



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

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

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Commissioner

FINAL DECISION

December 18, 2012 Government Records Council Meeting

Andrew Balik  
Complainant

Complaint No. 2011-227

v.

City of Bayonne (Hudson)  
Custodian of Record

At the December 18, 2012 public meeting, the Government Records Council (“Council”) considered the November 20, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Complainant’s requests with the exception of parts of OPRA requests Item No. 1 and No. 2 are invalid because they fail to specify senders/recipients of e-mails and letters, fail to identify specific government records sought, or require the Custodian to perform research in order to fulfill the request. *See* MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007), and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).
2. Although the Custodian’s Custodian responded to the OPRA request in writing on behalf of the Custodian in a timely manner, said response is insufficient pursuant to Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008), and N.J.S.A. 47:1A-5.i. because Counsel failed to provide a specific anticipated date upon which the City would grant or deny access to the responsive records. *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-48 (Interim Order dated March 25, 2009).
3. The Custodian has borne his burden of proof under N.J.S.A. 47:1A-6 that he did not unlawfully deny access to the records responsive to request Item Nos. 1, 2, and 3 of the Complainant’s amended OPRA request.
4. Because the Custodian certified that no record responsive to the Complainant’s request Item No. 4 exists, and because there is no credible evidence in the record to refute the Custodian’s certification, the Custodian did not unlawfully deny access to the requested record pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).



5. Although the Custodian Counsel's response to the OPRA request on behalf of the Custodian was insufficient pursuant to Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008), and N.J.S.A. 47:1A-5.i., because he failed to provide a date certain upon which the Complainant could expect the City to grant or deny access to the requested record, the Custodian provided all records responsive to the Complainant's amended request on November 30, 2011 and certified that records responsive to request Item No. 4 of said request do not exist. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's insufficient response does not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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

Final Decision Rendered by the  
Government Records Council  
On The 18<sup>th</sup> Day of December, 2012

Robin Berg Tabakin, Chair  
Government Records Council

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

Denise Parkinson Vetti, Secretary  
Government Records Council

**Decision Distribution Date: December 20, 2012**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
December 18, 2012 Council Meeting**

**Andrew Balik<sup>1</sup>  
Complainant**

**GRC Complaint No. 2011-227**

v.

**City of Bayonne (Hudson)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Copies of:

1. Solid waste bids from 2002 or last five (5) year Pool Food Concession (“Concession”) contract for the lowest bidder only, to include proposal pages and price sheets; the attending lawyer’s bid evaluation for each bid date taken; the “questions” page for each bid date showing financial requirements; and a copy of the Purchasing Agent (“P.A.”) reports for bids received and award recommendations.
2. Letters from Galaxy lawyers complaining of audited requirement; letters and/or faxes replying to Galaxy’s complaints; lawsuit records from Galaxy v. City of Bayonne (Citation omitted); and all bid addendums for 2010 bid specs for both solid waste and recycling.
3. Complainant’s hand-written comments regarding Ms. Maggi Khalil’s (“Ms. Khalil”) actions during the solid waste, recycling and Concession bids; all work folders from the Purchasing Department regarding the last four (4) outings for solid waste and recycling bids to include bidders lists, internal memoranda, faxes sent to bidders (with a particular interest in 2009) regarding additional price needs and fax receipts.
4. Bid evaluation report from lawyer that attended to the receipt of bids for the Concession contract, e-mails between Mr. Marc Pfeiffer (“Mr. Pfeiffer”), Local Government Services (“LGS”), and the City of Bayonne (“City”) regarding the legality of the contract.

**Request Made:** March 14, 2011

**Response Made:** March 23, 2011

**Custodian:** Robert Sloan

**GRC Complaint Filed:** June 30, 2011<sup>3</sup>

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

<sup>2</sup> Represented by Peter Cecinini, Esq. (Bayonne, NJ).

<sup>3</sup> The GRC received the Denial of Access Complaint on said date.

