



**State of New Jersey**  
DEPARTMENT OF COMMUNITY AFFAIRS  
101 SOUTH BROAD STREET  
PO BOX 819  
TRENTON, NJ 08625-0819

**CHRIS CHRISTIE**  
*Governor*

**KIM GUADAGNO**  
*Lt. Governor*

**CHARLES A. RICHMAN**  
*Acting Commissioner*

**FINAL DECISION**

**May 26, 2015 Government Records Council Meeting**

Jeff Carter  
Complainant

Complaint No. 2011-73

v.

Franklin Fire District No. 1 (Somerset)  
Custodian of Record

At the May 26, 2015 public meeting, the Government Records Council (“Council”) considered the May 19, 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 dismiss this complaint because the Complainant (via Counsel) withdrew his complaint, dated October 27, 2014, to the Honorable Susan M. Scarola, Administrative Law Judge, on the basis that the parties agreed to settle the matter in a letter. No further adjudication is therefore required.

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 26<sup>th</sup> Day of May, 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: May 28, 2015**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
May 26, 2015 Council Meeting**

**Jeff Carter<sup>1</sup>  
Complainant**

**GRC Complaint No. 2011-73**

v.

**Franklin Fire District No. 1 (Somerset)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:**

January 14, 2011 OPRA request: Copies of:

1. All legal appointments, contracts, professional service agreements, etc., for services provided by Cooper & Cooper for 2008, 2009, 2010, and 2011.
2. Payment vouchers and invoices for Cooper & Cooper for 2008, 2009, 2010, and 2011.

January 31, 2011 OPRA request: Copies of e-mails, memoranda, letters, notes, policies, procedures, minutes, resolutions, facsimiles, manuals, handbooks, text messages, instant messages, chat boards/forums, discussion boards/forums, message boards/forums, legal appointments, legal contracts, legal agreements, professional service agreements, qualifications, invitation for bids, request for proposals (including “drafts” of any preceding records), payment vouchers and invoices, purchase orders, voice recordings, and video recordings between January 1, 2000, and January 31, 2011, regarding:

- Legal services
- Appointment of legal counsel
- Legal appointments
- Legal contracts
- Legal counsel qualifications, including any reasonably construed variation thereof.

The following parties identified in the records:

- The Custodian
- Mr. William T. Cooper, III, Esq. (“Mr. Cooper”)
- Mr. Louis L. Hajdu-Nemeth, Jr.
- Mr. Bernard Louie Pongratz
- Mr. Timothy A. Szyborski

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<sup>1</sup> Represented by Walter M. Luers, Esq., of the Law Offices of Walter M. Luers, LLC (Clinton, NJ).

<sup>2</sup> Represented by Dominic DiYanni, Esq., of Eric M. Bernstein & Associates, LLC (Warren, NJ).

- Mr. James J. Wickman
- Mr. William H. Cullen, III
- Mr. Kevin J. McKenna
- Mr. Russell Corletto
- Mr. Joseph F. Daniels
- Mr. Robert R. Scheer, Jr.
- Mr. Donald T. Sweeney
- Mr. Frederick J. Pfeiffer
- Mr. Richard J. De Lisi

**Custodian of Record:** Melissa Kosensky.<sup>3</sup>

**Request Received by Custodian:** January 14, 2011, and January 31, 2011.

**Response Made by Custodian:** January 19, 2011, and None.

**GRC Complaint Received:** March 22, 2011.

### Background

#### September 25, 2012, Council Meeting:

At its September 25, 2012, public meeting, the Council considered the September 18, 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 current Custodian provided the GRC with a legal certification, the unredacted records requested for the *in camera* inspection, and a redaction index on August 7, 2012. The Custodian further certified that no 2011 invoices responsive to the Complainant's OPRA request existed at the time of such OPRA request. Therefore, the current Custodian timely complied with the Council's July 31, 2012, Interim Order.
2. Because the current Custodian failed to provide an adequate redaction index explaining the reasons for each redaction contained within the invoices required to be submitted for an *in camera* review, this complaint should be referred to the Office of Administrative Law for a determination of whether the Custodian lawfully denied access to the redacted portions of the 13 invoices. The Office of Administrative Law shall also determine whether the original Custodian's actions rise to a level of a knowing and willful violation of OPRA and whether the Complainant is a prevailing party subject to an award of reasonable attorney's fees.

#### Procedural History:

On September 26, 2012, the Council distributed its Interim Order to all parties. On April 29, 2013, the complaint was transmitted to the Office of Administrative Law ("OAL").

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<sup>3</sup> The current Custodian of Record is Tim Szymborski, who replaced Ms. Melissa Kosensky on March 1, 2011.

On October 27, 2014, the Complainant's Counsel sent a letter to the Honorable Susan M. Scarola, Administrative Law Judge, withdrawing this complaint because the parties have agreed to settle the matter.

### **Analysis**

No analysis required.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends that the Council dismiss this complaint because the Complainant (via Counsel) withdrew his complaint, dated October 27, 2014, to the Honorable Susan M. Scarola, Administrative Law Judge, on the basis that the parties agreed to settle the matter in a letter. No further adjudication is therefore required.

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

Reviewed By: Joseph D. Glover  
Executive Director

May 19, 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**

**September 25, 2012 Government Records Council Meeting**

Jeff Carter  
Complainant

Complaint No. 2011-73

v.

Franklin Fire District No. 1 (Somerset)  
Custodian of Record

At the September 25, 2012 public meeting, the Government Records Council (“Council”) considered the September 18, 2012 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The current Custodian provided the GRC with a legal certification, the unredacted records requested for the *in camera* inspection and a redaction index on August 7, 2012. The Custodian further certified that no 2011 invoices responsive to the Complainant’s OPRA request existed at the time of such OPRA request. Therefore, the current Custodian timely complied with the Council’s July 31, 2012 Interim Order.
2. Because the current Custodian failed to provide an adequate redaction index explaining the reasons for each redaction contained within the invoices required to be submitted for an *in camera* review, this complaint should be referred to the Office of Administrative Law for a determination of whether the Custodian lawfully denied access to the redacted portions of the 13 invoices. The Office of Administrative Law shall also determine whether the original Custodian’s actions rise to a level of a knowing and willful violation of OPRA and whether the Complainant is a prevailing party subject to an award of reasonable attorney’s fees.

Interim Order Rendered by the  
Government Records Council  
On The 25<sup>th</sup> Day of September, 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: September 26, 2012**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
September 25, 2012 Council Meeting**

**Jeff Carter<sup>1</sup>  
Complainant**

**GRC Complaint No. 2011-73**

v.

**Franklin Fire District No. 1 (Somerset)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

January 14, 2011 OPRA request: Copies of:

1. All legal appointments, contracts, professional service agreements, etc., for services provided by Cooper & Cooper for 2008, 2009, 2010 and 2011.
2. Payment vouchers and invoices for Cooper & Cooper for 2008, 2009, 2010 and 2011.

January 31, 2011 OPRA request: Copies of e-mails, memoranda, letters, notes, policies, procedures, minutes, resolutions, facsimiles, manuals, handbooks, text messages, instant messages, chat boards/forums, discussion boards/forums, message boards/forums, legal appointments, legal contracts, legal agreements, professional service agreements, qualifications, invitation for bids, request for proposals (including “drafts” of any preceding records), payment vouchers and invoices, purchase orders, voice recordings and video recordings between January 1, 2000 and January 31, 2011 regarding:

- Legal services
- Appointment of legal counsel
- Legal appointments
- Legal contracts
- Legal counsel qualifications, including any reasonably construed variation thereof.

The following parties identified in the records:

- The Custodian
- Mr. William T. Cooper, III, Esq. (“Mr. Cooper”)
- Mr. Louis L. Hajdu-Nemeth, Jr.
- Mr. Bernard Louie Pongratz

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<sup>1</sup> Represented by Walter M. Luers, Esq., of the Law Offices of Walter M. Luers, LLC (Clinton, NJ).

<sup>2</sup> Represented by Dominic DiYanni, Esq., of Davenport & Spiotti, LLC (Seaside Heights, NJ).

