



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
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TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

January 28, 2014 Government Records Council Meeting

David Roundtree
Complainant

Complaint No. 2011-266

v.

New Jersey Department of State,
Division of Elections
Custodian of Record

At the January 28, 2014 public meeting, the Government Records Council (“Council”) considered the January 21, 2014 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian partially complied with the Council’s November 19, 2013 Interim Order because although he timely responded and submitted certified confirmation of compliance, he improperly redacted e-mail No. 5 and further failed to provide all 37 records in accordance with conclusion No. 3. However, the Custodian timely responded to the GRC’s request for additional information rectifying these deficiencies.
2. Although the Custodian unlawfully denied access to nine (9) e-mails in part or whole and further only partially complied with the Council’s November 19, 2013 Interim Order, the Custodian fully complied with the Council’s May 28, 2013 Interim Order and further rectified his deficient response to the Council’s November 19, 2013 Interim Order within the extended time frame to do so. 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, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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



Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the
Government Records Council
On The 28th Day of January, 2014

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: January 30, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
January 28, 2014 Council Meeting**

**David Roundtree¹
Complainant**

GRC Complaint No. 2011-266

v.

**New Jersey Department of State,
Division of Elections²
Custodial Agency**

Records Relevant to Complaint: Copies of the following:³

1. All e-mails that were sent to and from all parties, in regards to matter concerning James Whelan or Jim Whelan or inter-office documents pertaining to this matter concerning the name above.
2. All memoranda and e-mails involving discussions about the Complainant.
3. Details of any conversation between the Custodian and Custodian's Counsel regarding the Complainant.
4. Any records provided by Custodian's Counsel in regards to why James Whelan failed to follow the Division of Elections' ("Division") requirements regarding filing papers incorrectly.
5. James Whelan and Jim Whelan's voting record, signature and voter card.
6. Electronic copy of the policy and procedures rules and regulations manual.
7. New Jersey and United States Statutes regarding what signature on an oath must be notarized.
8. Any documentation in which Custodian's Counsel stated that James Whelan could use the name of Jim Whelan on an Oath of Acceptance and what law supports this decision.
9. What steps were taken in the Complainant's complaint with the Division regarding the forgery and the fraudulent signature submitted to the Division pertaining to Jim Whelan.
10. Is altering an Oath of Acceptance fraud?

Custodian of Record: Robert F. Giles
Request Received by Custodian: May 18, 2011
Response Made by Custodian: May 24, 2011
GRC Complaint Received: August 10, 2011

¹ No legal representation listed on record.

² Represented by Deputy Attorney General George Cohen.

³ The Complainant submits an e-mail seeking these records. The Complainant's request was not on an OPRA request form, nor did the e-mail mention OPRA. However, the Custodian responded to the Complainant's request as if it were a valid OPRA request; thus, the Council will treat it as such.

Background

November 19, 2013 Council Meeting:

At its November 19, 2013 public meeting, the Council considered the November 12, 2013 *In Camera* Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian complied with the Council's May 28, 2013 Interim Order because he submitted nine (9) copies of the records at issue to the GRC and submitted certified confirmation of compliance to the Executive Director within the extended time frame to comply.
2. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.⁴**
3. The Custodian must disclose all other portions of the requested e-mails to the Complainant (i.e. sender, recipients, date, time, subject, and salutations where applicable). To these portions of the requested e-mails, the Custodian has unlawfully denied access. *See Ray v. Freedom Academy Charter School (Camden)*, GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010).
4. **The Custodian must comply with conclusion Nos. 2 and 3 within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.**
5. 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.

Procedural History:

On November 20, 2013, the Council distributed its Interim Order to all parties. On November 25, 2013, the Custodian responded to the Council's Interim Order certifying that in accordance with the Council's Order, he has provided the Complainant the records determined to be disclosable by the Council after an *in camera* review. The Custodian affirmed that he redacted

⁴ Satisfactory compliance requires that the Custodian deliver the records 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.

the records in accordance with the Council's "*In Camera Examination*" table and sent the records to the Complainant via certified mail on November 25, 2013.

On December 31, 2013, the Council sought additional information from the Custodian. Specifically, the Council noted that e-mail No. 5 did not appear to be redacted in accordance with the Council's findings requiring redaction of only one sentence where the Custodian redacted both sentences. Further, the Council noted that it was unclear from the Custodian's certification whether all other records were disclosed in accordance with conclusion No. 3 of the Council's Order. The Council thus requested that the Custodian provide a legal certification by January 8, 2014, responding to the following:

1. Redact and again provide e-mail No. 5 to the Complainant in accordance with the Council's "*In Camera Examination*" table.
2. Certify to whether all 37 e-mails were provided to the Complainant in accordance with conclusion No. 3 of the Council's Interim Order.

On the same day, the Complainant noted that he requested electronic copies of the records via e-mail and not hardcopies via certified mail.

On January 7, 2014, the Council responded noting that the Council's decisions and case file did not reflect a method of delivery, but that it would alert Custodian's Counsel to the Complainant's preference. On the same day, Custodian's Counsel acknowledged the Complainant's requested method of delivery and sought an extension until January 10, 2014 to respond to the request for additional information, which the GRC granted.

On January 9, 2014, the Custodian responded to the Council's request for additional information. The Custodian certified that he redacted e-mail No. 5 in accordance with the Council's Order and further redacted all other records in accordance with conclusion No. 3. The Custodian affirmed that he provided all records required to be disclosed to the Complainant via both e-mail and certified mail.

Analysis

Compliance

At its November 19, 2013 meeting, the Council ordered the Custodian to comply with its *in camera* findings and to provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On November 20, 2013, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on November 27, 2013.

On November 25, 2013, the third (3rd) business day after receipt of the Council's Order, the Custodian disclosed to the Complainant all e-mails determined to have been unlawfully denied and simultaneously provided certified confirmation of compliance. Thereafter, the GRC required the Custodian to again redact e-mail No. 5 and provide a certification as to whether he

also provided the remaining e-mails in accordance with conclusion No. 3. The Custodian provided his supplemental compliance and certified confirmation of same within the extended time frame to do so. However, notwithstanding the Custodian's timely submissions, he failed to properly redact e-mail No. 5 and failed to initially provide all other e-mails in accordance with conclusion No. 3, resulting in only partial compliance.

Therefore, the Custodian partially complied with the Council's November 19, 2013 Interim Order because although he timely responded and submitted certified confirmation of compliance, he improperly redacted e-mail No. 5 and further failed to provide all 37 records in accordance with conclusion No. 3. However, the Custodian timely responded to the GRC's request for additional information rectifying these deficiencies.

