



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

January 30, 2015 Government Records Council Meeting

Rebecca Boudwin, Esq.
(On behalf of Borough of Milford Board of Education)
Complainant

Complaint No. 2011-34

v.

NJ Department of Treasury,
Division of Administration
Custodian of Record

At the January 30, 2015 public meeting, the Government Records Council ("Council") considered the January 20, 2015 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 the Council adopt the Honorable Lisa James-Beavers' January 14, 2015 Initial Decision in which she approved the Settlement Agreement signed by the parties or their representatives, ordered the parties to comply with the settlement terms and further determined that these proceedings be concluded.

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 30th Day of January, 2015

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: February 4, 2015



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
January 30, 2015 Council Meeting**

Rebecca Boudwin, Esq.
(on behalf of Borough of Milford Board of Education)¹
Complainant

GRC Complaint No. 2011-34

v.

**New Jersey Department of Treasury,
Division of Administration²**
Custodial Agency

Records Relevant to Complaint:

December 2, 2010 OPRA request: Copy of a list of all property addresses used by the Department of Treasury (“Department”) in its calculation of district income, for purposes of calculating the State Equalization Act for the Borough of Milford (“Borough”) for the years 2006 through 2010.³

January 3, 2011 OPRA request: Copy of a list of all resident tax return addresses that make up the Wealth Summary Aggregate INC 2006: \$27,046,688 figure on the attached State Aid Profile Sheet issued March 11, 2009 by the Division of Finance for 2009 through 2010.

Custodian of Record: Gary Dallet

Request Received by Custodian: December 3, 2010 and January 3, 2010

Response Made by Custodian: December 14, 2010 and January 11, 2011

GRC Complaint Received: February 14, 2011

Background

December 18, 2012 Council Meeting:

At its December 18, 2012 public meeting, the Council considered the October 23, 2012 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

¹ The Complainant is an attorney representing the Borough of Milford Board of Education.

² Represented by Deputy Attorney General Heather Lynn Anderson.

³ The Custodian states that she is not requesting confidential or financial information and any information considered confidential or otherwise protected by the Department of Treasury may be redacted.

[B]ecause the GRC is unable to determine whether the Complainant was provided with copies of all the addresses responsive to her request dated December 2, 2010, this complaint should be referred to the Office of Administrative Law for a hearing to resolve said facts. The Office of Administrative Law should also determine if Ms. O'Hare knowingly and willfully violated OPRA if found to have unlawfully denied access to the requested records. Lastly, the Office of Administrative Law should also determine if the Complainant is a prevailing party and entitled to reasonable prevailing party attorney's fees.

Procedural History:

On December 19, 2012, the Council distributed its Interim Order to all parties. On May 2, 2013, the complaint was transmitted to the Office of Administrative Law ("OAL"). On January 14, 2015, the Honorable Lisa James-Beavers, Administrative Law Judge ("ALJ"), issued an Initial Decision as follows:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representative's signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

Therefore, the ALJ ". . . **CONCLUDE[D]** that the agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. [The ALJ] approve[ed] the settlement and therefore **ORDER[ED]** that the parties comply with the terms of the settlement and that the proceedings in this matter be concluded."

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends that the Council adopt the Honorable Lisa James-Beavers' January 14, 2015 Initial Decision in which she approved the Settlement Agreement signed by the parties or their representatives, ordered the parties to comply with the settlement terms and further determined that these proceedings be concluded.

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

Approved By: Dawn R. SanFilippo, Esq.
Deputy Executive Director

January 20, 2015



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

December 18, 2012 Government Records Council Meeting

Rebecca Boudwin, Esq.
(on behalf of Borough of Milford Board of Education)
Complainant

Complaint No. 2011-34

v.
New Jersey Department of Treasury,
Division of Administration
Custodian of Record

At the December 18, 2012 public meeting, the Government Records Council ("Council") considered the October 23, 2012 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that because the GRC is unable to determine whether the Complainant was provided with copies of all the addresses responsive to her request dated December 2, 2010, this complaint should be referred to the Office of Administrative Law for a hearing to resolve said facts. The Office of Administrative Law should also determine if Ms. O'Hare knowingly and willfully violated OPRA if found to have unlawfully denied access to the requested records. Lastly, the Office of Administrative Law should also determine if the Complainant is a prevailing party and entitled to reasonable prevailing party attorney's fees.

Interim Order Rendered by the
Government Records Council
On The 18th 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 19, 2012



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

Rebecca Boudwin, Esq. **GRC Complaint No. 2011-34**
(on behalf of Borough of Milford Board of Education)¹
Complainant

v.

New Jersey Department of Treasury, Division of Administration²
Custodian of Records

Records Relevant to Complaint:

December 2, 2010: Copy of a list of all property addresses used by the Department of Treasury (“Department”) in its calculation of district income, for purposes of calculating the State Equalization Act for the Borough of Milford (“Borough”) for the years 2006 through 2010.³

January 3, 2011: Copy of a list of all resident tax return addresses that make up the Wealth Summary Aggregate INC 2006: \$27,046,688 figure on the attached State Aid Profile Sheet issued March 11, 2009 by the Division of Finance for 2009 through 2010.

Request Made: December 2, 2010 and January 3, 2011

Response Made: December 14, 2010 and January 11, 2011

Custodian: Gary Dallet

GRC Complaint Filed: February 14, 2011⁴

Background

August 28, 2012

Government Records Council’s (“Council”) Interim Order. At its August 28, 2012 public meeting, the Council considered the August 28, 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, found that:

1. Because N.J.S.A. 47:1A-1 et seq. contains no specific statute of limitations on Denial of Access Complaints filed with the GRC, and because the GRC is therefore without authority to impose a statute of limitations where one does

¹ The Complainant is an attorney representing the Borough of Milford Board of Education.

² Represented by DAG Heather Lynn Anderson, on behalf of the NJ Attorney General.

³ The Custodian states that she is not requesting confidential or financial information and any information considered confidential or otherwise protected by the Department of Treasury may be redacted.

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

not exist, no statute of limitations in OPRA bars the GRC's adjudication of the Complainant's Denial of Access Complaint in the instant matter.