## **Background**

### **March 14, 2011**

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above in a letter referencing OPRA. The Complainant further offers to come in and copy the records upon retrieval.

### **March 23, 2011**

Custodian's response to the OPRA request. On behalf of the Custodian, the Custodian's Counsel responds in writing via letter to the Complainant's OPRA request on the seventh (7<sup>th</sup>) business day following receipt of such request. Counsel states that the Complainant's OPRA request has been forwarded to the Law Department. Counsel states that he believes the records responsive to said request will be voluminous and will require additional time to compile and review. Counsel states that he will contact the Complainant shortly to provide the cost associated with the Complainant's OPRA request.

Counsel further notes that he believes it would be inappropriate for the Complainant, who is a party to litigation that may involve some of the requested records, to personally handle the files that contain the responsive records.

### **April 26, 2011**

Letter from the Complainant to the Custodian's Counsel. The Complainant states that he submitted an OPRA request to the City on March 14, 2011. The Complainant states that Counsel responded on March 23, 2011 stating that he would contact the Complainant shortly. The Complainant states that it has been over 30 days and he has received no response.

The Complainant states that he has reviewed OPRA and found no exemption for access to requestors involved in litigation with a public agency. The Complainant states that he does not wish to file a complaint; rather, he simply wants a response from the City.

### **June 6, 2011**

Letter from the Custodian's Counsel to the Complainant. Counsel states that the responsive records are available for pickup at the Complainant's earliest convenience.

### **June 30, 2011**

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

- Complainant's OPRA request dated March 14, 2011.
- Letter from the Custodian's Counsel to the Complainant dated March 23, 2011.
- Letter from the Complainant to the Custodian's Counsel dated April 26, 2011.
- Letter from the Custodian's Counsel to the Complainant dated June 6, 2011.

The Complainant states that he submitted an OPRA request to the City on March 14, 2011. The Complainant states that the Custodian's Counsel responded in writing on

March 23, 2011 advising that the City would need additional time to compile and review the responsive records. The Complainant states that on April 26, 2011, he sent a letter to Counsel requesting a status update on his OPRA request.

The Complainant states that Counsel responded on June 6, 2011 advising that the responsive records were available for pickup. The Complainant asserts that the records provided represented only a small portion of his four (4) part OPRA request.<sup>4</sup>

The Complainant agrees to mediate this complaint.

**July 19, 2011**

Offer of Mediation sent to both parties.

**July 29, 2011**

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

**August 2, 2011**

The Custodian agrees to mediate this complaint.

**August 2, 2011**

Complaint referred to mediation.<sup>5</sup>

**October 20, 2011**

Complaint referred back from mediation.

**October 31, 2011**

Letter from the GRC to the Complainant. The GRC informs the Complainant that he has the opportunity to amend this Denial of Access Complaint prior to the GRC’s request for the Statement of Information (“SOI”) from the Custodian. The GRC states that the Complainant’s response is due by close of business on November 7, 2011.

**November 1, 2011**

Complainant’s amended Denial of Access Complaint.<sup>6</sup> The Complainant states that he amends each OPRA request item to seek the following:

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<sup>4</sup> The Complainant notes that he is the former Purchasing Agent for the City and is currently suing the City in connection with his dismissal in 2010.

<sup>5</sup> The GRC notes that it forwarded the SOI request to the Custodian on July 29, 2011 because the Custodian did not respond to the Offer of Mediation. The GRC further notes that the Custodian subsequently submitted his signed agreement to mediate on August 2, 2011; thus, the GRC is rescinding the SOI request and referring this complaint to mediation.

<sup>6</sup> The Complainant included additional information regarding correspondence between the parties that occurred while this complaint was in mediation. Pursuant to the Uniform Mediation Act, N.J.S.A. 2A:23C-1 et seq., communications that take place during the mediation process are not deemed to be public records subject to disclosure under OPRA. N.J.S.A. 2A:23C-2. All communications which occur during the mediation process are privileged from disclosure and may not be used in any judicial, administrative or legislative proceeding, or in any arbitration, unless all parties and the mediator waive the privilege. N.J.S.A. 2A:23C-4.

