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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

August 27, 2013 Government Records Council Meeting

Jeff Carter
Complainant
v.
Franklin Fire District #2
Custodian of Record

Complaint Nos. 2011-124, 2011-125, 2011-126 and 2011-127

At the August 27, 2013 public meeting, the Government Records Council ("Council") considered the August 20, 2013 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, accepts the Administrative Law Judge's Initial Decision dated July 8, 2013, in which the Administrative Law Judge approved the Stipulation of Dismissal signed by the parties or their representatives.

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 27th Day of August, 2013

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: August 29, 2013

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Supplemental Findings and Recommendations of the Executive Director
August 27, 2013 Council Meeting

Jeff Carter[1]
Complainant

GRC Complaint Nos. 2011-124, 2011-125, 2011-126, and 2011-127[2]

v.

Franklin Fire District #2[3]
Custodial Agency

Records Relevant to Complaints:

1. GRC Complaint No. 2011-124: purchase orders, including invoices/attachments, and payment vouchers, including invoices/attachments, for computers, computer services, system maintenance, and/or network maintenance of Network Blade, LLC, from January 1, 2009 through December 31, 2009.
2. GRC Complaint No. 2011-125: purchase orders, including invoices/attachments, and payment vouchers, including invoices/attachments, for computers, computer services, system maintenance, and/or network maintenance of Network Blade, LLC, from January 1, 2010 through December 31, 2010.
3. GRC Complaint No. 2011-126: purchase orders, including invoices/attachments, and payment vouchers, including invoices/attachments, for computers, computer services, system maintenance, and/or network maintenance of Network Blade, LLC, from January 1, 2007 through December 31, 2007.
4. GRC Complaint No. 2001-127: purchase orders, including invoices/attachments, and payment vouchers, including invoices/attachments, for computers, computer services, system maintenance, and/or network maintenance of Network Blade, LLC, from January 1, 2008 through December 31, 2008.

Custodian of Record: William Kleiber
Request Received by Custodian: March 2011
Response Made by Custodian: March 15, 2011
GRC Complaint Received: April 18, 2011

[1] Represented by Walter M. Luers, Esq., of Law Offices of Walter M. Luers, LLC, (Clinton, NJ).
[2] The GRC has consolidated these complaints for adjudication because of the commonality of the parties and issues herein.
[3] Represented by Eric C. Perkins, Esq. (Skillman, NJ).

Background

Procedural History:

At its February 28, 2012 public meeting, the Council considered the February 21, 2012 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. Based on both the Custodian's and the Complainant's submissions in response to the Council's Interim Order, there is conflicting evidence regarding whether the Custodian complied with the Council's October 25, 2011 Interim Order, which required the Custodian to disclose to the Complainant all records responsive to the Complainant's request for purchase orders, including invoices/attachments, and payment vouchers, including invoices/attachments, for computers, computer services, system maintenance, and/or network maintenance of Network Blade, LLC, from January 1, 2007 through December 31, 2010 collectively, with the exception of the records that the Custodian has previously provided to the Complainant, or if no additional records responsive exist, the Custodian shall so indicate. Therefore, it is necessary to refer these matters to the Office of Administrative Law to resolve the facts. Specifically, the Administrative Law Judge should determine whether the Custodian complied with the Council's October 25, 2011 Interim Order.

2. Because of the conflicting evidence submitted by both parties, these matters are being referred to the Office of Administrative Law to resolve the facts. As such, the Administrative Law Judge should also determine whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

3. Because of the conflicting evidence submitted by both parties, these matters are being referred to the Office of Administrative Law to resolve the facts. As such, the Administrative Law Judge should also determine whether the Complainant is a "prevailing party" pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney's fees.

Settlement:

On, February 29, 2012, the Council distributed its Interim Order to all parties. On June 8, 2012, the complaints were referred to the Office of Administrative Law ("OAL").

On July 8, 2013 the Administrative Law Judge's ("ALJ") Initial Decision was received by the GRC. The ALJ advised that the parties had reached a settlement and had executed a Stipulation of Dismissal.

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends that the Council accept the Administrative Law Judge's Initial Decision dated July 8, 2013, in which the Administrative Law Judge approved the Stipulation of Dismissal signed by the parties or their representatives.

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

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

August 20, 2013

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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Acting Commissioner

INTERIM ORDER

February 28, 2012 Government Records Council Meeting

Jeff Carter
Complainant
v.
Franklin Fire District #2 (Somerset)
Custodian of Record

Complaint Nos. 2011-124, 2011-125, 2011-126, 2011-127

At the February 28, 2012 public meeting, the Government Records Council ("Council") considered the February 21, 2012 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Based on both the Custodian's and the Complainant's submissions in response to the Council's Interim Order, there is conflicting evidence regarding whether the Custodian complied with the Council's October 25, 2011 Interim Order, which required the Custodian to disclose to the Complainant all records responsive to the Complainant's request for purchase orders, including invoices/attachments, and payment vouchers, including invoices/attachments, for computers, computer services, system maintenance, and/or network maintenance of Network Blade, LLC, from January 1, 2007 through December 31, 2010 collectively, with the exception of the records that the Custodian has previously provided to the Complainant, or if no additional records responsive exist, the Custodian shall so indicate. Therefore, it is necessary to refer these matters to the Office of Administrative Law to resolve the facts. Specifically, the Administrative Law Judge should determine whether the Custodian complied with the Council's October 25, 2011 Interim Order.

2. Because of the conflicting evidence submitted by both parties, these matters are being referred to the Office of Administrative Law to resolve the facts. As such, the Administrative Law Judge should also determine whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

3. Because of the conflicting evidence submitted by both parties, these matters are being referred to the Office of Administrative Law to resolve the facts. As such, the Administrative Law Judge should also determine whether the Complainant is a "prevailing party" pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney's fees.

