



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

FINAL DECISION

February 24, 2011 Government Records Council Meeting

Steven Lemongello
(on behalf of The Press of Atlantic City)
Complainant

Complaint No. 2010-88

v.
City of Brigantine (Atlantic)
Custodian of Record

At the February 24, 2011 public meeting, the Government Records Council (“Council”) considered the February 15, 2011 *In Camera* Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian has complied with the Council’s November 30, 2010 Interim Order by providing the Council with all records set forth in Paragraph 1 of said Order within five (5) business days of receiving the Council’s Order.
2. **The *In Camera* Examination set forth above reveals the Custodian has lawfully denied access to the report provided for the *in camera* examination pursuant to N.J.S.A. 47:1A-6 because said report is exempt from disclosure under N.J.S.A. 47:1A-1.1, as “information generated by or on behalf of public employers or public employees in connection with any sexual harassment complaint filed with a public employer or with any grievance filed by or against an individual...”**
3. 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 because the Custodian lawfully denied access to the Complainant’s request for the report authored by Archer & Greiner, P.C. on the basis that said report is exempt from disclosure as “information generated by or on behalf of public employers or public employees in connection with any sexual harassment complaint filed with a public employer or with any grievance filed by or against an individual...” and the Council determined that the remainder of the Complainant’s request was invalid.

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 24th Day of February, 2011

Robin Berg Tabakin, Chair
Government Records Council

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

Charles A. Richman, Secretary
Government Records Council

Decision Distribution Date: March 1, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

Steven Lemongello
(on behalf of The Press of Atlantic City)¹
Complainant

GRC Complaint No. 2010-88

v.

City of Brigantine (Atlantic)²
Custodian of Records

Records Relevant to Complaint: Copy of report and all relevant and related information concerning investigation by Archer & Greiner of Brigantine Police Department and/or Chief Frugoli.

Request Made: April 9, 2010

Response Made: April 13, 2010

Custodian: Lynn Sweeney

GRC Complaint Filed: April 28, 2010³

Records Submitted for *In Camera* Examination: 15 page report dated March 22, 2010 prepared by Susan S. Hodges, Esq. of the law firm of Archer & Greiner, P.C.

Background

November 30, 2010

Government Records Council's Interim Order. At the November 30, 2010 public meeting, the Government Records Council ("Council") considered the November 23, 2010 Executive Director's Findings and Recommendations and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council therefore found that:

1. 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 requested record (15 page report by Archer & Greiner dated March 22, 2010) to determine the validity of the Custodian's assertion that the record constitutes "information generated by or on behalf of public employers or public employees in connection with any sexual harassment complaint filed with a public employer or with any grievance filed by or against an individual..." N.J.S.A. 47:1A-1.1.

¹ No legal representation listed on record.

² Represented by Timothy Patrick Maguire, Esq., of Maguire & Maguire P.C. (Northfield, NJ).

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

2. **The Custodian must deliver⁴ to the Council in a sealed envelope nine (9) copies of the requested unredacted document (see # 1 above), a document or redaction index⁵, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4⁶, that the 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.**
3. The Complainant's request for all relevant and related information concerning the investigation by Archer & Greiner of Brigantine Police Department and/or Chief Frugoli is not a valid OPRA request 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 (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), because it fails to specifically identify the records sought. As such, the Custodian has not unlawfully denied access to this portion of the Complainant's OPRA request.
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the outcome of the Council's *in camera* review.

November 30, 2010

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

December 1, 2010

Certification of the Custodian in response to the Council's Interim Order with nine (9) copies of the 15 page report dated March 22, 2010 prepared by Susan S. Hodges, Esq., of the law firm of Archer & Greiner, P.C., enclosed. The Custodian certifies that copies of said report are true and accurate copies of the original document. The Custodian certifies that it is the City's position that said report is not to be considered a public record pursuant to OPRA as the report constitutes "information generated by or on behalf of public employers or public employees in connection with any sexual harassment complaint filed with the public employer or with any grievance filed by or against an individual..."⁷ The Custodian certifies that the City also believes there are additional reasons why the report should not be released to the public and reserves all rights regarding same in this or any future proceedings.