1. From the “Roselle” recycling and solid waste bids for 2010: “Questions” section that makes references to required Department of Environmental Protection reports and financial reports.
2. Letters from Galaxy lawyers complaining of audited requirement; letters and/or faxes replying to Galaxy’s complaints; lawsuit records from Galaxy v. City of Bayonne (Citation omitted); and all bid addendums for 2010 bid specs for both solid waste and recycling.
3. Complainant’s faxes to bidders for the 2009 solid waste and recycling bids regarding bid proposals, pickup scheduling and pricing and relevant fax receipts.
4. Bid evaluation report from lawyer that attended to the receipt of bids for the Concession contract in 2010, e-mails between Mr. Pfeiffer and the City regarding the legality of the contract.

The Complainant states that to date, he has not received any of the records at issue herein even after narrowing the scope of his four (4) OPRA request items.

**November 9, 2011**

Request for the SOI sent to the Custodian.

**November 25, 2011**

Letter from GRC to the Custodian. The GRC sends a letter to the Custodian indicating that the GRC provided the Custodian with a request for an SOI on November 9, 2011 and to date has not received a response. Further, the GRC states that if the SOI is not submitted within three (3) business days, the GRC will adjudicate this complaint based solely on the information provided by the Complainant.

**November 30, 2011**

Letter from the Custodian’s Counsel to the Complainant (with attachments). Counsel states that attached are the records responsive to the Complainant’s OPRA request Item Nos. 1, 2 and 3. Counsel further states that the City is not in possession of any records responsive to the Complainant’s OPRA request Item No. 4.

**November 30, 2011**

Custodian’s SOI attaching<sup>7</sup> a letter from the Custodian’s Counsel to the Complainant dated November 30, 2011 (attachments omitted).

The Custodian certifies that his search for the requested records included having the Law Department and Purchasing Department search its bids records for any records that may be responsive to the Complainant’s OPRA request.

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<sup>7</sup> The Custodian included additional information regarding correspondence between the parties that occurred while this complaint was in mediation. Pursuant to the Uniform Mediation Act, N.J.S.A. 2A:23C-1 et seq., communications that take place during the mediation process are not deemed to be public records subject to disclosure under OPRA. N.J.S.A. 2A:23C-2. All communications which occur during the mediation process are privileged from disclosure and may not be used in any judicial, administrative or legislative proceeding, or in any arbitration, unless all parties and the mediator waive the privilege. N.J.S.A. 2A:23C-4.

The Custodian also certifies that no records responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by Records Management Services.

The Custodian certifies that he received the Complainant's OPRA request on March 14, 2011. The Custodian certifies that Counsel responded to the Complainant on his behalf in writing on March 23, 2011. The Custodian certifies that he sent an additional response to the Complainant on April 28, 2011.<sup>8</sup> The Custodian certifies that the Complainant amended his OPRA request on May 6, 2011.<sup>9</sup> The Custodian certifies that on June 6, 2011, Counsel advised the Complainant that responsive records were available for pickup. The Custodian certifies that regarding the Complainant's modified OPRA request in the amended Denial of Access Complaint, the Custodian provided the Complainant with nearly 50 pages of records. The Custodian certifies that the following records were provided in their entirety:

- Recycling bid report dated July 28, 2009.
- Solid waste bid report dated July 28, 2009.
- Concession lease agreement for 2010.
- Concession resolution dated March 16, 2010.
- Concession resolution dated April 21, 2010.
- Sand Castle's certificate of liability insurance.
- Sand Castle's Concession proposal including attachments and addenda.

The Custodian certifies that six (6) pages of records were responsive to the Complainant's OPRA request Item No. 1. The Custodian certifies that four (4) pages of records are responsive to the Complainant's OPRA request Item No. 2. The Custodian certifies that 20 pages of records were responsive to the Complainant's OPRA request Item No. 3 including the Complainant's 2010 faxes to bidders.

