in camera* inspection on February 15, 2012. The GRC notes that no redaction index was necessary because the Custodian denied access to the responsive records in their entirety. Therefore, the Custodian timely complied with the Council's January 31, 2012 Interim Order.

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

<sup>2</sup> Represented by Francesco Taddeo, Esq. (Somerville, NJ).

<sup>3</sup> The Complainant requested additional records that are not at issue in this complaint.

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

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 Rules, 1969 R. 1:4-4 (2005) 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.

**April 27, 2012**

Council's Interim Order distributed to the parties.

**May 3, 2012**

E-mail from the Custodian to the GRC. The Custodian requests an extension of time until May 9, 2012 to comply with the Council's Interim Order.

**May 7, 2012**

E-mail from the GRC to the Custodian. The GRC grants the Custodian an extension of time until May 9, 2012 to comply with the Council's Interim Order.

**May 8, 2012**

Custodian's response to the Council's Interim Order. The Custodian certifies that on February 15, 2012, the Custodian provided the five (5) records responsive to the Complainant's OPRA request without redactions to the GRC for an *in camera* review. The Custodian certifies that the Council issued an Interim Order on April 25, 2012 requiring that the Custodian comply with the findings of said *in camera* review. The Custodian certifies that in accordance with the Council's Order, attached are the five (5) records redacted in accordance with said Order.

The Custodian notes that the records were redacted to protect attorney-client privileged material, as was the Custodian's basis for initially denying access to the records.<sup>5</sup>

**Analysis**

**Whether the Custodian complied with the Council's April 25, 2012 Interim Order?**

At its April 25, 2012 meeting, the Council ordered that **"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**

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<sup>5</sup> The cover sheet on the Custodian's certified confirmation of compliance indicates that the Complainant was copied on the Custodian's submission.  
Robert A. Verry v. Borough of South Bound Brook (Somerset), 2010-302 – Supplemental Findings and Recommendations of the Executive Director 2

**Rules, 1969 R. 1:4-4 (2005) to the Executive Director.”** The Council disseminated its Interim Order to the parties on April 27, 2012. Thus, the Custodian’s response was due by close of business on May 4, 2012.

The Custodian e-mailed the GRC on May 3, 2012 and requested an extension of time until May 9, 2012 to comply with the Council’s Order. The GRC responded on May 7, 2012 granting the Custodian an extension until May 9, 2012. Subsequently, on May 8, 2012, the Custodian simultaneously forwarded to the GRC and Complainant certified confirmation of compliance with the Council’s Order via facsimile.

Therefore, the Custodian timely complied with the Council’s April 25, 2012 Interim Order by providing access to the requested records with the redactions specified in the Council’s Order to the Complainant via facsimile and providing simultaneous certified confirmation to the GRC within the extended time frame to comply.

**Whether the Custodian’s denial of access rises 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 (Felder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian’s actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian’s actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian’s actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely

negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

Although the Custodian unlawfully denied access to the requested records pursuant to N.J.S.A. 47:1A-6. because such records contain information that is not exempt from disclosure as attorney-client privileged material pursuant to N.J.S.A. 47:1A-1.1., the Custodian timely complied with both the Council's January 31, 2012 and April 25, 2012 Interim Orders. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian timely complied with the Council's April 25, 2012 Interim Order by providing access to the requested records with the redactions specified in the Council's Order to the Complainant via facsimile and simultaneously providing certified confirmation to the GRC within the extended time frame to comply.
2. Although the Custodian unlawfully denied access to the requested records pursuant to N.J.S.A. 47:1A-6. because same contain information that was not exempt from disclosure as attorney-client privileged material pursuant to N.J.S.A. 47:1A-1.1., the Custodian timely complied with both the Council's January 31, 2012 and April 25, 2012 Interim Orders. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: Frank F. Caruso  
Senior Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

May 22, 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  
Acting Commissioner

INTERIM ORDER

April 25, 2012 Government Records Council Meeting

Robert A. Verry  
Complainant

Complaint No. 2010-302

v.

Borough of South Bound Brook (Somerset)  
Custodian of Record

At the April 25, 2012 public meeting, the Government Records Council (“Council”) considered the April 18, 2012 *In Camera* Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian provided the GRC with a legal certification, the unredacted records requested for the *in camera* inspection on February 15, 2012. The GRC notes that no redaction index was necessary because the Custodian denied access to the responsive records in their entirety. Therefore, the Custodian timely complied with the Council’s January 31, 2012 Interim 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 Rules, 1969 R. 1:4-4 (2005) 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.



