



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

July 25, 2017 Government Records Council Meeting

Dudley Burdge
Complainant

Complaint No. 2014-179

v.

NJ Office of Information Technology
Custodian of Record

At the July 25, 2017 public meeting, the Government Records Council (“Council”) considered the July 18, 2017 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that the Complainant and Complainant’s Counsel failed to comply with the Council’s Interim Order because they failed to submit an application for attorney’s fees within the prescribed deadline. N.J.A.C. 5:105-2.13(b). Accordingly, the Executive Director recommends that the Council close the matter, as no analysis is necessary.

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 25th Day of July, 2017

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 28, 2017



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
July 25, 2017 Council Meeting**

**Dudley Burdge¹
Complainant**

GRC Complaint No. 2014-179

v.

**NJ Office of Information Technology²
Custodial Agency**

Records Relevant to Complaint: Hard or electronic copies of:

January 9, 2014 OPRA Request³

1. Copies of all correspondence including e-mails and reports assessing the costs of current [Office of Information Technology (“OIT”)] print operation & expected future costs.
2. Annual budgets and budget submissions concerning in whole or part OIT HUB print operations for 2013, 2014, and 2015.

January 16, 2014 OPRA Request

Studies of print privatization including reports on alternatives to privatization prepared by Elliot Lynn, Hagen Hottmann, Michael Haberstick and other OIT managers.

Custodian of Record: Shelley Bates⁴

Request Received by Custodian: January 9, 2014; January 16, 2014

Response Made by Custodian: February 21, 2014; March 27, 2014; April 4, 2014; April 16, 2014; June 27, 2014; July 11, 2014

GRC Complaint Received: April 24, 2014

Background

April 25, 2017 Council Meeting:

At its April 25, 2017 public meeting, the Council considered the January 24, 2017 Findings and Recommendations of the Executive Director and all related documentation

¹ Annemarie Pinarski, Esq. of Weissman & Mintz, LLC (Somerset, NJ).

² Represented by Thomas R. Hower, DAG.

³ The Complainant requested other records, but they are not at issue in this matter.

⁴ Lisa Blaur became the Custodian of Record in 2016. Shelley Bates was the Custodian at the time the Complainant submitted his OPRA request.

submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found in part that:

Pursuant to the Council's February 21, 2017 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters, 387 N.J. Super. 432. Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, the Council determined that a portion of the withheld records was unlawfully denied and ordered disclosure of all responsive records. The Custodian did so in response to the Council's Interim Order. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. *See* N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. at 432, and Mason, 196 N.J. at 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Procedural History:

On April 27, 2017, the Council distributed its Interim Order to all parties. The Council's Interim Order noted that the Complainant was a prevailing party and entitled to an award of attorney's fees. The Council ordered the parties to negotiate an amount for reasonable attorney's fees to be paid to the Complainant within twenty (20) business days following the effective date of the Interim Order. Complainant's Counsel was ordered to file and serve a fee application in accordance with N.J.A.C. 5:105-2.13(b).

Analysis

Compliance

In its Interim Order, the Council found that the Complainant was a prevailing party. The Council therefore ordered the parties to negotiate a fee agreement within twenty (20) business days following the effective date of the order. Therefore the deadline to notify the GRC of any agreement was May 25, 2017.

In the event that no agreement was reached, the Council ordered the Complainant or Complainant's Counsel to submit a fee application in accordance with N.J.A.C. 5:105-2.13(b). Thus, the deadline to submit a fee application was June 23, 2017.

As of July 14, 2017, the Council has received neither a fee agreement among the parties, nor an application for an award of attorney's fees from the Complainant or Complainant's Counsel.

Therefore, the Complainant and Complainant's Counsel failed to comply with the Council's Interim Order because they failed to submit an application for attorney's fees within the prescribed deadline. N.J.A.C. 5:105-2.13(b). Accordingly, the Executive Director recommends that the Council close the matter, as no analysis is necessary.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Complainant and Complainant's Counsel failed to comply with the Council's Interim Order because they failed to submit an application for attorney's fees within the prescribed deadline. N.J.A.C. 5:105-2.13(b). Accordingly, the Executive Director recommends that the Council close the matter, as no analysis is necessary.

Prepared By: Samuel A. Rosado, Esq.
Staff Attorney

July 18, 2017



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

INTERIM ORDER

April 25, 2017 Government Records Council Meeting

Dudley Burdge
Complainant

Complaint No. 2014-179

v.