2. Although Ms. O'Hare's response was timely and in writing, she failed to address each of the years listed in the Complainant OPRA request and did not provide a lawful basis for the denial of access to those years, thus, Ms. O'Hare's response was insufficient pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008).
3. Because Ms. O'Hare only provided the Complainant with addresses responsive for the year 2009 only and because there is no evidence in the record that the other addresses provided on March 25, 2011 are responsive to the Complainant's OPRA request dated December 2, 2010, Ms. O'Hare failed to bear her burden of proof that the addresses responsive to the remaining years (2006 through 2008 and 2010) were lawfully denied under OPRA. Thus, the Custodian must disclose all the addresses responsive to the Complainant's OPRA request dated December 2, 2010 or certify that no other records responsive to the Complainant's request exist.
4. **The Custodian shall comply with item #3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁵ to the Executive Director.⁶**
5. Ms. O'Hare did not unlawfully deny access to the Complainant's OPRA request dated January 3, 2011 because the requested records are exempt from disclosure pursuant to the provisions of N.J.S.A. 54:50-8, N.J.S.A. 47:1A-9.a. and N.J.S.A. 47:1A-6. Furthermore, the Complainant failed to show that she is a party who is privileged to secure information under N.J.S.A. 54:50-9 and she failed to show that any exception of N.J.S.A. 54:50-8 applies in the instant matter to permit her access to the requested records.
6. The Council defers analysis of whether Ms. O'Hare and the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

⁵ "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."

⁶ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

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

August 29, 2012

Council's Interim Order distributed to the parties.

September 5, 2012

E-mail from Manager of the Government Records Access Unit, Ms. Barbara O'Hare (Ms. O'Hare) to the Complainant. Ms. O'Hare states that she is writing in response to the Council's Order. Ms. O'Hare provides the Complainant with addresses responsive to the Complainant's first (1st) OPRA request as directed by the Council's Order.

September 6, 2012

Telephone call from Custodian's Counsel to the GRC. Counsel states that Ms. O'Hare provided a copy of the records responsive to the Complainant's OPRA request Item No. 1 pursuant to the Council's Order on September 5, 2011. Counsel requests an extension of time to provide the certification of compliance pursuant to the Council's Order.

September 6, 2012

E-mail from the GRC to Custodian's Counsel. The GRC grants a three (3) business day extension to provide the certification.

September 7, 2012

Ms. O'Hare's response to the Council's Interim Order attaching the following:

- Certified confirmation of compliance
- E-mail from Ms. O'Hare to the Complainant dated September 5, 2012 with attachments.⁷

Ms. O'Hare certifies that she is the Manager for the Department of Treasury, Government Records Access Unit. Ms. O'Hare also certifies that in that capacity she is the State Officer who is assigned to review and respond to OPRA requests. Ms. O'Hare further certifies that the Council's Order required the Department to forward the addresses responsive for the 2006 through 2008 and 2010 tax years within five (5) business days. Ms. O'Hare additionally certifies that she provided the Complainant with copies of the addresses responsive to the Complainant's first (1st) OPRA request via e-mail on September 5, 2012.

September 13, 2012

E-mail from the Complainant to the GRC. The Complainant states that she is in receipt of the Microsoft Excel spreadsheets containing the addresses responsive to the Complainant's request Item No. 1 pursuant to the Council's Order. The Complainant also states that Ms. O'Hare's response is confusing and appears to be inconsistent with the Ms. O'Hare's initial response dated December 14, 2010. The Complainant further

⁷ Ms. O'Hare includes copies of the addresses responsive to the Complainant's first (1st) OPRA request. Rebecca Boudwin, Esq. (on behalf of Milford Board of Education) v. New Jersey Department of Treasury, Division of Administration 2011-34 – Supplemental Findings and Recommendations of the Executive Director 3

states that Council's Order stated "the Custodian must disclose all the addresses responsive to the Complainant's OPRA request dated December 2, 2010." The Complainant additionally states that she is confused by some of the addresses Ms. O'Hare provided because some addresses provided are not located in New Jersey and further are not located in Hunterdon County. The Complainant states that on September 7, 2012 she received a copy of Ms. O'Hare's certification where she certified that she provided the Complainant with copies of the addresses responsive to the Complainant's first (1st) OPRA request.

The Complainant argues that based on the information provided, she has no choice but to conclude that the Department is indicating that they use addresses both outside of Hunterdon County and not even within New Jersey in its calculation of State Equalization Aid for the Borough of Milford. The Complainant asserts that Ms. O'Hare's response does not accurately and appropriately represent the information requested in her first (1st) OPRA request. The Complainant states that on December 14, 2010 she received a list of addresses that indicated it was in response for the year 2009. The Complainant also states that when compared with the addresses with those Ms. O'Hare provided in response to the Council's order, these addresses do not match up. The Complainant asserts that there is a clear discrepancy as to which 2009 report is accurate. Therefore, the Complainant argues that the Department has not complied with the Council's Order.

Analysis

Whether the Custodian complied with the Council's August 28, 2012 Interim Order?

In the Council's August 28, 2012 Order required the Custodian to disclose all the addresses responsive to the Complainant's OPRA request dated December 2, 2010 or certify that no other records responsive to the Complainant's request exist and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁸ to the Executive Director. The Council's Order required the Custodian to comply within five (5) business days from receipt of said Interim Order. In the original complaint Ms. O'Hare only provided the Complainant with addresses responsive to the first (1st) OPRA request for the year 2009 only. In addition there was no evidence in the record that the other addresses provided on March 25, 2011 were responsive to the Complainant's OPRA request dated December 2, 2010.

The evidence of record indicates that Ms. O'Hare e-mailed copies of addresses used by the Department in its calculation of district income for the purposes of calculating State Equalization Aid for the Borough for tax years 2006 through 2010 on September 5, 2012, the fourth (4th) business day following receipt of Council's Order. The evidence of record also indicates that Custodian's Counsel requested an extension to complete the required certification on September 6, 2012, the fifth (5th) business day following receipt of the Council's Order. The GRC granted Counsel a three (3) business

⁸ "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."
Rebecca Boudwin, Esq. (on behalf of Milford Board of Education) v. New Jersey Department of Treasury, Division of Administration 2011-34 – Supplemental Findings and Recommendations of the Executive Director 4

day extension and informed him that the certification was due by September 11, 2012. Ms. O'Hare provided the required certification to the GRC on September 7, 2012. Ms. O'Hare certified that the Complainant's OPRA request dated December 2, 2010 sought "a list of all property addresses used by the Department for the purposes of calculating the State Equalization Aid for the Borough from 2006 through 2010." Ms. O'Hare also certified that she provided the Complainant with nine (9) addresses in her original response dated December 14, 2010. Ms. O'Hare further certified that she believed this was a complete list of all the addresses responsive to the Complainant's OPRA request. Ms. O'Hare additionally certified that the Council issued an Order on August 29, 2012 requiring the Department to provide the Complainant with copies of the addresses responsive to her December 2, 2010 request for 2006 through 2008 and 2010 within five (5) business days. Lastly, Ms. O'Hare certified that she e-mailed the Complainant with copies of the requested addresses from 2006 through 2010.