The Custodian certifies that she is providing this certification and copies of the report pursuant to the Council's November 30, 2010 Interim Order for an *in camera* inspection. The Custodian certifies that the report provided is not being released to become a part of the record in this complaint or to be released to the public, the Complainant, or any other party.

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

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

⁶ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁷ N.J.S.A. 47:1A-1.1.

Based on the above understanding, the Custodian certifies that the report has not been redacted and thus no redaction index has been prepared. The Custodian requests that to the extent the intention of the GRC is to release the report (other than upon the finding that the report is a public record), the GRC notify the City in advance of same so that redaction or other appropriate legal action could be taken. The Custodian certifies that the report is to be deemed confidential and is only being provided to the members of the GRC for an *in camera* inspection.

Additionally, the Custodian certifies that she is forwarding her certification with the nine (9) copies of the unredacted report to the City Attorney so that he may submit said records to the GRC within the ordered five (5) business days.⁸

Analysis

Whether the Custodian complied with the Council's November 30, 2010 Interim Order?

At its November 30, 2010 public meeting, the Council determined that because the Custodian asserted that the requested report was lawfully denied because said report constitutes "information generated by or on behalf of public employers or public employees in connection with any sexual harassment complaint filed with a public employer or with any grievance filed by or against an individual..." 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 record at issue pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005). Therefore, the GRC ordered an *in camera* review of the requested record 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 document, 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 document provided is the document 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 December 7, 2010.

The Custodian provided the GRC with a legal certification and nine (9) copies of the unredacted record requested for the *in camera* inspection on December 3, 2010. Therefore, the Custodian timely complied with the Council's November 30, 2010 Interim Order.

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

The Custodian asserts that she lawfully denied the Complainant access to the requested report because said report constitutes "information generated by or on behalf of public employers or public employees in connection with any sexual harassment complaint

⁸ The Custodian's Counsel submitted the Custodian's certification and *in camera* documents to the GRC under cover letter dated December 1, 2010. The GRC received said documents on December 3, 2010.
Steven Lemongello v. City of Brigantine (Atlantic), 2010-88 – *In Camera* Findings and Recommendations of the Executive Director

filed with a public employer or with any grievance filed by or against an individual...” pursuant to N.J.S.A. 47:1A-1.1.

OPRA provides that “information generated by or on behalf of public employers or public employees in connection with any sexual harassment complaint filed with a public employer or with any grievance filed by or against an individual...” is not a government record pursuant to N.J.S.A. 47:1A-1.1.

The GRC conducted an *in camera* examination on the submitted record, a 15 page report dated March 22, 2010 authored by Susan S. Hodges, Esq., of the law firm of Archer & Greiner, P.C. This report was prepared by the City’s Attorney to determine whether an employee’s conduct violated the agency’s Harassment in the Workplace policy, after a sexual harassment complaint was filed against said employee by another employee of the agency. The report discusses interviews Counsel conducted with all parties involved in the complaint, as well as other employees of the agency. Said discussions provide details regarding the sexual harassment allegations, including witness accounts. Additionally, the report includes Counsel’s findings of fact and a determination whether the Harassment in the Workplace policy had been violated.

The report was clearly created after the filing of a sexual harassment complaint by an employee against another employee and its purpose was for Counsel to investigate the matter and determine if violations of the City’s harassment policy had occurred. As such, the report fits squarely within OPRA’s exemption from disclosure at N.J.S.A. 47:1A-1.1 for “information generated by or on behalf of public employers or public employees in connection with any sexual harassment complaint filed with a public employer or with any grievance filed by or against an individual...”

Therefore, the Custodian lawfully denied access to the requested record because it constitutes “information generated by or on behalf of public employers or public employees in connection with any sexual harassment complaint filed with a public employer or with any grievance filed by or against an individual...” pursuant to N.J.S.A. 47:1A-1.1.

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

OPRA states that:

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

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

“... If the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the

council may impose the penalties provided for in [OPRA]...” N.J.S.A. 47:1A-7.e.

