



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

July 29, 2014 Government Records Council Meeting

Joyce Blay
Complainant

Complaint No. 2013-150

v.

Lakewood Board of Education (Ocean)
Custodian of Record

At the July 29, 2014 public meeting, the Government Records Council (“Council”) considered the July 22, 2014 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian complied with the Council’s June 24, 2014 Interim Order because he made available the responsive records to the Complainant for inspection within the extended time frame and simultaneously provided certified confirmation of compliance to the Executive Director.
2. Although the Custodian unlawfully denied access to transportation contracts, invoices, bills and purchase orders for the 2009-2010 and 2010-2011 school years due to his concern over the pendency of an FBI subpoena, the Custodian timely complied with the Council’s June 24, 2014 Interim Order within the extended time frame to do so. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s unlawful denial of access does not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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



Final Decision Rendered by the
Government Records Council
On The 29th Day of July, 2014

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: July 31, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
July 29, 2014 Council Meeting**

**Joyce Blay¹
Complainant**

GRC Complaint No. 2013-150

v.

**Lakewood Board of Education (Ocean)²
Custodial Agency**

Records Relevant to Complaint: Inspection and/or copies of all transportation contracts, invoices, bills and purchase orders for public and non-public school bus routes servicing Lakewood students living in Somerset Walk during the 2009-2010, 2010-2011, 2011-2012 and 2012-2013 school years.

Custodian of Record: Thomas D'Ambola
Request Received by Custodian: May 14, 2013
Response Made by Custodian: May 23, 2013
GRC Complaint Received: May 22, 2013

Background

June 24, 2014 Council Meeting:

At its June 24, 2014 public meeting, the Council considered the June 17, 2014 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted said findings and recommendations. The Council, therefore, found that:

1. Although Mr. Fink responded in writing to the Complainant's OPRA request on behalf of the Custodian immediately, his response was insufficient because he failed to provide a date certain upon which the Custodian would respond to the Complainant's OPRA request. N.J.S.A. 47:1A-5(i); Hardwick v. NJ Dep't of Transportation, GRC Complaint No. 2007-164 (February 2008), *See also Bentz v. Borough of Paramus (Bergen)*, GRC Complaint No. 2008-89 (June 2011).
2. The Custodian unlawfully denied access of transportation contracts, invoices, bills and purchase orders for 2009-2010 and 2010-2011 because the evidence of record indicates that same were not part of the FBI's investigation and therefore were not exempt from access at the time of the Complainant's OPRA request. Thus, the

¹ No legal representation listed on record.

² Represented by James Eric Andrews, Esq., of Schenck, Price, Smith & King, LLP (Florham Park, NJ).

Custodian must make available those records that exist for inspection to the Complainant.

3. **The Custodian shall comply with item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,³ to the Executive Director.⁴**
4. The Council defers analysis of whether Mr. Fink and the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On June 25, 2014, the Council distributed its Interim Order to all parties. On July 2, 2014, the Custodian's Counsel sought an extension of five (5) business days, or until July 10, 2014, to comply with the Council's Order, which the GRC granted on July 2, 2014. On July 8, 2014, the Complainant confirmed that she inspected the records provided by Lakewood Board of Education and was satisfied that the Custodian complied with her OPRA request.

On July 9, 2014, the Custodian responded to the Council's Interim Order. The Custodian certified that all records relating to the Complainant's OPRA request for 2009-2010 and 2010-2011 were provided to the Complainant for inspection on July 9, 2014. The Custodian certified that the Complainant confirmed her satisfaction with the records provided in an e-mail to the GRC on the same day. The Custodian noted that no redactions were made to any records inspected by the Complainant.

Analysis

Compliance

At its June 24, 2014 meeting, the Council ordered the Custodian to make available those records responsive to the Complainant's request for the 2009-2010 and 2010-2011 school years that exist for inspection to the Complainant. On June 25, 2014, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on July 2, 2014.