Interim Order Rendered by the
Government Records Council
On The 28th Day of February, 2012

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Denise Parkinson Vetti, Esq., Secretary
Government Records Council

Decision Distribution Date: February 29, 2012

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

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

Jeff Carter[1] **GRC Complaint Nos. 2011-124, 2011-125, 2011-126, 2011-127**[2]
Complainant

v.

Franklin Fire District #2 (Somerset)[3]
Custodian of Records

Records Relevant to Complaints:

1. GRC Complaint No. 2011-124: purchase orders, including invoices/attachments, and payment vouchers, including invoices/attachments, for computers, computer services, system maintenance, and/or network maintenance of Network Blade, LLC, from January 1, 2009 through December 31, 2009.
2. GRC Complaint No. 2011-125: purchase orders, including invoices/attachments, and payment vouchers, including invoices/attachments, for computers, computer services, system maintenance, and/or network maintenance of Network Blade, LLC, from January 1, 2010 through December 31, 2010.
3. GRC Complaint No. 2011-126: purchase orders, including invoices/attachments, and payment vouchers, including invoices/attachments, for computers, computer services, system maintenance, and/or network maintenance of Network Blade, LLC, from January 1, 2007 through December 31, 2007.
4. GRC Complaint No. 2001-127: purchase orders, including invoices/attachments, and payment vouchers, including invoices/attachments, for computers, computer services, system maintenance, and/or network maintenance of Network Blade, LLC, from January 1, 2008 through December 31, 2008.

Requests Made: March 23, 2011
Responses Made: March 15, 2011[4]
Custodian: William Kleiber
GRC Complaints Filed: April 18, 2011[5]

[1] Represented by Walter M. Luers, Esq., of Law Offices of Walter M. Luers, LLC (Clinton, NJ).
[2] The GRC has consolidated these complaints for adjudication due to the commonality of the parties and issues therein.
[3] Represented by Eric M. Perkins, Esq. (Skillman, NJ).
[4] The Custodian alleges in his Statement of Information that he provided responses to the Complainant's March 23, 2011 OPRA requests on March 15, 2011.
[5] The GRC received the Denial of Access Complaint on said date.

Background

October 25, 2011

Government Records Council's ("Council") Interim Order. At its October 25, 2011 public meeting, the Council considered the October 18, 2011 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (January 2010). Further, the Custodian's failure to immediately respond to the Complainant's requests for "vouchers" results in a violation of OPRA's immediate access provision at N.J.S.A. 47:1A-5.e.

2. Because the Custodian failed to respond to the Complainant's four (4) OPRA requests dated March 23, 2011 thus resulting in a "deemed" denial of said requests, the Custodian must disclose to the Complainant the records responsive to said requests. However, pursuant to Bart v. City of Paterson Housing Authority, 403 N.J. Super. 609 (App. Div. 2008), the Custodian need not disclose the records previously provided to the Complainant on March 15, 2011 since both the Complainant and the Complainant's Counsel acknowledge the Complainant's receipt of said records, which are responsive to the Complainant's OPRA requests at issue in these Denial of Access Complaints. Specifically, the Custodian must disclose to the Complainant all records responsive to the Complainant's request for purchase orders, including invoices/attachments, and payment vouchers, including invoices/attachments, for computers, computer services, system maintenance, and/or network maintenance of Network Blade, LLC, from January 1, 2007 through December 31, 2010 collectively, with the exception of the following records that the Custodian has previously provided to the Complainant:

    - Invoice No. 182 dated March 19, 2008
    - Invoice No. 193 dated April 20, 2008
    - Invoice No. 203 dated May 23, 2008
    - Invoice No. 208 dated June 17, 2008
    - Invoice No. 253 dated October 28, 2008
    - Invoice No. 276 dated January 7, 2009
    - Invoice No. 281 dated January 17, 2009
    - Invoice No. 302 dated April 11, 2009
    - Invoice No. 327 dated June 14, 2009
    - Invoice No. 352 dated August 9, 2009
    - Invoice No. 365 dated September 25, 2009

- Invoice No. 375 dated November 8, 2009
- Invoice No. 400 dated January 7, 2010
- Invoice No. 412 dated January 29, 2010
- Invoice No. 420 dated March 3, 2010
- Invoice No. 426 dated March 26, 2010
- Invoice No. 432 dated March 30, 2010
- Invoice No. 451 dated May 13, 2010
- Invoice No. 482 dated August 1, 2010
- Invoice No. 502 dated August 16, 2010
- Invoice No. 514 dated September 16, 2010
- Invoice No. 527 dated October 14, 2010
- Invoice No. 545 dated November 11, 2010
- Invoice No. 568 dated January 21, 2011
- Invoice No. 574 dated January 25, 2011.

If no additional records responsive exist, the Custodian shall so indicate. Similarly, if the Custodian is withholding records, or portions of records, from public access the Custodian shall indicate the specific legal basis for such a denial of access.

3. **The Custodian shall comply with item 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4[6], to the Executive Director.[7]**

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

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

October 28, 2011

Council's Interim Order distributed to the parties.

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

November 9, 2011[8]

Custodian's response to the Council's Interim Order. The Custodian certifies that he is the custodian of records for Franklin Fire District No. 2. The Custodian certifies that he identified and responded to the OPRA requests the Complainant made and referenced in the Denial of Access Complaints. The Custodian certifies that all of the records sought were delivered to the Complainant on March 15, 2011 and are listed in the Council's Interim Order. Further, the Custodian states that the Complainant submitted an OPRA request on March 14, 2011 that duplicated the requests dated March 23, 2011 (which are the subject of these four (4) consolidated complaints). The Custodian certifies that the Fire District's response on March 15, 2011 providing the records responsive included all the records sought in the Complainant's March 23, 2011 requests, so the Custodian did not respond to said requests.

November 15, 2011

Complainant's certification. The Complainant certifies that despite the Custodian's certification that he provided "all of the records," the Complainant has never received copies of purchase orders, vouchers or their corresponding attachments nor has the Custodian provided any evidence that he actually delivered same in response to the Complainant's OPRA request.