The Custodian denied access to the Complainant’s OPRA request on the basis that the records responsive were exempt from disclosure as “information generated by or on behalf of public employers or public employees in connection with any sexual harassment complaint filed with a public employer or with any grievance filed by or against an individual...” pursuant to N.J.S.A. 47:1A-1.1.

In its November 30, 2010 Interim Order the Council determined that the Complainant’s request for all relevant and related information concerning the investigation by Archer & Greiner of Brigantine Police Department and/or Chief Frugoli is not a valid OPRA request 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 (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), because it fails to specifically identify the records sought. Additionally, the Council determined that the Custodian did not unlawfully deny access to this portion of the Complainant’s OPRA request.

In the same Interim Order, the Council ordered an *in camera* review of the 15 page report dated March 22, 2010 authored by Susan S. Hodges, Esq., of the law firm of Archer & Greiner, P.C., regarding a sexual harassment complaint. As previously stated in these Findings and Recommendations, the report was clearly created after the filing of a sexual harassment complaint from an employee against another employee and its purpose was for Counsel to investigate the matter and determine if violations of the City’s harassment policy had taken place. As such, the report fits squarely into OPRA’s exemption at N.J.S.A. 47:1A-1.1 for “information generated by or on behalf of public employers or public employees in connection with any sexual harassment complaint filed with a public employer or with any grievance filed by or against an individual...” Therefore, the Custodian lawfully denied access to the requested report.

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).

The Custodian lawfully denied access to the Complainant’s request for the report authored by Archer & Greiner, P.C., on the basis that said report is exempt from disclosure as “information generated by or on behalf of public employers or public employees in connection with any sexual harassment complaint filed with a public employer or with any

grievance filed by or against an individual...” and the Council determined that the remainder of the Complainant’s request was invalid. 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 has complied with the Council’s November 30, 2010 Interim Order by providing the Council with all records set forth in Paragraph 1 of said Order within five (5) business days of receiving the Council’s Order.
2. **The *In Camera* Examination set forth above reveals the Custodian has lawfully denied access to the report provided for the *in camera* examination pursuant to N.J.S.A. 47:1A-6 because said report is exempt from disclosure under N.J.S.A. 47:1A-1.1. as “information generated by or on behalf of public employers or public employees in connection with any sexual harassment complaint filed with a public employer or with any grievance filed by or against an individual...”**
3. 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 because the Custodian lawfully denied access to the Complainant’s request for the report authored by Archer & Greiner, P.C. on the basis that said report is exempt from disclosure as “information generated by or on behalf of public employers or public employees in connection with any sexual harassment complaint filed with a public employer or with any grievance filed by or against an individual...” and the Council determined that the remainder of the Complainant’s request was invalid.

Prepared By: Dara Lownie
Communications Manager/Information Specialist

Approved By: Catherine Starghill, Esq.
Executive Director

February 15, 2011



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

November 30, 2010 Government Records Council Meeting

Steven Lemongello
(on behalf of The Press of Atlantic City)
Complainant

Complaint No. 2010-88

v.
City of Brigantine (Atlantic)
Custodian of Record

At the November 30, 2010 public meeting, the Government Records Council ("Council") considered the November 23, 2010 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. 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 requested record (15 page report by Archer & Greiner dated March 22, 2010) to determine the validity of the Custodian's assertion that the record constitutes "information generated by or on behalf of public employers or public employees in connection with any sexual harassment complaint filed with a public employer or with any grievance filed by or against an individual..." N.J.S.A. 47:1A-1.1.
2. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted document (see # 1 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.**

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."

3. The Complainant's request for all relevant and related information concerning the investigation by Archer & Greiner of Brigantine Police Department and/or Chief Frugoli is not a valid OPRA request 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 (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), because it fails to specifically identify the records sought. As such, the Custodian has not unlawfully denied access to this portion of the Complainant's OPRA request.

4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the outcome of the Council's *in camera* review.