On July 2, 2014, the last day to comply with the Council's Order, the Custodian's Counsel sought an extension of time until July 10, 2014, which the GRC granted. Thereafter, the

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

⁴ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

Custodian submitted certified confirmation of compliance on July 9, 2014 that the Complainant inspected those records required to be disclosed per the Council's Interim Order, to her satisfaction on July 8, 2014.

Therefore, the Custodian complied with the Council's June 24, 2014 Interim Order because he made available the responsive records to the Complainant for inspection within the extended time frame and simultaneously provided certified confirmation of compliance to the Executive Director.

Knowing & Willful

OPRA states that “[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty ...” N.J.S.A. 47:1A-11(a). OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states “... [i]f the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA]...” N.J.S.A. 47:1A-7(e).

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (id.; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

Although the Custodian unlawfully denied access to transportation contracts, invoices, bills and purchase orders for the 2009-2010 and 2010-2011 school years due to his concern over the pendency of an FBI subpoena, the Custodian timely complied with the Council's June 24, 2014 Interim Order within the extended time frame to do so. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's unlawful denial of access does not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's June 24, 2014 Interim Order because he made available the responsive records to the Complainant for inspection within the extended time frame and simultaneously provided certified confirmation of compliance to the Executive Director.
2. Although the Custodian unlawfully denied access to transportation contracts, invoices, bills and purchase orders for the 2009-2010 and 2010-2011 school years due to his concern over the pendency of an FBI subpoena, the Custodian timely complied with the Council's June 24, 2014 Interim Order within the extended time frame to do so. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's unlawful denial of access does not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: Frank F. Caruso
Senior Case Manager

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

July 22, 2014



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

June 24, 2014 Government Records Council Meeting

Joyce Blay
Complainant

Complaint No. 2013-150

v.

Lakewood Board of Education (Ocean)
Custodian of Record

At the June 24, 2014 public meeting, the Government Records Council ("Council") considered the June 17, 2014 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Although Mr. Fink responded in writing to the Complainant's OPRA request on behalf of the Custodian immediately, his response was insufficient because he failed to provide a date certain upon which the Custodian would respond to the Complainant's OPRA request. N.J.S.A. 47:1A-5(i); Hardwick v. NJ Dep't of Transportation, GRC Complaint No. 2007-164 (February 2008), *See also* Bentz v. Borough of Paramus (Bergen), GRC Complaint No. 2008-89 (June 2011).
2. The Custodian unlawfully denied access of transportation contracts, invoices, bills and purchase orders for 2009-2010 and 2010-2011 because the evidence of record indicates that same were not part of the FBI's investigation and therefore were not exempt from access at the time of the Complainant's OPRA request. Thus, the Custodian must make available those records that exist for inspection to the Complainant.
3. **The Custodian shall comply with item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹ to the Executive Director.²**

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

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

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

Interim Order Rendered by the
Government Records Council
On The 24th Day of June, 2014

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: June 25, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 24, 2014 Council Meeting**

**Joyce Blay¹
Complainant**

GRC Complaint No. 2013-150

v.

**Lakewood Board of Education (Ocean)²
Custodial Agency**

Records Relevant to Complaint: Inspection and/or copies of all transportation contracts, invoices, bills and purchase orders for public and non-public school bus routes servicing Lakewood students living in Somerset Walk during the 2009-2010, 2010-2011, 2011-2012 and 2012-2013 school years.

Custodian of Record: Thomas D'Ambola
Request Received by Custodian: May 14, 2013
Response Made by Custodian: May 23, 2013
GRC Complaint Received: May 22, 2013

Background³

Request and Response:

On May 14, 2013, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On the same day, Mr. Carl Fink, Lakewood Board of Education ("BOE") President, responded advising that the Custodian was out on personal business and the BOE would not be able to comply within seven (7) business days. The Complainant responded seeking a date certain on which the BOE would respond. On May 21, 2013, the Complainant advised that she received no response and that a response is due by the end of the day.