<b>Record or Redaction Number</b>	<b>Record Name/Date</b>	<b>Description of Record or Redaction</b>	<b>Custodian's Explanation/ Citation for Non-disclosure or Redactions</b>	<b>Findings of the In Camera Examination<sup>1</sup></b>
Letter from Francesco Taddeo, Esq., to Mayor Terry Warrelmann Re: Verry v. Borough of South Bound Brook, Docket No.: SOM-L-281-10	August 26, 2010	Access to the entire record was denied.	Letter is exempt from disclosure under OPRA as attorney client privileged material pursuant to <u>N.J.S.A. 47:1A-1.1.</u> <sup>2</sup>	The body of the letter contains attorney client privileged material relating to litigation matters and legal advice and is therefore exempt from disclosure under OPRA pursuant to <u>N.J.S.A. 47:1A-1.1.</u>  <b>Thus, the Custodian must disclose the letter redacting everything after "Dear Mayor Warrelmann:" and before "Of course, should you have any questions ..."</b>
Letter from	August 26,	Access to the	Letter is exempt	The body of the

<sup>1</sup> **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. 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.

<sup>2</sup> The GRC notes that although the Custodian originally asserted that the record was additionally exempt from disclosure as ACD material, the Custodian only asserts in his compliance certification that the record was attorney-client privileged.



Francesco Taddeo, Esq., to Mayor Terry Warrelman Re: Fittin v. Borough of South Bound Brook, Docket No.: SOM-L-1950-09	2010	entire record was denied.	from disclosure under OPRA as attorney client privileged material pursuant to <u>N.J.S.A. 47:1A-1.1</u> . <sup>3</sup>	letter contains attorney client privileged material relating to litigation matters and legal advice and is therefore exempt from disclosure under OPRA pursuant to <u>N.J.S.A. 47:1A-1.1</u> .  <b>Thus, the Custodian must disclose the letter redacting everything after “Dear Mayor Warrelmann:” and before “Should you have any questions ...”</b>
Letter from Francesco Taddeo, Esq., to Councilman Ormosi Re: Borough of South Bound Brook Police and PBA Local 148	August 26, 2010	Access to the entire record was denied.	Letter is exempt from disclosure under OPRA as attorney client privileged material pursuant to <u>N.J.S.A. 47:1A-1.1</u> . <sup>4</sup>	<b>The letter contains no attorney client privileged material relating to litigation matters or legal advice and is therefore <u>not</u> exempt from disclosure under OPRA pursuant to <u>N.J.S.A. 47:1A-1.1</u>.</b>
Letter from	August 20,	Access to the	Letter is exempt	The body of the

<sup>3</sup> See. F.N. No. 9.

<sup>4</sup> See F.N. No. 9.

<p>Francesco Taddeo, Esq., to Councilman Quinlan Re: South Bound Brook and AFL-CIO (DPW contract negotiations)</p>	<p>2010</p>	<p>entire record was denied.</p>	<p>from disclosure under OPRA as attorney client privileged material pursuant to <u>N.J.S.A. 47:1A-1.1.</u><sup>5</sup></p>	<p>letter contains attorney client privileged material relating to contract negotiations, legal advice and attorney opinions and is therefore exempt from disclosure under OPRA pursuant to <u>N.J.S.A. 47:1A-1.1.</u></p> <p><b>Therefore, the Custodian must disclose the letter redacting everything after “Dear Councilman Quinlan:” and before “Should you have any questions...”</b></p>
<p>Letter from Francesco Taddeo, Esq., to Councilman Ormosi Re: Borough of South Bound Brook Police and PBA Local 48</p>	<p>August 19, 2010</p>	<p>Access to the entire record was denied.</p>	<p>Letter is exempt from disclosure under OPRA as attorney client privileged material pursuant to <u>N.J.S.A. 47:1A-1.1.</u><sup>6</sup></p>	<p>The body of the letter contains attorney client privileged material relating to contract negotiations, legal advice and attorney opinions and is therefore exempt from disclosure under OPRA pursuant to</p>

<sup>5</sup> See F.N. No. 9.

<sup>6</sup> See F.N. No. 9.

				<u>N.J.S.A.</u> 47:1A-1.1.  <b>Thus, the Custodian must disclose the letter redacting everything after “Dear Councilman Ormosi:” and before “As always, should you have any questions...”</b>
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Interim Order Rendered by the  
Government Records Council  
On The 25<sup>th</sup> Day of April, 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: April 27, 2012**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director  
April 25, 2012 Council Meeting**

**Robert A. Verry<sup>1</sup>  
Complainant**

**GRC Complaint No. 2010-302**

v.