NJ Office of Information Technology
Custodian of Record

At the April 25, 2017 public meeting, the Government Records Council (“Council”) considered the April 18, 2017 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 February 21, 2017 Interim Order because she responded in the prescribed extended time frame by providing records and simultaneously providing certified confirmation of compliance to the Executive Director.
2. The Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), failed to comply with the Counsel’s February 25, 2015 Interim Order, and unlawfully denied access to responsive records. However, the Custodian complied in full with the Council’s February 21, 2017 Interim Order. 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.
3. Pursuant to the Council’s February 21, 2017 Interim Order, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters, 387 N.J. Super. 432. Additionally, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, the Council determined that a portion of the withheld records was unlawfully denied and ordered disclosure of all responsive records. The Custodian did so in response to the Council’s Interim Order. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee. *See* N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. at 432, and Mason, 196 N.J. at 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney’s fees to be paid to Complainant**



within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.

Interim Order Rendered by the
Government Records Council
On The 25th Day of April, 2017

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: April 27, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
April 25, 2017 Council Meeting**

**Dudley Burdge¹
Complainant**

GRC Complaint No. 2014-179

v.

**NJ Office of Information Technology²
Custodial Agency**

Records Relevant to Complaint: Hard or electronic copies of:

January 9, 2014 OPRA Request³

1. Copies of all correspondence including e-mails and reports assessing the costs of current [Office of Information Technology (“OIT”)] print operation & expected future costs.
2. Annual budgets and budget submissions concerning in whole or part OIT HUB print operations for 2013, 2014, and 2015.

January 16, 2014 OPRA Request

Studies of print privatization including reports on alternatives to privatization prepared by Elliot Lynn, Hagen Hottmann, Michael Haberstick and other OIT managers.

Custodian of Record: Shelley Bates⁴

Request Received by Custodian: January 9, 2014; January 16, 2014

Response Made by Custodian: February 21, 2014; March 27, 2014; April 4, 2014; April 16, 2014; June 27, 2014; July 11, 2014

GRC Complaint Received: April 24, 2014

Background

February 21, 2017 Council Meeting:

At its February 21, 2017 public meeting, the Council considered the January 24, 2017, *In Camera* Findings and Recommendations of the Executive Director and all related documentation

¹ Annemarie Pinarski, Esq. of Weissman & Mintz, LLC (Somerset, NJ).

² Represented by Thomas R. Hower, DAG.

³ The Complainant requested other records, but they are not at issue in this matter.

⁴ Lisa Blaur became the Custodian of Record in 2016. Shelley Bates was the Custodian at the time the Complainant submitted his OPRA request.

submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The original Custodian failed to comply with the Council's February 24, 2015 Interim Order because she failed to provide a signed certification to the Executive Director within the prescribed extended time frame.
2. With few exceptions, the Custodian lawfully denied access to the requested e-mails and attachments because said records contain ACD material or would provide an advantage to competitors or bidders if disclosed. N.J.S.A. 47:1A-1.1. See Educ. Law Center v. N.J. Dep't of Educ., 198 N.J. 274, 285 (2009), Mapother v. Dep't of Justice, 3 F.3d 1533, 1539 (D.C. Cir. 1993)), Murray v. Twp. of Warren, GRC Complaint No. 2006-169 (February 2008), Renna v. Cnty. of Union, GRC Complaint No. 2003-100. Specifically, the e-mail discussions and attachments pertain to the formulation of an RFP for printing services on behalf of the agency, including the process to create an RDP, cost estimations, organizational drafts, and job descriptions. Therefore, the e-mails and attachments invariably contain ACD material and/or would include information that would give potential bidders an advantage if disclosed.
3. **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 conformation of compliance pursuant to N.J. Court Rule 1:4-4 to the Executive Director.⁵**
4. **The Custodian shall also disclose all other portions of the requested e-mails and memos to the Complainant (i.e., sender, recipients, date, time, subject, and closing salutations).**
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 Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On February 23, 2017, the Council distributed its Interim Order to all parties. On March 1, 2017, the Custodian sought additional time to comply with the Council's Interim Order. The GRC granted the Custodian's request for an extension to until March 22, 2017.

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.

On March 21, 2017, the Custodian responded to the Council's Interim Order. The Custodian provided the responsive records in their entirety with accompanying redactions in accordance with the Interim Order.

Analysis

Compliance

At its February 21, 2017 meeting, the Council ordered the Custodian to deliver the responsive records to the Complainant and to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On February 23, 2017, 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 March 2, 2017.

On March 1, 2017 the fourth (4th) business day after receipt of the Council's Order, the Custodian sought and was granted an extension of time to comply with the Order to until March 22, 2017. On March 21, 2017, the Custodian produced the records in whole or containing redactions, along with a certification to the Executive Director.