The Complainant responded to Ms. O'Hare's response to the Council's Order via e-mail on September 13, 2012. The Complainant stated that Ms. O'Hare's response was confusing and appears inconsistent with Ms. O'Hare's initial response dated December 14, 2010. The Complainant also stated that on December 14, 2010, Ms. O'Hare provided a list of addresses that indicated those addresses were responsive for the 2009 tax year. However, the Complainant also stated that the addresses do not match up when compared with the addresses that Ms. O'Hare provided in response to the Council's Order. The Complainant argued that there is a clear discrepancy as to which addresses were used for the State Equalization Aid for 2009.

The GRC reviewed the addresses that Ms. O'Hare provided to the Complainant in her initial response and pursuant to the Council's August 28, 2012 Order. In her original response dated December 14, 2010, Ms. O'Hare provided the Complainant with nine (9) addresses responsive to the Complainant's OPRA request for the year 2009. However, pursuant to the Council's Order on September 7, 2012, Ms. O'Hare provided the Complainant with only six (6) addresses responsive for the year 2009. Further, the addresses provided in Ms. O'Hare's original response are not the same addresses as provided on September 7, 2012 pursuant to the Council's Order. Therefore, the GRC is unable to determine if Ms. O'Hare provided the Complainant with all of the addresses responsive to the Complainant's OPRA request dated December 2, 2010.

Therefore, because the GRC is unable to determine whether the Complainant was provided with copies of all the addresses responsive to her request dated December 2, 2010, this complaint should be referred to the Office of Administrative Law for a hearing to resolve said facts. The Office of Administrative Law should also determine if Ms. O'Hare knowingly and willfully violated OPRA if found to have unlawfully denied access to the requested records. Lastly, the Office of Administrative Law should also determine if the Complainant is a prevailing party and entitled to reasonable prevailing party attorney's fees.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that, because the GRC is unable to determine whether the Complainant was provided with copies of all

the addresses responsive to her request dated December 2, 2010, this complaint should be referred to the Office of Administrative Law for a hearing to resolve said facts. The Office of Administrative Law should also determine if Ms. O'Hare knowingly and willfully violated OPRA if found to have unlawfully denied access to the requested records. Lastly, the Office of Administrative Law should also determine if the Complainant is a prevailing party and entitled to reasonable prevailing party attorney's fees.

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

Approved By: Karyn Gordon, Esq.
Acting Executive Director

October 23, 2012⁹

⁹ This complaint was prepared and scheduled for adjudication at the Council's October 30, 2012 meeting; however, said meeting was cancelled due to Hurricane Sandy. Additionally, the Council's November 27, 2012 was cancelled due to lack of quorum.

Rebecca Boudwin, Esq. (on behalf of Milford Board of Education) v. New Jersey Department of Treasury, Division of Administration 2011-34 – Supplemental Findings and Recommendations of the Executive Director 6



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
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RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

August 28, 2012 Government Records Council Meeting

Rebecca Boudwin, Esq.
(on behalf of Borough of Milford Board of Education)
Complainant

Complaint No. 2011-34

v.

New Jersey Department of Treasury,
Division of Administration
Custodian of Record

At the August 28, 2012 public meeting, the Government Records Council ("Council") considered the August 21, 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. Because N.J.S.A. 47:1A-1 et seq. contains no specific statute of limitations on Denial of Access Complaints filed with the GRC, and because the GRC is therefore without authority to impose a statute of limitations where one does not exist, no statute of limitations in OPRA bars the GRC's adjudication of the Complainant's Denial of Access Complaint in the instant matter.
2. Although Ms. O'Hare's response was timely and in writing, she failed to address each of the years listed in the Complainant OPRA request and did not provide a lawful basis for the denial of access to those years, thus, Ms. O'Hare's response was insufficient pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008).
3. Because Ms. O'Hare only provided the Complainant with addresses responsive for the year 2009 only and because there is no evidence in the record that the other addresses provided on March 25, 2011 are responsive to the Complainant's OPRA request dated December 2, 2010, Ms. O'Hare failed to bear her burden of proof that the addresses responsive to the remaining years (2006 through 2008 and 2010) were lawfully denied under OPRA. Thus, the Custodian must disclose all the addresses responsive to the Complainant's OPRA request dated December 2, 2010 or certify that no other records responsive to the Complainant's request exist.
4. **The Custodian shall comply with item #3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each**



redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹ to the Executive Director.²

5. Ms. O'Hare did not unlawfully deny access to the Complainant's OPRA request dated January 3, 2011 because the requested records are exempt from disclosure pursuant to the provisions of N.J.S.A. 54:50-8, N.J.S.A. 47:1A-9.a. and N.J.S.A. 47:1A-6. Furthermore, the Complainant failed to show that she is a party who is privileged to secure information under N.J.S.A. 54:50-9 and she failed to show that any exception of N.J.S.A. 54:50-8 applies in the instant matter to permit her access to the requested records.
6. The Council defers analysis of whether Ms. O'Hare and 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.
7. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 28th Day of August, 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: August 29, 2012

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

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

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
August 28, 2012 Council Meeting**

Rebecca Boudwin, Esq. **GRC Complaint No. 2011-34**
(on behalf of Borough of Milford Board of Education)¹
Complainant

v.

New Jersey Department of Treasury, Division of Administration²
Custodian of Records

Records Relevant to Complaint:

December 2, 2010: Copy of a list of all property addresses used by the Department of Treasury (“Department”) in its calculation of district income, for purposes of calculating the State Equalization Act for the Borough of Milford (“Borough”) for the years 2006 through 2010.³

January 3, 2011: Copy of a list of all resident tax return addresses that make up the Wealth Summary Aggregate INC 2006: \$27,046,688 figure on the attached State Aid Profile Sheet issued March 11, 2009 by the Division of Finance for 2009 through 2010.

Request Made: December 2, 2010 and January 3, 2011

Response Made: December 14, 2010 and January 11, 2011

Custodian: Gary Dallet

GRC Complaint Filed: February 14, 2011⁴

Background

December 2, 2010

Complainant’s first (1st) Open Public Records Act (“OPRA”) request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form. The Complainant states that her preferred method of delivery is U.S. Mail.

December 14, 2010

Manager of Government Records Access Unit, Ms. Barbara O’Hare’s, (“Ms. O’Hare”), response to the OPRA request dated December 2, 2010. Ms. O’Hare responds in writing, on behalf of the Custodian via letter to the Complainant’s OPRA request on

¹ The Complainant is an attorney representing the Borough of Milford Board of Education.

² Represented by DAG Heather Lynn Anderson, on behalf of the NJ Attorney General.

³ The Custodian states that she is not requesting confidential or financial information and any information considered confidential or otherwise protected by the Department of Treasury may be redacted.

