



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
Commissioner

FINAL DECISION

June 28, 2016 Government Records Council Meeting

J.C. McCormack
Complainant

Complaint No. 2013-357

v.

NJ Department of Treasury
Custodian of Record

At the June 28, 2016 public meeting, the Government Records Council (“Council”) considered the June 21, 2016 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian complied with the Council’s May 24, 2016 Interim Order because he responded in the prescribed time frame by providing to the Complainant two (2) pages containing two (2) unredacted excerpts in accordance with the Council’s *In Camera* Examination. The Custodian also simultaneously provided certified confirmation of compliance to the Executive Director.
2. The previously named Custodian, Cynthia Jablonski, failed to bear her burden of proving that she timely responded to the Complainant’s request for immediate access records, which resulted in a “deemed” denial of access. Further, at the direction of The Data Entry Company, both Ms. Jablonski and the Custodian unlawfully denied access to two (2) redacted excerpts from the responsive contracts. However, Ms. Jablonski and the Custodian lawfully denied access to a majority of the redacted material in the contracts. Further, the Custodian timely complied with the Council’s September 30, 2014 and May 24, 2016 Interim Orders. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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



Final Decision Rendered by the
Government Records Council
On The 28th Day of June, 2016

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 30, 2016

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
June 28, 2016 Council Meeting**

**J.C. McCormack¹
Complainant**

GRC Complaint No. 2013-357

v.

**State of N.J. Department of Treasury²
Custodial Agency**

and

**The Data Entry Company³
Intervener**

Records Relevant to Complaint:

Item No. 1: Copies of all contracts with Pioneer Credit Recovery, Inc. (PCR), plus copies of all reports, audits, and e-mails mentioning Pioneer, especially concerning their compliance/fulfillment of their contracts.

Item No. 2: Copies of all contracts that the Department of Treasury (“Treasury”) and/or the Division of Revenue (“Revenue”) have with private companies for the processing of tax returns/payments plus copies of all reports, audits, and e-mails mentioning/concerning the companies compliance/fulfillment of their contracts.

Custodian of Record: Garry Dales⁴

Request Received by Custodian: September 6, 2013

Response Made by Custodian: September 17, 2013; October 1, 2013; December 5, 2013; December 17, 2013; January 6, 2014

GRC Complaint Received: December 10, 2013

Background

May 24, 2016 Council Meeting:

At its May 24, 2016 public meeting, the Council considered the May 17, 2016 *In Camera*

¹ No legal representation listed on record.

² Represented by Roza Dabaghyan, DAG.

³ Represented by David C. Dreifuss, Esq. (Florham Park, N.J.).

⁴ Cynthia Jablonski was named in the complaint; however, Mr. Dales submitted the Statement of Information and compliance for this complaint.

Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian complied with the Council's September 30, 2014 Interim Order because he submitted to the GRC nine (9) copies of the records at issue and submitted certified confirmation of compliance to the Executive Director within the prescribed time frame to comply.
2. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.**⁵
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On May 26, 2016, the Council distributed its Interim Order to all parties. On June 2, 2016, the Custodian responded to the Council's Interim Order. The Custodian certified that, on this date, he disclosed to the Complainant via UPS Overnight mail two (2) pages containing (2) unredacted excerpts in accordance with the Council's *In Camera* Examination.⁶

Analysis

Compliance

At its May 24, 2016 meeting, the Council ordered the Custodian to comply with the Council's Findings of the *In Camera* Examination and to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On May 26, 2016, 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 June 3, 2016.

On June 2, 2016, the fourth (4th) business day after receipt of the Council's Order, the Custodian disclosed to the Complainant the two (2) excerpts as identified in the Council's *In*

⁵ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If the Complainant incurred a copying or special service charge, 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 On June 6, 2016, the Custodian advised the GRC that the compliance e-mail he sent to the Complainant failed to deliver. Additionally, the Custodian provided to the GRC a copy of the relevant UPS Overnight receipt and tracking information.

Camera Examination via UPS Overnight mail on that date. The Custodian also provided certified confirmation of compliance to the Executive Director.

Therefore, the Custodian complied with the Council's May 24, 2016 Interim Order because he responded in the prescribed time frame by providing to the Complainant two (2) pages containing two (2) unredacted excerpts in accordance with the Council's *In Camera* Examination. The Custodian also 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)).

Here, the previously named Custodian, Cynthia Jablonski, failed to bear her burden of proving that she timely responded to the Complainant's request for immediate access records, which resulted in a “deemed” denial of access. Further, at the direction of The Data Entry Company, both Ms. Jablonski and the Custodian unlawfully denied access to two (2) redacted excerpts from the responsive contracts. However, Ms. Jablonski and the Custodian lawfully denied access to a majority of the redacted material in the contracts. Further, the Custodian timely complied with the Council's September 30, 2014 and May 24, 2016 Interim Orders. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's May 24, 2016 Interim Order because he responded in the prescribed time frame by providing to the Complainant two (2) pages containing two (2) unredacted excerpts in accordance with the Council's *In Camera* Examination. The Custodian also simultaneously provided certified confirmation of compliance to the Executive Director.

2. The previously named Custodian, Cynthia Jablonski, failed to bear her burden of proving that she timely responded to the Complainant's request for immediate access records, which resulted in a "deemed" denial of access. Further, at the direction of The Data Entry Company, both Ms. Jablonski and the Custodian unlawfully denied access to two (2) redacted excerpts from the responsive contracts. However, Ms. Jablonski and the Custodian lawfully denied access to a majority of the redacted material in the contracts. Further, the Custodian timely complied with the Council's September 30, 2014 and May 24, 2016 Interim Orders. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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

June 21, 2016



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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

INTERIM ORDER

May 24, 2016 Government Records Council Meeting

J.C. McCormack
Complainant

Complaint No. 2013-357

v.