Therefore, the Custodian complied with the Council's February 21, 2017 Interim Order because she responded in the prescribed extended time frame by providing records and simultaneously providing 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 violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), failed to comply with the Counsel's February 25, 2015 Interim Order, and unlawfully denied access to responsive records, the Custodian complied in full with the Council's February 21, 2017 Interim Order. 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.

Prevailing Party Attorney's Fees

OPRA provides that:

A person who is denied access to a government record by the custodian of the record, at the option of the requestor, may: institute a proceeding to challenge the custodian's decision by filing an action in Superior Court . . .; or in lieu of filing an action in Superior Court, file a complaint with the Government Records Council . . . A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.

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

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Court held that a complainant is a "prevailing party" if he achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct. Id. at 432. Additionally, the Court held that attorney's fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. Id.

Additionally, the New Jersey Supreme Court has ruled on the issue of "prevailing party" attorney's fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the Supreme Court discussed the catalyst theory, "which posits that a plaintiff is a 'prevailing party' if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." Mason, 196 N.J. at 71, (quoting Buckhannon Bd. & Care Home v. West Virginia Dep't of Health & Human Res., 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court stated that the phrase "prevailing party" is a legal term of art that refers to a "party in whose favor a judgment is rendered." (quoting Black's Law Dictionary 1145 (7th ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because "[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties, Id. at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863, but also over concern that the catalyst theory would spawn extra litigation over attorney's fees. Id. at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866."

However, the Court noted in Mason, that Buckhannon is binding only when counsel fee provisions under federal statutes are at issue. 196 N.J. at 72, *citing* Teeters, 387 N.J. Super. at 429; *see, e.g.*, Baer v. Klagholz, 346 N.J. Super. 79 (App. Div. 2001) (applying Buckhannon to the federal Individuals with Disabilities Education Act), *certif. denied*, 174 N.J. 193 (2002). “But in interpreting New Jersey law, we look to state law precedent and the specific state statute before us. When appropriate, we depart from the reasoning of federal cases that interpret comparable federal statutes.” 196 N.J. at 73 (citations omitted).

The Mason Court accepted the application of the catalyst theory within the context of OPRA, stating that:

OPRA itself contains broader language on attorney's fees than the former RTKL did. OPRA provides that “[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.” N.J.S.A. 47:1A-6. Under the prior RTKL, “[a] plaintiff in whose favor such an order [requiring access to public records] issues . . . may be awarded a reasonable attorney's fee not to exceed \$500.00.” N.J.S.A. 47:1A-4 (repealed 2002). The Legislature's revisions therefore: (1) mandate, rather than permit, an award of attorney's fees to a prevailing party; and (2) eliminate the \$500 cap on fees and permit a reasonable, and quite likely higher, fee award. Those changes expand counsel fee awards under OPRA.

Mason at 73-76 (2008).

The Court in Mason, further held that:

[R]equestors are entitled to attorney's fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) ‘a factual causal nexus between plaintiff's litigation and the relief ultimately achieved’; and (2) ‘that the relief ultimately secured by plaintiffs had a basis in law.’ Singer v. State, 95 N.J. 487, 495, *cert denied* (1984).

Id. at 76.

The Complainant filed the instant complaint, disputing the claim that a portion of the requested records were lawfully denied for containing advisory, consultative, and/or deliberative material, and contesting the unreasonable delay in providing a response to his OPRA request. In its February 21, 2017 Interim Order, the Council determined that some of the withheld records were unlawfully denied and ordered disclosure. The Custodian eventually provided all of the responsive records in accordance with the Council's Interim Order. Accordingly the Complainant is a prevailing party, who is entitled to an award of attorney's fees.

Conclusion:

Therefore, pursuant to the Council's February 21, 2017 Interim Order, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or

otherwise) in the custodian's conduct." Teeters, 387 N.J. Super. 432. Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, the Council determined that a portion of the withheld records was unlawfully denied and ordered disclosure of all responsive records. The Custodian did so in response to the Council's Interim Order. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. *See* N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. at 432, and Mason, 196 N.J. at 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's February 21, 2017 Interim Order because she responded in the prescribed extended time frame by providing records and simultaneously providing certified confirmation of compliance to the Executive Director.
2. The Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), failed to comply with the Counsel's February 25, 2015 Interim Order, and unlawfully denied access to responsive records. However, the Custodian complied in full with the Council's February 21, 2017 Interim Order. 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.
3. Pursuant to the Council's February 21, 2017 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters, 387 N.J. Super. 432. Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, the Council determined that a portion of the withheld records was unlawfully denied and ordered disclosure of all responsive records. The Custodian did so in response to the Council's Interim Order. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. *See* N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. at 432, and Mason, 196 N.J. at 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount**

of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.