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

the seventh (7th) business day following receipt of such request.⁵ Ms. O'Hare provides the Complainant with nine (9) addresses used by the Division of Taxation ("Division") in the Director's "Table of Equalized Valuation" which is a component in the calculation of the State Equalization Aid for the Borough.

January 3, 2011

Complainant's second (2nd) OPRA request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form. The Complainant states that her preferred method of delivery is U.S. Mail.

January 11, 2011

Ms. O'Hare's response to the OPRA request dated January 3, 2011. Ms. O'Hare responds in writing via letter to the Complainant's OPRA request on the sixth (6th) business day following receipt of such request. Ms. O'Hare states that access to the requested records is denied pursuant to the State Uniform Tax Procedure Law, N.J.S.A. 54:50-8, as all records and files of the Division relating to the administration of the State's tax laws are deemed confidential.

February 14, 2011

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

- Complainant's first (1st) OPRA request dated December 2, 2010
- Letter from Ms. O'Hare to the Complainant dated December 14, 2010
- Complainant's second (2nd) OPRA request dated January 3, 2011
- Letter from Ms. O'Hare to the Complainant dated January 11, 2011.

OPRA Request dated December 2, 2010:

The Complainant states that she filed her first (1st) OPRA request with the Department on December 2, 2010, requesting "a list of all property addresses used by the Department in its calculation of district income, for purposes of calculating State Equalization Act for the Borough for the years 2006 through 2010." The Complainant also states that Ms. O'Hare responded to the Complainant's OPRA request on December 14, 2010 providing access to nine (9) addresses used by the Division in the Director's "Table of Equalized Valuation." The Complainant further states that she was surprised by the few number of addresses provided, considering there are hundreds or thousands of addresses present within the Borough. Lastly, the Complainant states that because the Department provided such few addresses, she filed a second (2nd) OPRA request on January 3, 2011.

OPRA request dated January 3, 2011:

The Complainant states that she filed a second (2nd) OPRA request with the Department on January 3, 2011 requesting "a list of all resident tax return addresses that

⁵ The Custodian certifies in the Statement of Information that the Department of Treasury received the Complainant's OPRA request on December 3, 2010.
Rebecca Boudwin, Esq. (on behalf of Milford Board of Education) v. New Jersey Department of Treasury, Division of Administration 2011-34 – Findings and Recommendations of the Executive Director 2

make up the Wealth Summary Aggregate INC 2006: \$27,046,688 figure on the attached State Aid Profile Sheet issued March 11, 2009 by the Division of Finance for 2009 through 2010.” The Complainant also states that Ms. O’Hare denied access to the requested records on January 11, 2011 via letter because such records are considered confidential pursuant to the Stat Uniform Tax Procedure Law, N.J.S.A. 54:50-8.

The Complainant argues that pursuant to N.J.S.A. 54:50-8(a), records regarding the administration of the State Uniform Tax Procedure Law or of any State tax law shall be considered confidential and privileged except “when the records or files of the facts shown thereby are directly involved in an action or proceeding under the provisions of the State Uniform Tax Procedure Law or of the State tax law affected...” The Complainant also argues that neither the statute or subsequent case law defines what records or information is involved with the “administration” of the tax law. The Complainant further argues that the requested records are needed for the purposes of assessing whether she should file suit and commence such an “action or proceeding” based on whether the Department’s information is accurate. The Complainant states that the State aid allocated to the Borough is unusually low, especially when compared to other similar districts.

The Complainant states that she received nine (9) addresses responsive to her OPRA request dated December 2, 2010, but Ms. O’Hare did not provide access to any records responsive to her request dated January 3, 2011. The Complainant asserts that the Department contradicted itself and took inapposite positions. The Complainant requests the GRC find that the Department violated OPRA, order the Department to provide all the records responsive and order an award of reasonable attorney’s fees against the Department in favor of the Complainant.

The Complainant does not agree to mediate this complaint.

February 22, 2011

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

February 25, 2011

E-mail from Custodian’s Counsel to the GRC. Counsel requests a one (1) week extension to complete the SOI by March 8, 2011.

February 25, 2011

E-mail from the GRC to Custodian’s Counsel. The GRC grants Counsel the requested one (1) week extension to complete the SOI. The GRC informs Counsel that the SOI must be submitted no later than March 8, 2011.

March 4, 2011

E-mail from Custodian’s Counsel to the GRC. Counsel states that the Department has provided additional records responsive to the Complainant’s OPRA request. Counsel also states that the Complainant informed her that the Complainant needed additional time to review these records. Counsel further states that since the parties are in settlement negotiations, the parties jointly request a one (1) week extension to complete the SOI by March 15, 2011.

March 4, 2011

E-mail from the GRC to Custodian's Counsel. The GRC grants Counsel the requested one (1) week extension to complete the SOI. The GRC informs Counsel that the SOI must be submitted no later than March 15, 2011.

March 11, 2011

E-mail from Custodian's Counsel to the GRC. Counsel states that the Complainant has clarified her OPRA request and the Division is in the process of obtaining additional information. Counsel also states that since the parties are in settlement negotiations, the parties jointly request a one (1) week extension to complete the SOI by March 22, 2011.

March 8, 2011

E-mail from the Complainant to Custodian's Counsel. The Complainant clarifies her OPRA request dated January 3, 2011. The Complainant states that her office met with OTT Manager, Matthew Bastardi ("Mr. Bastardi"), regarding the method used for calculating the Borough's district income.⁶ The Complainant states she is seeking address information relating to the school aid ratio calculations.

March 15, 2011

E-mail from the GRC to Custodian's Counsel. The GRC grants Counsel the requested one (1) week extension to complete the SOI. The GRC informs Counsel that the SOI must be submitted no later than March 22, 2011. The GRC states that it will not grant any more extensions to complete the SOI.

March 22, 2011

Custodian's SOI with the following attachments:

- Complainant's first (1st) OPRA request dated December 2, 2010
- Letter from Ms. O'Hare to the Complainant dated December 14, 2010
- Complainant's second (2nd) OPRA request dated January 3, 2011
- Letter from Ms. O'Hare to the Complainant dated January 11, 2011.

The Custodian certifies that his search for the requested records included reviewing information with the Department's Office of Treasury Technology.⁷

OPRA Request dated December 2, 2010:

⁶ The Complainant attaches an e-mail sent from Mr. Bastardi to the Complainant's law office dated July 27, 2010 in which Mr. Bastardi described the procedure used when the Department receives an inquiry regarding district income figures.

⁷ The Custodian did not certify to whether any records responsive to the Complainant's OPRA request were destroyed in accordance with the Records Management Services as is required pursuant to Paff v. NJ Department of Labor, 392 N.J. Super. 334 (App. Div. 2007).