November 21, 2011

Letter from GRC to Custodian's Counsel. The GRC states that it requires additional information from the Custodian in order to adjudicate the instant complaints. Specifically, the GRC requests a legal certification from the Custodian in response to the following:

1. Do any purchase orders, including invoices/attachments and payment vouchers, including invoices/attachments for computers, computer services, system maintenance, and/or network maintenance of Network Blade, LLC, from January 1, 2007 through December 31, 2010 exist on file with the Franklin Fire District #2 ***in addition*** to the 25 invoices identified in the Council's October 25, 2011 Interim Order as having previously been provided to the Complainant?

2. If any such records exist, provide the specific legal basis for withholding access to said records.

December 5, 2011

Custodian's certification. The Custodian certifies that no purchase orders, including invoices/attachments and payment vouchers, and/or network maintenance of Network Blade, LLC, from January 1, 2008 through December 31, 2010 exist on file with the Franklin Fire District No. 2 other than the 25 invoices identified in the Council's October 25, 2011 Interim Order which were previously provided to the Complainant.

[8] The GRC received the Custodian's legal certification on said date; however, the Custodian signed said certification on November 4, 2011.

December 17, 2011

Complainant's certification in response to Custodian's certification with the following attachments:

- Custodian's certification dated November 4, 2011
- Complainant's certification dated November 15, 2011
- Letter from GRC to Custodian's Counsel dated November 21, 2011
- Custodian's certification dated December 5, 2011
- Complainant's OPRA request dated December 8, 2011
- Custodian Counsel's response to Complainant's OPRA request dated December 16, 2011[9] providing the following records:
    - Purchase Order Voucher No. 2008-124 for Network Blade Incorporated dated April 5, 2008
    - Purchase Order Voucher No. 2008-155 for Network Blade Incorporated dated April 27, 2008
    - Purchase Order Voucher No. 2008-202 for Network Blade Incorporated dated June 7, 2008
    - Purchase Order Voucher No. 2008-211 for Network Blade Incorporated dated June 17, 2008
    - Purchase Order Voucher No. 2008-252 for Network Blade Incorporated dated August 2, 2008
    - Purchase Order Voucher No. 2008-354 for Network Blade Incorporated dated November 1, 2008
    - Purchase Order Voucher No. 2009-32 for Network Blade Incorporated dated January 25, 2009
    - Purchase Order Voucher No. 2009-162 for Network Blade Incorporated dated June 6, 2009
    - Purchase Order Voucher No. 2009-216 for Network Blade Incorporated dated August 6, 2009
    - Purchase Order Voucher No. 2009-224 for Network Blade Incorporated dated August 12, 2009
    - Purchase Order Voucher No. 2009-335 for Network Blade Incorporated dated November 21, 2009
    - Purchase Order Voucher No. 2010-056 for Network Blade Incorporated dated February 7, 2010
    - Purchase Order Voucher No. 2010-148 for Network Blade Incorporated dated March 27, 2010
    - Purchase Order Voucher No. 2010-152 for Network Blade Incorporated dated April 3, 2010
    - Purchase Order Voucher No. 2010-227 for Network Blade Incorporated dated May 15, 2010
    - Purchase Order Voucher No. 2010-319 for Network Blade Incorporated dated August 15, 2010

[9] The Complainant attaches additional correspondence between himself and the Fire District regarding his December 8, 2011 OPRA request; however, said correspondence is not relevant to the adjudication of the present Denial of Access Complaints.

- Purchase Order Voucher No. 2010-339 for Network Blade Incorporated dated August 28, 2010
- Purchase Order Voucher No. 2010-460 for Network Blade Incorporated dated December 18, 2010
- Purchase Order Voucher No. 2011-42 for Network Blade Incorporated dated January 25, 2011
- Purchase Order Voucher No. 2011-45 for Network Blade Incorporated dated February 5, 2011
- Purchase Order Voucher No. 2011-96 for Network Blade Incorporated dated February 19, 2011
- Purchase Order Voucher No. 2011-203 for Network Blade Incorporated dated May 14, 2011
- Purchase Order Voucher No. 2011-278 for Network Blade Incorporated dated August 6, 2011
- Purchase Order Voucher No. 2011-289 for Network Blade Incorporated dated August 20, 2011
- Purchase Order Voucher No. 2011-322 for Network Blade Incorporated dated September 10, 2011

The Complainant states that the Custodian certified that:

> "no purchase orders, including invoices/attachments and payment vouchers, and or network maintenance of Network Blade,, LLC from January 1, 2007 through December 31, 2010 exist on file with the Franklin Fire District No. 2 other than the 25 invoices identified in the GRC's October 25, 2011 Interim Order which were previously provided to the Complainant."

The Complainant certifies that on December 8, 2011 he filed another OPRA request to the Fire District seeing statutorily required "warrants" including attachments that were dispersed to Network Blade. The Complainant certifies that in response to said request he received 25 purchase order vouchers ranging in date from 2008 through 2011. The Complainant asserts the factually relevant information to the present complaints is that each responsive record clearly lists a "P.O. No." in the upper right corner; each record clearly lists a "Voucher #" and "Authorized by Bill. K." statement in the lower right corner.

The Complainant contends that the Custodian's certification is factually controverted by the responsive records provided to the Complainant in response to his December 8, 2011 OPRA request. Additionally, the Complainant states that the Custodian's Counsel wrote in the Custodian's Statement of Information that "[t]he Secretary of the Board reviewed all vouchers, purchase orders and related material for each of the four years and extracted any items which listed Network Blade." The Complainant states that although the Custodian's Counsel confirmed the existence of "vouchers, purchase orders, and related material," the Custodian legally certified that no such records exist on file. The Complainant asserts that the records provided to him in response to his December 8, 2011 OPRA request unequivocally confirm that:

1. In his capacity as Board Treasurer, the Custodian knew that the responsive records existed for the present complaints because he personally authorized the records; and
2. In his most recent certification, the Custodian consciously, knowingly and willfully certifies that "no" such records "exist on file" knowing that said records did exist because he personally authorized the records.