Denial of Access Complaint:

On May 22, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that, notwithstanding her

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² Represented by James Eric Andrews, Esq., of Schenck, Price, Smith & King, LLP (Florham Park, NJ).

³ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

emails and phone calls to the BOE seeking a response to her OPRA request for immediate access records, the Custodian failed to respond at all.

Supplemental Response

On May 23, 2013, the seventh (7th) business day after receipt of the OPRA request, the Custodian advised that records for the 2011-2012 and 2012-2013 school years are available and all previous records are currently unavailable due to a Federal Bureau of Investigation (“FBI”) subpoena. On May 26, 2013, the Complainant disputed that the records sought were the subject of the FBI subpoena reported on in the Asbury Park Press on May 14, 2013. On the same day, the Custodian advised the Complainant that his secretary left a message advising of disclosure of the records on May 23, 2013 and same are still available. The Custodian suggested that the Complainant come to the BOE on May 28, 2013 to retrieve the records. The Complainant disputed that anyone other than Mr. Fink contacted her regarding this request.

On June 5, 2013, the Custodian’s secretary e-mailed the Complainant advising that she left several voicemails but did not hear back from the Complainant. The secretary advised that records for 2011-2012 and 2012-2013 are available for retrieval at a copy cost of \$25.90. The secretary further advised that records for 2009-2010 and 2010-2011 are not available because they are locked in the BOE’s warehouse and cannot be accessed due to a pending FBI investigation. On June 6, 2013, the Complainant responded noting that she did not seek copies of the responsive records and that she filed a complaint with the GRC. The Custodian responded disputing that the BOE failed to respond, rather, the Complainant failed to appear for inspection.

On June 6, 2013, the Complainant argued that although Mr. Fink responded to her request immediately, he failed to provide a date certain on which the Custodian would respond. The Complainant further argued that the Custodian failed to respond in writing immediately. The Complainant finally asserted that unless the BOE produces an FBI subpoena identifying the records at issue, the Complainant would not accept this legal basis because the FBI investigation was not focused on transportation contractors.

Statement of Information:

On June 28, 2013, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that the Complainant’s OPRA request was stored in his junk e-mail folder and he did not actually see the request until May 20, 2013 after being alerted to the request by the Complainant via telephone. The Custodian certified that he was also out for several days for personal reasons. The Custodian affirmed that the BOE asked the transportation department for responsive records. The Custodian certified that he responded on May 23, 2013 advising that records for the 2011-2012 and 2012-2013 school years are available and all previous records are currently unavailable due to a FBI subpoena. He further certified that his secretary again contacted the Complainant via e-mail and telephone on June 5, 2013 advising of the BOE’s response, but that to date, the Complainant has not reviewed or retrieved same.

The Custodian disputed the Complainant’s argument that he failed to timely respond. The Custodian countered that due to his absence from work and the fact that the request was in his

spam mail, the Custodian did not actually receive same until May 20, 2013. The Custodian further contended that he made a good faith effort thereafter to timely provide 518 pages of responsive records that were not in storage and also not the subject of the FBI investigation. The Custodian also contended that he must actually possess the OPRA request in order for the statutorily mandated time frame to apply.

Additional Submissions

On January 7, 2014, the GRC sought additional information from the Custodian. Specifically, the GRC noted that the Custodian failed to provide any evidence supporting that records for the 2009-2010 and 2010-2011 school years could not be disclosed due to an FBI subpoena. Thus, the GRC requested that the Custodian provide a legal certification and documentation supporting that he was unable to gain access to the responsive records due to the subpoena by January 10, 2014.

On January 10, 2014, the Custodian certified that on May 10, 2013, the FBI issued a subpoena directing him to provide certain records in connection with a Grand Jury investigation. The Custodian certified that the Superintendent directed that all records in the storage room, where the 2009-2010 and 2010-2011 transportation records were stored, not be removed or handled pending submission to the FBI of all requested records sought in connection with the subpoena. The Custodian certified that because he was new at the time of the request and because the storage room was in such disarray, the Custodian feared that any search in the storage room would compromise the FBI's investigation. The Custodian certified that per a June 4, 2013 e-mail from FBI Agent Sean McCarthy to the BOE, “. . . no documents should be removed or released for any circumstances ([i.e.] OPRA requests).”