Custodian's Counsel states that the Complainant filed her OPRA request on December 3, 2010 for "a list of all property addresses used by the Department in its calculation of district income, for purposes of calculating State Equalization act for the Borough for the years 2006 through 2010." Counsel also states that the Department forwarded the request to the Division. Counsel further states that the Division believed the Complainant was seeking a list of properties utilized in calculation of the County Equalization Table which is used by the county boards and municipalities to determine the property taxes due and owing by property owners. Counsel additionally states that this information is kept in a ModIV database, which is available to the public. Counsel states that the Department provided the Complainant a list of nine (9) addresses used in calculating the Equalization Table for the 2009 tax year via letter on December 14, 2010.

Counsel states that the Supreme Court of New Jersey has held that requestors who choose to file an action to challenge a Custodian's decision, must do so within forty-five (45) days. Counsel argues that pursuant to N.J.S.A. 47:1A-6, a requestor who is denied access to a government record has forty-five (45) days to either file an action in Superior Court or with the GRC. Counsel states that the Complainant received a response to her OPRA request on December 14, 2010. Counsel argues that the Complainant had until January 28, 2011 to either file a complaint in Superior Court or with the GRC. Counsel states that the Complainant filed her Denial of Access Complaint with the GRC on February 14, 2011. Counsel argues that the Complainant's filing is untimely and must be dismissed.

The Custodian certifies that the Department received an OPRA request from the Complainant on December 3, 2010, requesting "a list of all property addresses used by the Department in its calculation of district income, for purposes of calculating State Equalization act for the Borough for the years 2006 through 2010." The Custodian also certifies that Ms. O'Hare forwarded the Complainant's OPRA request to the Division for review and response because the request sought property tax information. The Custodian further certifies that he believed the Complainant's request sought the list of properties used in calculating the County Equalization Table employed by the county boards and municipalities to determine the property taxes due and owing by property owners. The Custodian additionally certifies that this information is contained in the ModIV database and is public information. The Custodian certifies that he had Ms. O'Hare send the Complainant a list of nine (9) addresses used in calculating the Equalization Table for the 2009 tax year.⁸

OPRA Request dated January 3, 2011:

Counsel states that the Complainant filed a second (2nd) OPRA request on January 3, 2011 for "a copy of a list of all resident tax return addresses that make up the Wealth Summary Aggregate INC 2006: \$27,046,688 figure on the attached State Aid Profile Sheet issued March 11, 2009 by the Division of Finance for 2009 through 2010." Counsel also states that these records responsive included tax return information which is considered confidential pursuant to N.J.S.A. 54:50-8. Counsel further states that the

⁸ There is no evidence in the instant complaint to demonstrate that Ms. O'Hare sent the Complainant a list of addresses used in calculating the Equalization Table for the 2006 through 2008 and 2010 tax years. Rebecca Boudwin, Esq. (on behalf of Milford Board of Education) v. New Jersey Department of Treasury, Division of Administration 2011-34 – Findings and Recommendations of the Executive Director 5

Department denied the Complainant's request via e-mail on January 11, 2011 because the information sought is confidential pursuant to N.J.S.A. 54:50-8.

Counsel states that the Complainant clarified her request via letter to the Department on March 8, 2011. Counsel additionally states that the Complainant sought information relating to the school aid ratio calculations. Counsel states that the Department does not make these calculations nor does the Division receive, maintain or keep on file such records. Counsel also states that the Division provides confidential tax return information to the Department including but not limited to income information, dependent information, and taxpayer addresses. Counsel further states that the Department, Office of Treasury Technology ("OTT") utilizes this confidential tax information to determine estimated total population and total income for a particular township. Counsel additionally states that after OTT geocodes addresses to a specific municipality, the resident occupant numbers and income amount associated with each address within a specific municipality are totaled into estimated total population and estimated total income for that municipality, as well as estimated per capita income and per capita rank for that municipality. Counsel states that only aggregated estimates are provided to the Department of Education ("DOE"), in compliance with N.J.S.A. 54:50-9(b) which allows release of information in a manner that does not disclose a particular tax report or its contents. Counsel also states that although public databases are sometimes used in confirming address locations, the primary source of information is from confidential personal gross income tax returns.

Counsel states that on March 16, 2011 the Division offered to provide the Complainant with the addresses from the ModIV database and the addresses from the census information. Counsel also states that the Division expects to provide that information to the Complainant within the next three (3) days. Counsel argues that notwithstanding attempts to resolve this Denial of Access Complaint, the Division maintains that the Complainant's request was properly denied because the requested records are confidential and not subject to OPRA. Counsel states that N.J.S.A. 47:1A-9.b. provides that "the provisions of this act shall not abrogate or erode any executive or legislative privilege or grant of confidentiality established by...statute...which privilege or grant of confidentiality may duly be claimed to restrict public access...to a government record." Counsel also states that N.J.S.A. 54:50-8(a) states:

"the records and files of the director respecting the administration of the State Uniform Tax Procedure Law or of any State tax law shall be considered confidential and privileged and neither the director nor any employee engaged in the administration thereof or charged with the custody of any such records or files, nor any former officer or employee; nor any person who may have secured information therefrom under subsection d., e., f., g., or p., or any other provision of State law, shall divulge, disclose, use for their own personal advantage, or examine for any reason other than a reason necessitated by the performance of official duties any information obtained from said records or files or from any examination or inspection of the premises or property of any person. Neither the director nor any employee engaged in such administration or charged with the custody of any such records or files shall be required to

produce any of them for the inspection of any person or for use in any action or proceeding except when the records or files or the facts shown thereby are directly involved in an action or proceeding under the provisions of the State Uniform Tax Procedure Law or of the State tax law affected, or where the determination of the action or proceeding will affect the validity or amount of the claim of the State under some State tax law, or in any lawful proceeding for the investigation or any prosecution of any violation of the criminal provisions of the State Uniform Tax Procedure Law or of any State tax law.”

Counsel argues that the Courts have held that N.J.S.A. 54:50-8(a) is deliberate and cannot be expanded. Counsel also argues that personal gross income tax returns are confidential records pursuant to N.J.S.A. 54:50-8. Counsel also argues that information contained on the tax returns, including individual addresses and income information, is entitled to confidentiality. Counsel further argues that none of the exceptions to confidentiality in N.J.S.A. 54:50-9 apply to the Complainant’s request.