**Borough of South Bound Brook (Somerset)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Copies of the following correspondence reflected on Custodian Counsel's September 8, 2010 invoice:

1. Correspondence to Police Committee Re: negotiations dated August 20, 2010.
2. Correspondence to Mayor dated August 25, 2010.
3. Correspondence to Mayor dated August 26, 2010.
4. Correspondence to Councilman Ormosi dated August 28, 2010.
5. Correspondence to Councilman Quinlan Re: DPW dated August 29, 2010.<sup>3</sup>

**Request Made:** September 21, 2010

**Response Made:** September 29, 2010

**Custodian:** Donald E. Kazar

**GRC Complaint Filed:** November 12, 2010<sup>4</sup>

**Records Submitted for *In Camera* Examination:**

1. Letter from the Custodian's Counsel to Councilman Ormosi Re: Police, dated August 19, 2010.
2. Letter from the Custodian's Counsel to Councilman Quinlan Re: DPW, dated August 20, 2010.
3. Letter from the Custodian's Counsel to Mayor Terry Warrelman Re: Verry, dated August 26, 2010
4. Letter from the Custodian's Counsel to Mayor Terry Warrelman Re: Fittin, dated August 26, 2010.
5. Letter from the Custodian's Counsel to Councilman Ormosi Re: Police, dated August 26, 2010.

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

<sup>2</sup> Represented by Francesco Taddeo, Esq. (Somerville, NJ).

<sup>3</sup> The Complainant requested additional records that are not at issue in this complaint.

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

## Background

### **January 31, 2012**

Government Records Council's Interim Order. At its January 31, 2012 public meeting, the Government Records Council ("Council") considered the January 24, 2012 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. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the following records to determine the validity of the Custodian's assertion that the records are exempt from disclosure as inter-agency or intra-agency advisory, consultative or deliberative material, are attorney-client privileged and contain information "information generated by or on behalf of public employers in connection with collective negotiations" pursuant to N.J.S.A. 47:1A-1.1., N.J.S.A. 47:1A-9.b. and R. 4:10-2(c):
  1. Correspondence to Police Committee Re: negotiations dated August 20, 2010.
  2. Correspondence to Mayor dated August 25, 2010.
  3. Correspondence to Mayor (Verry) dated August 26, 2010.
  4. Correspondence to Councilman Ormosi dated August 28, 2010.
  5. Correspondence to Councilman Quinlan Re: DPW dated August 29, 2010.
2. **The Custodian must deliver<sup>5</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 2 above), a document or redaction index<sup>6</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4<sup>7</sup>, that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
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.

### **February 2, 2012**

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

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<sup>5</sup> The *in camera* records 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.

<sup>6</sup> The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

<sup>7</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

### **February 7, 2012**

E-mail from the Custodian's Counsel to the GRC. Counsel requests an extension of five (5) business days to comply with the Council's Order.

### **February 7, 2012**

E-mail from the GRC to the Custodian's Counsel. The GRC states that the prescribed deadline to comply with the Council's Order is February 9, 2012. The GRC thus grants Counsel an extension of time until February 16, 2012 to comply with the Council's Order.

### **February 15, 2012**

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

1. Letter from the Custodian's Counsel to Councilman Ormosi Re: Police dated August 19, 2010.
2. Letter from the Custodian's Counsel to Councilman Quinlan Re: DPW dated August 20, 2010.
3. Letter from the Custodian's Counsel to Mayor Terry Warrelman Re: Verry dated August 26, 2010
4. Letter from the Custodian's Counsel to Mayor Terry Warrelman Re: Fittin dated August 26, 2010.
5. Letter from the Custodian's Counsel to Councilman Ormosi Re: Police dated August 26, 2010.

The Custodian certifies that pursuant to the Council's January 31, 2012 Order, attached are nine (9) copies of the five (5) records referenced in the Custodian Counsel's September 8, 2010 invoice that are the records the GRC requested for an *in camera* review. The Custodian certifies that he denied the Complainant access to these five (5) records as attorney-client privileged communications between Counsel and the Borough regarding matters of litigation and/or ongoing negotiations. The Custodian certifies that the actual date of each record differs slightly from the billing date found on the invoice.

### **Analysis**

#### **Whether the Custodian complied with the Council's January 31, 2012 Interim Order?**

At its January 31, 2012 public meeting, the Council determined that because the Custodian has asserted that access to the requested records was lawfully denied because the responsive records are exempt from disclosure as inter-agency or intra-agency advisory, consultative or deliberative ("ACD") material, are attorney-client privileged and contain "information generated by or on behalf of public employers in connection with collective negotiations" pursuant to N.J.S.A. 47:1A-1.1., N.J.S.A. 47:1A-9.b. and R. 4:10-2(c), the Council must determine whether the legal conclusions asserted by the Custodian are properly applied to the records at issue pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005). Therefore, the GRC

must conduct an *in camera* review of the requested records to determine the validity of the Custodian's assertion that the requested records were properly denied.

The Council therefore ordered the Custodian to deliver to the Council in a sealed envelope nine (9) copies of the requested unredacted records, a document or redaction index, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery was to be received by the GRC within five (5) business days from receipt of the Council's Interim Order or on February 9, 2012.