NJ Department of Treasury
Custodian of Record

At the May 24, 2016 public meeting, the Government Records Council (“Council”) considered the May 17, 2016 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian complied with the Council’s September 30, 2014 Interim Order because he submitted nine (9) copies of the records at issue to the GRC and submitted certified confirmation of compliance to the Executive Director within the prescribed time frame to comply.
2. **On the basis of the Council’s determination in this matter, the Custodian shall comply with the Council’s Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.¹**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

¹ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If the Complainant incurred a copying or special service charge, 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.

Interim Order Rendered by the
Government Records Council
On The 24th Day of May, 2016

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 26, 2016

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
May 24, 2016 Council Meeting**

**J.C. McCormack¹
Complainant**

GRC Complaint No. 2013-357

v.

**State of N.J. Department of Treasury²
Custodial Agency**

and

**The Data Entry Company³
Intervener**

Records Relevant to Complaint:

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Item No. 2: Copies of all contracts that the Department of Treasury (“Treasury”) and/or the Division of Revenue (“Revenue”) have with private companies for the processing of tax returns/payments plus copies of all reports, audits, and e-mails mentioning/concerning the companies compliance/fulfillment of their contracts.

Custodian of Record: Garry Dales⁴

Request Received by Custodian: September 6, 2013

Response Made by Custodian: September 17, 2013; October 1, 2013; December 5, 2013; December 17, 2013; January 6, 2014

GRC Complaint Received: December 10, 2013

Records Submitted for *In Camera* Examination:⁵

- Proposal submitted by The Data Entry Company (“TDEC”)(redacted and unredacted).

¹ No legal representation listed on record.

² Represented by Roza Dabaghyan, DAG.

³ Represented by David C. Dreifuss, Esq. (Florham Park, N.J.).

⁴ Cynthia Jablonski was named in the complaint; however, Mr. Dales submitted the Statement of Information and compliance for this complaint.

⁵ The GRC notes that the Custodian also provided copies of the best and final offer submitted by TDEC and PRWT. The GRC will not consider those records as part of its *in camera* examination because the Custodian disclosed those records to the Complainant without redactions on December 17, 2013.

- TDEC professional contracts (redacted and unredacted).
- Proposal submitted by PRWT Services (redacted and unredacted).
- PRWT professional contracts (redacted and unredacted).

Background

September 30, 2014 Council Meeting:

At its September 30, 2014, public meeting, the Council considered the September 23, 2014 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request for contracts. See N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond immediately in writing to the Complainant's OPRA request, either granting access, denying access, 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. See N.J.S.A. 47:1A-5(e); Herron v. Twp. of Montclair (Essex), GRC Complaint No. 2006-178 (February 2007).
2. The Custodian must disclose unredacted copies of the TDEC Proposal, TDEC Professional Contract, PRWT Proposal, and PRWT Professional Contract so that an *in camera* examination may be conducted to determine the validity of the Custodian's assertion that the records were properly redacted based on N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9.
3. TDEC, in turn, shall provide to the Custodian any records or information necessary for the Custodian to comply with the Council's Order.
4. **The Custodian must deliver⁶ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see number two (2) above), nine (9) copies of the redacted records, a document or redaction index⁷, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,⁸ 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.**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

⁶ 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.

⁷ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

⁸ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

Procedural History:

On October 1, 2014, the Council distributed its Interim Order to all parties. On October 7, 2014, the Custodian responded to the Council's Interim Order, certifying that he submitted nine (9) copies of redacted and unredacted records for review along with a redaction index.

On February 4, 2016, the GRC sent balancing test questionnaires to the parties regarding the redaction of employee names, addresses, telephone numbers, *etc.*⁹

On April 4, 2016, on behalf of the Custodian's Counsel's firm, Gregory Haroutunian, Esq., submitted TDEC's balancing test responses. Therein, Mr. Haroutunian argued that disclosure of employee information would represent a severe violation of the employees' privacy, could expose the employees to identity theft, and could severely injure the relationship between TDEC and the State. He also argued that, beyond upholding the redactions, no safeguards existed against unauthorized disclosure of employee personal information. Finally, Mr. Haroutunian asserted that there is no statutory mandate or articulated public policy in favor of disclosure of the redacted employee information. Conversely, Mr. Haroutunian argued that there existed articulated policies against requiring employers to disclose "trade secrets, confidential information, and customer relations." Ingersoll-Rand, Co. v. Ciavatta, 110 N.J. 609 (1988).

On the same day, the Custodian's Counsel also submitted balancing test responses supporting TDEC's arguments against disclosure. The Complainant did not submit responses to his balancing test questionnaire.¹⁰

Analysis

Compliance

On September 30, 2014, the Council ordered the Custodian to submit nine (9) copies of the TDEC Proposal, TDEC professional contract, PRWT proposal, and PRWT professional contract at issue for an *in camera* review, submit a document or redaction index, and further to provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On October 1, 2014, the Council distributed its Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. The Custodian received the Council's Order on the same day; thus, October 8, 2014, was the last day to comply. On October 7, 2014, the Custodian responded, submitting to the GRC nine (9) copies of the records and certified confirmation of compliance.

Therefore, the Custodian complied with the Council's September 30, 2014 Interim Order because he submitted nine (9) copies of the records at issue to the GRC and submitted certified

⁹ The Custodian's Counsel sought two (2) extension of time to submit their balancing test: the final date was April 4, 2016. The GRC provided the Complainant the same extensions.

¹⁰ On March 24, 2016, the Complainant contacted the GRC telephonically regarding his current situation and orally provided a partial response to his questionnaire. The GRC sent a letter to the Complainant on March 24, 2016, advising that it could not accept oral responses and that it required the Complainant to submit written responses by close of business on April 4, 2016.

confirmation of compliance to the Executive Director within the prescribed time frame.