- Mr. Timothy A. Szymborski
- Mr. James J. Wickman
- Mr. William H. Cullen, III
- Mr. Kevin J. McKenna
- Mr. Russell Corletto
- Mr. Joseph F. Danielsen
- Mr. Robert R. Scheer, Jr.
- Mr. Donald T. Sweeney
- Mr. Frederick J. Pfeiffer
- Mr. Richard J. De Lisi

**Request Made:** January 14, 2011 and January 31, 2011

**Response Made:** January 19, 2011 and None

**Custodian:** Melissa Kosensky<sup>3</sup>

**GRC Complaint Filed:** March 22, 2011<sup>4</sup>

**Records Submitted for *In Camera* Examination:**

- Invoice dated February 14, 2008 (1 page).
- Invoice dated April 9, 2008 (2 pages).
- Invoice dated July 25, 2008 (1 page).
- Invoice dated October 16, 2008 (2 pages).
- Invoice dated December 8, 2008 (1 page).
- Invoice dated April 22, 2009 (1 page).
- Invoice dated September 24, 2009 (1 page).
- Invoice dated December 3, 2009 (2 pages).
- Invoice dated January 26, 2010 (2 pages).
- Invoice dated March 24, 2010 (2 pages).
- Invoice dated May 17, 2010 (2 pages).
- Invoice dated July 15, 2010 (2 pages).
- Invoice dated November 10, 2010 (4 pages).

**Background**

**July 31, 2012**

Government Records Council’s Interim Order. At its July 31, 2012 public meeting, the Government Records Council (“Council”) considered the July 24, 2012 Executive Director’s Findings and Recommendations and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council therefore found that:

1. The Custodian violated N.J.S.A. 47:1A-5.e. by failing to immediately respond in writing to the Complainant’s first (1<sup>st</sup>) OPRA request seeking an extension

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<sup>3</sup> The current Custodian of Record is Tim Szymborski, who replaced Ms. Melissa Kosensky on March 1, 2011.

<sup>4</sup> The GRC received the Denial of Access Complaint on said date.



of time to grant access to the responsive contract and invoices. See Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007).

2. Although the Custodian timely responded (via Mr. Cooper) to the Complainant's January 14, 2011 OPRA request in writing requesting an extension of one (1) week to respond to said request, the Custodian's failure to grant or deny access to the requested records within the extended time frame results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.i., and Kohn v. Township of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). See also Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-253 (September 2009). Moreover, although the Custodian provided records on February 7, 2011, eight (8) business days after the expiration of the extended time frame to respond, her response was insufficient because she failed to state whether certain records existed pursuant to Shanker v. Borough of Cliffside Park (Bergen), GRC Complaint No. 2007-245 (March 2009), and further failed to provide a date certain on which she would advise the Complainant whether any 2011 records existed pursuant to Taylor v. Township of Downe (Cumberland), GRC Complaint No. 2009-174 (Interim Order dated July 27, 2010).
3. The Custodian did not timely respond to the Complainant's second (2<sup>nd</sup>) OPRA request. As such, the Custodian's failure to respond in writing to said OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). Further, the Custodian's failure to immediately respond to the Complainant's requests for contracts and vouchers results in a violation of OPRA's immediate access provision at N.J.S.A. 47:1A-5.e.
4. The Custodian certified that the only existing record responsive to the Complainant's first (1<sup>st</sup>) OPRA request Item No. 1 was the 2009 contract provided to the Complainant on February 7, 2011. Thus, the evidence of record supports a conclusion that no other records responsive exist and the Complainant has provided no competent, credible evidence to refute this certification. Therefore, the Custodian did not unlawfully deny access to the contracts for 2008, 2010 and 2011 pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
5. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the following redacted invoices to determine the validity of the Custodian's assertion that the records contain attorney-client privileged and personnel information which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.:

- Invoice dated February 14, 2008 (1 page).

- Invoice dated April 9, 2008 (2 pages).
- Invoice dated July 25, 2008 (1 page).
- Invoice dated October 16, 2008 (2 pages).
- Invoice dated December 8, 2008 (1 page).
- Invoice dated April 22, 2009 (1 page).
- Invoice dated September 24, 2009 (1 page).
- Invoice dated December 3, 2009 (2 pages).
- Invoice dated January 26, 2010 (2 pages).
- Invoice dated March 24, 2010 (2 pages).
- Invoice dated May 17, 2010 (2 pages).
- Invoice dated July 15, 2010 (2 pages).
- Invoice dated November 10, 2010 (4 pages).

Moreover, the Custodian must either certify whether any 2011 invoices responsive to the Complainant's OPRA request exist or provide same as part of the *in camera* review if the existent records were redacted.

6. **The Custodian must deliver<sup>5</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 5 above), a document or redaction index<sup>6</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,<sup>7</sup> 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.**
  
7. Based upon the Appellate Division's decision in New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007), the Complainant's voluminous second (2<sup>nd</sup>) request, a seven (7) page request including numerous records spanning eleven (11) years and one (1) month, is not a valid OPRA request because it bears no resemblance to the record request envisioned by the Legislature, which "provide[s] space for ... a brief description of the record sought." *Id.* at 179. *See also* Vessio v. Department of Community Affairs, Division of Fire Safety, GRC Complaint No. 2007-63 (May 2007), Caggiano v. Borough of Stanhope (Sussex), GRC Complaint No. 2006-220 (September 2007), MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005).
  
8. The Council defers analysis of whether the original Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of

<sup>5</sup> 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.

<sup>6</sup> The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

<sup>7</sup> "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."

the circumstances pending the Custodian's compliance with the Council's Interim Order.

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

**August 3, 2012**

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

**August 7, 2012**

Certification of the Custodian in response to the Council's Order with the following attachments:

- Invoice dated February 14, 2008 (1 page).
- Invoice dated April 9, 2008 (2 pages).
- Invoice dated July 25, 2008 (1 page).
- Invoice dated October 16, 2008 (2 pages).
- Invoice dated December 8, 2008 (1 page).
- Invoice dated April 22, 2009 (1 page).
- Invoice dated September 24, 2009 (1 page).
- Invoice dated December 3, 2009 (2 pages).
- Invoice dated January 26, 2010 (2 pages).
- Invoice dated March 24, 2010 (2 pages).
- Invoice dated May 17, 2010 (2 pages).
- Invoice dated July 15, 2010 (2 pages).
- Invoice dated November 10, 2010 (4 pages).

The current Custodian certifies that he has served as custodian of record for the FFD since March 2011. The Custodian certifies that attached are nine (9) copies of the unredacted records the GRC requested for an *in camera* review pursuant to the Council's July 31, 2012 Interim Order. The Custodian further certifies that no 2011 invoices responsive to the Complainant's OPRA request existed at the time of such OPRA request.

**Analysis**

**Whether the current Custodian complied with the Council's July 31, 2012 Interim Order?**

At its July 31, 2012 public meeting, the Council determined that because the Custodian has asserted that the requested records were lawfully redacted pursuant to the attorney-client privilege and personnel exemptions pursuant to N.J.S.A. 47:1A-1.1., the Council must determine whether the legal conclusions asserted by the Custodian are properly applied to the records at issue pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005). Therefore, the GRC must conduct an *in camera* review of the requested records to determine the validity of the Custodian's assertion that the requested record was properly denied.

The Council therefore ordered the Custodian to deliver to the Council in a sealed envelope nine (9) copies of the requested unredacted records, a document or redaction index, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, that the records provided are the records requested by the Council for the *in camera* inspection. The Council further ordered the Custodian to certify whether any 2011 invoices responsive to the Complainant's OPRA request existed at the time of submission of said request. Such delivery was to be received by the GRC within five (5) business days from receipt of the Council's Interim Order or on August 10, 2012.

The current Custodian provided the GRC with a legal certification, the unredacted records requested for the *in camera* inspection and a redaction index on August 7, 2012. The Custodian further certified that no 2011 invoices responsive to the Complainant's OPRA request existed at the time of such OPRA request. Therefore, the current Custodian timely complied with the Council's July 31, 2012 Interim Order.