The Custodian further certified that in October 2013, the FBI removed the remainder of records it sought from the storage room. The Custodian thus affirmed that the records at issue here could be accessed for review and disclosure. The Custodian finally noted that although he could likely locate and provide the 2009-2010 and 2010-2011 records, the Complainant has failed to inspect or retrieve the 2011-2012 and 2012-2013 school year records available to her since May 2013.

On January 13, 2014, the Complainant requested that the GRC adjudicate this complaint based on her Denial of Access Complaint and not an unrelated defense. The Complainant included an e-mail chain between herself and Agent McCarthy in which Agent McCarthy stated that the FBI's subpoena did not include the BOE's transportation records. On January 17, 2014, the GRC requested that the Complainant confirm whether the only issue to be considered for adjudication is whether the Custodian failed to provide immediate access to the requested records. On the same day, the Complainant stated that she is asking the GRC to determine whether the BOE timely responded to her request for immediate access records. The Complainant further stated that the GRC should reject the Custodian's certification as to why he did not disclose the transportation records because Agent McCarthy's statements contradict same. On January 18, 2014, the Complainant clarified that the GRC should accept her e-mail chain with Agent McCarthy to refute the Custodian's certification that every responsive transportation record was exempt at the time of her request.

On January 27, 2014, the Custodian's Counsel contended that the Complainant's previous e-mails misconstrued the Custodian's certification. Counsel asserted that the Custodian's concern was limiting the potential for interference with the FBI's investigation. Counsel asserted that the Custodian was concerned that a search for the responsive records may have resulted in misplacing or removal of records sought under the subpoena. Counsel noted that the Custodian never certified that the subpoena sought transportation records and consistently maintained that he was concerned about interfering with the FBI investigation.

Analysis

Sufficiency of Response

OPRA provides that "[i]mmediate access ordinarily shall be granted to budgets, bills, vouchers, contracts, including collective negotiation agreements and individual employment contracts, and public employee salary and overtime information." N.J.S.A. 47:1A-5(e).

The contracts, invoices, bills and purchase orders requested by the Complainant are specifically classified under OPRA as "immediate access" records. N.J.S.A. 47:1A-5(e). In Herron v. Twp. 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)) suggests 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.

Moreover, OPRA provides that a custodian may have an extension of time to respond to a complainant's OPRA request, but the custodian must provide a date certain. N.J.S.A. 47:1A-5(i). OPRA further requires that should the custodian fail to provide a response on that specific date, "access shall be deemed denied." Id.

In Hardwick v. NJ Dep't of Transportation, GRC Complaint No. 2007-164 (February 2008), the custodian responded by requesting an extension of time to address the request but failed to provide a date certain upon which the requested records would be provided. The Council held that the custodian's request for an extension of time was inadequate under OPRA pursuant to N.J.S.A. 47:1A-5(i).

Here, Mr. Fink responded on behalf of the Custodian on the same day as receipt of the request advising the Complainant that the Custodian was out on personal business and that the BOE would be able to respond within seven (7) business days. Mr. Fink's response would certainly classify as immediate and thus is not a violation of N.J.S.A. 47:1A-5(e). However, Mr. Fink's failure to provide a date certain on which the BOE would respond is an insufficient response. N.J.S.A. 47:1A-5(i).

Therefore, although Mr. Fink responded in writing to the Complainant's OPRA request on behalf of the Custodian immediately, his response was insufficient because he failed to provide a date certain upon which the Custodian would respond to the Complainant's OPRA

request. N.J.S.A. 47:1A-5(i); Hardwick, GRC 2007-164. *See also* Bentz v. Borough of Paramus (Bergen), GRC Complaint No. 2008-89 (June 2011).

Unlawful Denial of Access

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

OPRA further provides that it “. . . shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to . . . federal order.” N.J.S.A. 47:1A-9(a).