Unlawful Denial of Access

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

OPRA provides that “a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy . . .” N.J.S.A. 47:1A-1. Further, OPRA provides that:

A government record shall not include . . . *trade secrets and proprietary commercial or financial information* obtained from any source. For the purposes of this paragraph, trade secrets shall include data processing software obtained by a public body under a licensing agreement which prohibits its disclosure (emphasis added).

N.J.S.A. 47:1A-1.1.

In reviewing the above provision, the GRC notes that OPRA specifically identifies as exempt “*proprietary commercial or financial information . . .*” (emphasis added), rather than merely basic or general financial information.

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

Redaction Number	Record Name/Date	Description of Record or Redaction	Custodian's Explanation/ Citation for Redactions	Findings of the <i>In Camera</i> Examination¹¹
DPP-1	TDEC RFP No. 12-X-21802	Disclaimer	Trade secrets and proprietary commercial or	The disclaimer appears to use very general, standard language about the use

¹¹ **Unless expressly identified for redaction, everything in the record shall be disclosed.** For purposes of identifying redactions, unless otherwise noted, a paragraph/new paragraph begins whenever there is an indentation and/or a skipped space(s). The paragraphs are to be counted starting with the first whole paragraph in each record and continuing sequentially through the end of the record. If a record is subdivided with topic headings, renumbering of paragraphs will commence under each new topic heading. Sentences are to be counted in sequential order throughout each paragraph in each record. Each new paragraph will begin with a new sentence number. If only a portion of a sentence is to be redacted, the word in the sentence which the redaction follows or precedes, as the case may be, will be identified and set off in quotation marks. If there is any question as to the location and/or extent of the redaction, the GRC should be contacted for clarification before the record is redacted. The GRC recommends the redactor make a paper copy of the original record and manually "black out" the information on the copy with a dark colored marker, then provide a copy of the blacked-out record to the requester.

			financial information. <u>N.J.S.A. 47:1A-1.1.</u>	and dissemination of the information contained in the RFP. The disclaimer does not reveal any trade secret or proprietary information. Thus, the Custodian unlawfully denied this portion of the RFP and must disclose same.
DPP-5	TDEC RFP No. 12-X-21802	1. 2 nd paragraph; sentence 2-5: identification of other TDEC clients and processes for servicing same. 2. TDEC Operational Team, titles, and employee locations	Trade secrets and proprietary commercial or financial information. <u>N.J.S.A. 47:1A-1.1.</u> Citizen's reasonable expectation of privacy. <u>N.J.S.A. 47:1A-1.</u>	1. In accordance with the Court's determination in <u>Comme'ns Workers of Am., AFL-CIO v. Rousseau</u> , 417 N.J. Super. 341, 357 (App. Div. 2010), customer information is protected as trade secret. Thus, the Custodian lawfully denied access to this information. 2. Although the Custodian initially argued in the Statement of Information that this information falls under the privacy interest exemption, he cited the trade secret and proprietary information exemption in the redaction index. The GRC, in determining that its review of the information related more to the privacy interest exemption, required the parties to complete balancing test questionnaires. TDEC and the Custodian's Counsel submitted responses; however, the Complainant did not submit a response. The GRC thus looks to its decision in <u>Smith v. NJ Dep't of Banking & Ins.,</u>

				GRC Complaint No. 2014-301 (March 2015), as instructive here. Specifically, the Council found that in the absence of the complainant’s balancing test responses, the test weighed in favor of non-disclosure. The GRC is satisfied that here, the Council should similarly conclude that the Custodian lawfully denied access to this information.
DPP-7	TDEC RFP No. 12-X-21802	Federal Employer Identification Number (“FEIN”)	Trade secrets and proprietary commercial or financial information. <u>N.J.S.A. 47:1A-1.1.</u>	Notwithstanding the Custodian’s basis for exemption, a FEIN is akin to a social security number. Specifically, the numbers are identified interchangeably in several places throughout the RFP. For this reason, same is exempt under the personal privacy interest exemption. <u>N.J.S.A. 47:1A-1; Burnett v. Cnty. of Bergen, 402 N.J. Super. 319 (App. Div. 2008).</u> Thus, the Custodian lawfully denied access to this information.
DPP-8	TDEC RFP No. 12-X-21802	FEIN/Social Security Number (“SSN”)	Trade secrets and proprietary commercial or financial information. <u>N.J.S.A. 47:1A-1.1.</u>	As noted in DPP-7, a FEIN is akin to a social security number. Specifically, the numbers are identified interchangeably in several places throughout the RFP. For this reason, same is exempt under the personal privacy interest exemption. <u>N.J.S.A. 47:1A-1; Burnett, 402 N.J. Super. 319.</u> Thus, the Custodian lawfully denied access to this information.

DPP-9	TDEC RFP No. 12-X-21802	Ownership interest Percentage	Citizen's reasonable expectation of privacy. <u>N.J.S.A. 47:1A-1</u> .	Notwithstanding the Custodian's assertion that <u>N.J.S.A. 47:1A-1</u> applies to this information, Executive Order No. 26 (Gov. McGreevey, 2002) ("EO 26") applies as it pertains to a natural person's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness. The Custodian has thus lawfully redacted this information.
DPP-10	TDEC RFP No. 12-X-21802	Ownership interest Percentage	Citizen's reasonable expectation of privacy. <u>N.J.S.A. 47:1A-1</u> .	This information is exempt under EO 26 and the Custodian has lawfully denied access to same.
DPP-13	TDEC RFP No. 12-X-21802	Current contracts and client representatives.	Trade secrets and proprietary commercial or financial information. <u>N.J.S.A. 47:1A-1.1</u> .	In accordance with <u>CWA</u> , this information is protected as trade secret. Thus, the Custodian lawfully denied access to this information.
DPP-21	TDEC RFP No. 12-X-21802	FEIN	Trade secrets and proprietary commercial or financial information. <u>N.J.S.A. 47:1A-1.1</u> .	As noted in DPP-7, a FEIN is akin to a social security number. Specifically, the numbers are identified interchangeably in several places throughout the RFP. For this reason, same is exempt under the personal privacy interest exemption. <u>N.J.S.A. 47:1A-1</u> ; <u>Burnett</u> , 402 <u>N.J. Super.</u> 319. Thus, the Custodian lawfully denied access to this information.
DPP-23	TDEC RFP No. 12-X-21802	1. Processing operations	Trade secrets and proprietary	1. The first (1 st) and second (2 nd) full