The Custodian's Counsel requested an extension of five (5) business days to comply with the Council's Order via e-mail on February 7, 2012. The GRC responded on the same day noting that the prescribed deadline was February 9, 2012 and that it was granting Counsel an extension of time until February 16, 2010 to comply.

The Custodian provided the GRC with a legal certification and the unredacted records requested for the *in camera* inspection on February 15, 2012. The GRC notes that no redaction index was necessary because the Custodian denied access to the responsive records in their entirety. Therefore, the Custodian timely complied with the Council's January 31, 2012 Interim 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:

<b>Record or Redaction Number</b>	<b>Record Name/Date</b>	<b>Description of Record or Redaction</b>	<b>Custodian's Explanation/ Citation for Non-disclosure or Redactions</b>	<b>Findings of the In Camera Examination<sup>8</sup></b>
Letter from Francesco Taddeo, Esq., to Mayor Terry Warrelmann	August 26, 2010	Access to the entire record was denied.	Letter is exempt from disclosure under OPRA as attorney client privileged	The body of the letter contains attorney client privileged material

<sup>8</sup> **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. 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>Re: Verry v. Borough of South Bound Brook, Docket No.: SOM-L-281-10</p>			<p>material pursuant to <u>N.J.S.A. 47:1A-1.1</u>.<sup>9</sup></p>	<p>relating to litigation matters and legal advice and is therefore exempt from disclosure under OPRA pursuant to <u>N.J.S.A. 47:1A-1.1</u>.</p> <p><b>Thus, the Custodian must disclose the letter redacting everything after “Dear Mayor Warrelmann:” and before “Of course, should you have any questions ...”</b></p>
<p>Letter from Francesco Taddeo, Esq., to Mayor Terry Warrelman Re: Fittin v. Borough of South Bound Brook, Docket No.: SOM-L-1950-09</p>	<p>August 26, 2010</p>	<p>Access to the entire record was denied.</p>	<p>Letter is exempt from disclosure under OPRA as attorney client privileged material pursuant to <u>N.J.S.A. 47:1A-1.1</u>.<sup>10</sup></p>	<p>The body of the letter contains attorney client privileged material relating to litigation matters and legal advice and is therefore exempt from disclosure under OPRA pursuant to <u>N.J.S.A. 47:1A-1.1</u>.</p>

<sup>9</sup> The GRC notes that although the Custodian originally asserted that the record was additionally exempt from disclosure as ACD material, the Custodian only asserts in his compliance certification that the record was attorney-client privileged.

<sup>10</sup> See. F.N. No. 9.



				<b>Thus, the Custodian must disclose the letter redacting everything after “Dear Mayor Warrelmann:” and before “Should you have any questions ...”</b>
Letter from Francesco Taddeo, Esq., to Councilman Ormosi Re: Borough of South Bound Brook Police and PBA Local 148	August 26, 2010	Access to the entire record was denied.	Letter is exempt from disclosure under OPRA as attorney client privileged material pursuant to <u>N.J.S.A. 47:1A-1.1.</u> <sup>11</sup>	<b>The letter contains no attorney client privileged material relating to litigation matters or legal advice and is therefore <u>not</u> exempt from disclosure under OPRA pursuant to <u>N.J.S.A. 47:1A-1.1.</u></b>
Letter from Francesco Taddeo, Esq., to Councilman Quinlan Re: South Bound Brook and AFL-CIO (DPW contract negotiations)	August 20, 2010	Access to the entire record was denied.	Letter is exempt from disclosure under OPRA as attorney client privileged material pursuant to <u>N.J.S.A. 47:1A-1.1.</u> <sup>12</sup>	The body of the letter contains attorney client privileged material relating to contract negotiations, legal advice and attorney opinions and is therefore exempt from disclosure under OPRA

<sup>11</sup> See F.N. No. 9.

<sup>12</sup> See F.N. No. 9.

				<p>pursuant to <u>N.J.S.A.</u> 47:1A-1.1.</p> <p><b>Therefore, the Custodian must disclose the letter redacting everything after “Dear Councilman Quinlan:” and before “Should you have any questions...”</b></p>
<p>Letter from Francesco Taddeo, Esq., to Councilman Ormosi Re: Borough of South Bound Brook Police and PBA Local 48</p>	<p>August 19, 2010</p>	<p>Access to the entire record was denied.</p>	<p>Letter is exempt from disclosure under OPRA as attorney client privileged material pursuant to <u>N.J.S.A.</u> 47:1A-1.1.<sup>13</sup></p>	<p>The body of the letter contains attorney client privileged material relating to contract negotiations, legal advice and attorney opinions and is therefore exempt from disclosure under OPRA pursuant to <u>N.J.S.A.</u> 47:1A-1.1.</p> <p><b>Thus, the Custodian must disclose the letter redacting everything after “Dear Councilman Ormosi:” and before “As</b></p>

<sup>13</sup> See F.N. No. 9.