Knowing & Willful

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 “... [i]f 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 (id.; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

Although the Custodian unlawfully denied access to nine (9) e-mails in part or whole and further only partially complied with the Council's November 19, 2013 Interim Order, the Custodian fully complied with the Council's May 28, 2013 Interim Order and further rectified his deficient response to the Council's November 19, 2013 Interim Order within the extended time frame to do so. 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, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian partially complied with the Council's November 19, 2013 Interim Order because although he timely responded and submitted certified confirmation of compliance, he improperly redacted e-mail No. 5 and further failed to provide all 37 records in accordance with conclusion No. 3. However, the Custodian timely responded to the GRC's request for additional information rectifying these deficiencies.
2. Although the Custodian unlawfully denied access to nine (9) e-mails in part or whole and further only partially complied with the Council's November 19, 2013 Interim Order, the Custodian fully complied with the Council's May 28, 2013 Interim Order and further rectified his deficient response to the Council's November 19, 2013 Interim Order within the extended time frame to do so. 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, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: Frank F. Caruso
Senior Case Manager

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

January 21, 2014



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

November 19, 2013 Government Records Council Meeting

David Roundtree
Complainant

Complaint No. 2011-266

v.

NJ Department of State, Division
Of Elections
Custodian of Record

At the November 19, 2013 public meeting, the Government Records Council (“Council”) considered the November 12, 2013 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 complied with the Council’s May 28, 2013 Interim Order because he submitted nine (9) copies of the records at issue to the GRC and submitted certified confirmation of compliance to the Executive Director within the extended time frame to comply.
2. **On the basis of the Council’s determination in this matter, the Custodian shall comply with the Council’s Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.¹**
3. The Custodian must disclose all other portions of the requested e-mails to the Complainant (i.e. sender, recipients, date, time, subject, and salutations where applicable). To these portions of the requested e-mails, the Custodian has unlawfully denied access. *See Ray v. Freedom Academy Charter School (Camden)*, GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010).
4. **The Custodian must comply with conclusion Nos. 2 and 3 within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.**

¹ Satisfactory compliance requires that the Custodian deliver the records 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.

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

Interim Order Rendered by the
Government Records Council
On The 19th Day of November, 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: November 20, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
November 19, 2013 Council Meeting**

**David Roundtree¹
Complainant**

GRC Complaint No. 2011-266

v.

**New Jersey Department of State,
Division of Elections²
Custodial Agency**

Records Relevant to Complaint: Copies of the following:³

1. All e-mails that were sent to and from all parties, in regards to matter concerning James Whelan or Jim Whelan or inter-office documents pertaining to this matter concerning the name above.
2. All memoranda and e-mails involving discussions about the Complainant.
3. Details of any conversation between the Custodian and Custodian's Counsel regarding the Complainant.
4. Any records provided by Custodian's Counsel in regards to why James Whelan failed to follow the Division of Elections' ("Division") requirements regarding filing papers incorrectly.
5. James Whelan and Jim Whelan's voting record, signature and voter card.
6. Electronic copy of the policy and procedures rules and regulations manual.
7. New Jersey and United States Statutes regarding what signature on an oath must be notarized.
8. Any documentation in which Custodian's Counsel stated that James Whelan could use the name of Jim Whelan on an Oath of Acceptance and what law supports this decision.
9. What steps were taken in the Complainant's complaint with the Division regarding the forgery and the fraudulent signature submitted to the Division pertaining to Jim Whelan.
10. Is altering an Oath of Acceptance fraud?

Custodian of Record: Robert F. Giles
Request Received by Custodian: May 18, 2011
Response Made by Custodian: May 24, 2011
GRC Complaint Received: August 10, 2011

¹ No legal representation listed on record.

² Represented by Deputy Attorney General George Cohen.

³ The Complainant submits an e-mail seeking these records. The Complainant's request was not on an OPRA request form, nor did the e-mail mention OPRA. However, the Custodian responded to the Complainant's request as if it were a valid OPRA request; thus, the Council will treat it as such.

Records Submitted for *In Camera* Examination: 37 unredacted e-mail chains.

Background

May 28, 2013 Council Meeting:

At its May 28, 2013 public meeting, the Council considered the May 21, 2013 Reconsideration Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Council should decline to reconsider this complaint on the basis of “mistake” because the Council’s Interim Order was based on the evidence submitted. The Custodian should have certified in the Statement of Information which e-mails and records provided were responsive to the Complainant’s OPRA request. Moreover, at the time of the Statement of Information, the Custodian failed to make any arguments as to why he denied the Complainant access to the requested records. Thus, the Council considered the significance of probative, competent evidence on the record at that time and did not act arbitrarily and capriciously when referring the complaint to OAL. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D’Atria v. D’Atria, 242 N.J. Super. 392 (Ch. Div. 1990); and In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).
2. The GRC must conduct an *in camera* review of the identified eighteen (18) e-mails denied as attorney-client privilege material and the nineteen (19) responsive e-mails denied as containing advisory, consultative, or deliberative material to determine the validity of the Custodian’s assertion that these e-mails contain advisory, consultative, or deliberative and attorney-client privilege material. See Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005) and N.J.S.A. 47:1A-1.1.
3. **The Custodian must deliver⁴ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see #2 above), a document or redaction index⁵, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,⁶ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council’s Interim Order.**

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

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

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

4. The Custodian properly denied the Complainant access to the requested signature and signature card because the law provides that signatures are not accessible absent a court order. *See* N.J.S.A. 47:1A-9(a) and N.J.S.A. 19:31-18.
5. The Complainant's OPRA request Items No. 6, No. 7, No. 9, and No. 10 are overly broad because they fail to identify specific government records sought, and are thus invalid under OPRA. *See* MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). *See* LaMantia v. Jamesburg Public Library (Middlesex), GRC Complaint No. 2008-140 (February 2009).
6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On May 29, 2013, The Council distributed its Interim Order to all parties on. On June 5, 2013, the Custodian's Counsel sought an extension of time until June 7, 2013 to submit compliance of the Council's Order, which the GRC granted.

On June 7, 2013, the Custodian responded to the Council's Interim Order providing nine (9) copies of the records requested for an *in camera* review, a document index and certification of the Custodian. The Custodian contends that the 37 records are inter-agency or intra-agency advisory, consultative or deliberative ("ACD") material and attorney-client privileged communications exempt from access under OPRA.

Analysis

Compliance

On May 28, 2013, the Council ordered the Custodian to submit nine (9) copies of the 37 e-mails at issue for an *in camera* review and further to provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On May 29, 2013, the Council distributed its Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. The Custodian received the Council's Order on May 29, 2013; thus, June 5, 2013 was the last day to comply. On June 5, 2013, the Custodian's Counsel sought an extension until June 7, 2013 to respond. On June 7, 2013, the last day to comply, the Custodian responded submitting to the GRC nine (9) copies of the records and certified confirmation of compliance.