		<p>details</p> <p>2. Network Diagram.</p>	<p>commercial or financial information. <u>N.J.S.A.</u> 47:1A-1.1.</p>	<p>paragraphs describe the in-depth process that TDEC planned to utilize as part of its contract to include technology and internal staffing by full time equivalents (“FTE”). The Custodian lawfully denied access to this information.</p> <p>However, the four (4) bullet points following the first (1st) paragraph identifying each site and their specific operation were not redacted later in the RFP. <u>Id.</u> at DPP 30. As this information was later disclosed, the GRC is not satisfied that it should have been redacted here. Thus, the Custodian unlawfully denied this portion of the RFP and must disclose same.</p> <p>2. The diagram at the bottom of the page illustrates TDEC’s proposed process. Disclosure of this information would reveal sensitive information about TDEC’s internal operations. Thus, the Custodian lawfully denied access to this information.</p>
DPP-24	TDEC RFP No. 12-X-21802	Number of workstations at each site, identification of TDEC’s equipment at each site, and FTE numbers.	Trade secrets and proprietary commercial or financial information. <u>N.J.S.A.</u> 47:1A-1.1.	The redacted information describes the in-depth process that TDEC planned to utilize as part of its contract to include technology and internal staffing by full time equivalents (“FTE”).

				<p>Additionally, the diagram at the bottom of the page illustrates TDEC's proposed process. Disclosure of this information would reveal sensitive information about TDEC's internal operations. Thus, the Custodian lawfully denied access to this information.</p>
DPP-25	TDEC RFP No. 12-X-21802	<p>1. Network Diagram.</p> <p>2. FTE numbers.</p>	<p>Trade secrets and proprietary commercial or financial information. <u>N.J.S.A. 47:1A-1.1.</u></p>	<p>The Network Diagram illustrates TDEC's proposed process. Additionally, there is a detailed explanation of FTE utilization. Disclosure of this information would reveal sensitive information about TDEC's technical coordination and staffing. Thus, the Custodian lawfully denied access to this information.</p>
DPP-26	TDEC RFP No. 12-X-21802	<p>1. TDEC Operational Team, titles, employee addresses, and telephone numbers.</p> <p>2. Network Diagram.</p>	<p>Trade secrets and proprietary commercial or financial information. <u>N.J.S.A. 47:1A-1.1.</u></p> <p>Citizen's reasonable expectation of privacy. <u>N.J.S.A. 47:1A-1.</u></p>	<p>1. Regarding employee telephone numbers, the Custodian did not provide an argument as to why same would fall within the trade secret and proprietary information exemptions. However, the GRC has previously decided that a custodian could redact same from records. <i>See Livecchia v. Borough of Mount Arlington (Morris)</i>, GRC Complaint No. 2008-80 (Interim Order dated November 18, 2009). Thus, the Custodian lawfully denied access to this information. <u>N.J.S.A. 47:1A-6.</u></p>

				<p>Additionally, as noted in DPP-5, the Custodian lawfully denied access to the responsive information because it implies privacy interest. <u>Smith</u>, GRC 2014-301.</p> <p>2. The Network Diagram illustrates TDEC's proposed process, disclosure of which would reveal sensitive information about TDEC's technical coordination. Thus, the Custodian lawfully denied access to this information.</p>
DPP-27	TDEC RFP No. 12-X-21802	Employee names.	<p>Trade secrets and proprietary commercial or financial information. <u>N.J.S.A. 47:1A-1.1</u>.</p> <p>Citizen's reasonable expectation of privacy. <u>N.J.S.A. 47:1A-1</u>.</p>	As noted in DPP-5, the Custodian lawfully denied access to the responsive information because it implies privacy interest. <u>Smith</u> , GRC 2014-301.
DPP-28 & 29	TDEC RFP No. 12-X-21802	<p>1. Description of quality assurance tests.</p> <p>2. Employee name, address, telephone number, fax number and e-mail address.</p> <p>3. Identification of clients/auditors.</p>	<p>Trade secrets and proprietary commercial or financial information. <u>N.J.S.A. 47:1A-1.1</u>.</p> <p>Citizen's reasonable expectation of privacy. <u>N.J.S.A. 47:1A-1</u>.</p>	<p>1. Disclosure of this information would reveal sensitive information about TDEC's technical coordination. Thus, the Custodian lawfully denied access to this information.</p> <p>2. As noted in DPP-26, the Custodian lawfully denied access to the redacted telephone number.</p>