Mr. Bastardi certifies that he is assigned to geocode addresses to estimate district population and district income of municipalities for submission to DOE in accordance with N.J.S.A. 18A:7F-45. Mr. Bastardi also certifies that the Division provides confidential tax return information to OTT pursuant to N.J.S.A. 18A:7F-45, including taxpayer names, addresses, dependent information and income stream information. Mr. Bastardi further certifies that in order to geocode or allocate an address to a specific municipality, the addresses are matched to the appropriate New Jersey property tax database (ModIV) address information. Mr. Bastardi additionally certifies that the ModIV is a database listing all real property in the state by municipality and each address is uniquely associated with a municipality in the ModIV database. Mr. Bastardi certifies that if any addresses are not matched in the ModIV database, such addresses are matched to the Census Street directory. Mr. Bastardi also certifies that after the addresses are geocoded to a specific municipality by the foregoing verification process, the resident occupant numbers and income amount associated with each address within a specific municipality are totaled into estimated total population and estimated total income for that municipality, as well as estimated per capita income and per capita rank for that municipality; 2) only aggregated estimates are provided to DOE in compliance with N.J.S.A. 54:50-9(b) that allows release of information in a manner that does not disclose a particular tax report or its contents. Mr. Bastardi further certifies that he followed these procedures in compiling the aggregated estimates of population and income to DOE for the calendar years 2006 through 2010. Lastly, Mr. Bastardi certifies that the Census Street directory for calendar year 2006 was utilized to match addresses to a specific municipality for the 2009 and 2010 calendar years and for year 2000 was utilized to match addresses to a specific municipality for the years 2006 through 2008.

The Custodian certifies that the Department received a second (2nd) OPRA request from the Complainant on January 3, 2011 requesting “a list of all resident tax return addresses that make up the Wealth Summary Aggregate INC 2006: \$27,046,688 figure on the attached State Aid Profile Sheet issued March 11, 2009 by the Division of Finance for 2009 through 2010.” The Custodian also certifies that Ms. O’Hare forwarded the Complainant’s request to the Division for review and response because the

Complainant requested tax information. The Custodian further certifies that the Complainant requested tax return information which is considered confidential pursuant to N.J.S.A. 54:50-8 and thus is exempt from disclosure under OPRA. The Custodian additionally certifies that the Complainant filed her Denial of Access Complaint on February 14, 2011. The Custodian certifies that he received a letter from the Complainant on March 8, 2011 clarifying her OPRA request.⁹ The Custodian also certifies that it was not until he received that letter that he understood that the Complainant was seeking address information relating to the school aid ratio calculations. The Custodian further certifies that the Division does not make these calculations and does not receive maintain or keep on file such records.

The Custodian certifies that the Division provides confidential tax return information to the Department as required by law including income information, dependent information and addresses. The Custodian also certifies that OTT utilizes that confidential tax information to determine an estimate of the total population and total income for a particular municipality. The Custodian further certifies that OTT submits these two (2) numbers to DOE. The Custodian additionally certifies that the Division offered to assist the Department to provide the Complainant with non-confidential publicly available information, including the addresses from the ModIV database and the Census Street directory. Lastly, the Custodian certifies that OTT will provide that information to the Complainant no later than March 25, 2011.

March 25, 2011

Letter from the Custodian to the Complainant. The Custodian provides the ModIV residential information for the years 2004 through 2010 and the Census Street Directory for the years 2000 and 2006 in response to the Complainant's request dated January 3, 2011.

April 6, 2011

The Complainant's response to the Custodian's SOI. The Complainant states that her Denial of Access Complaint regarding her OPRA request dated December 2, 2010 was timely filed with the GRC. The Complainant also states that there is no statute of limitations when filing a complaint with the GRC and the forty-five (45) day statute of limitations only applies to actions brought to Superior Court. The Complainant also states that the Borough has attempted to reach an amicable solution for this complaint. The Complainant further states that the Borough has been stified in their attempts to obtain the information requested. The Complainant additionally states that the Borough's purpose in seeking these records from the Department was to confirm that the calculation of the district's income was accurate.

The Complainant responds to the Custodian's argument that the requested records are confidential and states that the Borough is not seeking any confidential information. The Complainant additionally states that the Board of Education ("BOE") has no desire to investigate whether Borough residents are filing tax returns, rather, the information requested from the Department is an appeal from one government entity to another for assistance in this matter. The Complainant states that she received from the Department

⁹ The Custodian does not include a copy of this letter along with his SOI.

the ModIV residential information for the years 2004 through 2010 and the Census Street directory information for the years 2000 and 2006 on March 25, 2011. The Complainant also states that the information received is nothing new; the information from the ModIV database and the Census Street directory is public information that was previously obtained by the BOE. The Complainant further states that the Department indicated that the BOE could essentially compare data from the ModIV database and the Census Street directory and have a good estimate as to what addresses were used in the calculation of the district income figure provided to DOE.¹⁰ The Complainant additionally states that the BOE requested the final document given to DOE whereby the address comparison was already completed, however, the Department informed the BOE that this record was also confidential. The Complainant argues that the Department's position is inconsistent.

Analysis

Is there a forty-five (45) day statute of limitations for filing a Denial of Access Complaint with the GRC?

The Custodian's Counsel asserted in the SOI that the Complainant did not timely file her Denial of Access Complaint regarding her OPRA request dated December 2, 2010. Counsel states that the Complainant received a response to her OPRA request on December 14, 2010. Counsel argues that the Complainant had until January 28, 2011 to either file a complaint in Superior Court or with the GRC. Counsel states that the Complainant filed her Denial of Access Complaint with the GRC on February 14, 2011. Counsel asserted that the Supreme Court of New Jersey has held that requestors who choose to file an action to challenge a Custodian's action must do so within forty-five (45) days. Conversely, the Complainant asserted that there is no statute of limitations when filing a complaint with the GRC and the forty-five(45) day statute of limitations only applies to actions brought to Superior Court.

In Mason v. City of Hoboken, 196 N.J. 51 (2008), the Supreme Court determined that the appropriate statute of limitations for filing a denial of access complaint *in Superior Court* was 45 days from the date of the Custodian's denial of access. The Court noted that this statute of limitations was consistent with the limitations period in actions in lieu of prerogative writs. *Id.* The Court noted that "the former Right to Know Law specifically directed that litigants headed to Superior Court should proceed via an action in lieu of prerogative writs. *N.J.S.A. 47:1A-4* (repealed 2002). That language does not appear in OPRA. *See N.J.S.A. 47:1A-6.*" *Id.*

The Court further noted that

"The Legislature plainly stated that requestors denied access to public records may file an action in Superior Court or a complaint before the GRC. N.J.S.A. 47:1A-6. Those matters "shall proceed in a summary or expedited manner." *Ibid.* Beyond that, the Legislature specifically deferred to the Supreme Court to adopt court rules "necessary to effectuate the purposes of this act." N.J.S.A. 47:1A-12. The Legislature's action was

¹⁰ The Complainant does not assert that she requested this record through OPRA.
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consistent with our Constitution, which vests this Court with the authority to create procedural rules *for court practices*. See N.J. Const. art. VI, § 2, P 3; Winberry v. Salisbury, 5 N.J. 240, 255, 74 A.2d 406 (1950).” 196 N.J. 68 [Emphasis added].