Therefore, the Custodian complied with the Council's May 28, 2013 Interim Order because he submitted nine (9) copies of the records at issue to the GRC and submitted certified confirmation of compliance to the Executive Director within the extended time frame to comply.

Unlawful Denial of Access

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. N.J.S.A. 47:1A-6.

The Custodian contended that access to 18 e-mails was denied under the attorney-client privilege exemption. N.J.S.A. 47:1A-1.1. The Custodian further contended that access to 19 e-mails was denied under the “... inter-agency, intra agency advisory, consultative or deliberative...” (“ACD”) material exemption. Id.

The GRC conducted an *in camera* examination on the submitted record. The results of this examination are set forth in the following table:

Record Number	Record Name/Date	Description of Record	Custodian’s Explanation/ Citation for Non-disclosure	Findings of the <i>In Camera</i> Examination⁷
1.	E-mail from the Custodian to Deputy Attorney General (“DAG”) Donna Kelly dated April 14, 2011 (10:48 a.m.)	Strategy discussion between Custodian to DAG	Attorney-client privilege. <u>N.J.S.A.</u> 47:1A-1.1.	The Custodian lawfully denied access to the discussion in the e-mail. <u>N.J.S.A.</u> 47:1A-1.1.
2.	E-mail from the Custodian to DAG Kelly dated April 15, 2011 (7:50 a.m.)	Custodian forwards an e-mail chain between the Complainant and Custodian.	Attorney-client privilege. <u>N.J.S.A.</u> 47:1A-1.1.	There is no message in the e-mail; rather, the Custodian simply forwarded an e-mail chain from the Complainant to

⁷ **Unless expressly identified for redaction, everything in the record shall be disclosed.** For purposes of identifying redactions, unless otherwise noted a paragraph/new paragraph begins whenever there is an indentation and/or a skipped space(s). The paragraphs are to be counted starting with the first whole paragraph in each record and continuing sequentially through the end of the record. If a record is subdivided with topic headings, renumbering of paragraphs will commence under each new topic heading. Sentences are to be counted in sequential order throughout each paragraph in each record. Each new paragraph will begin with a new sentence number. If only a portion of a sentence is to be redacted, the word in the sentence which the redaction follows or precedes, as the case may be, will be identified and set off in quotation marks. If there is any question as to the location and/or extent of the redaction, the GRC should be contacted for clarification before the record is redacted. The GRC recommends the redactor make a paper copy of the original record and manually "black out" the information on the copy with a dark colored marker, then provide a copy of the blacked-out record to the requester.

				DAG Kelly. The Custodian has thus unlawfully denied access to this e-mail.
3.	E-mail from DAG Kelly to the Custodian dated April 15, 2011 (9:19 a.m.)	DAG provides advice	Attorney-client privilege. <u>N.J.S.A. 47:1A-1.1.</u>	The Custodian lawfully denied access to the discussion in the e-mail. <u>N.J.S.A. 47:1A-1.1.</u>
4.	E-mail from the Custodian to DAG Kelly dated April 15, 2011 (9:51 a.m.) *Note: Record No. 3 included in chain.	Custodian seeking DAG on an issue	Attorney-client privilege. <u>N.J.S.A. 47:1A-1.1.</u>	The Custodian lawfully denied access to the discussion in the e-mail. <u>N.J.S.A. 47:1A-1.1.</u>
5.	E-mail from DAG Kelly to the Custodian dated April 18, 2011 (10:27 a.m.)	DAG comments and notification of work schedule.	Attorney-client privilege. <u>N.J.S.A. 47:1A-1.1.</u>	The Custodian lawfully denied access to sentence No. 1 of the discussion in the e-mail. <u>N.J.S.A. 47:1A-1.1.</u> However, there is no discussion in the second sentence that implicates attorney client privilege. The Custodian has thus unlawfully denied access to the second sentence in this e-mail.
6.	E-mail from the Custodian to Judy Larkin, Matt McDermott, Kathleen Kisko and DAG Kelly dated April 28, 2011. *Note: Record No. 22 included in chain.	Custodian advises of strategy regarding Complainant.	Attorney-client privilege. <u>N.J.S.A. 47:1A-1.1.</u>	The Custodian lawfully denied access to the discussion in the e-mail. <u>N.J.S.A. 47:1A-1.1.</u>

7.	E-mail from the Custodian to DAG Kelly and Ms. Kisko dated May 4, 2013 (6:18 p.m.)	Custodian discusses strategy regarding Complainant.	Attorney-client privilege. <u>N.J.S.A.</u> 47:1A-1.1.	The Custodian lawfully denied access to the discussion in the e-mail. <u>N.J.S.A.</u> 47:1A-1.1.
8.	E-mail from DAG Kelly to the Custodian dated May 4, 2011 (6:38 p.m.) *Note: Record No. 7 included in chain.	DAG provides advice and strategy.	Attorney-client privilege. <u>N.J.S.A.</u> 47:1A-1.1.	The Custodian lawfully denied access to the discussion in the e-mail. <u>N.J.S.A.</u> 47:1A-1.1.
9.	E-mail from DAG Kelly to the Custodian dated May 5, 2011 (12:23 p.m.)	DAG provides advice and strategy.	Attorney-client privilege. <u>N.J.S.A.</u> 47:1A-1.1.	The Custodian lawfully denied access to the discussion in the e-mail. <u>N.J.S.A.</u> 47:1A-1.1.
10.	E-mail from the Custodian to DAG Kelly dated May 5, 2011 (12:13p.m.) *Note: Record No. 9 included in chain.	Custodian responds to DAG's advice and strategy.	Attorney-client privilege. <u>N.J.S.A.</u> 47:1A-1.1.	The Custodian lawfully denied access to the discussion in the e-mail. <u>N.J.S.A.</u> 47:1A-1.1.
11.	E-mail from DAG Kelly to the Custodian copying Ms. Kisko dated May 5, 2011 (12:39 p.m.)	DAG provides advices and strategy.	Attorney-client privilege. <u>N.J.S.A.</u> 47:1A-1.1.	The Custodian lawfully denied access to the discussion in the e-mail. <u>N.J.S.A.</u> 47:1A-1.1.
12.	E-mail from the Custodian to DAG Kelly dated May 5, 2011 (12:58 p.m.) *Note: Record No. 11 included in chain to which access is lawfully denied. (See above.)	Custodian states "Great. Thanks."	Attorney-client privilege. <u>N.J.S.A.</u> 47:1A-1.1.	There is no discussion in the e-mail that implicates attorney client privilege. The Custodian has thus unlawfully denied access to this e-mail.
13.	E-mail from DAG Kelly to the Custodian copying Ms. Kisko and Donna Barber dated May 5, 2011 (1:24 p.m.)	DAG provides draft response for review and advice on responding to Complainant.	Attorney-client privilege. <u>N.J.S.A.</u> 47:1A-1.1.	The Custodian lawfully denied access to the discussion in the e-mail. <u>N.J.S.A.</u> 47:1A-1.1.