				<b>always, should you have any questions...”</b>
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Thus, the Custodian unlawfully denied access to the requested records because same contain information that is not exempt from disclosure as attorney-client privileged material pursuant to N.J.S.A. 47:1A-1.1. N.J.S.A. 47:1A-6. Therefore, the Custodian must disclose all five (5) letters to the Complainant with redactions pursuant to N.J.S.A. 47:1A-5.g. as directed by the Council in the above table.

**Whether the Custodian’s denial of access 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.

**Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian provided the GRC with a legal certification, the unredacted records requested for the *in camera* inspection on February 15, 2012. The GRC notes that no redaction index was necessary because the Custodian denied access to the responsive records in their entirety. Therefore, the Custodian timely complied with the Council’s January 31, 2012 Interim 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 Rules, 1969 R. 1:4-4 (2005) 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.

Prepared By: Frank F. Caruso  
Senior Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

April 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  
Acting Commissioner

INTERIM ORDER

January 31, 2012 Government Records Council Meeting

Robert A. Verry  
Complainant

Complaint No. 2010-302

v.

Borough of South Bound Brook (Somerset)  
Custodian of Record

At the January 31, 2012 public meeting, the Government Records Council ("Council") considered the January 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, finds that:

1. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the following records to determine the validity of the Custodian's assertion that the records are exempt from disclosure as inter-agency or intra-agency advisory, consultative or deliberative material, are attorney-client privileged and contain information "information generated by or on behalf of public employers in connection with collective negotiations" pursuant to N.J.S.A. 47:1A-1.1., N.J.S.A. 47:1A-9.b. and R. 4:10-2(c):
  1. Correspondence to Police Committee Re: negotiations dated August 20, 2010.
  2. Correspondence to Mayor dated August 25, 2010.
  3. Correspondence to Mayor (Verry) dated August 26, 2010.
  4. Correspondence to Councilman Ormosi dated August 28, 2010.
  5. Correspondence to Councilman Quinlan Re: DPW dated August 29, 2010.
2. **The Custodian must deliver<sup>1</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 1 above), a document or redaction index<sup>2</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4<sup>3</sup>, that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**

<sup>1</sup> The *in camera* records 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.

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

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

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.

Interim Order Rendered by the  
Government Records Council  
On The 31<sup>st</sup> Day of January, 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: February 2, 2012**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
January 31, 2012 Council Meeting**

**Robert A. Verry<sup>1</sup>  
Complainant**

**GRC Complaint No. 2010-302**

v.

**Borough of South Bound Brook (Somerset)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Copies of the following correspondence reflected on Custodian Counsel's September 8, 2010 invoice:

1. Correspondence to Police Committee Re: negotiations dated August 20, 2010.
2. Correspondence to Mayor dated August 25, 2010.
3. Correspondence to Mayor (Verry) dated August 26, 2010.
4. Correspondence to Councilman Ormosi dated August 28, 2010.
5. Correspondence to Councilman Quinlan Re: DPW dated August 29, 2010.<sup>3</sup>

**Request Made:** September 21, 2010

**Response Made:** September 29, 2010

**Custodian:** Donald E. Kazar

**GRC Complaint Filed:** November 12, 2010<sup>4</sup>

**Background**

**September 21, 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.<sup>5</sup> The Complainant indicates that the preferred method of delivery is via facsimile.

**September 29, 2010**

Custodian's response to the OPRA request. On behalf of the Custodian, Custodian's Counsel responds in writing to the Complainant's OPRA request on the sixth (6<sup>th</sup>) business day following receipt of such request. Counsel states that the Borough of South Bound Brook ("Borough") is in receipt of the Complainant's OPRA request seeking all correspondence listed in an invoice dated September 8, 2010. Counsel states that access to the records dated August 20, 2010, August 25, 2010, August 26, 2010,

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

<sup>2</sup> Represented by Francesco Taddeo, Esq. (Somerville, NJ).

<sup>3</sup> The Complainant requested additional records that are not at issue in this complaint.

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

<sup>5</sup> The Complainant includes on his OPRA request a snapshot of the Custodian Counsel's September 8, 2010 invoice identifying the correspondence sought.