Interim Order Rendered by the
Government Records Council
On The 30th Day of November, 2010

Robin Berg Tabakin, Chair
Government Records Council

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

Charles A. Richman, Secretary
Government Records Council

Decision Distribution Date: November 30, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 30, 2010 Council Meeting**

**Steven Lemongello
(on behalf of The Press of Atlantic City)¹
Complainant**

GRC Complaint No. 2010-88

v.

**City of Brigantine (Atlantic)²
Custodian of Records**

Records Relevant to Complaint: Copy of report and all relevant and related information concerning investigation by Archer & Greiner of Brigantine Police Department and/or Chief Frugoli.

Request Made: April 9, 2010

Response Made: April 13, 2010

Custodian: Lynn Sweeney

GRC Complaint Filed: April 28, 2010³

Background

April 9, 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.

April 13, 2010

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the second (2nd) business day following receipt of such request.⁴ The Custodian states that access to the requested record is denied because the requested records constitute communications which fall within the attorney-client privilege and are exempt from public access pursuant to N.J.S.A. 47:1A-1.1. The Custodian also states that the requested records are denied pursuant to N.J.S.A. 47:1A-9 because they constitute official information, deliberative process information, and work product which are expressly confidential under OPRA. Further, the Custodian states that N.J.S.A. 47:1A-1⁵ exempts "information generated by or on behalf of public employers

¹ No legal representation listed on record.

² Represented by Timothy Patrick Maguire, Esq., of Maguire & Maguire P.C. (Northfield, NJ).

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

⁴ The Custodian's response letter is dated April 12, 2010.

⁵ N.J.S.A. 47:1A-1.1.

or public employees in connection with any sexual harassment complaint filed with a public employer or with any grievance filed by or against an individual...” The Custodian states that none of the requested records can be produced.

April 28, 2010

Denial of Access Complaint filed with the Government Records Council (“GRC”) with the Custodian’s written response dated April 12, 2010 attached. The Complainant states that he submitted his OPRA request on April 9, 2010. The Complainant states that he also spoke to the City Manager on April 13, 2010 who indicated that the Complainant’s request would be denied. Additionally, the Complainant states that he spoke to the Custodian on April 16, 2010 regarding when he could expect a response to his OPRA request. The Complainant states that he then received the Custodian’s letter dated April 12, 2010 in which the Custodian denied access to his OPRA request in its entirety.

May 11, 2010

Offer of Mediation sent to both parties.

May 17, 2010

Custodian’s signed Agreement to Mediate.

May 19, 2010

E-mail from GRC to Complainant. The GRC states that the Custodian has agreed to mediate this Denial of Access Complaint. The GRC requests that the Complainant return his signed Agreement to Mediate form by the close of business on May 21, 2010 if he also wishes to participate in mediation.⁶

June 9, 2010

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

June 14, 2010

E-mail from GRC to Custodian. The GRC grants a five (5) business day extension of time, ending June 23, 2010, for the Custodian to submit her completed SOI.⁷

June 22, 2010

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated April 9, 2010.
- Custodian’s response to the Complainant’s OPRA request dated April 12, 2010.
- Delivery receipt for Custodian’s response letter to Complainant dated April 13, 2010.

The Custodian certifies that she received the Complainant’s OPRA request on April 9, 2010. The Custodian certifies that she responded to said request on April 13, 2010 (letter dated April 12, 2010). The Custodian certifies that based on legal advice, she denied the Complainant’s OPRA request in its entirety. The Custodian certifies that the

⁶ The Complainant did not agree to participate in mediation.

⁷ In response to the Custodian’s verbal request on said date.

requested 15 page report by Archer & Greiner is dated March 22, 2010 and exempt from public access as a report of an alleged sexual harassment investigation. Additionally, the Custodian asserts that the Complainant's request for all relative and related information does not identify a specific record.

The Custodian also certifies that in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management, no records responsive to the Complainant's OPRA request have been destroyed, nor will said records be destroyed before this matter is concluded.

June 24, 2010

GRC forwards the Custodian's SOI submission to the Complainant.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

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

Additionally, OPRA defines a government record as:

"... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ... A government record shall not *include* the following information which is deemed to be confidential for the purposes of [OPRA]...*information generated by or on behalf of public employers or public employees in connection with any sexual harassment complaint filed with a public employer or with any grievance filed by or against an individual...*" (Emphasis added.) N.J.S.A. 47:1A-1.1.