14.	E-mail from DAG Kelly to the Custodian and Lt. Governor Kim Guadagno dated May 10, 2011 (3:05 p.m.)	DAG provides advice and an update on a response to the Complainant.	Attorney-client privilege. <u>N.J.S.A.</u> 47:1A-1.1.	The Custodian lawfully denied access to the discussion in the e-mail. <u>N.J.S.A.</u> 47:1A-1.1.
15.	E-mail from DAG Kelly to Ms. Larkin and Andrew Walko copying Ms. Kisko and the Custodian dated May 10, 2011 (4:15 p.m.)	DAG provides strategy directive to Complainant.	Attorney-client privilege. <u>N.J.S.A.</u> 47:1A-1.1.	The Custodian lawfully denied access to the discussion in the e-mail. <u>N.J.S.A.</u> 47:1A-1.1.
16.	E-mail from DAG Kelly to the Custodian copying Ms. Kisko dated May 11, 2011 (1:15 p.m.)	DAG provides advice and additional comments on draft response as well as strategy.	Attorney-client privilege. <u>N.J.S.A.</u> 47:1A-1.1.	The Custodian lawfully denied access to the discussion in the e-mail. <u>N.J.S.A.</u> 47:1A-1.1.
17.	E-mail from Ms. Kisko to DAG Donna Kelly and Donald Palombi dated May 11, 2011 (12:46 p.m.)	Ms. Kisko addresses strategy of Custodian's response to the Complainant.	Attorney-client privilege. <u>N.J.S.A.</u> 47:1A-1.1.	The Custodian lawfully denied access to the discussion in the e-mail. <u>N.J.S.A.</u> 47:1A-1.1.
18.	E-mail from the Custodian to DAG Kelly and Ms. Kisko dated May 19, 2011 (11:54 a.m.)	Custodian requests advice.	Attorney-client privilege. <u>N.J.S.A.</u> 47:1A-1.1.	The Custodian lawfully denied access to the discussion in the e-mail. <u>N.J.S.A.</u> 47:1A-1.1.
19.	E-mail from Ms. Deryl Nerolich to the Custodian dated April 19, 2011 (9:22 a.m.)	Ms. Nerolich requests direction on handling the Complainant's e-mails.	ACD. <u>N.J.S.A.</u> 47:1A-1.1.	The Custodian lawfully denied access to the discussion in the e-mail. <u>N.J.S.A.</u> 47:1A-1.1.
20.	E-mail from Ms. Larkin to Ms. Kisko, the Custodian, DAG Kelly, and Mr. McDermott dated April 27, 2011 (1:00 p.m.)	Ms. Larkin gives impression of and requests direction on handling Complainant's e-mails.	ACD. <u>N.J.S.A.</u> 47:1A-1.1.	The Custodian lawfully denied access to the discussion in the e-mail. <u>N.J.S.A.</u> 47:1A-1.1.
21.	E-mail from Mr. McDermott to the	Mr. McDermott deliberates the	ACD. <u>N.J.S.A.</u>	The Custodian lawfully denied

	Custodian, DAG Kelly, Ms. Larkin and Ms. Kisko dated April 27, 2011 (1:22 p.m.)	merits of a response to the Complainant.	47:1A-1.1.	access to the discussion in the e-mail. <u>N.J.S.A.</u> 47:1A-1.1.
22.	E-mail from Ms. Larkin to the Custodian, Mr. McDermott, Ms. Kisko and DAG Kelly dated April 28, 2011 (2:24 p.m.)	Ms. Larkin discusses a recent communication with the Complainant.	ACD. <u>N.J.S.A.</u> 47:1A-1.1.	The Custodian lawfully denied access to the discussion in the e-mail. <u>N.J.S.A.</u> 47:1A-1.1.
23.	E-mail from Ms. Larkin to the Custodian, Mr. McDermott, Ms. Kisko and DAG Kelly dated April 28, 2011 (2:26 p.m.) *Note: Record Nos. 6 and 22 included in chain to which access was lawfully denied. (See above.)	Ms. Larkin thanks the Custodian.	ACD. <u>N.J.S.A.</u> 47:1A-1.1.	There is no discussion in the e-mail that can reasonably be considered ACD in nature. The Custodian has thus unlawfully denied access to this e-mail.
24.	E-mail from the Custodian to Ms. Kisko dated May 4, 2011 (6:55 p.m.) *Note: Record Nos. 7 and 8 included in chain.	The Custodian discusses attorney-client privileged communications and deliberates as to the next action he should take.	ACD. <u>N.J.S.A.</u> 47:1A-1.1.	The Custodian lawfully denied access to the discussion in the e-mail. <u>N.J.S.A.</u> 47:1A-1.1.
25.	E-mail from Ms. Kisko to the Custodian dated May 4, 2011 (7:09 p.m.) *Note: Record Nos. 7, 8 and 25 included in chain.	Ms. Kisko deliberates as to the next action the Custodian should take.	ACD. <u>N.J.S.A.</u> 47:1A-1.1.	The Custodian lawfully denied access to the discussion in the e-mail. <u>N.J.S.A.</u> 47:1A-1.1.
26.	E-mail from the Custodian to Ms. Kisko dated May 4, 2011 (7:14 p.m.) *Note: Record Nos. 7, 8, 25 and 26 included in chain.	The Custodian deliberates as to the next action he should take.	ACD. <u>N.J.S.A.</u> 47:1A-1.1.	The Custodian lawfully denied access to the discussion in the e-mail. <u>N.J.S.A.</u> 47:1A-1.1.