The Complainant contends that the Custodian's knowledge that the requested records existed lies at the heart of the Custodian's egregious conduct in repeatedly denying the Complainant access to the records subject to the present complaints because the Custodian served as the Board's Treasurer for many years and because N.J.S.A. 40A:14-89 provides that:

> "[t]he treasurer of the fire district shall be the custodian and disbursing officer of the moneys of the said district. Moneys shall be disbursed by warrants signed by a majority of the board."

Further, the Complainant asserts that had he not filed a subsequent OPRA request seeking the statutorily required warrants, there is no doubt that the GRC would have taken the Custodian's repeated certifications at face value that the Custodian either provided all responsive records, or that no purchase orders and/or vouchers existed, and the Complainant would be denied access to records that existed all along.

The Complainant, therefore, requests the following from the GRC:

1. Actively pursue, or refer to the appropriate investigative authority, the Custodian's factually controverted certifications in the present complaints;
2. Find that the Custodian violated OPRA by failing to provide the Complainant with the records responsive to his OPRA requests within seven (7) business days;
3. Find that the Complainant is a prevailing party and order an award of reasonable attorney's fees pursuant to N.J.S.A. 47:1A-6;
4. Find that the Custodian knowingly and willfully violated OPRA and unreasonably denied access to the requested records under the totality of the circumstances warranting an imposition of civil penalties pursuant to N.J.S.A. 47:1A-11; and
5. Order the Custodian to immediately disclose all outstanding responsive records.

December 22, 2011

E-mail from Complainant to GRC. The Complainant states that the Custodian provided him with copies of two (2) additional invoices which are responsive to the requests subject of the present complaints and were not previously provided. The Complainant states that the Custodian has consistently indicated that he had provided all records responsive. The Complainant attaches the following records:

- E-mail from Custodian to Complainant dated December 16, 2011 enclosing the following records:
    - Invoice No. 213 for Network Blade dated June 18, 2008
    - Invoice No. 226 for Network Blade dated July 22, 2008

Analysis

Whether the Custodian complied with the Council's October 25, 2011 Interim Order?

In its October 25, 2011 Interim Order, the Council directed the Custodian to disclose to the Complainant all records responsive to the Complainant's request for purchase orders, including invoices/attachments, and payment vouchers, including invoices/attachments, for computers, computer services, system maintenance, and/or network maintenance of Network Blade, LLC, from January 1, 2007 through December 31, 2010 collectively, with the exception of the following records that the Custodian has previously provided to the Complainant:

- Invoice No. 182 dated March 19, 2008
- Invoice No. 193 dated April 20, 2008
- Invoice No. 203 dated May 23, 2008
- Invoice No. 208 dated June 17, 2008
- Invoice No. 253 dated October 28, 2008
- Invoice No. 276 dated January 7, 2009
- Invoice No. 281 dated January 17, 2009
- Invoice No. 302 dated April 11, 2009
- Invoice No. 327 dated June 14, 2009
- Invoice No. 352 dated August 9, 2009
- Invoice No. 365 dated September 25, 2009
- Invoice No. 375 dated November 8, 2009
- Invoice No. 400 dated January 7, 2010
- Invoice No. 412 dated January 29, 2010
- Invoice No. 420 dated March 3, 2010
- Invoice No. 426 dated March 26, 2010
- Invoice No. 432 dated March 30, 2010
- Invoice No. 451 dated May 13, 2010
- Invoice No. 482 dated August 1, 2010
- Invoice No. 502 dated August 16, 2010
- Invoice No. 514 dated September 16, 2010
- Invoice No. 527 dated October 14, 2010
- Invoice No. 545 dated November 11, 2010
- Invoice No. 568 dated January 21, 2011
- Invoice No. 574 dated January 25, 2011.

The Council's Interim Order also indicated that if no additional records responsive exist, the Custodian shall so indicate. Similarly, if the Custodian was withholding records, or portions of records, from public access the Custodian shall indicate the specific legal basis for such a denial of access. The Council's Interim Order directed the Custodian to comply with the above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of

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

On November 9, 2011, the GRC received the Custodian's certification dated November 4, 2011 in response to the Council's Interim Order. The Custodian certified that all of the records sought were delivered to the Complainant on March 15, 2011 and are listed in the Council's Interim Order. Further, the Custodian certified that the Complainant submitted an OPRA request on March 14, 2011 that duplicated the requests dated March 23, 2011 (which are the subject of these four (4) consolidated complaints). The Custodian certified that the Fire District's response on March 15, 2011 providing the records responsive included all the records sought in the Complainant's March 23, 2011 requests, so the Custodian did not respond to the March 23rd requests.

However, the Complainant certified on November 15, 2011 that he never received copies of purchase orders, vouchers, or their corresponding attachments in response to his OPRA requests. As such, the GRC requested a certification from the Custodian indicating whether any records responsive to the Complainant's OPRA requests exist in addition to the 25 records specifically identified in the Council's October 25, 2011 Interim Order. The Custodian provided the GRC with a subsequent certification on December 5, 2011 wherein the Custodian certified that there are no additional records responsive to the Complainant's OPRA requests.

Nevertheless, on December 17, 2011, the Complainant certified that he received records in response to a December 8, 2011 OPRA request that he believes are responsive to his OPRA requests at issue in the present Denial of Access Complaints. The records, which the Complainant attached to his certification, are 25 pages of purchase order vouchers for Network Blade Incorporated dating from April 5, 2008 to September 10, 2011. The Complainant contends that had he not filed this subsequent OPRA request and received these records, the GRC would have taken the Custodian's certifications at face value since the Custodian has repeatedly certified that he has provided the Complainant access to all records responsive to his requests and that no additional records responsive exist.

Further, on December 22, 2011 the Complainant informed the GRC that the Custodian provided access to two (2) additional invoices on December 16, 2011 which the Complainant believes are also responsive to the requests at issue in the present complaints. The invoices provided are both dated July 2008 and involve Network Blade Incorporated.