August 28, 2010 and August 29, 2010 is denied. Counsel states that these records are exempt from disclosure as attorney-client privileged communications.<sup>6</sup>

### **September 29, 2010**

E-mail from the Complainant to the Custodian. The Complainant states that in order for the attorney work-product doctrine to apply “the materials must have been prepared in anticipation of litigation and not in the ordinary course of business.” Payton v. N.J. Tpk. Auth., 148 N.J. 524, 554 (1997)(citing Wylie v. Mills, 195 N.J. Super. 332 at 337 (Law Div. 1984). The Complainant states that as such, without a subject listed for each correspondence, it is impossible to know whether the attorney-client privilege applies to each item of correspondence requested.

The Complainant further states that he needs some idea of the content of the correspondence to be able to judge the applicability of the privilege. The Complainant notes that an Illinois court stated “in meeting its burden, the public body may not simply treat the words ‘attorney-client privilege’ or ‘legal advice’ as some talisman, the mere utterance of which magically casts a spell of secrecy over the documents at issue. Rather, the public body can meet its burden only by providing some objective indicia that the exemption is applicable under the circumstances.” Illinois Education Association v. Illinois State Board of Education, 791 N.E.2d 522, 531 (Ill. 2003)(Emphasis omitted).

The Complainant states that if the Custodian agrees with Counsel’s denial of access there is no need to respond to this e-mail. The Complainant further states that if the Custodian provides the subject matter and the content of the denied correspondence by October 1, 2010, the Complainant will reconsider filing a Denial of Access Complaint.

### **November 12, 2011**

Denial of Access Complaint filed with the Government Records Council (“GRC”) with the following attachments:<sup>7</sup>

- Complainant’s OPRA request dated September 21, 2010.
- Letter from the Custodian’s Counsel to the Complainant dated September 29, 2010.
- E-mail from the Complainant to the Custodian dated September 29, 2010.

The Complainant states that he submitted an OPRA request to the Borough on September 21, 2010 seeking correspondence listed on an invoice dated September 8, 2010. The Complainant states that Counsel responded on September 29, 2010 denying access to five (5) of the seven (7) records listed on the invoice.

The Complainant states that he e-mailed the Custodian on September 29, 2010 requesting that the Custodian provide additional information about the correspondence in order for the Complainant to determine whether the exemption from disclosure for attorney client privileged material cited by Counsel applies. The Complainant states that

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<sup>6</sup> Counsel also disclosed two (2) records dated August 17, 2010 and September 8, 2010. These records are not at issue in the instant complaint.

<sup>7</sup> The Complainant attached two (2) additional documents that are not at issue in this complaint.

he requested that the Custodian respond by October 1, 2010 in order to avoid the filing of a Denial of Access Complaint. The Complainant states that to date, the Custodian has not responded to his e-mail dated September 29, 2010.

The Complainant does not agree to mediate this complaint.

**November 26, 2010**

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

**November 29, 2010**

E-mail from the Custodian to the GRC. The Custodian requests an extension of time until December 8, 2010 to submit the requested SOI.

**November 30, 2010**

E-mail from the GRC to the Custodian. The GRC grants the Custodian an extension of five (5) business days until December 10, 2010 to submit the requested SOI.

**December 9, 2010**

Custodian’s SOI with no attachments.

The Custodian certifies that no records responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management.<sup>8</sup>

Counsel submits a letter brief on behalf of the Borough. Counsel states that the Borough denied access to five (5) of the seven (7) responsive records pursuant to attorney-client privilege exemption. N.J.S.A. 47:1A-1.1. Counsel argues that some of the correspondence is also exempt from disclosure because it contains “information generated by or on behalf of public employers in connection with collective negotiations” N.J.S.A. 47:1A-1.1. Counsel asserts that the records withheld comprise various items of attorney-work product containing legal strategy, attorney-client communications involving pending and ongoing litigation issues with the Borough (including the Complainant’s current suits against the Borough) and ongoing collective negotiations.

Counsel further states that he is involved in various pending litigation matters regarding various employees. Counsel notes that these matters are all ongoing and that the references in the invoice pertain to items containing strategy and attorney-client privileged matters. Counsel states that the Appellate Division has held that notes and responses of counsel are exempt from disclosure as attorney-work product. Gannett New Jersey Partners, LP v. County of Middlesex, 379 N.J. Super. 205 (App. Div. 2005).

Counsel states that OPRA specifically provides that access to government records may be denied if said records contain “inter-agency or intra-agency advisory, consultative or deliberative” (“ACD”) material or “any record within the attorney-client privilege.”