				<p>Additionally, as noted in DPP-5, the Custodian lawfully denied access to the responsive information because it implies privacy interest. <u>Smith</u>, GRC 2014-301.</p> <p>3. In accordance with <u>CWA</u>, this information is protected as trade secret. Thus, the Custodian lawfully denied access to this information.</p>
DPP-30	TDEC RFP No. 12-X-21802	<p>1. Identification of clients.</p> <p>2. TDEC Operational Team, titles and employee locations.</p>	<p>Trade secrets and proprietary commercial or financial information. <u>N.J.S.A. 47:1A-1.1</u>.</p> <p>Citizen's reasonable expectation of privacy. <u>N.J.S.A. 47:1A-1</u>.</p>	<p>1. In accordance with <u>CWA</u>, this information is protected as trade secret. Thus, the Custodian lawfully denied access to this information.</p> <p>2. As noted in DPP-5, the Custodian lawfully denied access to the responsive information because it implies privacy interest. <u>Smith</u>, GRC 2014-301.</p>
DPP-31	TDEC RFP No. 12-X-21802	<p>1. FTEs, quality assurance information, and process details.</p> <p>2. Employee name.</p>	<p>Trade secrets and proprietary commercial or financial information. <u>N.J.S.A. 47:1A-1.1</u>.</p> <p>Citizen's reasonable expectation of privacy. <u>N.J.S.A. 47:1A-1</u>.</p>	<p>1. Disclosure of this information would reveal sensitive information about TDEC's technical coordination and staffing. Thus, the Custodian lawfully denied access to this information.</p> <p>2. As noted in DPP-5, the Custodian lawfully denied access to the responsive information because it implies privacy interest. <u>Smith</u>, GRC 2014-301.</p>
DPP-32	TDEC RFP No. 12-X-21802	1. Employee name, address, telephone number, fax	Trade secrets and proprietary commercial or financial	1. As noted in DPP-26, the Custodian lawfully denied access to the redacted telephone

		<p>number and e-mail address.</p> <p>2. Paragraph 3: Description of the employees process for managing the contract.</p>	<p>information. <u>N.J.S.A. 47:1A-1.1.</u></p> <p>Citizen’s reasonable expectation of privacy. <u>N.J.S.A. 47:1A-1.</u></p>	<p>number.</p> <p>Additionally, as noted in DPP-5, the Custodian lawfully denied access to the responsive information because it implies privacy interest. <u>Smith</u>, GRC 2014-301.</p> <p>2. Disclosure of this information would reveal sensitive information about TDEC’s managerial practices. Thus, the Custodian lawfully denied access to this information.</p>
DPP-33	TDEC RFP No. 12-X-21802	Employee names, duties and locations.	<p>Trade secrets and proprietary commercial or financial information. <u>N.J.S.A. 47:1A-1.1.</u></p> <p>Citizen’s reasonable expectation of privacy. <u>N.J.S.A. 47:1A-1.</u></p>	As noted in DPP-5, the Custodian lawfully denied access to the responsive information because it implies privacy interest. <u>Smith</u> , GRC 2014-301.
DPP-35-41	TDEC RFP No. 12-X-21802	<p>1. Various technical and staffing information.</p> <p>2. Operation Team names, addresses, telephone numbers, fax numbers, e-mail addresses, and responsibilities.</p> <p>3. Client</p>	<p>Trade secrets and proprietary commercial financial or information. <u>N.J.S.A. 47:1A-1.1.</u></p> <p>Citizen’s reasonable expectation of privacy. <u>N.J.S.A. 47:1A-1.</u></p>	<p>1. Disclosure of this information would reveal sensitive information about TDEC’s technical coordination and staffing. Thus, the Custodian lawfully denied access to this information.</p> <p>2. As noted in DPP-26, the Custodian lawfully denied access to the redacted telephone number.</p>

		identification and contact information.		<p>Additionally, as noted in DPP-5, the Custodian lawfully denied access to the responsive information because it implies privacy interest. <u>Smith</u>, GRC 2014-301.</p> <p>3. In accordance with <u>CWA</u>, this information is protected as trade secret. Thus, the Custodian lawfully denied access to this information.</p>
DPP-45-47	TDEC RFP No. 12-X-21802	Template document	Trade secrets and proprietary commercial or financial information. <u>N.J.S.A. 47:1A-1.1.</u>	Disclosure of this template could provide TDEC's competitors with an easy way to improve on their own processes. Thus, the Custodian lawfully denied access to this information.
DPP-57	TDEC RFP No. 12-X-21802	Vendor number and FEIN/SSN	Trade secrets and proprietary commercial or financial information. <u>N.J.S.A. 47:1A-1.1.</u>	As noted in DPP-7, a FEIN is akin to a social security number. Specifically, the numbers are identified interchangeably in several places throughout the RFP. For this reason, same is exempt under the personal privacy interest exemption. <u>N.J.S.A. 47:1A-1</u> ; <u>Burnett</u> , 402 <u>N.J. Super.</u> 319. The GRC notes that the vendor number is the same as the FEIN/SSN number. Thus, the Custodian lawfully denied access to this information.

DPP-1	PRWT RFP No. 12-X-21940	FEIN	Trade secrets and proprietary commercial or financial	As noted in DPP-7, a FEIN is akin to a social security number. Specifically, the
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			information. <u>N.J.S.A. 47:1A-1.1.</u>	numbers are identified interchangeably in several places throughout the RFP. For this reason, same is exempt under the personal privacy interest exemption. <u>N.J.S.A. 47:1A-1; Burnett, 402 N.J. Super. 319.</u> Thus, the Custodian lawfully denied access to this information.
DPP-3	PRWT RFP No. 12-X-21940	FEIN/SSN	Trade secrets and proprietary commercial or financial information. <u>N.J.S.A. 47:1A-1.1.</u>	As noted in DPP-7, a FEIN is akin to a social security number. Specifically, the numbers are identified interchangeably in several places throughout the RFP. For this reason, same is exempt under the personal privacy interest exemption. <u>N.J.S.A. 47:1A-1; Burnett, 402 N.J. Super. 319.</u> Thus, the Custodian lawfully denied access to this information.
DPP-4	PRWT RFP No. 12-X-21940	Date of Birth, Ownership interest Percentage, and home address.	Citizen's reasonable expectation of privacy. <u>N.J.S.A. 47:1A-1.</u>	Ownership interest is exempt under EO 26 and the Custodian has lawfully denied access to same.
DPP-47	PRWT RFP No. 12-X-21940	2010 revenue and net income.	Trade secrets and proprietary commercial or financial information. <u>N.J.S.A. 47:1A-1.1.</u>	The revenue and net income numbers are financial information as contemplated by the exemption. Thus, the Custodian has lawfully denied access to same.
DPP-53-75	PRWT RFP No. 12-X-21940	"Financial Statements and	Trade secrets and proprietary	The Report clearly analyzes PRWT's