The GRC first notes that the Custodian previously endeavored to provide responsive 2011-2012 and 2012-2013 transportation records available for inspection and pick up on May 23, 2013 and June 5, 2013. Thus, the GRC will focus its analysis on whether the Custodian unlawfully denied access to the 2009-2010 and 2010-2011 records he asserted could not be provided due to an FBI subpoena.

Both parties have submitted competent, credible evidence that an FBI subpoena was issued to the BOE. This complaint calls into question what affect the subpoena had on the disclosability of the records at the time the Complainant submitted her OPRA request.

The Custodian maintained throughout the pendency of this complaint that the Superintendent ordered that no records in the storage room containing responsive records be removed or handled during the pendency of the subpoena. Further, the Custodian has maintained that his concern was that attempting to locate responsive records could interfere with the FBI’s investigation. Additionally, the Custodian submitted an e-mail in which Agent McCarthy advised the BOE that it should not remove or disclose any records that are the subject of the subpoena. The Custodian further certified that the FBI investigation was completed in October 2013, and that records could be disclosed at that time.

Conversely, the Complainant submitted an e-mail chain between herself and Agent McCarthy in which he confirmed that the subpoena did not encompass BOE transportation records. The Complainant thus contended that Agent McCarthy’s response refuted that every transportation record responsive to her request was exempt at the time of her OPRA request.

The evidence submitted to the GRC in this matter supports that while the FBI was conducting an investigation, there was no binding order barring the Custodian from accessing other records within the same storage unit. The e-mail the Custodian submitted as part of his January 10, 2014 certification directly references only those records sought under the subpoena, which the evidence supports did not include transportation records. While the GRC appreciates the Custodian’s trepidation of interfering with the FBI’s investigation, the evidence herein does not support that the records sought were part of the investigation and accordingly could not be

exempt from disclosure pursuant to same. Further, the Council has previously determined that an agency's internal policy cannot inhibit a request's right to access records; thus, the Superintendent's decree does not supersede OPRA. Renna v. Cnty. of Union, GRC Complaint No. 2004-136 (August 2005). Finally, the fact that the storage room was disorganized did not alleviate the Custodian from performing or causing others to perform a search to locate responsive records. Lebbing v. Borough of Highland Park (Middlesex), GRC Complaint No. 2009-251 (January 2011)(citing Donato v. Twp. of Union, GRC Complaint No. 2005-182 (February 2007)) at 8.

Therefore, the Custodian unlawfully denied access of transportation contracts, invoices, bills and purchase orders for 2009-2010 and 2010-2011 because the evidence of record indicates that same were not part of the FBI's investigation and therefore were not exempt from access at the time of the Complainant's OPRA request. Thus, the Custodian must make available those records that exist for inspection to the Complainant.

Knowing & Willful

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Although Mr. Fink responded in writing to the Complainant's OPRA request on behalf of the Custodian immediately, his response was insufficient because he failed to provide a date certain upon which the Custodian would respond to the Complainant's OPRA request. N.J.S.A. 47:1A-5(i); Hardwick v. NJ Dep't of Transportation, GRC Complaint No. 2007-164 (February 2008), *See also* Bentz v. Borough of Paramus (Bergen), GRC Complaint No. 2008-89 (June 2011).
2. The Custodian unlawfully denied access of transportation contracts, invoices, bills and purchase orders for 2009-2010 and 2010-2011 because the evidence of record indicates that same were not part of the FBI's investigation and therefore were not exempt from access at the time of the Complainant's OPRA request. Thus, the Custodian must make available those records that exist for inspection to the Complainant.
3. **The Custodian shall comply with item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁴ to the Executive Director.⁵**

⁴ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

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

Prepared By: Frank F. Caruso
Senior Case Manager

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

June 17, 2014⁶

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

⁶ This complaint was prepared for adjudication at the Council's April 29, 2014 meeting; however, the complaint could not be adjudicated due to lack of quorum.