### **Whether the Custodian unlawfully denied the Complainant access to the requested records?**

The original Custodian asserted that she lawfully denied the Complainant access to the redacted portions of the requested records because said redactions contain attorney-client privileged and personnel information. N.J.S.A. 47:1A-1.1. Conversely, the Complainant's Counsel argued in the Denial of Access Complaint that attorney invoices normally do not contain information that is confidential or subject to the attorney-client privilege exemption.

OPRA defines a government record as:

"... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ... A government record shall not include the following information which is deemed to be confidential ... *any record within the attorney-client privilege*. This paragraph *shall not be construed as exempting from access attorney or consultant bills or invoices* except that such bills or invoices *may be redacted to remove any information protected by the attorney-client privilege...*" (Emphasis added.) N.J.S.A. 47:1A-1.1.

As part of the *in camera* order, the Custodian was required to submit a redaction index which the current Custodian submitted as part of his compliance. The index is organized into headings for each invoice with the entry date in which a redaction appears below it. However, the index only includes the asserted exemption that applies and does not include "... the nature of the documents ... not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection." See Paff at 354 (App. Div. 2005)(Citing New Jersey Court Rule R. 4:10-2(e)).

In Hyman v. City of Jersey City, Docket No. A-0789-10T4 (App. Div., August 27, 2012), the complainant appealed a final decision of the GRC<sup>8</sup> in which the GRC ordered disclosure of three (3) documents after performing an *in camera* review. The complainant challenged the Council's holding that multiple records were exempt as attorney-client privileged and inter-agency and intra-agency advisory, consultative or deliberative ("ACD") material. Specifically, the complainant argued that the record failed to support the Council's decision. Regarding the complainant's argument, the Court stated that:

"... the GRC must require that the custodian do more than submit a conclusory recitation of the particular exception raised (*citing Paff v. NJ. Dep't of Labor*, 379 N.J. Super. 346, 353 (App. Div. 2005)). In other words, it is not enough for the custodian to merely state that the record is exempt because of an asserted privilege or exception. Rather, accompanying the privilege or exception category must be an explanation, which is sufficient, without revealing information itself privileged or protected, to 'enable other parties to assess the applicability of the privilege or protection.' *Id.* at 354 (quoting [New Jersey Court Rule] 4:10-2(e))" *Id.* at pg. 9-10.

The Court further noted that in Hyman:

"[t]he description of the privileged documents provided by the GRC ... essentially mirrors the privilege log provided by the custodian and is limited to designating the privileged document as "attorney-client privilege," or "[ACD]," or both, with no further explanation as to why the privilege or exception applies." *Id.* at pg. 13.

The Court thus held that:

"... [the] generalized designation by the custodian failed to provide a description of the nature of the withheld documents 'in a manner that, without revealing information itself privileged or protected,' would enable [Appellant] 'to assess the applicability of the privilege.' R. 4:10-2(e). More importantly, it prevented meaningful adjudication by the GRC. *See Paff, supra*, [at 354] (noting 'OPRA contemplates the GRC's meaningful review of the basis for an agency's decision to withhold government records'). The generalized designations also stymie meaningful review by [the Court]." *Id.* at pg. 16.

The Court reasoned that when a custodian's response to a complaint fails to adequately justify the basis for a lawful denial of access, the GRC "... has a number of options available to it ..." *Id.* at pg. 19. Of those options, the GRC "... may conduct a hearing on the matter in conformity with the rules and regulations provided ... under the 'Administrative Procedure Act,' ... insofar as they may be applicable and practical." (*citing N.J.S.A. 47:1A-7.e.*) *Id.* Due to the GRC's scarce resources, it will routinely refer

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<sup>8</sup> Hyman v. City of Jersey City, GRC Complaint No. 2007-118 (August 2010).

complaints to the Office of Administrative Law (“OAL”) for issues of contested facts, possible knowing and willful violations and prevailing party attorney’s fees.

In the instant complaint, the Council ordered an *in camera* review of 13 invoices to determine the validity of the Custodian’s assertion that portions of the invoices were exempt from disclosure as attorney-client privileged material and personnel matters. The Custodian timely complied; however, the redaction index attached to the records is insufficient as it provides only the list of redactions and the exemption, and not the statutory citation. Further, the Custodian’s redaction index is extremely similar to the privilege log at issue in Hyman in that it fails to include the required description that would allow the GRC to make an informed decision on whether each redaction is lawful. Thus, the GRC cannot determine whether the asserted exemptions apply to the records at issue and must refer this complaint to the OAL for further review.

Thus, because the current Custodian failed to provide an adequate redaction index explaining the reasons for each redaction contained within the invoices required to be submitted for an *in camera* review, this complaint should be referred to the OAL for a determination of whether the Custodian lawfully denied access to the redacted portions of the 13 invoices. The OAL shall also determine whether the original Custodian’s actions rise to a level of a knowing and willful violation of OPRA and whether the Complainant is a prevailing party subject to an award of reasonable attorney’s fees.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The current Custodian provided the GRC with a legal certification, the unredacted records requested for the *in camera* inspection and a redaction index on August 7, 2012. The Custodian further certified that no 2011 invoices responsive to the Complainant’s OPRA request existed at the time of such OPRA request. Therefore, the current Custodian timely complied with the Council’s July 31, 2012 Interim Order.
2. Because the current Custodian failed to provide an adequate redaction index explaining the reasons for each redaction contained within the invoices required to be submitted for an *in camera* review, this complaint should be referred to the Office of Administrative Law for a determination of whether the Custodian lawfully denied access to the redacted portions of the 13 invoices. The Office of Administrative Law shall also determine whether the original Custodian’s actions rise to a level of a knowing and willful violation of OPRA and whether the Complainant is a prevailing party subject to an award of reasonable attorney’s fees.

Prepared By: Frank F. Caruso  
Senior Case Manager

Approved By: Karyn Gordon, Esq.  
Acting Executive Director

September 18, 2012



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

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

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
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RICHARD E. CONSTABLE, III  
Commissioner

INTERIM ORDER

July 31, 2012 Government Records Council Meeting

Jeff Carter  
Complainant

Complaint No. 2011-73

v.

Franklin Fire District No. 1 (Somerset)  
Custodian of Record

At the July 31, 2012 public meeting, the Government Records Council (“Council”) considered the July 24, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian violated N.J.S.A. 47:1A-5.e. by failing to immediately respond in writing to the Complainant’s first (1<sup>st</sup>) OPRA request seeking an extension of time to grant access to the responsive contract and invoices. *See* Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007).
2. Although the Custodian timely responded (via Mr. Cooper) to the Complainant’s January 14, 2011 OPRA request in writing requesting an extension of one (1) week to respond to said request, the Custodian’s failure to grant or deny access to the requested records within the extended time frame results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.i., and Kohn v. Township of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-253 (September 2009). Moreover, although the Custodian provided records on February 7, 2011, eight (8) business days after the expiration of the extended time frame to respond, her response was insufficient because she failed to state whether certain records existed pursuant to Shanker v. Borough of Cliffside Park (Bergen), GRC Complaint No. 2007-245 (March 2009), and further failed to provide a date certain on which she would advise the Complainant whether any 2011 records existed pursuant to Taylor v. Township of Downe (Cumberland), GRC Complaint No. 2009-174 (Interim Order dated July 27, 2010).
3. The Custodian did not timely respond to the Complainant’s second (2<sup>nd</sup>) OPRA request. As such, the Custodian’s failure to respond in writing to said OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No.





2007-11 (Interim Order October 31, 2007). Further, the Custodian's failure to immediately respond to the Complainant's requests for contracts and vouchers results in a violation of OPRA's immediate access provision at N.J.S.A. 47:1A-5.e.