The Custodian further certifies that no records responsive to the Complainant's OPRA request Item No. 4 exists. The Custodian certifies that the Purchasing Department file for the 2010 Concession bid does not contain any bid evaluations or e-mails to/from LGS.<sup>10</sup>

The Custodian asserts that the Complainant's original OPRA request sought over 500 pages of records and was invalid under OPRA pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005)(OPRA "... 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.").

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<sup>8</sup> The Custodian includes no supporting evidence for his claim that he sent a second (2<sup>nd</sup>) response on April 28, 2011.

<sup>9</sup> There is no evidence in the record to indicate that the Complainant amended his OPRA request on this date.

<sup>10</sup> The Custodian notes that if any records did exist, they would be exempt from disclosure as attorney-client privileged and/or inter-agency or intra-agency advisory, consultative or deliberative material.

The Custodian further asserts that the Complainant's Counsel already submitted an OPRA request for several of the records sought herein. The Custodian asserts that the Complainant modified his request several times after submitting his original OPRA request.

The Custodian asserts that he did not intentionally withhold any records; however, the City's limited resources were strained in responding to the Complainant's voluminous OPRA request.

### Analysis

#### **Whether the Custodian timely responded 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.

Further, OPRA provides that:

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

OPRA provides that a custodian may request an extension of time to respond to a complainant's OPRA request, but a specific date when the custodian will respond must be provided. N.J.S.A. 47:1A-5.i. OPRA further provides that should the custodian fail to provide a response on that specific date, “access shall be deemed denied.” N.J.S.A. 47:1A-5.i.

In Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008), the custodian provided the complainant with a written response to his request on the seventh (7<sup>th</sup>) business day following receipt of such request in which the custodian requested an extension of time to fulfill said request but failed to notify the complainant of when the requested records would be provided. The Council held that the custodian's response was insufficient:



“...because the Custodian failed to notify the Complainant in writing within the statutorily mandated seven (7) business days of when the requested records would be made available pursuant to N.J.S.A. 47:1A-5.i., the Custodian’s written response to the Complainant dated June 20, 2007 and the request for an extension of time dated June 29, 2007 are inadequate under OPRA ...” *Id.*

In the instant complaint, the evidence of record indicates that the Custodian’s Counsel responded to the Complainant’s OPRA request in writing in a timely manner on behalf of the Custodian stating that the records responsive to said request will be voluminous and take additional time to compile and review. Counsel further stated that he would contact the Complainant shortly to provide the cost associated to said request. Thus, Counsel’s response is insufficient under OPRA because he failed to provide a date certain on which the City would grant or deny access to the requested records. N.J.S.A. 47:1A-5.i.

Therefore, although the Custodian’s Custodian responded to the OPRA request in writing on behalf of the Custodian in a timely manner, said response is insufficient pursuant to Hardwick, supra, and N.J.S.A. 47:1A-5.i. because Counsel failed to provide a specific anticipated date upon which the City would grant or deny access to the responsive records. *See also Verry v. Borough of South Bound Brook (Somerset)*, GRC Complaint No. 2008-48 (Interim Order dated March 25, 2009).

### **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.

In the matter before the Council, only OPRA request Item No. 1 for solid waste bids from 2002, and OPRA request Item No. 2 for all bid addenda for 2010 bid specifications, are valid under OPRA. The remainder of the requests fail to identify specific senders/recipients of e-mails and letters, fail to identify specific government records sought, or require the Custodian to perform research in order to fulfill the request.

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.

“Most significantly, the request failed to identify with any specificity or particularity the governmental records sought. MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past. Such an open-ended demand required the Division’s records custodian to manually search through all of the agency’s files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted.” *Id.* at 549.

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.*

In addition, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),<sup>11</sup> 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.”<sup>12</sup>

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<sup>11</sup> Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

<sup>12</sup> As stated in Bent, *supra*.