27.	E-mail from Ms. Kisko to the Custodian dated May 4, 2011 (7:15 p.m.) *Note: Record Nos. 7, 8, 25, 26 and 27 included in chain to which access was lawfully denied. (See above.)	Ms. Kisko states "Ok."	ACD. <u>N.J.S.A.</u> 47:1A-1.1.	There is no discussion in the e-mail that can reasonably be considered ACD in nature. The Custodian has thus unlawfully denied access to this e-mail.
28.	E-mail from the Custodian to Ms. Kisko dated May 5, 2011 (6:16 a.m.)	Custodian deliberates applicability of a case.	ACD. <u>N.J.S.A.</u> 47:1A-1.1.	The Custodian lawfully denied access to the discussion in the e-mail. <u>N.J.S.A.</u> 47:1A-1.1.
29.	E-mail from Ms. Kisko to the Custodian dated May 5, 2011 (6:26 a.m.) *Note: Record No. 28 included in chain.	Ms. Kisko deliberates as to the Custodian's next action.	ACD. <u>N.J.S.A.</u> 47:1A-1.1.	The Custodian lawfully denied access to the discussion in the e-mail. <u>N.J.S.A.</u> 47:1A-1.1.
30.	E-mail from Ms. Kisko to Ms. Barber, the Custodian and Ms. Larkin dated May 5, 2011 (4:17 p.m.) *Note: An e-mail in the chain that was not submitted as part of the <i>in camera</i> review is included. The GRC will address this e-mail as well.	Ms. Kisko forwards an e-mail from Mr. Walko advising of Mr. Walko's discussion with the Complainant.	ACD. <u>N.J.S.A.</u> 47:1A-1.1.	There is no discussion in the e-mail that can reasonably be considered ACD in nature. The Custodian has thus unlawfully denied access to this e-mail. Regarding Mr. Walko's e-mail, the first two (2) paragraphs are exempt as attorney-client privileged. <u>N.J.S.A.</u> 47:1A-1.1. However, the Custodian must disclose the remainder of the e-mail comprised of the

				Complainant's contact information.
31.	E-mail from Ms. Barber to the Custodian dated May 6, 2011 (2:53 p.m.) *Note: Record No. 30 included in chain to which partial access was lawfully denied. (See above.)	Ms. Barber forwards Mr. Walko's response to the Custodian.	ACD. <u>N.J.S.A.</u> 47:1A-1.1.	There is no discussion in the e-mail that can reasonably be considered ACD in nature. The Custodian has thus unlawfully denied access to this e-mail.
32.	E-mail from the Custodian to Ms. Barber dated May 6, 2011 (2:53 p.m.) *Note: Record Nos. 30 and 31 included in chain. Partial access to Record No. 30 was lawfully denied. (See above.)	Custodian acknowledges receipt of Ms. Barber's forwarded e-mail.	ACD. <u>N.J.S.A.</u> 47:1A-1.1.	There is no discussion in the e-mail that can reasonably be considered ACD in nature. The Custodian has thus unlawfully denied access to this e-mail.
33.	E-mail from Ms. Kisko to the Custodian dated May 10, 2011 (2:59 p.m.) *Note: Two (2) e-mails in the chain that were not submitted as part of the <i>in camera</i> are included. The GRC will address these e-mails as well.	Communication regarding strategy.	ACD. <u>N.J.S.A.</u> 47:1A-1.1.	The Custodian lawfully denied access to the discussion in the e-mail. <u>N.J.S.A.</u> 47:1A-1.1. The two (2) e-mails not submitted as part of the <i>in camera</i> review contain attorney-client privileged discussions exempt from disclosure. <u>N.J.S.A.</u> 47:1A-1.1.
34.	E-mail from Ms. Larkin to Mr. Walko copying DAG Kelly, the Custodian and Ms. Kisko dated May 10, 2011 (4:13 p.m.)	Ms. Larkin deliberates Complainant's issues.	ACD. <u>N.J.S.A.</u> 47:1A-1.1.	The Custodian lawfully denied access to the discussion in the body of the e-mail. <u>N.J.S.A.</u> 47:1A-1.1.
35.	E-mail from Ms. Kisko to Ms. Larkin	Ms. Kisko advises group of possible	ACD. <u>N.J.S.A.</u>	The Custodian lawfully denied

	and Mr. Walko and copying DAG Kelly and the Custodian dated May 10, 2011 (4:18 p.m.) *Note: Record No. 34 included in chain.	plan for handling the Complainant's issues.	47:1A-1.1.	access to the discussion in the e-mail. <u>N.J.S.A. 47:1A-1.1.</u>
36.	E-mail from Ms. Larkin to Ms. Kisko and Mr. Walko and copying DAG Kelly and the Custodian dated May 10, 2011 (4:18 p.m.) *Note: Record Nos. 34 and 35 included in chain to which access was lawfully denied. (See above.)	Ms. Larkin thanks group for update.	ACD. <u>N.J.S.A. 47:1A-1.1.</u>	There is no discussion in the e-mail that can reasonably be considered ACD in nature. The Custodian has thus unlawfully denied access to this e-mail.
37.	E-mail from Ms. Barber to the Custodian dated May 11, 2011 (9:44 a.m.) *Note: Record No. 13 included in chain to which access was lawfully denied. (See above.)	Ms. Barber forwards an e-mail to the Custodian with no additional explanation.	ACD. <u>N.J.S.A. 47:1A-1.1.</u>	There is no discussion in the e-mail and thus no ACD material. The Custodian has thus unlawfully denied access to this e-mail.

Additionally, consistent with N.J.S.A. 47:1A-5(g), if the custodian of a government record asserts that part of a particular record is exempt from public access pursuant to OPRA, the custodian must delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and must promptly permit access to the remainder of the record.

Thus, the Custodian must disclose all other portions of the requested e-mails to the Complainant (i.e. sender, recipients, date, time, subject, and salutations where applicable). As to these portions of the requested e-mails, the Custodian has unlawfully denied access. See Ray v. Freedom Academy Charter School (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010).

Knowing & Willful

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's May 28, 2013 Interim Order because he submitted nine (9) copies of the records at issue to the GRC and submitted certified confirmation of compliance to the Executive Director within the extended time frame to comply.
2. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.**⁸
3. The Custodian must disclose all other portions of the requested e-mails to the Complainant (i.e. sender, recipients, date, time, subject, and salutations where applicable). To these portions of the requested e-mails, the Custodian has unlawfully denied access. *See Ray v. Freedom Academy Charter School (Camden)*, GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010).
4. **The Custodian must comply with conclusion Nos. 2 and 3 within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Senior Case Manager

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

November 12, 2013

⁸ Satisfactory compliance requires that the Custodian deliver the records 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.



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

May 28, 2013 Government Records Council Meeting

David Roundtree
Complainant

Complaint No. 2011-266

v.