4. The Custodian certified that the only existing record responsive to the Complainant's first (1<sup>st</sup>) OPRA request Item No. 1 was the 2009 contract provided to the Complainant on February 7, 2011. Thus, the evidence of record supports a conclusion that no other records responsive exist and the Complainant has provided no competent, credible evidence to refute this certification. Therefore, the Custodian did not unlawfully deny access to the contracts for 2008, 2010 and 2011 pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
5. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the following redacted invoices to determine the validity of the Custodian's assertion that the records contain attorney-client privileged and personnel information which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.:
  - Invoice dated February 14, 2008 (1 page).
  - Invoice dated April 9, 2008 (2 pages).
  - Invoice dated July 25, 2008 (1 page).
  - Invoice dated October 16, 2008 (2 pages).
  - Invoice dated December 8, 2008 (1 page).
  - Invoice dated April 22, 2009 (1 page).
  - Invoice dated September 24, 2009 (1 page).
  - Invoice dated December 3, 2009 (2 pages).
  - Invoice dated January 26, 2010 (2 pages).
  - Invoice dated March 24, 2010 (2 pages).
  - Invoice dated May 17, 2010 (2 pages).
  - Invoice dated July 15, 2010 (2 pages).
  - Invoice dated November 10, 2010 (4 pages).

Moreover, the Custodian must either certify whether any 2011 invoices responsive to the Complainant's OPRA request exist or provide same as part of the *in camera* review if the existent records were redacted.

6. **The Custodian must deliver<sup>1</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 5 above), a document or redaction index<sup>2</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,<sup>3</sup> 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.**

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<sup>1</sup> 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.

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

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

7. Based upon the Appellate Division's decision in New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007), the Complainant's voluminous second (2<sup>nd</sup>) request, a seven (7) page request including numerous records spanning eleven (11) years and one (1) month, is not a valid OPRA request because it bears no resemblance to the record request envisioned by the Legislature, which "provide[s] space for ... a brief description of the record sought." *Id.* at 179. *See also* Vessio v. Department of Community Affairs, Division of Fire Safety, GRC Complaint No. 2007-63 (May 2007), Caggiano v. Borough of Stanhope (Sussex), GRC Complaint No. 2006-220 (September 2007), MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005).
8. The Council defers analysis of whether the original 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.
9. The Council defers analysis of whether the Complainant is a prevailing party pending the current Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the  
Government Records Council  
On The 31<sup>st</sup> Day of July, 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 3, 2012**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
July 31, 2012 Council Meeting**

**Jeff Carter<sup>1</sup>  
Complainant**

**GRC Complaint No. 2011-73**

v.

**Franklin Fire District No. 1 (Somerset)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

January 14, 2011 OPRA request: Copies of:

1. All legal appointments, contracts, professional service agreements, etc., for services provided by Cooper & Cooper for 2008, 2009, 2010 and 2011.
2. Payment vouchers and invoices for Cooper & Cooper for 2008, 2009, 2010 and 2011.

January 31, 2011 OPRA request: Copies of e-mails, memoranda, letters, notes, policies, procedures, minutes, resolutions, facsimiles, manuals, handbooks, text messages, instant messages, chat boards/forums, discussion boards/forums, message boards/forums, legal appointments, legal contracts, legal agreements, professional service agreements, qualifications, invitation for bids, request for proposals (including “drafts” of any preceding records), payment vouchers and invoices, purchase orders, voice recordings and video recordings between January 1, 2000 and January 31, 2011 regarding:

- Legal services
- Appointment of legal counsel
- Legal appointments
- Legal contracts
- Legal counsel qualifications, including any reasonably construed variation thereof.

The following parties identified in the records:

- The Custodian
- Mr. William T. Cooper, III, Esq. (“Mr. Cooper”)
- Mr. Louis L. Hajdu-Nemeth, Jr.
- Mr. Bernard Louie Pongratz
- Mr. Timothy A. Szyborski

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<sup>1</sup> Represented by Walter M. Luers, Esq., of the Law Offices of Walter M. Luers, LLC (Clinton, NJ).

<sup>2</sup> Represented by Dominic DiYanni, Esq., of Davenport & Spiotti, LLC (Seaside Heights, NJ).

- Mr. James J. Wickman
- Mr. William H. Cullen, III
- Mr. Kevin J. McKenna
- Mr. Russell Corletto
- Mr. Joseph F. Danielsen
- Mr. Robert R. Scheer, Jr.
- Mr. Donald T. Sweeney
- Mr. Frederick J. Pfeiffer
- Mr. Richard J. De Lisi

**Request Made:** January 14, 2011 and January 31, 2011

**Response Made:** January 19, 2011 and None

**Custodian:** Melissa Kosensky<sup>3</sup>

**GRC Complaint Filed:** March 22, 2011<sup>4</sup>

### Background

#### **January 14, 2011**

Complainant's first (1<sup>st</sup>) Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above in an e-mail referencing OPRA. The Complainant indicates that the preferred method of delivery is e-mail. The Complainant further requests that the Custodian confirm receipt of this OPRA request via e-mail.

#### **January 16, 2011**

E-mail from the Custodian to the Complainant. The Custodian acknowledges receipt of the Complainant's first (1<sup>st</sup>) OPRA request.

#### **January 19, 2011**

Custodian's response to the first (1<sup>st</sup>) OPRA request. On behalf of the Custodian, Mr. Cooper, previous Franklin Fire District ("FFD") Counsel, responds in writing via letter to the Complainant's OPRA request on the third (3<sup>rd</sup>) business day following receipt of such request. Mr. Cooper states that an extension of one (1) week is necessary to respond to the instant OPRA request. Mr. Cooper requests that the Complainant provide a mailing address or advise whether he wishes to retrieve the responsive records from the FFD offices once they are ready.

#### **January 19, 2011**

E-mail from the Complainant to Mr. Cooper. The Complainant agrees to an extension of time until January 26, 2011.

The Complainant further states that he indicated in his OPRA request that his preferred method of delivery is e-mail. The Complainant states that because OPRA provides for electronic delivery and the FFD is capable of providing information

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<sup>3</sup> The current Custodian of Record is Tim Szymborski, who replaced Ms. Melissa Kosensky on March 1, 2011.

<sup>4</sup> The GRC received the Denial of Access Complaint on said date.

electronically, he should receive the records via e-mail. The Complainant states that should electronic delivery not be possible, Mr. Cooper is required to provide an explanation as to why the records cannot be provided in this manner.

#### **January 24, 2011**

Letter from Mr. Cooper to the Complainant. Mr. Cooper states that regarding Item No. 1 of the Complainant's January 14, 2011 OPRA, 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-1.1." MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005). Mr. Cooper states that 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." *Id.* at 549. Mr. Cooper thus states that the Custodian cannot comply with request Item No. 1.

Mr. Cooper states that regarding Item No. 2, the responsive invoices have been reviewed and redacted where necessary. Mr. Cooper states that he cannot deliver the records electronically; thus, the Complainant must provide a mailing address. Mr. Cooper further states that if the Complainant prefers to pick up the records, arrangements can be made to deliver the records to the FFD office.

#### **January 25, 2011**

E-mail from the Complainant to the Custodian. The Complainant states that he is in receipt of Mr. Cooper's response to his first (1<sup>st</sup>) OPRA request. The Complainant states that OPRA requires a custodian to specifically state the reason for denying access to an OPRA request. The Complainant states that he does not understand Mr. Cooper's denial of access to request Item No. 1, but acknowledges that Mr. Cooper's explanation is an overly broad and nonspecific boilerplate denial of access. The Complainant requests that the Custodian comply with OPRA by responding to the following:

1. Whether the denial of access is based on OPRA, common law, neither or both?
2. Why "legal appointments," "contracts" and "professional service agreements" are not considered identifiable government records?
3. Why these three terms would force the Custodian to conduct an open-ended search of the FFD's files?
4. Why the Custodian is unable to comply with an OPRA request that contains a defined time frame?

The Complainant further states that he is equally confused by Mr. Cooper's response to Item No. 2 that the responsive records cannot be delivered via e-mail. The Complainant states that he has submitted several OPRA requests to the Custodian via e-mail to which she responded. The Complainant states that because he submitted his OPRA request to the Custodian, he expects that the Custodian will comply with said

request by providing the responsive invoices in the preferred method of delivery as is required under OPRA.

The Complainant states that before filing a complaint with the GRC, he will give the Custodian until January 26, 2011 to respond to his questions and provide the responsive records via e-mail.