Based on both the Custodian's and the Complainant's submissions in response to the Council's Interim Order, there is conflicting evidence regarding whether the Custodian complied with the Council's October 25, 2011 Interim Order, which required the Custodian to disclose to the Complainant all records responsive to the Complainant's request for purchase orders, including invoices/attachments, and payment vouchers, including invoices/attachments, for computers, computer services, system maintenance, and/or network maintenance of Network Blade, LLC, from January 1, 2007 through December 31, 2010 collectively, with the exception of the records that the Custodian has previously provided to the Complainant, or if no additional records responsive exist, the Custodian shall so indicate. Therefore, it is necessary to refer these matters to the Office

of Administrative Law ("OAL") to resolve the facts. Specifically, the Administrative Law Judge should determine whether the Custodian complied with the Council's October 25, 2011 Interim Order.

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

Because of the conflicting evidence submitted by both parties, these matters are being referred to OAL to resolve the facts. As such, the Administrative Law Judge should also determine whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

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

Because of the conflicting evidence submitted by both parties, these matters are being referred to OAL to resolve the facts. As such, the Administrative Law Judge should also determine whether the Complainant is a "prevailing party" pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney's fees.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Based on both the Custodian's and the Complainant's submissions in response to the Council's Interim Order, there is conflicting evidence regarding whether the Custodian complied with the Council's October 25, 2011 Interim Order, which required the Custodian to disclose to the Complainant all records responsive to the Complainant's request for purchase orders, including invoices/attachments, and payment vouchers, including invoices/attachments, for computers, computer services, system maintenance, and/or network maintenance of Network Blade, LLC, from January 1, 2007 through December 31, 2010 collectively, with the exception of the records that the Custodian has previously provided to the Complainant, or if no additional records responsive exist, the Custodian shall so indicate. Therefore, it is necessary to refer these matters to the Office of Administrative Law to resolve the facts. Specifically, the Administrative Law Judge should determine whether the Custodian complied with the Council's October 25, 2011 Interim Order.

2. Because of the conflicting evidence submitted by both parties, these matters are being referred to the Office of Administrative Law to resolve the facts. As such, the Administrative Law Judge should also determine whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

3. Because of the conflicting evidence submitted by both parties, these matters are being referred to the Office of Administrative Law to resolve the facts. As such, the Administrative Law Judge should also determine whether the Complainant is

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

Prepared By: Dara Lownie
Communications Manager

Approved By: Catherine Starghill, Esq.
Executive Director

February 21, 2012

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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

INTERIM ORDER

October 25, 2011 Government Records Council Meeting

Jeff Carter
Complainant
v.
Franklin Fire District #2 (Somerset)
Custodian of Record

Complaint Nos. 2011-124, 2011-125, 2011-126, 2011-127

At the October 25, 2011 public meeting, the Government Records Council ("Council") considered the October 18, 2011 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (January 2010). Further, the Custodian's failure to immediately respond to the Complainant's requests for "vouchers" results in a violation of OPRA's immediate access provision at N.J.S.A. 47:1A-5.e.

2. Because the Custodian failed to respond to the Complainant's four (4) OPRA requests dated March 23, 2011 thus resulting in a "deemed" denial of said requests, the Custodian must disclose to the Complainant the records responsive to said requests. However, pursuant to Bart v. City of Paterson Housing Authority, 403 N.J. Super. 609 (App. Div. 2008), the Custodian need not disclose the records previously provided to the Complainant on March 15, 2011 since both the Complainant and the Complainant's Counsel acknowledge the Complainant's receipt of said records, which are responsive to the Complainant's OPRA requests at issue in these Denial of Access Complaints. Specifically, the Custodian must disclose to the Complainant all records responsive to the Complainant's request for purchase orders, including invoices/attachments, and payment vouchers, including invoices/attachments, for computers, computer services, system maintenance, and/or network maintenance of Network Blade, LLC from January 1, 2007 through December 31, 2010 collectively, with the exception of the following records that the Custodian has previously provided to the Complainant:

   - Invoice No. 182 dated March 19, 2008
   - Invoice No. 193 dated April 20, 2008

- Invoice No. 203 dated May 23, 2008
- Invoice No. 208 dated June 17, 2008
- Invoice No. 253 dated October 28, 2008
- Invoice No. 276 dated January 7, 2009
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- Invoice No. 514 dated September 16, 2010
- Invoice No. 527 dated October 14, 2010
- Invoice No. 545 dated November 11, 2010
- Invoice No. 568 dated January 21, 2011
- Invoice No. 574 dated January 25, 2011.

If no additional records responsive exist, the Custodian shall so indicate. Similarly, if the Custodian is withholding records, or portions of records, from public access the Custodian shall indicate the specific legal basis for such a denial of access.

3. **The Custodian shall comply with item 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4[1], to the Executive Director.[2]**

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

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

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

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

Interim Order Rendered by the
Government Records Council
On The 25th Day of October, 2011

Robin Berg Tabakin, Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: October 28, 2011

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Findings and Recommendations of the Executive Director
October 25, 2011 Council Meeting

Jeff Carter[1] **GRC Complaint Nos. 2011-124, 2011-125, 2011-126, 2011-127**[2]
Complainant

v.

Franklin Fire District #2 (Somerset)[3]
Custodian of Records

Records Relevant to Complaints:

1. GRC Complaint No. 2011-124: purchase orders, including invoices/attachments, and payment vouchers, including invoices/attachments, for computers, computer services, system maintenance, and/or network maintenance of Network Blade, LLC from January 1, 2009 through December 31, 2009.
2. GRC Complaint No. 2011-125: purchase orders, including invoices/attachments, and payment vouchers, including invoices/attachments, for computers, computer services, system maintenance, and/or network maintenance of Network Blade, LLC from January 1, 2010 through December 31, 2010.
3. GRC Complaint No. 2011-126: purchase orders, including invoices/attachments, and payment vouchers, including invoices/attachments, for computers, computer services, system maintenance, and/or network maintenance of Network Blade, LLC from January 1, 2007 through December 31, 2007.
4. GRC Complaint No. 2001-127: purchase orders, including invoices/attachments, and payment vouchers, including invoices/attachments, for computers, computer services, system maintenance, and/or network maintenance of Network Blade, LLC from January 1, 2008 through December 31, 2008.