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<sup>8</sup> The Custodian did not certify to the search undertaken to locate the records responsive as is required pursuant to Paff v. NJ Department of Labor, 392 N.J. Super. 334 (App. Div. 2007).  
Robert A. Verry v. Borough of South Bound Brook (Somerset), 2010-302 – Findings and Recommendations of the Executive Director 3



N.J.S.A. 47:1A-1.1. Counsel states that the Gannett Court held that notes fall within the ACD exemption at N.J.S.A. 47:1A-1.1. Counsel states the Gannett Court held that:

“The exemption from disclosure provided by N.J.S.A. 47:1A-1.1, which is often referred to as the deliberative process privilege, *see In re Readoption with Amendments of Death Penalty Regulations N.J.A.C.* 10A:23, by the *N.J. Dep’t of Corr.*, 367 N.J. Super. 61, 73-74, 842 A.2d 207 (App. Div.), *certif. denied*, 182 N.J. 149, 862 A.2d 57 (2004), is aimed at protecting the quality of government decisions by shielding the communications received by a decision maker from public disclosure, NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151, 95 S. Ct. 1504, 1516-17, 44 L. Ed.2d 29, 47-48 (1975) ... The privilege does not extend to ‘[p]urely factual material that does not reflect deliberative processes.’ *Id.* at 85, 754 A.2d 1177.” *Id.* at 219.

Counsel states if a document contains both ACD and factual materials, the ACD materials must be redacted and the factual materials must be disclosed.

Counsel further states OPRA provides that “the provisions ... shall not abrogate or erode any ... grant of confidentiality ... recognized by court rule.” N.J.S.A. 47:1A-9.b. Counsel states that the Rules of Court extend broad protection from disclosure to attorney-work product relating to litigation. *See R.* 4:10-2(c).<sup>9</sup>

Counsel disputes the Complainant’s assertion that he was not provided with enough information to determine whether the exemption cited by Counsel applies to the withheld correspondence. Counsel asserts that the privilege is clear and any request made by the Complainant to discern the Borough’s strategy should not be entertained because this would constitute an unfair advantage for the Complainant in pending litigation. Counsel notes that the Complainant was formerly employed by the Borough and relinquished active duty pursuant to a settlement agreement on August 24, 2007. Counsel further notes that the Complainant has filed suit (and numerous OPRA requests) in order to gain an unfair advantage as an adversarial litigant. Counsel rejects the Complainant’s request for additional information about the records to which access was denied.

### **December 9, 2010**

E-mail from the Complainant to the GRC. The Complainant contends that the GRC should not accept the Custodian’s SOI because it is incomplete. The Complainant states that the document index (Item No. 9) was improperly completed. The Complainant argues that the Custodian failed to list each responsive record individually, thus not giving the Complainant enough information to determine to which records the cited exemptions apply.

The Complainant states that in Paff v. New Jersey Department of Labor, Board of Review, 379 N.J. Super. 346, 354-55 (App. Div. 2005), the Court required that a public

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<sup>9</sup> R. 4:10-2(c) provides that, “[i]n ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.”

agency explain its reason for denying access to each record in a manner that “will enable other parties to assess the applicability of the privilege or protection.” *Id.* The Complainant further states that in Courier News v. Hunterdon County Prosecutor’s Office, 358 N.J. Super. 373, 382-83 (App. Div. 2003), the Court required a public agency to “produce specific reliable evidence sufficient to meet a statutorily recognized basis for confidentiality” for each denied record. The Complainant argues that the Borough’s document index contains nothing more than vague, conclusory assertions of privilege.

The Complainant further contends that the Borough’s SOI contains no reasons why the responsive correspondence cannot be provided with redactions. N.J.S.A. 47:1A-5.g. The Complainant states that for example, the Custodian could have provided the correspondence to the Mayor dated August 25, 2010 with the letterhead, addresses and signature block even if the substantive text was redacted.<sup>10</sup>

### **Analysis**

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

OPRA provides that:

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

Additionally, OPRA defines a government record as:

“... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ... *The terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material ... [and] any record within the attorney-client privilege ...*” (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.

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<sup>10</sup> Additional correspondence was submitted by the parties. However, said correspondence is either not relevant to this complaint or restates the facts/assertions already presented to the GRC.  
Robert A. Verry v. Borough of South Bound Brook (Somerset), 2010-302 – Findings and Recommendations of the Executive Director 5

OPRA further provides that:

“[t]he provisions of [OPRA], shall not abrogate or erode any ... or grant of confidentiality heretofore established or recognized by ... court rule ...”  
N.J.S.A. 47:1A-9.b.

R. 4:10-2(c) provides that:

“[i]n ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.” *Id.*

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

In the instant complaint, the Complainant sought correspondence referred to in an invoice dated September 8, 2010. The Custodian’s Counsel responded in a timely manner providing access to two (2) records and denying access to five (5) records. Counsel advised that the records were attorney-client privileged communications. The Complainant filed the instant complaint disputing the Borough’s denial of access.

The Custodian’s Counsel argued in the SOI that the responsive records were exempt from disclosure as attorney-client privileged, collective bargaining material and ACD material. Counsel further argued that the Complainant, who is currently engaged in litigation against the Borough, is attempting to use OPRA to obtain an unfair advantage in said litigation. The Complainant submitted a response to the SOI in which he argued that the Borough failed to provide a sufficient document index as part of the SOI. The Custodian argued that the Borough failed to identify each record individually and give a general nature description of the content of the record, which would allow the Complainant to determine whether the cited exemptions apply.