**January 25, 2011**

E-mail from Mr. Cooper to the Complainant. Mr. Cooper states that the responsive records were redacted and his office does not have the ability to scan those pages. Mr. Cooper states that this limitation necessitates an alternate method of delivery. Mr. Cooper states that because the Complainant is unwilling to accept the records via U.S. Mail, the following options are available:

1. Mr. Cooper can deliver the records to the FFD office and the Complainant can retrieve them there.
2. Mr. Cooper can deliver the records to the FFD office and Ms. Debi Nelson (“Ms. Nelson”), Administrative Aide, can scan the records, create a .pdf file and e-mail the file to the Complainant.

Mr. Cooper requests that the Complainant advise which of these methods of delivery he would prefer.

**January 26, 2011**

E-mail from the Complainant to the Custodian. The Complainant states that he has on three (3) separate occasions clearly stated in writing that his preferred method of delivery is e-mail.

**January 28, 2011**

Letter from Mr. Cooper to Ms. Nelson (with attachments). Mr. Cooper states that attached are the invoices responsive to the Complainant’s first (1<sup>st</sup>) OPRA request and a redaction index. Mr. Cooper requests that Ms. Nelson scan the records and e-mail them to the Complainant.

**January 31, 2011**

Complainant’s second (2<sup>nd</sup>) OPRA request. The Complainant requests the records relevant to this complaint listed above in a letter (attached to an e-mail) referencing OPRA. The Complainant indicates that the preferred method of delivery is e-mail. The Complainant further requests that the Custodian confirm receipt of this OPRA request via e-mail.

**February 7, 2011**

E-mail from the Custodian to the Complainant (with attachments). The Custodian acknowledges receipt of the Complainant’s second (2<sup>nd</sup>) OPRA request and requests that the Complainant fill out the attached OPRA request form.

Additionally, the Custodian states that attached are the records responsive to the Complainant's first (1<sup>st</sup>) OPRA request for Mr. Cooper's legal services through 2010. The Custodian states that she will have to do further research for 2011 records.

### **February 8, 2011**

E-mail from the Complainant to the Custodian. The Complainant states that he electronically submitted several OPRA requests to which the Custodian responded. The Complainant asks the Custodian to explain why he must fill out the official OPRA request form.

### **March 22, 2011**

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

- Complainant's first (1<sup>st</sup>) OPRA request dated January 14, 2011.
- E-mail from the Custodian to the Complainant dated January 16, 2011.
- E-mail from Mr. Cooper to the Complainant dated January 19, 2011.
- E-mail from the Complainant to Mr. Cooper dated January 19, 2011.
- E-mail from Mr. Cooper to the Complainant dated January 24, 2011.
- E-mail from the Complainant to the Custodian dated January 25, 2011.
- E-mail from Mr. Cooper to the Complainant dated January 25, 2011.
- E-mail from the Complainant to the Custodian dated January 26, 2011.
- Letter from Mr. Cooper to Ms. Nelson dated January 28, 2011 (with attachments).
- Complainant's second (2<sup>nd</sup>) OPRA request dated January 31, 2011.
- E-mail from the Custodian to the Complainant dated February 7, 2011 (with attachments).
- E-mail from the Complainant to the Custodian dated February 8, 2011.

The Complainant's Counsel states that the FFD and its Custodian failed to provide copies of attorney retention agreements, years of invoices and unlawfully redacted other invoices.

Counsel states that the Complainant submitted his first (1<sup>st</sup>) OPRA request to the FFD on January 14, 2011. Counsel states that the Custodian acknowledged receipt of the OPRA request on January 16, 2011. Counsel states that Mr. Cooper responded on January 19, 2011 and indicated that redactions may be necessary. Counsel states that after a series of correspondence, on February 7, 2011 the Custodian disclosed a Cooper & Cooper agreement for 2009 responsive to request Item No. 1, but no other agreements. Counsel further states that the Custodian provided access to the requested invoices, but with substantial redactions.

Counsel states that on January 31, 2011, the Complainant resubmitted a second (2<sup>nd</sup>) OPRA request for the same types of records sought in his first (1<sup>st</sup>) OPRA request, but with an expanded time frame of 2000 through January 31, 2011. Counsel states that to date, the Custodian has not responded to the Complainant's second (2<sup>nd</sup>) OPRA request.

Counsel states that OPRA mandates that “government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access accorded [under OPRA], shall be construed in favor of the public's right of access.” Libertarian Party of Cent. New Jersey v. Murphy, 384 N.J. Super. 136, 139 (App. Div. 2006)(citing N.J.S.A. 47:1A-1). Further, Counsel states that “[t]he purpose of OPRA 'is to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process.’” Times of Trenton Publ'g Corp. v. Lafayette Yard Cmty. Dev. Corp., 183 N.J. 519, 535 (2005)(quoting Asbury Park Press v. Ocean County Prosecutor's Office, 374 N.J. Super. 312, 329 (Law Div. 2004). Counsel states that in any action under OPRA, the burden of proof rests with the public agency. N.J.S.A. 47:1A-6.

Counsel states that a custodian of record must bear the burden of proof in any proceeding under OPRA. N.J.S.A. 47:1A-6 and Paff v. Township of Lawnside (Camden), GRC Complaint No. 2009-155 (October 2010). Counsel contends that there is no doubt that the records requested by the Complainant are government records as defined under OPRA. N.J.S.A. 47:1A-1.1.

Counsel contends that the Custodian denied access to retention agreements between the FFD and Cooper & Cooper for 2008, 2010 and 2011 (if one exists). Counsel further contends that attorney invoices normally do not contain information that is confidential or subject to the attorney-client privilege exemption. Counsel contends that descriptions of work or cases do not convey privileged information and should not be redacted.

Counsel requests the following:

1. A determination ordering the Custodian to disclose the responsive records to the Complainant.
2. A determination ordering the Custodian to provide to the GRC the redacted invoices for an *in camera* review.
3. A determination that the Complainant is a prevailing party entitled to reasonable attorney's fees. N.J.S.A. 47:1A-6.
4. A determination of whether the Custodian knowingly and willfully violated OPRA.

The Complainant does not agree to mediate this complaint.

#### **April 29, 2011**

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

#### **May 3, 2011**

E-mail from the Custodian's Counsel to the GRC. Counsel states that the FFD recently retained him on April 15, 2011. Counsel requests an extension of fifteen (15) business days to submit the SOI. Counsel states that this extension is necessary to allow Counsel to familiarize himself with the complaint and obtain a sworn statement from the Custodian.



**May 4, 2011**

E-mail from the GRC to the Custodian's Counsel. The GRC grants Counsel an extension of time until May 27, 2011 to submit the SOI for the reasons stated by Counsel.

**May 24, 2011**

E-mail from the Custodian's Counsel to the GRC. Counsel states that he is working with the Complainant's Counsel to resolve this matter. Counsel thus requests an extension of time until July 1, 2011 to submit the SOI. Counsel states that this extension will allow sufficient time to resolve this complaint and to allow the FFD to approve any proposed settlement at its June meeting, which occurs on the fourth (4<sup>th</sup>) Monday of the month.

**May 24, 2011**

E-mail from the GRC to the Custodian's Counsel. The GRC states that it will generally grant one (1) extension of five (5) business days to submit an SOI. The GRC states that it has already granted Counsel an extension of fifteen (15) business days. The GRC states that regardless of any pending settlement, the GRC declines to grant another extension of time. The GRC states that Counsel must submit the SOI by close of business on May 27, 2011.

**May 24, 2011**

E-mail from the Custodian's Counsel to the GRC. Counsel requests that the GRC reconsider its denial of a second extension of time.

**May 28, 2011**

Custodian's SOI with the following attachments:

- Complainant's first (1<sup>st</sup>) OPRA request dated January 14, 2011.
- E-mail from the Custodian to the Complainant dated January 16, 2011.
- E-mail from Mr. Cooper to the Complainant dated January 19, 2011.
- E-mail from the Complainant to Mr. Cooper dated January 19, 2011.
- E-mail from Mr. Cooper to the Complainant dated January 24, 2011.
- E-mail from the Complainant to the Custodian dated January 25, 2011.
- E-mail from Mr. Cooper to the Complainant dated January 25, 2011.
- E-mail from the Complainant to the Custodian dated January 26, 2011.
- Complainant's second (2<sup>nd</sup>) OPRA request January 31, 2011.
- E-mail from the Custodian to the Complainant dated February 7, 2011 (with attachments).
- E-mail from the Complainant to the Custodian dated February 8, 2011.