New Jersey Department of State,
Division of Elections
Custodian of Record

At the May 28, 2013 public meeting, the Government Records Council (“Council”) considered the May 21, 2013 *Reconsideration* Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Council should decline to reconsider this complaint on the basis of “mistake” because the Council’s Interim Order was based on the evidence submitted. The Custodian should have certified in the Statement of Information which e-mails and records provided were responsive to the Complainant’s OPRA request. Moreover, at the time of the Statement of Information, the Custodian failed to make any arguments as to why he denied the Complainant access to the requested records. Thus, the Council considered the significance of probative, competent evidence on the record at that time and did not act arbitrarily and capriciously when referring the complaint to OAL. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D’Atria v. D’Atria, 242 N.J. Super. 392 (Ch. Div. 1990); and In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).
2. The GRC must conduct an *in camera* review of the identified eighteen (18) e-mails denied as attorney-client privilege material and the nineteen (19) responsive e-mails denied as containing advisory, consultative, or deliberative material to determine the validity of the Custodian’s assertion that these e-mails contain advisory, consultative, or deliberative and attorney-client privilege material. See Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005) and N.J.S.A. 47:1A-1.1.
3. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see #2 above), a document or redaction index², as**

¹ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.



well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,³ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.

4. The Custodian properly denied the Complainant access to the requested signature and signature card because the law provides that signatures are not accessible absent a court order. *See* N.J.S.A. 47:1A-9(a) and N.J.S.A. 19:31-18.
5. The Complainant's OPRA request Items No. 6, No. 7, No. 9, and No. 10 are overly broad because they fail to identify specific government records sought, and are thus invalid under OPRA. *See* MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). *See* LaMantia v. Jamesburg Public Library (Middlesex), GRC Complaint No. 2008-140 (February 2009).
6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 28th Day of May, 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: May 29, 2013

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

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

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***Reconsideration*
Supplemental Findings and Recommendations of the Executive Director
May 28, 2013 Council Meeting**

**David Roundtree¹
Complainant**

GRC Complaint No. 2011-266

v.

**New Jersey Department of State,
Division of Elections²
Custodian of Records**

Records Relevant to Complaint: Copies of the following:³

1. All e-mails that were sent to and from all parties, in regards to matter concerning James Whelan or Jim Whelan or inter-office documents pertaining to this matter concerning the name above.
2. All memoranda and e-mails involving discussions about the Complainant.
3. Details of any conversation between the Custodian and Custodian's Counsel regarding the Complainant.
4. Any records provided by Custodian's Counsel in regards to why James Whelan failed to follow the Division of Elections' ("Division") requirements regarding filing papers incorrectly.
5. James Whelan and Jim Whelan's voting record, signature and voter card.
6. Electronic copy of the policy and procedures rules and regulations manual.
7. New Jersey and United States Statutes regarding what signature on an oath must be notarized.
8. Any documentation in which Custodian's Counsel stated that James Whelan could use the name of Jim Whelan on an Oath of Acceptance and what law supports this decision.
9. What steps were taken in the Complainant's complaint with the Division regarding the forgery and the fraudulent signature submitted to the Division pertaining to Jim Whelan.
10. Is altering an Oath of Acceptance fraud?

Request Made: May 18, 2011

Response Made: May 24, 2011

GRC Complaint Filed: August 10, 2011⁴

¹ No legal representation listed on record.

² Robert F. Giles, Custodian of Records. Represented by Deputy Attorney General George Cohen.

³ The Complainant submits an e-mail seeking these records. The Complainant's request was not on an OPRA request form, nor did the e-mail mention OPRA. However, the Custodian responded to the Complainant's request as if it were a valid OPRA request, thus, the Council will treat it as such.

⁴ The GRC received the Denial of Access Complaint on said date.

Background

March 22, 2013 Meeting:

At its March 22, 2013 public meeting, the Council considered the March 15, 2013 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

“the Custodian failed to make any arguments against the Complainant’s Denial of Access Complaint and instead attached correspondence not relevant to the adjudication of this complaint. Further, based on the inadequate evidence in this matter the GRC is unable to determine whether or not the Custodian unlawfully denied access to the requested records. Therefore, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts. Also, this complaint should be referred to the Office of Administrative Law for a determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances. *See Semprevivo v. Pinelands Regional School District Board of Education*, GRC Complaint No. 2007-135 (Interim Order October 31, 2007).”

The Council distributed its Interim Order to all parties on March 26, 2013.

Motion for Reconsideration:

On April 16, 2013, Custodian’s Counsel filed his motion for reconsideration.⁵ Counsel requests that the Council reconsider its March 15, 2013 Interim Order based on mistake. Counsel states that the Custodian provided the requested information to the Complainant to the extent required under OPRA. Counsel also states that the Custodian’s Statement of Information (“SOI”) failed to adequately categorize which e-mails provided were responsive to the Complainant’s OPRA requests. Counsel also asserts that this may have led to the assumption that the Custodian failed to make any arguments against the Complainant’s Denial of Access Complaint, as cited in the March 22, 2013 Interim Order. Counsel states the Custodian’s SOI provided all the documentation the Complainant requested. Counsel argues that the Complainant seeks records which are exempt under OPRA. Counsel provides the GRC with a document index as required in the SOI. Counsel requests that the GRC grant the Custodian’s motion for reconsideration and dismiss the Complainant’s Denial of Access Complaint.

Furthermore, Counsel provides the following clarification to the Custodian’s SOI. Counsel states that the Custodian provided responsive e-mails to request Items No. 1 through No. 4 and No. 8. Counsel also states that other responsive e-mails were not provided because they contain advisory, consultative or deliberative (“ACD”) material or attorney-client privilege information. Counsel further states that the Custodian provided the voting record and history

⁵ Counsel telephoned the GRC on April 8, 2013, and requested a one week extension to file his motion for reconsideration.

responsive to request Item No. 5, but denied the signature and signature card pursuant to N.J.S.A. 19:31-18. Counsel states that the Custodian directed the Complainant to a NJ State website in response to request Items No. 6 and No. 7. Counsel states that the Custodian informed the Complainant in response to request Item No. 9 that his underlying complaint with the Division of Elections (“Division”) regarding James Whelan was invalid. Lastly, Counsel states that the Custodian denied request Item No. 10 as an invalid OPRA request.

Analysis

Reconsideration

Pursuant to *N.J.A.C.* 5:105-2.10, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. Requests must be in writing, delivered to the Council and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. *N.J.A.C.* 5:105-2.10(a) – (e).

Applicable case law holds that:

“[a] party should not seek reconsideration merely based upon dissatisfaction with a decision.” D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D'Atria, supra, 242 N.J. Super. at 401. ‘Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement.’ *Ibid.*” In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

Here, on April 8, 2013, Custodian’s Counsel, requested a one (1) week extension to file a motion for reconsideration of the March 22, 2013 Order. On April 16, 2013, within the requested extension of time, Custodian’s Counsel filed the request for reconsideration. In support of the request for reconsideration, the Custodian’s Counsel submitted the required document index to demonstrate that the Custodian properly responded to the Complainant’s OPRA request.