Requests Made: March 23, 2011
Responses Made: March 15, 2011[4]
Custodian: William Kleiber
GRC Complaints Filed: April 18, 2011[5]

[1] Represented by Walter M. Luers, Esq., of Law Offices of Walter M. Luers, LLC (Clinton, NJ).
[2] The GRC has consolidated these complaints for adjudication due to the commonality of the parties and issues therein.
[3] Represented by Eric M. Perkins, Esq. (Skillman, NJ).
[4] The Custodian alleges in his Statement of Information that he provided responses to the Complainant's March 23, 2011 OPRA requests on March 15, 2011.
[5] The GRC received the Denial of Access Complaint on said date.

Background

March 15, 2011

E-mail from Sandy Accardi, Secretary to the Board, to Complainant. The Secretary states that she has attached the records the Complainant requested regarding Network Blade Incorporated.

March 15, 2011

E-mail from Complainant to the Secretary to the Board. The Complainant states that he received a 25 page PDF document containing Network Blade invoices. The Complainant also states that he has submitted multiple OPRA requests to the Fire District and requests that the Secretary indicate to which specific OPRA requests the records provided are responsive.

March 23, 2011

Complainant's Open Public Records Act ("OPRA") requests. The Complainant requests the records relevant to this complaint listed above via four (4) separate letter requests sent by e-mail and facsimile. The Complainant states in the subject line of each four (4) letter requests that he is requesting records under OPRA.

April 18, 2011

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

- Complainant's OPRA request dated March 23, 2011[6]
- Complainant's OPRA request dated March 23, 2011[7]
- Complainant's OPRA request dated March 23, 2011[8]
- Complainant's OPRA request dated March 23, 2011[9]
- Letter from Complainant's Counsel dated April 16, 2011.

In the Complainant Counsel's attached letter dated April 16, 2011, Counsel states that the Complainant submitted his OPRA requests on March 23, 2011. Counsel states that despite the fact that the Complainant submitted his OPRA requests via e-mail and facsimile to the Fire District's Secretary, Ms. Sandy Accardi, the requested records have not yet been provided nor has the Custodian contacted the Complainant. Counsel asserts that because more than seven (7) business days have elapsed since the Complainant submitted his OPRA requests with no response from the Custodian, said requests are "deemed denied."

The Complainant's Counsel requests that the Council find that the Custodian violated OPRA by failing to provide the records requested; find that the Complainant is a prevailing party entitled to an award of reasonable attorney's fees pursuant to N.J.S.A.

[6] This request is the subject of GRC Complaint No. 2011-124.
[7] This request is the subject of GRC Complaint No. 2011-125.
[8] This request is the subject of GRC Complaint No. 2011-126.
[9] This request is the subject of GRC Complaint No. 2011-127.

47:1A-6; and determine whether the Fire District and/or the Custodian knowingly and willfully violated OPRA.

Additionally, the Complainant does not agree to mediate this complaint.

April 27, 2011

Requests for the Statements of Information ("SOI") sent to the Custodian.

May 3, 2011

E-mail from GRC to Custodian's Counsel. The GRC grants a five (5) business day extension of time for Counsel to submit the Custodian's completed SOIs.[10]

May 12, 2011

Custodian's SOI[11] with the following attachments:

- E-mail from Sandy Accardi, Secretary to the Board, to Complainant dated March 15, 2011 with 25 pages of Network Blade Incorporated Invoices attached as follows:
  - Invoice No. 182 dated March 19, 2008
  - Invoice No. 193 dated April 20, 2008
  - Invoice No. 203 dated May 23, 2008
  - Invoice No. 208 dated June 17, 2008
  - Invoice No. 253 dated October 28, 2008
  - Invoice No. 276 dated January 7, 2009
  - Invoice No. 281 dated January 17, 2009
  - Invoice No. 302 dated April 11, 2009
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  - Invoice No. 352 dated August 9, 2009
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  - Invoice No. 545 dated November 11, 2010
  - Invoice No. 568 dated January 21, 2011
  - Invoice No. 574 dated January 25, 2011

[10] In response to Counsel's request via telephone on May 3, 2011.

[11] The Custodian signed the SOI on May 7, 2011. The Custodian's Counsel submitted the SOI under a cover letter dated May 10, 2011. However, the GRC received the SOI on May 12, 2011.

- E-mail from Complainant to Sandy Accardi, Secretary to the Board, dated March 15, 2011
- Letter from Custodian's Counsel to GRC dated May 10, 2011

The Custodian does not indicate the date on which he received the Complainant's OPRA request. However, the Custodian certifies that 25 unredacted pages of Network Blade invoices were provided to the Complainant on March 15, 2011.

The Custodian also certifies that the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management for the requested invoices is unknown.

However, in the Custodian Counsel's cover letter dated May 10, 2011, Counsel states that although the Complainant filed four (4) separate Denial of Access Complaints, the Custodian has filed one (1) SOI for all four (4) complaints because the Fire District responded to multiple OPRA requests at one time.

The Custodian's Counsel states that the Secretary of the Board reviewed all vouchers, purchase orders and related material for each of the four (4) relevant years and extracted any items which relate to Network Blade. Counsel also states that no records responsive to the request have been destroyed pursuant to the records destruction schedule. Additionally, Counsel states that the Board has no legal argument in this matter because the Custodian has provided the Complainant with all records responsive to the Complainant's OPRA requests. Counsel states that he has enclosed the Complainant's e-mail dated March 15, 2011 wherein the Complainant acknowledged receipt of the responsive records. Further, Counsel states that the Board has invited the Complainant to personally review the files but the Complainant has declined said invitation. Counsel asserts that the Complainant believes there are additional records responsive, but Counsel states that no additional responsive records are known to the Board.