The Custodian certifies that her search for the requested records included locating the records responsive to the Complainant's first (1<sup>st</sup>) OPRA request totaling 59 pages (55 pages of invoices and a 4-page contract) and providing same to Mr. Cooper for review.

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

The Custodian certifies that she received the Complainant's first (1<sup>st</sup>) OPRA request on January 14, 2011. The Custodian certifies that she acknowledged receipt of the OPRA request on January 16, 2011. The Custodian certifies that she gathered the responsive records and forwarded the request and records to Mr. Cooper, who responded in writing to the Complainant on January 19, 2011 requesting an extension of one (1) week to respond to the Complainant's OPRA request. The Custodian certifies that the Complainant granted the request for an extension until January 26, 2011. The Custodian certifies that the FFD eventually provided all records responsive in its possession via e-mail on February 7, 2011. The Custodian certifies that the records consisted of 55 pages of invoices and one (1) professional services contract for 2009 (4 pages).

The Custodian certifies that regarding the Complainant's second (2<sup>nd</sup>) OPRA request, she inadvertently failed to follow up with Mr. Cooper regarding the responsive records. The Custodian certifies that this oversight was due to the number of requests coming into the FFD and the fact that she was transitioning the current Custodian into the job. The Custodian certifies that she relied on Mr. Cooper to make redactions to the responsive records; however, it appears as though the FFD failed to provide said records. The Custodian certifies that the additional 31 pages of invoices, with appropriate redactions, are available for disclosure at this time.

The Custodian certifies that she was an elected official for the FFD on a one (1) year term and did not maintain office hours. The Custodian certifies that as an elected official, she was required to utilize her limited free time in order to respond properly to OPRA requests filed on almost a daily basis. The Custodian further certifies that she did not have any full-time or part-time office hours to respond to OPRA requests. The Custodian certifies that from January 10, 2011 through January 16, 2011, the FFD received 12 OPRA requests for various records, or two (2) OPRA requests per business day. The Custodian notes that prior to this point, the FFD routinely received between three (3) and five (5) OPRA requests per year. The Custodian certifies that in addition to running for re-election, the number of requests and breadth of records sought was overwhelming.

The Custodian further argues that the Complainant's second (2<sup>nd</sup>) OPRA request is a perfect example of the circumstances the Custodian faced in responding to OPRA requests. The Custodian states that said OPRA request was a seven (7) page request for 11 years of records. The Custodian certifies that she received this OPRA request at a time when other OPRA requests were pending and while the Complainant continued to submit new OPRA requests daily. The Custodian further certifies that between inclement weather, vacation at the end of January, transition of the current Custodian in mid-February and no regular office hours, it became impossible for the Custodian to respond in a timely manner without making any mistakes. The Custodian certifies that although the task of sufficiently responding to multiple OPRA requests became almost impossible, she attempted to ensure that either she or Mr. Cooper requested extensions of time to respond.

The Custodian asserts that based on her reliance on Mr. Cooper for his redaction of the responsive records, her failure to follow-up on the Complainant's second (2<sup>nd</sup>) OPRA request does not constitute a knowing and willful violation of OPRA.

## Analysis

### **Whether the Custodian timely responded to the Complainant's first (1<sup>st</sup>) OPRA request?**

OPRA provides that:

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

The Complainant's first (1<sup>st</sup>) OPRA request sought contracts and vouchers for legal services rendered by Cooper & Cooper. The requested contracts and vouchers are specifically classified under OPRA as “immediate access” records pursuant to N.J.S.A. 47:1A-5.e. In Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007), the GRC held that “immediate access language of OPRA (N.J.S.A. 47:1A-5.e.) suggest that the Custodian was still obligated to immediately notify the Complainant...” Inasmuch as OPRA requires a custodian to respond within a statutorily required time frame, when immediate access records are requested, a custodian must respond to the request for those records immediately, granting or denying access, requesting additional time to respond or requesting clarification of the request.

Here, Mr. Cooper responded in writing to the Complainant on the third (3<sup>rd</sup>) business day after receipt of the Complainant's first (1<sup>st</sup>) OPRA request requesting an extension of time to respond. However, the Custodian failed to respond immediately in writing seeking an extension of time. Thus, the Custodian has violated N.J.S.A. 47:1A-5.e. because the Custodian had an obligation to respond to the Complainant's first (1<sup>st</sup>) OPRA request for immediate access records immediately.

Therefore, the Custodian violated N.J.S.A. 47:1A-5.e. by failing to immediately respond in writing to the Complainant's first (1<sup>st</sup>) OPRA request seeking an extension of time to grant access to the responsive contract and invoices. *See Herron, supra.*

Moreover, although Mr. Cooper sought an extension of time until January 26, 2011 to respond, the evidence of record indicates that the Custodian did not provide the Complainant with the responsive records until February 7, 2011. Additionally, the Custodian provided records without any indication as to whether contracts for 2008, 2010 and 2011 existed. Further, the Custodian advised the Complainant in her February 7, 2011 response that she would have to do more research for 2011 records, but provided no date on which she would provide those records.

In Kohn v. Township of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008), the custodian responded in writing on the fifth (5<sup>th</sup>) business day after receipt of the complainant's March 19, 2007, OPRA request, seeking an extension of time until April 20, 2007 to fulfill the complainant's OPRA request. However, the custodian responded on April 20, 2007, stating that he would provide the requested

records later in the week, and the evidence of record showed that the custodian provided no records until May 31, 2007. The Council held that:

“[t]he Custodian properly requested an extension of time to provide the requested records to the Complainant by requesting such extension in writing within the statutorily mandated seven (7) business days pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. ... however ... [b]ecause the Custodian failed to provide the Complainant access to the requested records by the extension date anticipated by the Custodian, the Custodian violated N.J.S.A. 47:1A-5.i. resulting in a “deemed” denial of access to the records.” *Id.*

Moreover, In Shanker v. Borough of Cliffside Park (Bergen), GRC Complaint No. 2007-245 (March 2009), the custodian’s counsel responded to the complainant’s OPRA request within the statutorily mandated seven (7) business days denying access to the requested record pursuant to N.J.S.A. 47:1A-9, the Open Public Meetings Act and attorney-client privilege exemption. However, counsel later certified in the SOI that the Borough did not receive the requested record until October 16, 2007, after receipt of the complainant’s OPRA request and subsequent Denial of Access complaint. The Council undertook the task of deciding whether counsel’s initial response was appropriate under OPRA:

“[i]n O’Shea v. Township of Fredon (Sussex), GRC Complaint No. 2007-251 (April 2008), the GRC determined that N.J.S.A. 47:1A-5.g. states that if a Custodian is “unable to comply with a request for access, then the Custodian shall indicate the specific basis” for the inability to comply. In that complaint, the Council applied N.J.S.A. 47:1A-5.g. to the Custodian’s failure to address the Complainant’s choice of mode of delivery and held that “the Custodian’s response is insufficient because she failed to specifically address the Complainant’s preference for receipt of records.”

The GRC also applied N.J.S.A. 47:1A-5.g. to a custodian’s failure to provide an adequate response when denying access to a request for government records or failure to respond to each request individually. *See* Paff v. Township of Berkeley Heights (Union), GRC Complaint No. 2007-271 (November 2008)(holding that the custodian’s response was insufficient because she failed to specifically state that the requested executive session minutes were not yet approved by the governing body at the time of the complainant’s request pursuant to N.J.S.A. 47:1A-5.g.) and Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008)(holding that the custodian’s response was legally insufficient because he failed to respond to each request item individually).” *Id.* on page 6.

The Council thus held that, “Counsel’s response was insufficient because he failed to specifically state that the requested record did not exist at the time of the Complainant’s September 11, 2007 OPRA request pursuant to N.J.S.A. 47:1A-5.g. and Paff v. Township of Berkeley Heights (Union), GRC Complaint No. 2007-271 (November 2008).”