As the moving party, Custodian’s Counsel was required to establish either of the necessary criteria set forth above: 1) that the Council's decision is based upon a "palpably

incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. *See Cummings, supra*. Counsel failed to do so. Counsel has also failed to show that the Council acted arbitrarily, capriciously or unreasonably in referring this complaint to OAL. *See D'Atria, supra*. Further, Counsel failed to present any evidence which was not available at the time of the Council's adjudication which would change the substance of the Council's decision. The Council should decline to reconsider this complaint on the basis of "mistake" because the Council's Interim Order was based on the evidence submitted. The Custodian should have certified in the SOI which e-mails and records provided were responsive to the Complainant's OPRA request. Moreover, at the time of the SOI, the Custodian failed to make any arguments as to why he denied the Complainant access to the requested records. Thus, the Council considered the significance of probative, competent evidence on the record at that time and did not act arbitrarily and capriciously when referring the complaint to OAL. *Cummings, supra; D'Atria, supra; Comcast, supra*.

However, notwithstanding the previous analysis on Counsel's request for reconsideration, the Council should abandon its order sending this complaint to the OAL. Counsel submitted sufficient evidence stating identifying which records provided were responsive to the Complainant's OPRA request. Further, Counsel identifies the responsive e-mails to request Items No. 1 through No. 4, and No. 8 which the Custodian denied the Complainant access as ACD and attorney-client privilege. Moreover, the Counsel clarifies why the Custodian denied the Complainant access to the responsive records to request Item No. 5. Therefore, with this information now available, the Council addresses the Complainant's Denial of Access Complaint and the Custodian's Statement of Information.

Request Items No. 1 through No. 4, and No. 8:

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 Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the Complainant appealed a final decision of the GRC⁶ in which the GRC dismissed the complaint by accepting the Custodian's legal conclusion for the denial of access without further review. The court stated that:

"OPRA contemplates the GRC's meaningful review of the basis for an agency's decision to withhold government records...When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers."

The court also stated that:

⁶ Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005).

“[t]he statute also contemplates the GRC’s *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the ‘Open Public Meetings Act,’ N.J.S.A. 10:4-6 to -21, it also provides that the GRC ‘may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.’ N.J.S.A. 47:1A-7f. This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.”

Further, the court stated that:

“[w]e hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal...There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC’s obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7f, which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.”

Custodian’s Counsel asserted in his request for reconsideration that the Custodian provided the Complainant access to responsive e-mails to request Items No. 1 through No. 4 and No. 8.⁷ Counsel also asserted that the remaining e-mails responsive to request Item No. 1 through No. 4 and No. 8 contain ACD material and attorney-client privilege information. Counsel stated that there are eighteen (18) responsive e-mails which contain attorney-client privileged material and nineteen (19) responsive e-mails which contain ACD information.

Therefore, the GRC must conduct an *in camera* review of the identified eighteen (18) e-mails denied as attorney-client privilege material and the nineteen (19) responsive e-mails denied as containing ACD material to determine the validity of the Custodian’s assertion that these e-mails contain ACD and attorney-client privilege material. See Paff, *supra* and N.J.S.A. 47:1A-1.1.

Request Item No. 5:

OPRA provides “[t]he provisions of [OPRA]...shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to...any...statute...” N.J.S.A. 47:1A-9(a).

The Department of State, Division of Elections, statute provides, “[e]xcept when so ordered by a court, the list of registered voters shall not include voter signatures...” N.J.S.A. 19:31-18. The law’s default mode, therefore is that voter signatures and signature cards are not accessible absent a court order.

⁷ Although the Complainant’s request Item No. 1 through No. 4 and No. 8 fail to specifically identify a government record, the request is not invalid under OPRA because the Custodian identified responsive records. See Gannet v. County of Middlesex, 379 N.J. Super. 205 (App. Div. 2005).

The Complainant's request Item No. 5 sought, "James Whelan and Jim Whelan's voting record, signature and voter card." The Custodian responded and provided a copy of the responsive voting card and records history but not his signature or signature card. The Custodian relied on N.J.S.A. 19:31-18.

The Custodian properly denied the Complainant access to the requested signature and signature card because the law provides that signatures are not accessible absent a court order. See N.J.S.A. 47:1A-9(a) and N.J.S.A. 19:31-18.

Request Items No. 6, No. 7, No. 9, and No. 10:

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). As the court noted in invalidating MAG's request under OPRA:

"[m]ost significantly, the request failed to identify with any specificity or particularity the governmental records sought. MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past. Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted." *Id.* 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),⁸ 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."⁹

⁸ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

⁹ 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), NJ Builders, 390 N.J. Super. at 177.

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

The Complainant's request for Items No. 6, No. 7, and No. 9 seeks information rather than an identifiable government record. The Complainant's request for Item No. 10 asks a question rather than specifically identifying a government record. Although the Custodian directed the Complainant to NJ State websites to assist the Complainant in finding the requested information sought, the Complainant still failed to identify government records regarding these requests and thus said requests are improper under OPRA.

The Complainant's OPRA request Items No. 6, No. 7, No. 9, and No. 10 are overly broad because they fail to identify specific government records sought, and are thus invalid under OPRA. MAG, supra and Bent, supra, and New Jersey Builders Association, supra Schuler, supra. See LaMantia v. Jamesburg Public Library (Middlesex), GRC Complaint No. 2008-140 (February 2009).

Knowing & Willful

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that

1. The Council should decline to reconsider this complaint on the basis of "mistake" because the Council's Interim Order was based on the evidence submitted. The Custodian should have certified in the Statement of Information which e-mails and records provided were responsive to the Complainant's OPRA request. Moreover, at the time of the Statement of Information, the Custodian failed to make any arguments as to why he denied the Complainant access to the requested records. Thus, the Council considered the significance of probative, competent evidence on the record at that time and did not act arbitrarily and capriciously when referring the complaint to OAL. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); and In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).
2. The GRC must conduct an *in camera* review of the identified eighteen (18) e-mails denied as attorney-client privilege material and the nineteen (19) responsive e-mails denied as containing advisory, consultative, or deliberative material to determine the validity of the Custodian's assertion that these e-mails contain advisory, consultative, or

deliberative and attorney-client privilege material. See Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005) and N.J.S.A. 47:1A-1.1.