		Report of Independent Certified Public Accountants” (“Report”)	commercial or financial information. <u>N.J.S.A. 47:1A-1.1.</u>	financial information and its economic health. As such, this information is exempt under OPRA. Thus, the Custodian has lawfully denied access to same.
DPP-80	PRWT RFP No. 12-X-21940	Vendor number and FEIN/SSN	Trade secrets and proprietary commercial or financial information. <u>N.J.S.A. 47:1A-1.1.</u>	As noted in DPP-7, a FEIN is akin to a social security number. Specifically, the numbers are identified interchangeably in several places throughout the RFP. For this reason, same is exempt under the personal privacy interest exemption. <u>N.J.S.A. 47:1A-1; Burnett, 402 N.J. Super. 319.</u> Thus, the Custodian lawfully denied access to this information.

Based on the above *in-camera* examination table, the Custodian must disclose the responsive records in accordance with same.

Knowing & Willful

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council’s September 30, 2014 Interim Order because he submitted nine (9) copies of the records at issue to the GRC and submitted certified confirmation of compliance to the Executive Director within the prescribed time frame to comply.
2. **On the basis of the Council’s determination in this matter, the Custodian shall comply with the Council’s Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order and**

simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.¹²

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

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

May 17, 2016

¹² Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If the Complainant incurred a copying or special service charge, the Custodian must certify that the record has been *made available* to the Complainant, but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

September 30, 2014 Government Records Council Meeting

J.C. McCormack
Complainant

Complaint No. 2013-357

v.

NJ Department of Treasury
Custodian of Record

At the September 30, 2014 public meeting, the Government Records Council (“Council”) considered the September 23, 2014 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 did not bear his burden of proof that he timely responded to the Complainant’s OPRA request for contracts. *See N.J.S.A. 47:1A-6*. As such, the Custodian’s failure to respond immediately in writing to the Complainant’s OPRA request either granting access, denying access, seeking the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request. *See N.J.S.A. 47:1A-5(e); Herron v. Township of Montclair (Essex)*, GRC Complaint No. 2006-178 (February 2007).
2. The Custodian must disclose unredacted copies of the TDEC Proposal, TDEC Professional Contract, PRWT Proposal, and PRWT Professional Contract so that an *in camera* examination may be conducted to determine the validity of the Custodian’s assertion that the records were properly redacted based on *N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9*.
3. TDEC, in turn, shall provide to the Custodian any records or information necessary for the Custodian to comply with the Council’s Order.
4. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see number two (2) above), nine (9) copies of the redacted records, a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,³ that**

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

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

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

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.

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

Interim Order Rendered by the
Government Records Council
On The 30th Day of September, 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: October 1, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 30, 2014 Council Meeting**

**J.C. McCormack¹
Complainant**

GRC Complaint No. 2013-357

v.

**State of N.J. Department of Treasury²
Custodial Agency**

AND

**The Data Entry Company³
Intervener**

Records Relevant to Complaint:

Item No. 1: Copies of all contracts with Pioneer Credit Recovery, Inc. (PCR) plus copies of all reports, audits and emails mentioning Pioneer, especially concerning their compliance/fulfillment of their contracts.

Item No. 2: Copies of all contracts that the Department of Treasury (“Treasury”) and/or the Division of Revenue (“Revenue”) have with private companies for the processing of tax returns/payments plus copies of all reports, audits and emails mentioning/concerning the companies compliance/fulfillment of their contracts.

Custodian of Record: Cynthia Jablonski

Request Received by Custodian: September 6, 2013

Response Made by Custodian: September 17, 2013; October 1, 2013; December 5, 2013; December 17, 2013; January 6, 2014

GRC Complaint Received: December 10, 2013

¹ No legal representation listed on record.

² Represented by Melissa A. Haas, DAG.

³ Represented by David C. Dreifuss, Esq. (Florham Park, N.J.).

Background⁴

Request and Response:

On September 6, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On September 17, 2013, seven (7) business days later, the Custodian responded by stating that the Division of Purchase and Property (“DPP”) had one (1) contract with PCR and no complaints or audits filed regarding the company. The Custodian attached PCR’s Best and Final Offer (“BAFO”), Bid Proposal, and an exemption log. The Custodian also provided the Complainant with an internet link to the relevant Request for Proposal (“RFP”), RFP Addendum, and Notice of Award (“NOA”). Additionally, the Custodian stated that, regarding Item No. 2, DPP did not have any other contracts relating to tax collection or payment.

On September 20, 2013, the Complainant contacted the Custodian to indicate that he believed the State had contracts with two (2) companies “involving the processing of tax returns.” On October 1, 2013, the Custodian provided a second response to the Complainant’s request by stating that, as the request applied to Revenue, it was overly broad in that it failed to seek specific identifiable government records. The Custodian sought clarification by requesting that, for Item No. 1, the Complainant provide specific sender or recipient information, dates specific to emails he seeks, and the name or subject of the reports or audit/compliance matters. For Item No. 2, the Custodian asked that the Complainant provide the same information as requested for Item No. 1, as well as the name of the contract or contract number for the contracts being sought.

On October 9, 2013, the Complainant provided the following clarification to the Custodian regarding the content of the records requested:

“[E]mails, reports, memoranda and/or audits which mention, concern or refer to any problems in compliance/fulfillment of contracts for the processing (e.g. extraction, screening, preparation and delivery to [Revenue]) of tax returns and/or payments; and copies of all contracts currently in effect with [PCR], [The Data Entry Company (“TDEC”)] (of Bethesda, MD), and PRWT Services, Inc. [(“PRWT”)] (of Philadelphia, PA)[.]”