Moreover, in New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007), the Court enumerated the responsibilities of a custodian and a requestor as follows:

“OPRA identifies the responsibilities of the requestor and the agency relevant to the prompt access the law is designed to provide. The custodian, who is the person designated by the director of the agency, N.J.S.A. 47:1A-1.1, must adopt forms for requests, locate and redact documents, isolate exempt documents, assess fees and means of production, identify requests that require "extraordinary expenditure of time and effort" and warrant assessment of a "service charge," and, when unable to comply with a request, "indicate the specific basis." N.J.S.A. 47:1A-5(a)-(j). The requestor must pay the costs of reproduction and submit the request with information that is essential to permit the custodian to comply with its obligations. N.J.S.A. 47:1A-5(f), (g), (i). *Research is not among the custodian's responsibilities.*” (Emphasis added), *Id.* at 177.

The Court additionally cited MAG by stating that “...when a request is ‘complex’ because it fails to specifically identify the documents sought, then that request is not ‘encompassed’ by OPRA...” The Court also quoted N.J.S.A. 47:1A-5.g. in that “[i]f a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency.” The Court further stated that “...the Legislature would not expect or want courts to require more persuasive proof of the substantiality of a disruption to agency operations than the agency’s need to...generate new records...” Accordingly, the test under MAG then, is whether a requested record is a *specifically identifiable* government record.

Under such rationale, the GRC has repeatedly found that blanket requests are not valid OPRA requests. In the matter of Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009), the relevant part of the Complainant’s request sought:

- “Item No. 2: From the Borough Engineer’s files: all engineering documents for all developments or modifications to Block 25, Lot 28; Block 25, Lot 18; Block 23, Lot 1; Block 23, Lot 1.02.
- Item No. 3: From the Borough Engineer’s files: all engineering documents for all developments or modifications to North St., to the south and east of Wilson St.
- Item No. 4: From the Borough Attorney’s files: all documents related to the development or modification to Block 25, Lot 28; Block 25, Lot 18; Block 23, Lot 1; Block 23, Lot 1.02.
- Item No. 5: From the Borough Attorney’s files: all documents related to the development or modification to North Street, to the south and east of Wilson St.”

In reviewing the complainant's request, the Council found that "[b]ecause the Complainant's OPRA requests [Items No.] 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] and [Bent]."

Therefore, the Complainant's requests are invalid with the exception of parts of OPRA requests Item No. 1 and No. 2 because they fail to specify senders/recipients of e-mails and letters, fail to identify specific government records sought, or require the Custodian to perform research in order to fulfill the request. See MAG, *supra*, Bent, *supra*, NJ Builders, *supra*, and Schuler, *supra*.

However, the Complainant amended the Denial of Access Complaint on November 1, 2011 in which he asserted that he was amending each OPRA request item to seek the following:

1. From the "Roselle" recycling and solid waste bids for 2010: "Questions" section that makes references to required Department of Environmental Protection reports and financial reports.
2. Letters from Galaxy lawyers complaining of audited requirement; letters and/or faxes replying to Galaxy's complaints; lawsuit records from Galaxy v. City of Bayonne (Citation omitted); and all bid addendums for 2010 bid specs for both solid waste and recycling.
3. Complainant's faxes to bidders for the 2009 solid waste and recycling bids regarding bid proposals, pickup scheduling and pricing and relevant fax receipts.
4. Bid evaluation report from lawyer that attended to the receipt of bids for the Concession contract in 2010, e-mails between Mr. Pfeiffer and the City regarding the legality of the contract.

In the Custodian's SOI dated November 30, 2011, the Custodian certified that six (6) pages of records were responsive to the Complainant's OPRA request Item No. 1. The Custodian certified that four (4) pages of records are responsive to the Complainant's OPRA request Item No. 2. The Custodian certified that 20 pages of records were responsive to the Complainant's OPRA request Item No. 3 including the Complainant's 2010 faxes to bidders. The Custodian submitted competent, credible evidence in the form of a copy of a letter from the Custodian's Counsel to the Complainant dated November 30, 2011, in which Counsel states that attached are the records responsive to the Complainant's OPRA request Item Nos. 1, 2 and 3.