In the matter before the Council, as in Kohn, supra, Mr. Cooper responded in writing to the Complainant's January 19, 2011 OPRA request on behalf of the Custodian in a timely manner requesting an extension of one (1) week extension to respond. Thus, the Custodian's written response granting or denying access to the requested records was due by January 26, 2011. Although Mr. Cooper responded on January 24, 2011 advising that OPRA request Item No. 1 was invalid and the records responsive to OPRA request Item No. 2 could be provided by mail only, no records were provided to the Complainant until February 7, 2011. Additionally, as in Shanker, the Custodian provided the records with no explanation as to whether any records for 2008, 2010 and 2011 relevant to the Complainant's OPRA request Item No. 1 existed or whether. The Custodian further failed to provide a date certain on which she would advise the Complainant as to whether any 2011 records existed; her response was therefore insufficient. See Taylor v. Township of Downe (Cumberland), GRC Complaint No. 2009-174 (Interim Order dated July 27, 2010)(holding that the custodian's initial response was insufficient because she failed to provide a date certain on which she would respond).

Therefore, although the Custodian timely responded (via Mr. Cooper) to the Complainant's January 14, 2011 OPRA request in writing requesting an extension of one (1) week to respond to said request, the Custodian's failure to grant or deny access to the requested records within the extended time frame results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.i., and Kohn, supra. See also Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-253 (September 2009). Moreover, although the Custodian provided records on February 7, 2011, eight (8) business days after the expiration of the extended time frame to respond, her response was insufficient because she failed to state whether certain records existed pursuant to Shanker, and further failed to provide a date certain on which she would advise the Complainant whether any 2011 records existed pursuant to Taylor.

### **Whether the Custodian timely responded to the Complainant's second (2<sup>nd</sup>) OPRA request?**

OPRA provides that:

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

OPRA provides that:

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

Further, OPRA provides that:

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

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.<sup>5</sup> Thus, a custodian’s failure to respond in writing to a complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

As discussed above, in Herron, the Council held that “immediate access language of OPRA (N.J.S.A. 47:1A-5.e.) suggest that the Custodian was still obligated to immediately notify the Complainant...” Inasmuch as OPRA requires a custodian to respond within a statutorily required time frame, when immediate access records are requested, a custodian must respond to the request for those records immediately, granting or denying access, requesting additional time to respond or requesting clarification of the request.

OPRA further requires a written response to an OPRA request. N.J.S.A. 47:1A-5.g. Although N.J.S.A. 47:1A-5.i. speaks directly to the seven (7) business day time frame, the provision carries a caveat for “shorter time [periods] ... otherwise provided by statute ...” Additionally, the Legislature clearly intended that all OPRA requests be responded to in writing by providing that custodians “... shall indicate the specific basis [for a denial of access] on the request form and promptly return it to the requestor.” N.J.S.A. 47:1A-5.g. Had the Legislature intended to allow custodians to simply grant access to immediate access records without providing a written response, it would have included such language within N.J.S.A. 47:1A-5.e. Moreover, N.J.S.A. 47:1A-5.g. provides for no exceptions when responding to immediate access records.

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<sup>5</sup> It is the GRC’s position that a custodian’s written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA.

In the instant complaint, the Custodian acknowledged receipt of the Complainant's second (2<sup>nd</sup>) OPRA request on February 7, 2011. However, the Custodian failed to respond to said OPRA request within the statutorily mandated seven (7) business days, or by February 16, 2011. Moreover, the Complainant sought contracts and vouchers, among other records, which OPRA specifically classifies as "immediate access" records.

Therefore, the Custodian did not timely respond to the Complainant's second (2<sup>nd</sup>) OPRA request. As such, the Custodian's failure to respond in writing to said OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley, supra. Further, the Custodian's failure to immediately respond to the Complainant's requests for contracts and vouchers results in a violation of OPRA's immediate access provision at N.J.S.A. 47:1A-5.e.

The GRC further notes that the Custodian acknowledged receipt of the Complainant's second (2<sup>nd</sup>) OPRA request on February 7, 2011 and requested that the Complainant complete an official OPRA request form. The Complainant responded on February 8, 2011 disputing the requirement that he complete the form. The GRC further notes that there is no evidence in the record that the Complainant ever completed and submitted his request on the FFD's official form as requested by the Custodian. However, the GRC notes that the Custodian's request that the Complainant complete an official Township OPRA request form is an impermissible limitation on access under OPRA pursuant to Renna v. County of Union, 407 N.J. Super. 230 (App. Div. 2009), because the Complainant's e-mailed OPRA request clearly invoked OPRA and made clear the nature of the request.

### **Whether the Custodian unlawfully denied access to the records responsive to the Complainant's first (1<sup>st</sup>) OPRA request?**

OPRA provides that:

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

Additionally, OPRA defines a government record as:

"... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ..." (Emphasis added.) N.J.S.A. 47:1A-1.1.

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

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

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

The records at issue for the Complainant’s first (1<sup>st</sup>) OPRA request are contracts for 2008, 2010 and 2011 and 55 pages of redacted invoices that the Custodian provided to the Complainant on February 7, 2011.

Regarding the contracts responsive to the Complainant’s OPRA request Item No. 1, on February 7, 2011 the Custodian provided to the Complainant a contract for 2009, but provided no further indication as to whether any contracts for the other years existed. The Custodian subsequently certified in the SOI that the only existing responsive contract was the 2009 contract that was provided to the Complainant on February 7, 2011. The Complainant’s Counsel confirmed receipt of the 2009 contract in the Denial of Access Complaint.

In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the complainant sought telephone billing records showing a call made to him from the New Jersey Department of Education. The custodian certified in the SOI that no records responsive to the complainant’s request existed. The complainant submitted no evidence to refute the custodian’s certification in this regard. The GRC determined that, because the custodian certified that no records responsive to the request existed and no evidence existed in the record to refute the custodian’s certification, there was no unlawful denial of access to the requested records.

Here, the Custodian certified that the only existing record responsive to the Complainant’s first (1<sup>st</sup>) OPRA request Item No. 1 was the 2009 contract provided to the Complainant on February 7, 2011. Thus, the evidence of record supports a conclusion that no other records responsive exist and the Complainant has provided no competent, credible evidence to refute this certification. Therefore, the Custodian did not unlawfully deny access to the contracts for 2008, 2010 and 2011 pursuant to Pusterhofer.

Regarding the invoices responsive to the Complainant’s OPRA request Item No. 2, the Complainant’s Counsel argued in the Denial of Access Complaint that attorney invoices normally do not contain information that is confidential or subject to the attorney-client privilege exemption. The Custodian certified in the SOI that she retrieved 55 pages of records and forwarded same to Mr. Cooper for his review and redaction if necessary. The Custodian further certified that she provided the Complainant with redacted copies of the 55 pages of invoices on February 7, 2011.

A review of the redaction index attached to the records the Custodian provided to the Complainant on February 7, 2011 shows that redactions were made for attorney-client



privileged material and personnel matters. Of the records provided, 13 invoices contain minimal to moderate redactions. These invoices are as follows:

- Invoice dated February 14, 2008 (1 page).
- Invoice dated April 9, 2008 (2 pages).
- Invoice dated July 25, 2008 (1 page).
- Invoice dated October 16, 2008 (2 pages).
- Invoice dated December 8, 2008 (1 page).
- Invoice dated April 22, 2009 (1 page).
- Invoice dated September 24, 2009 (1 page).
- Invoice dated December 3, 2009 (2 pages).
- Invoice dated January 26, 2010 (2 pages).
- Invoice dated March 24, 2010 (2 pages).
- Invoice dated May 17, 2010 (2 pages).
- Invoice dated July 15, 2010 (2 pages).
- Invoice dated November 10, 2010 (4 pages).

Moreover, the GRC notes that at no point after her February 7, 2011 response did the Custodian address whether any 2011 invoices responsive to the Complainant's first (1<sup>st</sup>) OPRA request Item No. 2 exist.