The Complainant further explained that he sought communications sent or received by nine (9) specific individuals created between March 1, 2013 and September 30, 2013. For Item No. 2, the Complainant stated that he could not know the contracts’ details requested by the Custodian, but that he believed he had been specific enough to make the records identifiable.

On October 15, 2013, the Custodian acknowledged that she had received the Complainant’s clarification on October 9, 2013. On October 21, 2013, seven (7) business days

⁴ 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.

after receipt of the clarification, the Custodian extended the response date by ten (10) business days to November 4, 2013 “for legal review.” On November 4, 2013, after contacting TDEC regarding the company’s request that certain portions of its bid be held confidential by the State, the Custodian extended the deadline to respond by twenty (20) business days to December 5, 2013 in order to “exhaust the search for records and to continue the legal review underway.”

On December 5, 2013, the Custodian provided the Complainant with a copy of TDEC’s bid proposal and an exemption log, as the document was redacted based on assertions of trade secret material and citizens’ reasonable expectations of privacy. The Custodian also extended the response date by eleven (11) business days to December 20, 2013, stating again that this was necessary to “exhaust the search for records and to continue the legal review underway.”

Denial of Access Complaint:

On December 10, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts first that the Custodian violated N.J.S.A. 47:1A-5(e) by not providing immediate access to the TDEC and PRWT contracts. Further, the Complainant argues that the exemption log fails to fully identify those redactions made to the TDEC contract under the claimed exemption for trade secrets and proprietary commercial or financial information. The Complainant also contends that some material is improperly redacted based on this exemption.

Additionally, the Complainant asserts that the Custodian improperly redacted some material in the TDEC contract by “claiming a citizen’s reasonable expectation of privacy.” The Complainant argues that this exemption does not apply when such citizens are employees of a company which is party to a contract. *Citing Hig-A-Rella, Inc. v. County of Essex*, 141 N.J. 35(1995); *Walsh v. Twp. of Middletown (Monmouth)*, GRC Complaint No. 2008-266 (January 2010). Further, the Complainant contends that the Custodian failed to identify the nature of each redaction, such as whether it was a home phone number or Social Security Number (SSN).

The Complainant states that an unredacted copy of the contract should be disclosed because it is in the public’s interest to ensure transparency and confidence in the process of awarding publically bid contracts.

Additional Submissions:

On December 17, 2013, the Custodian provided the Complainant with copies of PRWT’s Bid Proposal, BAFO, Professional Contract, and the exemption log. The Custodian also provided TDEC’s BAFO and the Professional Contract.

On January 6, 2013, the Custodian provided the Complainant with an internet link to the RFPs, RFP Addenda, and NOAs for TDEC’s and PRWT’s contracts.

Statement of Information:

On January 9, 2013, the Custodian filed a Statement of Information (“SOI”). The Custodian’s SOI shows that she received the request on September 6, 2013, and she certifies that she provided records to the Complainant on September 17, 2013, December 5, 2013, December 17, 2013, and January 6, 2014.

The Custodian states that her initial response to the Complainant provided him with a link to the internet site where he could view the RFP, RFP Addenda, and NOA for the State’s contract with PCR, but also that she informed the Complainant that the DPP did not have any other responsive contracts relating to tax collection or payment. The Custodian explains that she sought clarification from the Complainant after he replied that he believed the State had contracts with two (2) companies involving the processing of tax returns.

Further, the Custodian states that when she located copies of responsive documents from TDEC and PRWT, she observed that TDEC had requested portions of its bid be held confidential and, as a result, she contacted TDEC on October 29, 2013 seeking additional information regarding the company’s assertion of confidentiality. The Custodian notes that on November 1, 2013, she received a response from TDEC’s Counsel detailing why certain information should be considered exempt from disclosure as trade secrets.

The Custodian argues that she lawfully redacted portions of the TDEC materials under OPRA because TDEC established that such material constituted trade secrets as defined by the New Jersey Trade Secrets Act, and because TDEC provided specific responses to each of the six (6) criteria established by the New Jersey Supreme Court to assess whether information is a trade secret. *Citing* N.J.S.A. 47:1A-1.1; N.J.S.A. 56:15-2; Ingersoll-Rand Co. v. Ciavatta, 110 N.J. 609, 637 (1988). The Custodian further contends that the redactions made to the TDEC documents followed the guidelines articulated by the Appellate Division, as the redacted material is, among other things, information scrupulously protected by the company, not available to the public, could undermine the company’s ability to do business and remain competitive if released, and was developed over many years through ongoing and expensive analysis and testing. *Citing* Commc’ns Workers of Am., AFL-CIO v. Rousseau, 417 N.J. Super. 341, 360-63 (App. Div. 2010); Gill v. N.J. Dep’t of Banking and Ins., 404 N.J. Super. 1, 4-5 (App. Div. 2008).

The Custodian maintains that TDEC’s Federal Employee Identification Number (“FEIN”) and certain TDEC employee contact information were properly redacted based on her duty to safeguard information where a citizen has a reasonable expectation of the privacy of that information. *Citing* N.J.S.A. 47:1A-1. Also, the Custodian notes that FEINs have been analogized to SSNs and that federal law prohibits their disclosure. *Citing* 26 U.S.C.S. 6103; N.J.S.A. 47:1A-9. Relatedly, the Custodian contends that she provided sufficient information with the exemption logs to allow the Complainant to assess the applicability of the claimed privileges without revealing the protected material. *Citing* Paff v. N.J. Dep’t of Labor, 379 N.J. Super. 346, 354 (App. Div. 2005).