Thus, the Custodian has borne his burden of proof under N.J.S.A. 47:1A-6 that he did not unlawfully deny access to the records responsive to request Item Nos. 1, 2, and 3 of the Complainant's amended OPRA request.

Additionally, the Custodian further certified in the SOI that no records responsive to the Complainant's OPRA request Item No. 4 exist. The Custodian certified that the Purchasing Department file for the 2010 Concession bid does not contain any bid evaluations or e-mails to/from LGS. The Complainant submitted no evidence to refute the Custodian's certification in this regard.

In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the Complainant sought telephone billing records from the New Jersey Department of Education. The Custodian responded stating that there was no record of any telephone calls made to the Complainant. The Custodian subsequently certified that no records responsive to the Complainant's request existed. The GRC determined that the Custodian did not unlawfully deny access to the requested records because the Custodian certified that no records responsive to the request existed.

Therefore, because the Custodian certified that no record responsive to the Complainant's request Item No. 4 exists, and because there is no credible evidence in the record to refute the Custodian's certification, the Custodian did not unlawfully deny access to the requested record pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

**Whether the Custodian's insufficient response rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?**

OPRA states that:

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

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

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

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a "knowing and willful" violation of OPRA. The following statements must be true for a determination that the Custodian "knowingly and willfully" violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001); the Custodian must have had some knowledge that his actions were wrongful (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)).

Although the Custodian Counsel's response to the OPRA request on behalf of the Custodian was insufficient pursuant to Hardwick, *supra*, and N.J.S.A. 47:1A-5.i., because he failed to provide a date certain upon which the Complainant could expect the City to grant or deny access to the requested record, the Custodian provided all records responsive to the Complainant's amended request on November 30, 2011 and certified that records responsive to request Item No. 4 of said request do not exist. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's insufficient response does 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 Complainant's requests with the exception of parts of OPRA requests Item No. 1 and No. 2 are invalid because they fail to specify senders/recipients of e-mails and letters, fail to identify specific government records sought, or require the Custodian to perform research in order to fulfill the request. *See* MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007), and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).
2. Although the Custodian's Custodian responded to the OPRA request in writing on behalf of the Custodian in a timely manner, said response is insufficient pursuant to Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008), and N.J.S.A. 47:1A-5.i. because Counsel failed to provide a specific anticipated date upon which the City would grant or deny access to the responsive records. *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-48 (Interim Order dated March 25, 2009).
3. The Custodian has borne his burden of proof under N.J.S.A. 47:1A-6 that he did not unlawfully deny access to the records responsive to request Item Nos. 1, 2, and 3 of the Complainant's amended OPRA request.
4. Because the Custodian certified that no record responsive to the Complainant's request Item No. 4 exists, and because there is no credible evidence in the record to refute the Custodian's certification, the Custodian did not unlawfully deny access to the requested record pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

5. Although the Custodian Counsel's response to the OPRA request on behalf of the Custodian was insufficient pursuant to Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008), and N.J.S.A. 47:1A-5.i., because he failed to provide a date certain upon which the Complainant could expect the City to grant or deny access to the requested record, the Custodian provided all records responsive to the Complainant's amended request on November 30, 2011 and certified that records responsive to request Item No. 4 of said request do not exist. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's insufficient response does not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: Frank F. Caruso  
Senior Case Manager

Approved By: Karyn Gordon, Esq.  
Acting Executive Director

November 20, 2012<sup>13</sup>

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<sup>13</sup> This complaint was prepared and scheduled for adjudication at the Council's November 27, 2012 meeting; however, said meeting was cancelled due to lack of quorum.  
Andrew Balik v. City of Bayonne (Hudson), 2011-227 – Findings and Recommendations of the Executive Director