May 16, 2011

Letter from Complainant's Counsel to GRC. Counsel states that the Custodian did provide the Complainant with copies of invoices. However, Counsel states that the four (4) OPRA requests that are at issue in these Denial of Access Complaints sought copies of purchase orders or payment vouchers. Additionally, Counsel states that the Custodian failed to respond at all to these requests. As such, Counsel asserts that the records requested in the instant OPRA requests are different from the invoices that have been previously provided to the Complainant.

June 24, 2011

Letter from GRC to Custodian's Counsel. The GRC states that it is in receipt of the Custodian's SOI under Counsel's cover letter dated May 10, 2011. The GRC states that in said cover letter, Counsel identified that he is responding to GRC Complaint Nos. 2001-124, 2011-125, 2011-126 and 2011-127; however on the SOI form itself the Custodian references GRC Complaint Nos. 2011-140, 2011-141 and 2011-142. The GRC also states that the Custodian indicates in said SOI that he provided the requested

records to the Complainant on March 15, 2011, yet the Complainant's OPRA requests were not submitted until March 23, 2011.

The GRC requests that the Custodian resubmit his SOI and provide all required information for the four (4) OPRA requests dated March 23, 2011 which are at issue in these Denial of Access Complaints. The GRC states that in its initial request for the SOI dated April 27, 2011, the GRC informed the Custodian that SOIs which are incomplete will be returned to the Custodian for completion only once. Additionally, the GRC states that it informed the Custodian that if an SOI remains incomplete, the GRC will adjudicate the matter based only on information submitted in the Denial of Access Complaint.[12]

July 8, 2011

E-mail from Complainant's Counsel to GRC. Counsel states that the Custodian's amended SOIs were due to the GRC by the close of business on July 1, 2011 and Counsel is not in receipt of said amended SOI. Counsel requests that the GRC direct the Custodian's Counsel to forward a copy of the amended SOI if same has been filed with the GRC.

July 8, 2011

E-mail from GRC to Complainant's Counsel. The GRC states that it is not in receipt of any amended SOIs from the Custodian and/or Counsel regarding these four (4) Denial of Access Complaints. The GRC also states that it has not received a request for an extension to submit said SOI from the Custodian and/or Counsel, nor has the GRC granted any such extension.

Analysis

Whether the Custodian responded timely to the Complainant's OPRA request?

OPRA provides that:

> "[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof …" N.J.S.A. 47:1A-5.g.

Also, OPRA provides that:

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

[12] The Custodian failed to respond to the GRC's request for an amended SOI.

OPRA further provides that:

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

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian's failure to respond within the required seven (7) business days results in a "deemed" denial. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.[13] Thus, a custodian's failure to respond in writing to a complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (January 2010).

However, OPRA contains a separate response timeline for certain records. Specifically, OPRA states that immediate access ordinarily shall be granted to vouchers, among other types of records. N.J.S.A. 47:1A-5.e.

Regarding these four (4) instant complaints, the Complainant stated that he submitted four (4) OPRA requests via e-mail and fax on March 23, 2011. The Complainant sought access to purchase orders, including invoices/attachments, and payment vouchers, including invoices/attachments, for computers, computer services, system maintenance, and/or network maintenance of Network Blade, LLC for the following date ranges:

- January 1, 2007 through December 31, 2007;
- January 1, 2008 through December 31, 2008;
- January 1, 2009 through December 31, 2009; and
- January 1, 2010 through December 31, 2009.

The Complainant asserted in his Denial of Access Complaints that he did not receive any response from the Custodian regarding his four (4) OPRA requests dated March 23, 2011.

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

In the Custodian's SOI, however, the Custodian certified that he provided the Complainant with 25 pages of responsive records on March 15, 2011. The Custodian included an e-mail in his SOI from the Complainant dated March 15, 2011 wherein the Complainant acknowledges receipt of the 25 pages of records. Additionally, the Complainant's Counsel acknowledged, in a letter to the GRC dated May 16, 2011, that the Complainant did previously receive 25 pages of invoices, but that the Complainant did not receive any response to his OPRA requests dated March 23, 2011 which sought access to purchase orders and payment vouchers.

Additionally, in a letter dated June 24, 2011, the GRC notified the Custodian's Counsel that a discrepancy existed between the date the Custodian certified providing a response to the Complainant's OPRA requests and the date on which the Custodian submitted his request. Specifically, the Custodian certified that he provided a response to the Complainant's request on March 15, 2011 which is before the Complainant submitted his OPRA requests on March 23, 2011. As such, the GRC requested that the Custodian resubmit his SOI. The Custodian failed to submit an amended SOI or any additional submissions regarding these four (4) Denial of Access Complaints.

Consequently, the evidence of record indicates that the Custodian failed to provide the Complainant with any response, written or unwritten, immediately, pursuant to N.J.S.A. 47:1A-5.e., or within the statutorily mandated seven (7) business days to the Complainant's four (4) OPRA requests dated March 23, 2011.

Therefore, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (January 2010). Further, the Custodian's failure to immediately respond to the Complainant's requests for "vouchers" results in a violation of OPRA's immediate access provision at N.J.S.A. 47:1A-5.e.

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 …" (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.

Additionally, in Bart v. City of Paterson Housing Authority, 403 N.J. Super. 609 (App. Div. 2008), the Appellate Division held that a complainant could not have been denied access to a requested record if he already had in his possession at the time of the OPRA request the document he sought pursuant to OPRA. *Id.* at 617. The Appellate Division noted that requiring a custodian to duplicate another copy of the requested record and send it to the complainant does not advance the purpose of OPRA, which is to ensure an informed citizenry. *Id.* (citations omitted).