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

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

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

Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

The Custodian certified that she received the Complainant's OPRA request on April 9, 2010. The Custodian certified that she responded to said request on April 13, 2010 (by letter dated April 12, 2010) and that based on legal advice, she denied the Complainant's OPRA request in its entirety. The Custodian certified that the requested 15 page report by Archer & Greiner is dated March 22, 2010 and is a report of an alleged sexual harassment investigation.

In the Custodian's April 13, 2010 response to the Complainant, the Custodian denied access to the requested report on the basis that the report constitutes communications which fall within the attorney-client privilege and are exempt from public access pursuant to N.J.S.A. 47:1A-1.1. The Custodian also asserted the report is exempt from disclosure under OPRA on the basis that it constitutes official information, deliberative process information, and work product which are expressly confidential under OPRA. Further, the Custodian denied access to the requested report because OPRA exempts "information generated by or on behalf of public employers or public employees in connection with any sexual harassment complaint filed with a public employer or with any grievance filed by or against an individual..." N.J.S.A. 47:1A-1.1.

OPRA specifically exempts from public access "information generated by or on behalf of public employers or public employees in connection with any sexual harassment complaint filed with a public employer..." N.J.S.A. 47:1A-1.1. In the Custodian's Statement of Information the Custodian legally certified under penalty of perjury that the requested report is a report of an alleged sexual harassment investigation.

However, 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 GRC⁸ 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.

⁸ Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005). Steven Lemongello v. City of Brigantine (Atlantic), 2010-88 – Findings and Recommendations of the Executive Director

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 requested record (15 page report by Archer & Greiner dated March 22, 2010) to determine the validity of the Custodian’s assertion that the record constitutes “information generated by or on behalf of public employers or public employees in connection with any sexual harassment complaint filed with a public employer or with any grievance filed by or against an individual...” N.J.S.A. 47:1A-1.1.

However, the Complainant also sought access to all relevant and related information concerning the investigation by Archer & Greiner of the Brigantine Police Department and/or Chief Frugoli.

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.

Further, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),⁹ 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.”¹⁰

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

⁹ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

¹⁰ As stated in Bent, supra.

stating that "...when a request is 'complex' because it fails to specifically identify the documents sought, then that request is not 'encompassed' by OPRA..."

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)."

In this instant complaint, the Complainant failed to identify any other specific identifiable government records besides the report by Archer & Greiner which is exempt from public access pursuant to N.J.S.A. 47:1A-1.1. as previously stated. As stated in Bent, supra, "...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."

Therefore, the Complainant's request for all relevant and related information concerning the investigation by Archer & Greiner of Brigantine Police Department and/or Chief Frugoli is not a valid OPRA request pursuant to MAG, supra, Bent, supra, NJ Builders, supra, and Schuler, supra, because it fails to specifically identify the records sought. As such, the Custodian has not unlawfully denied access to this portion of the Complainant's OPRA request.

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 outcome of the Council's *in camera* review.

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 requested record (15 page report by Archer & Greiner dated March 22, 2010) to determine the validity of the Custodian's assertion that the record constitutes "information generated by or on behalf of public employers or public employees in connection with any sexual harassment complaint filed with a public employer or with any grievance filed by or against an individual..." N.J.S.A. 47:1A-1.1.

2. **The Custodian must deliver¹¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted document (see # 1 above), a document or redaction index¹², as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4¹³, 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.**
3. The Complainant's request for all relevant and related information concerning the investigation by Archer & Greiner of Brigantine Police Department and/or Chief Frugoli is not a valid OPRA request 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 (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), because it fails to specifically identify the records sought. As such, the Custodian has not unlawfully denied access to this portion of the Complainant's OPRA request.
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the outcome of the Council's *in camera* review.

Prepared By: Dara Lownie
Communications Manager/Information Specialist

Approved By: Catherine Starghill, Esq.
Executive Director

November 23, 2010

¹¹ 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.

¹² The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

¹³ "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."