The Court therefore held that:

“requestors who choose to file an action *in Superior Court* to challenge the decision of an OPRA custodian must do so within 45 days...” *Id.* at 70. (emphasis added.)

Thus, the holding of Mason is limited to Denial of Access Complaints filed in the Superior Court of New Jersey.

The New Jersey Legislature is empowered to delegate to an administrative agency the authority to promulgate rules and regulations interpreting and implementing a statute. An appellate court will defer to an agency's interpretation of a statute unless it is plainly unreasonable. The presumption of validity, however, is not without limits. If an agency's statutory interpretation is contrary to the statutory language, or if the agency's interpretation undermines the Legislature's intent, no deference is required. An appellate court's deference does not go so far as to permit an administrative agency under the guise of an administrative interpretation to give a statute any greater effect than is permitted by the statutory language. See, Reilly v. AAA Mid-Atlantic Ins. Co. of New Jersey, 194 N.J. 474 (2008).

The Open Public Records Act, N.J.S.A. 47:1A-1 et seq., contains no statute of limitations on Denial of Access Complaints filed with the GRC. The GRC is therefore without authority to impose a statute of limitations where one does not exist. Thus, no statute of limitations in OPRA bars the GRC's adjudication of the Complainant's denial of access complaint in the instant matter.

Because N.J.S.A. 47:1A-1 et seq. contains no specific statute of limitations on Denial of Access Complaints filed with the GRC, and because the GRC is therefore without authority to impose a statute of limitations where one does not exist, no statute of limitations in OPRA bars the GRC's adjudication of the Complainant's Denial of Access Complaint in the instant matter.

Whether Ms. O'Hare lawfully denied access to the addresses responsive to the Complainant's OPRA request dated December 2, 2010?

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:

“[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 ...*” (Emphasis added.) N.J.S.A. 47:1A-5.i.

In the instant complaint, the Complainant filed an OPRA request on December 2, 2010 seeking “a copy of a list of all property addresses used by the Department in its calculation of district income, for the purposes of calculating the State Equalization Act for the Borough for the years 2006 through 2010.” Ms. O’Hare responded to the Complainant’s OPRA request via letter on the seventh (7th) business day following receipt of such request. Ms. O’Hare provided the Complainant with nine (9) addresses used by the Division in the Director’s “Table of Equalized Valuation” which is a component in the calculation of the State Equalization Aid for the Borough. The Custodian certified in the SOI that these nine (9) addresses were used in calculating the Equalization Table for the 2009 tax year. Ms. O’Hare failed to address the remaining years listed in the Complainant’s OPRA request.

In Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008), the Complainant’s Counsel asserted that the Custodian violated OPRA by failing to respond to each of the Complainant’s request items individually within seven (7) business days. The GRC examined how the facts in Paff applied to its prior holding in O’Shea v. Township of West Milford, GRC Complaint No. 2004-17

(April 2005) (finding that the Custodian's initial response stating that the Complainant's request was a duplicate of a previous request was legally insufficient because the Custodian has a duty to answer each request item individually). The Council reasoned that, "[b]ased on OPRA and the GRC's holding in O'Shea, a custodian is vested with the responsibility to respond to each individual request item within seven (7) business days after receipt of such request." The GRC ultimately held that:

"[a]lthough the Custodian responded in writing to the Complainant's August 28, 2007 OPRA request within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i., the Custodian's response was legally insufficient because he failed to respond to each request item individually. Therefore, the Custodian has violated N.J.S.A. 47:1A-5.g." *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-166 (April 2009) and Kulig v. Cumberland County Board of Chosen Freeholders, GRC Complaint No. 2008-263 (November 2009).

Although Ms. O'Hare's response was timely and in writing, she failed to address each of the years listed in the Complainant OPRA request and did not provide a lawful basis for the denial of access to those years, thus, Ms. O'Hare's response was insufficient pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008).

The Complainant stated in her Denial of Access Complaint that she was surprised the few addresses Ms. O'Hare provided, considering there are hundreds or thousands of addresses present within the Borough. The Custodian did not certify in the SOI that the addresses provided are the only addresses in the Department's possession. Further, Ms. O'Hare only provided the Complainant with addresses responsive for the year 2009 and did not address the remaining years. However, the Custodian provided the Complainant with ModIV residential information for the years 2004 through 2010 and the Census Street Directory for the years 2000 and 2006 in response to the Complainant's OPRA request dated January 3, 2011. Yet, there is no evidence in the record that these addresses are the records responsive to the Complainant's OPRA request dated December 2, 2010.

The Complainant's December 2, 2010 request sought "a copy of a list of all property addresses used by the Department in its calculation of district income, for the purposes of calculating the State Equalization Act for the Borough for the years 2006 through 2010." A request for addresses does not a specifically identifiable government record; rather it is a request for information. However, the Complainant requested a list of all property addresses that the Department used to calculate the district income. Ms. O'Hare identified a responsive government record and provided the Complainant with a list of addresses for the year 2009, but failed to provide the Complainant with a list of addresses for the remaining years. *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 of Affordable Housing, 390 N.J. Super. 166 (App.

Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009)

Therefore, because Ms. O’Hare only provided the Complainant with addresses responsive for the year 2009 only and because there is no evidence in the record that the other addresses provided on March 25, 2011 are responsive to the Complainant’s OPRA request dated December 2, 2010, Ms. O’Hare failed to bear her burden of proof that the addresses responsive to the remaining years (2006 through 2008 and 2010) were lawfully denied under OPRA. Thus, the Custodian must disclose all the addresses responsive to the Complainant’s OPRA request dated December 2, 2010 or certify that no other records responsive to the Complainant’s request exist.

Whether Ms. O’Hare lawfully denied the Complainant access to the resident tax return addresses responsive to the Complainant’s OPRA request dated January 3, 2011?

OPRA provides:

“The provisions of this act...shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to...any other statute...” N.J.S.A. 47:1A-9.a.

The State Uniform Tax Procedure Law states:

“[t]he records and files of the director respecting the administration of the State Uniform Tax Procedure Law or of any State tax law shall be considered confidential and privileged...and neither the director nor any employee nor any person who may have secured information therefrom under subsection d., e., f., g. or p. of N.J.S.A. 54:50-9...shall be required to produce any of them for the inspection of any person or for use in any action or proceeding except when the records or files...are directly involved in an action...under the provisions of the State Uniform Tax Procedure Law or...State tax law...or where the determination of the action...will affect the validity or amount of the claim of the State under...tax law, or in any lawful proceeding for the investigation and prosecution of any violation of the criminal provisions of the State Uniform Tax Procedure Law or of any State tax law.” N.J.S.A. 54:50-8(a).