Finally, the Custodian argues that she provided an initial timely response to the Complainant’s request and, upon receiving the Complainant’s later clarification, thereafter

sought extensions of time to dates certain while she worked with TDEC to obtain the responsive documents. The Custodian states that the Complainant never objected to these extended timeframes and that the documents were provided within the final deadline she specified to him.

Motion to Intervene:

On March 31, 2014, Counsel for TDEC filed a Motion to Intervene with the GRC, arguing that TDEC will be “specifically and directly affected by the outcome” of this complaint and that Treasury cannot adequately represent the interests of TDEC. *Citing N.J.A.C. 1:1-16.1(a)*. TDEC contends that the requested records contain confidential information of TDEC’s employees and customers, including names, SSNs, FEINs, addresses, phone numbers, email addresses, and trade secrets. Further, TDEC maintains that it is the sole party that will be able to introduce evidence regarding the import of the redactions, that its interests are sufficiently different than that of Treasury’s, and that its arguments will constructively contribute to this complaint. *Citing Gill, 404 N.J. Super. at 11*.

TDEC’s Counsel also provided a certification from TDEC’s President which states, in relevant part:

- On or about October 29, 2013, [Treasury] sent TDEC an Intent to Release letter affording TDEC the opportunity to redact certain information from TDEC’s bid proposal before it was released to [the Complainant].
- Through my role as President of TDEC, I redacted certain information I deemed confidential or to be trade secret, including but not limited to employee and customer names, [SSNs], addresses, email addresses, [FEINs], phone numbers, services provided and information regarding TDEC’s technical proposals for the project. Permitting the release of this information would be harmful to this company and would enable competitors to gain information that we consider and maintain as highly confidential.

On May 21, 2014, the GRC granted TDEC’s motion to intervene.

Analysis

Timeliness

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). A custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Id. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).⁵ 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

⁵ 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.

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. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

OPRA also states that “immediate access ordinarily shall be granted to . . . contracts” N.J.S.A. 47:1A-5(e). The GRC has held that this “immediate access” language requires a custodian to immediately notify the complainant either granting or denying access, requesting additional time to respond, or asking for clarification when certain records, such as contracts, are sought. *See Herron v. Twp. of Montclair*, GRC Complaint No. 2006-178 (February 2007).

Here, the Custodian provided an initial response to the Complainant seven (7) business days after receiving his request by providing records responsive to Item No. 1 and by stating that DPP did not possess any documents responsive to Item No. 2. The Custodian provided a second response to the Complainant seventeen (17) business days after the initial request, now pertaining to Revenue. The Custodian stated that Item No. 2 was overly broad and requested clarification. In either case, the Custodian failed to immediately respond to the Complainant’s request for contracts by either granting or denying access, asking for clarification, or seeking additional time to respond.

Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant’s OPRA request for contracts. *See N.J.S.A. 47:1A-6*. As such, the Custodian’s failure to respond immediately in writing to the Complainant’s OPRA request either granting access, denying access, seeking the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request. *See N.J.S.A. 47:1A-5(e)*; Herron, GRC 2006-178.

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.

In Paff v. N.J. Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the Council⁶ that accepted the custodian’s legal conclusion for the denial of access without further review. The Appellate Division noted 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.” *Id.* The Court stated that:

[OPRA] 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

⁶ Paff v. NJ Dep’t of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

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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-7(f). This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.

Id. at 355.

Further, the Court found that:

We 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-7(f), which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.

Id.

Here, the Complainant filed his complaint with the GRC on December 10, 2013 by objecting to the redactions made to the TDEC proposal disclosed on December 5, 2013. The record reveals that, subsequent to this filing, the Custodian also disclosed redacted versions of PRWT’s Proposal, PRWT’s Professional Contract, and TDEC’s Professional Contract.⁷ The Custodian asserts that she properly redacted this material because at different points: (1) it constitutes exempt trade secrets and proprietary commercial or financial information; (2) its disclosure would violate citizens’ reasonable expectations of privacy; and (3) it cannot be disclosed pursuant to federal law. *See* N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9. Thus, it is necessary for the GRC to conduct an *in camera* examination of both the redacted responsive records contested by the Complainant and those disclosed subsequent to the filing of the instant complaint.

Therefore, the Custodian must disclose unredacted copies of the TDEC Proposal, TDEC Professional Contract, PRWT Proposal, and PRWT Professional Contract so that an *in camera* examination may be conducted to determine the validity of the Custodian’s assertion that the records were properly redacted based on N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9.

TDEC, in turn, shall provide to the Custodian any records or information necessary for the Custodian to comply with the Council’s Order.

⁷ The materials related to PRWT appear to correspond to documents marked with RFP No. 12-X-21940. The materials related to TDEC appear to correspond to documents marked with RFP No. 12-X-21802. McCormack v. State of N.J. Department of Treasury, GRC Complaint No. 2013-357 – Findings and Recommendations of the Executive Director

Knowing & Willful

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request for contracts. *See* N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond immediately in writing to the Complainant's OPRA request either granting access, denying access, seeking the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request. *See* N.J.S.A. 47:1A-5(e); Herron v. Township of Montclair (Essex), GRC Complaint No. 2006-178 (February 2007).
2. The Custodian must disclose unredacted copies of the TDEC Proposal, TDEC Professional Contract, PRWT Proposal, and PRWT Professional Contract so that an *in camera* examination may be conducted to determine the validity of the Custodian's assertion that the records were properly redacted based on N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9.
3. TDEC, in turn, shall provide to the Custodian any records or information necessary for the Custodian to comply with the Council's Order.
4. **The Custodian must deliver⁸ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see number two (2) above), nine (9) copies of the redacted records, a document or redaction index⁹, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,¹⁰ 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.**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

⁸ 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.

⁹ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

¹⁰ "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."

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