The Appellate Division's decision in Bart, however, turns upon the specific facts of that case. In the adjudication of the Denial of Access Complaint, the Council's decision noted the certification of the custodian that copies of the requested record were available at the Housing Authority's front desk upon simple verbal request by any member of the public; moreover, the complainant actually admitted that he was in possession of this record at the time of the OPRA request for the same record. Bart v. City of Paterson Housing Authority, GRC Complaint No. 2005-145 (May 2006).

In the instant matter, the Custodian certified that he provided the Complainant access to 25 pages of Network Blade, LLC invoices on March 15, 2011. In an e-mail to the Board Secretary dated March 15, 2011, the Complainant acknowledged receipt of said invoices. Additionally, the Complainant's Counsel acknowledged the Complainant's receipt of said invoices in his letter to the GRC dated May 16, 2011. Specifically, the Complainant's Counsel stated "…while the Records Custodian did provide 'invoices' to Mr. Carter, the records requests at issue in this case asked for copies of 'purchase orders' and 'payment vouchers' for the vendor 'Network Blade' for the time period of 2007 to 2010." Thus, at the time the Complainant submitted his four (4) OPRA requests dated March 23, 2011 which are the subject of these four (4) consolidated Denial of Access Complaints, the Complainant was already in possession of 25 pages of invoices regarding Network Blade, LLC.

Nevertheless, the Complainant's OPRA requests sought access to purchase orders, including invoices/attachments, and payment vouchers, including invoices/attachments, for computers, computer services, system maintenance, and/or network maintenance of Network Blade, LLC from January 1, 2007 through December 31, 2010 collectively. Although the Complainant was already in receipt of *invoices*, he also sought access to *purchase orders* and *payment vouchers* in his March 23, 2011

OPRA requests which the Custodian has not yet provided to the Complainant or provided any indication that no such records exist or that records are being withheld based on a specific grant of confidentiality.

Therefore, because the Custodian failed to respond to the Complainant's four (4) OPRA requests dated March 23, 2011 thus resulting in a "deemed" denial of said requests, the Custodian must disclose to the Complainant the records responsive to said requests. However, pursuant to Bart, *supra*, the Custodian need not disclose the records previously provided to the Complainant on March 15, 2011 since both the Complainant and the Complainant's Counsel acknowledge the Complainant's receipt of said records, which are responsive to the Complainant's OPRA requests at issue in these Denial of Access Complaints. Specifically, the Custodian must disclose to the Complainant all records responsive to the Complainant's request for purchase orders, including invoices/attachments, and payment vouchers, including invoices/attachments, for computers, computer services, system maintenance, and/or network maintenance of Network Blade, LLC from January 1, 2007 through December 31, 2010 collectively, with the exception of the following records that the Custodian has previously provided to the Complainant:

- Invoice No. 182 dated March 19, 2008
- Invoice No. 193 dated April 20, 2008
- Invoice No. 203 dated May 23, 2008
- Invoice No. 208 dated June 17, 2008
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- Invoice No. 568 dated January 21, 2011
- Invoice No. 574 dated January 25, 2011.

If no additional records responsive exist, the Custodian shall so indicate. Similarly, if the

Custodian is withholding records, or portions of records, from public access, the Custodian shall indicate the specific legal basis for such a denial of access.

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

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

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

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (January 2010). Further, the Custodian's failure to immediately respond to the Complainant's requests for "vouchers" results in a violation of OPRA's immediate access provision at N.J.S.A. 47:1A-5.e.

2. Because the Custodian failed to respond to the Complainant's four (4) OPRA requests dated March 23, 2011 thus resulting in a "deemed" denial of said requests, the Custodian must disclose to the Complainant the records responsive to said requests. However, pursuant to Bart v. City of Paterson Housing Authority, 403 N.J. Super. 609 (App. Div. 2008), the Custodian need not disclose the records previously provided to the Complainant on March 15, 2011 since both the Complainant and the Complainant's Counsel acknowledge the Complainant's receipt of said records, which are responsive to the Complainant's OPRA requests at issue in these Denial of Access Complaints. Specifically, the Custodian must disclose to the Complainant all records responsive to the Complainant's request for purchase orders, including invoices/attachments, and payment vouchers, including invoices/attachments, for computers, computer services, system maintenance, and/or network maintenance of Network Blade, LLC from January 1, 2007 through December 31, 2010 collectively, with the exception of the following records that the Custodian has previously provided to the Complainant:

- Invoice No. 182 dated March 19, 2008
- Invoice No. 193 dated April 20, 2008
- Invoice No. 203 dated May 23, 2008
- Invoice No. 208 dated June 17, 2008
- Invoice No. 253 dated October 28, 2008
- Invoice No. 276 dated January 7, 2009
- Invoice No. 281 dated January 17, 2009
- Invoice No. 302 dated April 11, 2009
- Invoice No. 327 dated June 14, 2009
- Invoice No. 352 dated August 9, 2009
- Invoice No. 365 dated September 25, 2009
- Invoice No. 375 dated November 8, 2009
- Invoice No. 400 dated January 7, 2010
- Invoice No. 412 dated January 29, 2010
- Invoice No. 420 dated March 3, 2010
- Invoice No. 426 dated March 26, 2010
- Invoice No. 432 dated March 30, 2010
- Invoice No. 451 dated May 13, 2010
- Invoice No. 482 dated August 1, 2010
- Invoice No. 502 dated August 16, 2010
- Invoice No. 514 dated September 16, 2010
- Invoice No. 527 dated October 14, 2010
- Invoice No. 545 dated November 11, 2010
- Invoice No. 568 dated January 21, 2011
- Invoice No. 574 dated January 25, 2011.

If no additional records responsive exist, the Custodian shall so indicate. Similarly, if the Custodian is withholding records, or portions of records, from public access the Custodian shall indicate the specific legal basis for such a denial of access.

3. **The Custodian shall comply with item 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4[14], to the Executive Director.[15]**

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

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

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

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

Prepared By: Dara Lownie
Communications Manager

Approved By: Catherine Starghill, Esq.
Executive Director

October 18, 2011