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 GRC<sup>6</sup> in which the GRC dismissed the complaint by accepting the Custodian's legal conclusion for the denial of access without further review. The Court stated that:

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

The Court also stated that:

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

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<sup>6</sup> Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005).  
Jeff Carter v. Franklin Fire District No. 1 (Somerset), 2011-73 – Findings and Recommendations of the Executive Director

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.” *Id.*

Therefore, pursuant to Paff, supra, the GRC must conduct an *in camera* review of the following redacted invoices to determine the validity of the Custodian’s assertion that the records contain attorney-client privileged and personnel information which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1:

- Invoice dated February 14, 2008 (1 page).
- Invoice dated April 9, 2008 (2 pages).
- Invoice dated July 25, 2008 (1 page).
- Invoice dated October 16, 2008 (2 pages).
- Invoice dated December 8, 2008 (1 page).
- Invoice dated April 22, 2009 (1 page).
- Invoice dated September 24, 2009 (1 page).
- Invoice dated December 3, 2009 (2 pages).
- Invoice dated January 26, 2010 (2 pages).
- Invoice dated March 24, 2010 (2 pages).
- Invoice dated May 17, 2010 (2 pages).
- Invoice dated July 15, 2010 (2 pages).
- Invoice dated November 10, 2010 (4 pages).

Moreover, the Custodian must either certify whether any 2011 invoices responsive to the Complainant’s OPRA request exist or provide same as part of the *in camera* review if the existent records were redacted.

### **Whether the Complainant’s January 31, 2011 request is invalid under OPRA?**

OPRA states that:

“[t]he custodian of a public agency shall adopt a form for the use of any person who requests access to a government record held or controlled by the public agency. The form shall provide space for the name, address, and phone number of the requestor *and a brief description of the government record sought...*” N.J.S.A. 47:1A-5.f. (Emphasis added).

The Complainant’s second (2<sup>nd</sup>) request at issue herein is seven (7) pages long and includes multiple types of government records for multiple terms, identifies multiple

persons and identifies a time frame of 11 years and one (1) month.<sup>7</sup> The Custodian contended in the SOI that this request made a perfect example of the burdensome conditions within which the Custodian was attempting to respond to OPRA requests at that time.

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:

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

The Court further held that "[u]nder OPRA, *agencies are required to disclose only 'identifiable' government records* not otherwise exempt ... In short, OPRA does not countenance open-ended searches of an agency's files." (Emphasis added.) *Id.*

In addition, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),<sup>8</sup> the Superior Court references MAG in that the Court held that a requestor must specifically describe the document sought because OPRA operates to make identifiable government records "accessible." "As such, a proper request under OPRA must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting all of an agency's documents."<sup>9</sup>

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

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<sup>7</sup> The GRC notes that a portion of the seven (7) page request recapitulated the events of the Complainant's first (1<sup>st</sup>) OPRA request.

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

<sup>9</sup> As stated in Bent, *supra*.

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, at 177.

Moreover, 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 [Items No.] 2-5 are not requests for identifiable government records, the requests are invalid and the Custodian has not unlawfully denied access to the requested records pursuant to [MAG] and [Bent].”

Here, the Complainant's request sought 28 different types of records, identified 14 individuals and further identified five (5) key words and "any reasonably construed variation thereof." Moreover, the request identified five (5) conditions for the Custodian to follow, each a paragraph long. Further, the request sought all of this for an 11 year and one (1) month period. The Complainant's request is similar to the request in NJ Builders in that the request is extremely complex and does not provide a brief description for the records sought. Although the request seeks specific types of government records, it is invalid nonetheless based on the sheer voluminous nature of same. The request would force the Custodian to research 11 years of records to identify those records that fit within the scope of the request.

Therefore, based upon the Appellate Division's decision in NJ Builders, the Complainant's voluminous second (2<sup>nd</sup>) request, a seven (7) page request including numerous records spanning eleven (11) years and one (1) month, is not a valid OPRA request because it bears no resemblance to the records request envisioned by the Legislature, which "provide[s] space for ... a brief description of the record sought." *Id.* at 179. *See also* Vessio v. Department of Community Affairs, Division of Fire Safety, GRC Complaint No. 2007-63 (May 2007), Caggiano v. Borough of Stanhope (Sussex), GRC Complaint No. 2006-220 (September 2007), MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005).

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

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

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

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

**Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian violated N.J.S.A. 47:1A-5.e. by failing to immediately respond in writing to the Complainant's first (1<sup>st</sup>) OPRA request seeking an extension of time to grant access to the responsive contract and invoices. *See* Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007).
2. Although the Custodian timely responded (via Mr. Cooper) to the Complainant's January 14, 2011 OPRA request in writing requesting an extension of one (1) week to respond to said request, the Custodian's failure to grant or deny access to the requested records within the extended time frame

results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.i., and Kohn v. Township of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-253 (September 2009). Moreover, although the Custodian provided records on February 7, 2011, eight (8) business days after the expiration of the extended time frame to respond, her response was insufficient because she failed to state whether certain records existed pursuant to Shanker v. Borough of Cliffside Park (Bergen), GRC Complaint No. 2007-245 (March 2009), and further failed to provide a date certain on which she would advise the Complainant whether any 2011 records existed pursuant to Taylor v. Township of Downe (Cumberland), GRC Complaint No. 2009-174 (Interim Order dated July 27, 2010).

3. The Custodian did not timely respond to the Complainant’s second (2<sup>nd</sup>) OPRA request. As such, the Custodian’s failure to respond in writing to said OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). Further, the Custodian’s failure to immediately respond to the Complainant’s requests for contracts and vouchers results in a violation of OPRA’s immediate access provision at N.J.S.A. 47:1A-5.e.
4. The Custodian certified that the only existing record responsive to the Complainant’s first (1<sup>st</sup>) OPRA request Item No. 1 was the 2009 contract provided to the Complainant on February 7, 2011. Thus, the evidence of record supports a conclusion that no other records responsive exist and the Complainant has provided no competent, credible evidence to refute this certification. Therefore, the Custodian did not unlawfully deny access to the contracts for 2008, 2010 and 2011 pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
5. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the following redacted invoices to determine the validity of the Custodian’s assertion that the records contain attorney-client privileged and personnel information which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.:
  - Invoice dated February 14, 2008 (1 page).
  - Invoice dated April 9, 2008 (2 pages).
  - Invoice dated July 25, 2008 (1 page).
  - Invoice dated October 16, 2008 (2 pages).
  - Invoice dated December 8, 2008 (1 page).
  - Invoice dated April 22, 2009 (1 page).
  - Invoice dated September 24, 2009 (1 page).
  - Invoice dated December 3, 2009 (2 pages).

- Invoice dated January 26, 2010 (2 pages).
- Invoice dated March 24, 2010 (2 pages).
- Invoice dated May 17, 2010 (2 pages).
- Invoice dated July 15, 2010 (2 pages).
- Invoice dated November 10, 2010 (4 pages).

Moreover, the Custodian must either certify whether any 2011 invoices responsive to the Complainant's OPRA request exist or provide same as part of the *in camera* review if the existent records were redacted.

6. **The Custodian must deliver<sup>10</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 5 above), a document or redaction index<sup>11</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,<sup>12</sup> 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.**
7. Based upon the Appellate Division's decision in New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007), the Complainant's voluminous second (2<sup>nd</sup>) request, a seven (7) page request including numerous records spanning eleven (11) years and one (1) month, is not a valid OPRA request because it bears no resemblance to the record request envisioned by the Legislature, which "provide[s] space for ... a brief description of the record sought." *Id.* at 179. See also Vessio v. Department of Community Affairs, Division of Fire Safety, GRC Complaint No. 2007-63 (May 2007), Caggiano v. Borough of Stanhope (Sussex), GRC Complaint No. 2006-220 (September 2007), MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005).
8. The Council defers analysis of whether the original 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.
9. The Council defers analysis of whether the Complainant is a prevailing party pending the current Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso  
Senior Case Manager

<sup>10</sup> 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.

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

<sup>12</sup> "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."

Approved By: Karyn Gordon, Esq.  
Acting Executive Director

July 24, 2012