3. **The Custodian must deliver¹⁰ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see #2 above), a document or redaction index¹¹, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,¹² that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
4. The Custodian properly denied the Complainant access to the requested signature and signature card because the law provides that signatures are not accessible absent a court order. See N.J.S.A. 47:1A-9(a) and N.J.S.A. 19:31-18.
5. The Complainant's OPRA request Items No. 6, No. 7, No. 9, and No. 10 are overly broad because they fail to identify specific government records sought, and are thus invalid under OPRA. See MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). See LaMantia v. Jamesburg Public Library (Middlesex), GRC Complaint No. 2008-140 (February 2009).
6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

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

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

May 21, 2013

¹⁰ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

¹¹ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

¹² "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
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TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

March 22, 2013 Government Records Council Meeting

David Roundtree
Complainant

Complaint No. 2011-266

v.

New Jersey Department of State,
Division of Elections
Custodian of Record

At the March 22, 2013 public meeting, the Government Records Council (“Council”) considered the March 15, 2013 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 the Custodian failed to make any arguments against the Complainant’s Denial of Access Complaint and instead attached correspondence not relevant to the adjudication of this complaint. Further, based on the inadequate evidence in this matter the GRC is unable to determine whether or not the Custodian unlawfully denied access to the requested records. Therefore, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts. Also, this complaint should be referred to the Office of Administrative Law for a determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances. *See Semprevivo v. Pinelands Regional School District Board of Education*, GRC Complaint No. 2007-135 (Interim Order October 31, 2007).

Interim Order Rendered by the
Government Records Council
On The 22nd Day of March, 2013

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

Robin Berg Tabakin, Esq., Chair
Government Records Council

Decision Distribution Date: March 26, 2013



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
March 22, 2013 Council Meeting**

**David Roundtree¹
Complainant**

GRC Complaint No. 2011-266

v.

**New Jersey Department of State,
Division of Elections²
Custodian of Records**

Records Relevant to Complaint: Copies of the following:³

1. All e-mails that were sent to and from all parties, in regards to matter concerning James Whelan or Jim Whelan or inter-office documents pertaining to this matter concerning the name above.
2. All memoranda and e-mails involving discussions about the Complainant.
3. Details of any conversation between the Custodian and Custodian's Counsel regarding the Complainant.
4. Any records provided by Custodian's Counsel in regards to why James Whelan failed to follow the Division of Elections' ("Division") requirements regarding filing papers incorrectly.
5. James Whelan and Jim Whelan's voting record, signature and voter card.
6. Electronic copy of the policy and procedures rules and regulations manual.
7. New Jersey and United States Statutes regarding what signature on an oath must be notarized.
8. Any documentation in which Custodian's Counsel stated that James Whelan could use the name of Jim Whelan on an Oath of Acceptance and what law supports this decision.
9. What steps were taken in the Complainant's complaint with the Division regarding the forgery and the fraudulent signature submitted to the Division pertaining to Jim Whelan.
10. Is altering an Oath of Acceptance fraud?

Request Made: May 18, 2011

Response Made: May 24, 2011

GRC Complaint Filed: August 10, 2011⁴

¹ No legal representation listed on record.

² Robert F. Giles, Custodian of Records. No legal representation listed on record.

³ The Complainant submits an e-mail seeking these records. The Complainant's request was not on a OPRA request form, nor did the e-mail mention OPRA. However, the Custodian responded to the Complainant's request as if it were a valid OPRA request, thus the Council will treat it as such.

⁴ The GRC received the Denial of Access Complaint on said date.

Background⁵

The Complainant filed his OPRA request on May 18, 2011. The Complainant seeks the records and information listed above. The Custodian responded to the Complainant's OPRA request via e-mail on May 24, 2011, the fourth (4th) business day following receipt of such request. The Custodian provides copies of e-mails responsive to request Item No. 1 and No. 2 and also states that all e-mails to or from the Attorney General's Office are considered attorney-client privilege and thus exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. The Custodian denied the Complainant access to the records responsive to request Item No. 3, No. 4 and No. 8 as attorney client privileged material which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. The Custodian provides a copy of the voting record and history for James Whelan responsive to request Item No. 5; however, the Custodian denies the Complainant access to James Whelan's signature on his voter card because, except when ordered by a court, the list of registered voters shall not include voter signatures pursuant to N.J.S.A. 19:31-8. The Custodian directs the Complainant to the Division of Elections' ("Division") website for the records responsive to request Item No. 6. The Custodian also directs the Complainant to the Department of Treasury's website for information concerning notaries in response to request Item No. 7. The Custodian states that the Complainant's request for Item No. 9 is invalid; however, the Custodian also states that statute governing petitions can be found at N.J.S.A. 19:23-20. Lastly, in response to request Item No. 10, the Custodian states that the Division does not provide legal interpretations and suggests that the Complainant seek advice from private legal counsel.

The Complainant filed his Denial of Access Complaint with the Government Records Council ("GRC") on August 10, 2011.⁶ The Complainant states that the Custodian only answered part of his questions.

The Custodian filed the Statement of Information ("SOI") on September 8, 2011. The Custodian attaches a copy of the Complainant's OPRA request and the response thereto, including any documentation provided to the Complainant. The Custodian fails to make any arguments against the Denial of Access Complaint. Instead, the Custodian attaches additional correspondence not relevant to the adjudication of this complaint.

Analysis⁷

Unlawful Denial of Access

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

⁵ The parties may have submitted additional correspondence, or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

⁶ The Complainant and the Custodian agreed to mediate this complaint. However this complaint was referred back from mediation to the GRC for adjudication on August 29, 2011.

⁷ There may be other OPRA issues in this matter; however, the Council's analysis is based solely on the claims made in the Complainant's Denial of Access Complaint.

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

In the instant complaint, the Custodian failed to make any arguments against the Complainant’s Denial of Access Complaint and instead attached correspondence not relevant to the adjudication of this complaint. Further, based on the inadequate evidence in this matter, the GRC is unable to determine whether or not the Custodian unlawfully denied access to the requested records. Therefore, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts. Also, this complaint should be referred to the Office of Administrative Law for a determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances. *See Semprevivo v. Pinelands Regional School District Board of Education*, GRC Complaint No. 2007-135 (Interim Order October 31, 2007).

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian failed to make any arguments against the Complainant’s Denial of Access Complaint and instead attached correspondence not relevant to the adjudication of this complaint. Further, based on the inadequate evidence in this matter the GRC is unable to determine whether or not the Custodian unlawfully denied access to the requested records. Therefore, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts. Also, this complaint should be referred to the Office of Administrative Law for a determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances. *See Semprevivo v. Pinelands Regional School District Board of Education*, GRC Complaint No. 2007-135 (Interim Order October 31, 2007).

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Approved By: Karyn Gordon, Esq.
Acting Executive Director

March 15, 2013