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

The Complainant filed her second (2nd) OPRA request on January 3, 2011 seeking “a copy of a list of all resident tax return addresses that make up the Wealth Summary

Aggregate INC 2006: \$27,046.688 figure on the attached State Aid Profile Sheet issued March 11, 2009 by the Division of Finance for 2009 through 2010.” Ms. O’Hare timely responded via letter to the Complainant’s request denying the records because such records were exempt from disclosure because all records and files of the Division relating to the administration of the State’s tax laws are deemed confidential pursuant to the State Uniform Tax Procedure Law, N.J.S.A. 54:50-8.

The Complainant argued in her Denial of Access Complaint that pursuant to N.J.S.A. 54:50-8(a), record regarding the administration of the State Uniform Tax Procedure Law or of any State tax law shall be considered confidential except “when the records or files of the facts shown thereby are directly involved in an action or proceeding under the provisions of the State Uniform Tax Procedure Law or of the State tax law affected...” The Complainant also argued that the requested records are needed for the purposes of assessing whether she should file suit on behalf of the Borough and commence such an “action or proceeding” based on whether the Department’s information is accurate because the State aid allocated to the Borough’s district was unusually low. Conversely, Custodian’s Counsel argued in the SOI that N.J.S.A. 54:50-8 is deliberate and cannot be expanded. Counsel also argued that personal gross income tax returns are considered confidential, including the individual addresses and income information. Lastly, Counsel argued that none of the exceptions to confidentiality listed in N.J.S.A. 54:50-9.

Pursuant to N.J.S.A. 47:1A-9.a., the statutory exemptions from disclosure of N.J.S.A. 54:50-8 are not abrogated by OPRA. Therefore, short of any applicable exception to that statute, that statutory exemption was properly asserted by the Custodian to deny access to the requested records.

The tax return addresses requested by the Complainant are exempt from disclosure under OPRA as a matter of law. The Custodian certified that the records responsive to the Complainant’s request contain tax return information which is considered confidential pursuant to N.J.S.A. 54:50-8, which provides that all records and files respecting the administration of the State Uniform Tax Procedure Law or of any State tax law shall be considered confidential and privileged.

The Complainant has not submitted any evidence to the GRC to establish that she is a party who is privileged to secure information under N.J.S.A. 54:50-9.¹¹ Further, the

¹¹ Certain officers entitled to examine records, Nothing herein contained shall be construed to prevent:
d. The inspection by the Attorney General or other legal representative of this State of the reports or files relating to the claim of any taxpayer who shall bring an action to review or set aside any tax imposed under any State tax law or against whom an action or proceeding has been instituted in accordance with the provisions thereof;
e. The examination of said records and files by the Comptroller, State Auditor or State Commissioner of Finance, or by their respective duly authorized agents;
f. The furnishing, at the discretion of the director, of any information contained in tax reports or returns or any audit thereof or the report of any investigation made with respect thereto, filed pursuant to the tax laws, to the taxing officials of any other state, the District of Columbia, the United States and the territories thereof, providing said jurisdictions grant like privileges to this State and providing such information is to be used for tax purposes only;
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Complainant asserted that she needed the records to determine whether she has to file suit and commence an “action or proceeding” is not an exception to N.J.S.A. 54:50-8. Because, the Complainant has not yet filed any “action or proceeding” under the State Uniform Tax Procedure Law or any State tax law, she is not entitled to the resident tax return addresses under N.J.S.A. 54:50-8 or N.J.S.A. 54:50-9.

Therefore, Ms. O’Hare did not unlawfully deny access to the Complainant’s OPRA request dated January 3, 2011 because the requested records are exempt from disclosure pursuant to the provisions of N.J.S.A. 54:50-8, N.J.S.A. 47:1A-9.a. and N.J.S.A. 47:1A-6. Furthermore, the Complainant failed to show that she is a party who is privileged to secure information under N.J.S.A. 54:50-9 and she failed to show that any exception of N.J.S.A. 54:50-8 applies in the instant matter to permit her access to the requested records.

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

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

Whether the Complainant is a “prevailing party” pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney’s fees when the Complainant is an attorney?

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because N.J.S.A. 47:1A-1 et seq. contains no specific statute of limitations on Denial of Access Complaints filed with the GRC, and because the GRC is therefore without authority to impose a statute of limitations where one does not exist, no statute of limitations in OPRA bars the GRC’s adjudication of the Complainant’s Denial of Access Complaint in the instant matter.
2. Although Ms. O’Hare’s response was timely and in writing, she failed to address each of the years listed in the Complainant OPRA request and did not

g. The furnishing, at the discretion of the director, of any material information disclosed by the records or files to any law enforcing authority of this State who shall be charged with the investigation or prosecution of any violation of the criminal provisions of this subtitle or of any State tax law;

p. The furnishing at the discretion of the director of employer provided wage and tax withholding information contained in tax reports or returns filed pursuant to N.J.S.54A:7-2, 54A:7-4 and 54A:7-7, to the designated municipal officer of a municipality authorized to impose an employer payroll tax pursuant to the provisions of Article 5 (Employer Payroll Tax) of the "Local Tax Authorization Act," for the limited purpose of verifying the payroll information reported by employers subject to the employer payroll tax.

provide a lawful basis for the denial of access to those years, thus, Ms. O'Hare's response was insufficient pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008).

3. Because Ms. O'Hare only provided the Complainant with addresses responsive for the year 2009 only and because there is no evidence in the record that the other addresses provided on March 25, 2011 are responsive to the Complainant's OPRA request dated December 2, 2010, Ms. O'Hare failed to bear her burden of proof that the addresses responsive to the remaining years (2006 through 2008 and 2010) were lawfully denied under OPRA. Thus, the Custodian must disclose all the addresses responsive to the Complainant's OPRA request dated December 2, 2010 or certify that no other records responsive to the Complainant's request exist.
4. **The Custodian shall comply with item #3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹² to the Executive Director.¹³**
5. Ms. O'Hare did not unlawfully deny access to the Complainant's OPRA request dated January 3, 2011 because the requested records are exempt from disclosure pursuant to the provisions of N.J.S.A. 54:50-8, N.J.S.A. 47:1A-9.a. and N.J.S.A. 47:1A-6. Furthermore, the Complainant failed to show that she is a party who is privileged to secure information under N.J.S.A. 54:50-9 and she failed to show that any exception of N.J.S.A. 54:50-8 applies in the instant matter to permit her access to the requested records.
6. The Council defers analysis of whether Ms. O'Hare and 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.
7. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

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

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."

¹³ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

Approved By: Karyn Gordon, Esq.
Acting Executive Director

August 21, 2012