The Appellate Division has previously given the GRC the power to conduct an *in camera* review in complaints where privileged exemptions are at issue. 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 Council<sup>11</sup> in which the Council 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

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<sup>11</sup> Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005).  
Robert A. Verry v. Borough of South Bound Brook (Somerset), 2010-302 – Findings and Recommendations of the Executive Director

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.”

Therefore, pursuant to Paff, *supra*, the GRC must conduct an *in camera* review of the following records to determine the validity of the Custodian’s assertion that the records are exempt from disclosure as ACD material, are attorney-client privileged and contain information “information generated by or on behalf of public employers in connection with collective negotiations” pursuant to N.J.S.A. 47:1A-1.1., N.J.S.A. 47:1A-9.b. and R. 4:10-2(c):

1. Correspondence to Police Committee Re: negotiations dated August 20, 2010.
2. Correspondence to Mayor dated August 25, 2010.
3. Correspondence to Mayor (Verry) dated August 26, 2010.
4. Correspondence to Councilman Ormosi dated August 28, 2010.
5. Correspondence to Councilman Quinlan Re: DPW dated August 29, 2010.

The GRC notes that the Complainant’s OPRA request in this instance sought “correspondence” as listed on an invoice dated September 8, 2010. Each entry on the invoice contains a date and the specific person to whom said correspondence was sent. Additionally, three (3) of the five (5) entries contain a subject matter. However, the term “correspondence” is a general record that includes letters, memos, e-mails, etc., and could have required the Custodian to perform “an open-ended search” of the Borough’s files because “the Complainant failed to identify with reasonable clarity the records [sought].” See Oberwanowicz, Branchburg Township Board of Education (Somerset), GRC Complaint No. 2008-113 (June 2009).

The GRC has recognized that although a request on its face may be invalid, a custodian nonetheless was provided with enough information to identify responsive records. In Bond v. Borough of Washington (Warren), GRC Complaint No. 2009-324 (Final Decision dated March 29, 2011), the complainant requested “all proposals submitted for the position of ... solicitor.” The custodian responded stating that three (3) records responsive had been identified but that access to same was denied. The GRC noted that:

“... while the Complainant’s OPRA request on its face is overly broad and unclear due to the absence of a specific time period within which the Custodian could narrow her search ... the Complainant’s OPRA request was sufficient for the Custodian to identify the responsive records ... Additionally, the Custodian responded to the Complainant’s OPRA request identifying three (3) proposals as responsive: the Custodian’s response is an indication that she needed no additional information to identify the records responsive to the Complainant’s OPRA request.” *Id.* at pg. 15. *See also* Darata v. Monmouth County Board of Chosen Freeholders, GRC Complaint No. 2009-312 (Interim order dated February 24, 2011).

Similar to the facts of Bond, in the matter before the Council, the evidence of record indicates that the Borough was clearly able to identify the records sought. Specifically, the Complainant included as part of his OPRA request a snapshot of Counsel’s September 8, 2010 invoice identifying the correspondence sought. Further, the Custodian was clearly able to accurately identify the specific records sought based on the inclusion of this snapshot.

Thus, while the Complainant’s OPRA request on its face is overly broad and unclear due to the absence of a specific type of government record (*i.e.*, letter, memo, e-mail, etc.), the OPRA request was sufficiently clear for the Custodian and/or Counsel to identify the responsive records within the statutorily mandated time frame.

**Whether the Custodian’s denial of access 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.

**Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the following records to determine the validity of the Custodian’s assertion that the records are exempt from disclosure as inter-agency or intra-agency

advisory, consultative or deliberative material, are attorney-client privileged and contain information “information generated by or on behalf of public employers in connection with collective negotiations” pursuant to N.J.S.A. 47:1A-1.1., N.J.S.A. 47:1A-9.b. and R. 4:10-2(c):

1. Correspondence to Police Committee Re: negotiations dated August 20, 2010.
  2. Correspondence to Mayor dated August 25, 2010.
  3. Correspondence to Mayor (Verry) dated August 26, 2010.
  4. Correspondence to Councilman Ormosi dated August 28, 2010.
  5. Correspondence to Councilman Quinlan Re: DPW dated August 29, 2010.
2. **The Custodian must deliver<sup>12</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 1 above), a document or redaction index<sup>13</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4<sup>14</sup>, that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council’s Interim Order.**
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.

Prepared By: Frank F. Caruso  
Senior Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

January 24, 2012

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<sup>12</sup> The *in camera* records 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.

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

<sup>14</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."