Prepared By: Samuel A. Rosado, Esq.
Staff Attorney

April 18, 2017



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

INTERIM ORDER

February 21, 2017 Government Records Council Meeting

Dudley Burdge
Complainant

Complaint No. 2014-179

v.

NJ Office of Information Technology
Custodian of Record

At the February 21, 2017 public meeting, the Government Records Council (“Council”) considered the January 24, 2017 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 original Custodian failed to comply with the Council’s February 24, 2015 Interim Order because she failed to provide a signed certification to the Executive Director within the prescribed extended time frame.
2. With few exceptions, the Custodian lawfully denied access to the requested e-mails and attachments because said records contain ACD material or would provide an advantage to competitors or bidders if disclosed. N.J.S.A. 47:1A-1.1. See Educ. Law Center v. N.J. Dep't of Educ., 198 N.J. 274, 285 (2009), Mapother v. Dep't of Justice, 3 F.3d 1533, 1539 (D.C. Cir. 1993)), Murray v. Twp. of Warren, GRC Complaint No. 2006-169 (February 2008), Renna v. Cnty. of Union, GRC Complaint No. 2003-100. Specifically, the e-mail discussions and attachments pertain to the formulation of an RFP for printing services on behalf of the agency, including the process to create an RDP, cost estimations, organizational drafts, and job descriptions. Therefore, the e-mails and attachments invariably contain ACD material and/or would include information that would give potential bidders an advantage if disclosed.
3. **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 conformation of compliance pursuant to N.J. Court Rule 1:4-4 to the Executive Director.¹**

¹ 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 Custodian shall also disclose all other portions of the requested e-mails and memos to the Complainant (i.e., sender, recipients, date, time, subject, and closing salutations).**
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 Council defers analysis of whether the Complainant is a prevailing party, pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 21st Day of February, 2017

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: February 23, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
February 21, 2017 Council Meeting**

**Dudley Burdge¹
Complainant**

GRC Complaint No. 2014-179

v.

**NJ Office of Information Technology²
Custodial Agency**

Records Relevant to Complaint: Hard or electronic copies of:

January 9, 2014 OPRA Request³

1. Copies of all correspondence including e-mails and reports assessing the costs of current [Office of Information Technology (“OIT”)] print operation & expected future costs.
2. Annual budgets and budget submissions concerning in whole or part OIT HUB print operations for 2013, 2014, and 2015.

January 16, 2014 OPRA Request

Studies of print privatization including reports on alternatives to privatization prepared by Elliot Lynn, Hagen Hottmann, Michael Haberstick and other OIT managers.

Custodian of Record: Shelley Bates⁴

Request Received by Custodian: January 9, 2014; January 16, 2014

Response Made by Custodian: February 21, 2014; March 27, 2014; April 4, 2014; April 16, 2014; June 27, 2014; July 11, 2014

GRC Complaint Received: April 24, 2014

Records Submitted for *In Camera* Examination: Responsive records withheld from disclosure *in toto* on the grounds of containing advisory, consultative, or deliberative (“ACD”) material, and/or the disclosure of which would give an advantage to competitors or bidders.

Background

¹ Annemarie Pinarski, Esq. of Weissman & Mintz, LLC (Somerset, NJ).

² Represented by Deputy Attorney General Thomas Hower, Esq.

³ The Complainant requested other records, but they are not at issue in this matter.

⁴ Andrew Pratt has been the Custodian of Record since May 29, 2015. Shelley Bates was the Custodian at the time the Complainant submitted his OPRA request.

February 24, 2015 Council Meeting:

At its February 24, 2015 public meeting, the Council considered the February 17, 2015 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 January 9, 2014 and January 16, 2014 OPRA requests. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007). Moreover, the Custodian violated N.J.S.A. 47:1A-5(e) by failing to respond immediately in writing to Item No. 2 of the Complainant's January 9, 2014 OPRA request, which sought budgets and budget submissions. See Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007).
2. The GRC must conduct an *in camera* review of responsive records withheld from disclosure *in toto* as containing advisory, consultative, or deliberative material, and/or the disclosure of which would give an advantage to competitors or bidders, to determine the validity of the Custodian's assertions. See Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005); N.J.S.A. 47:1A-1.1.
3. Notwithstanding the Custodian's "deemed" denial, she has borne her burden of proof that she did not unlawfully deny access to Item No. 2 of the Complainant's January 9, 2014 OPRA request because she certified, and the record reflects, that no responsive documents exist. N.J.S.A. 47:1A-6; See Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
4. Notwithstanding the Custodian's "deemed" denial, she has borne her burden of proof that she did not unlawfully deny access to the Complainant's January 16, 2014 OPRA request because she certified, and the record reflects, that no additional responsive documents exist. N.J.S.A. 47:1A-6; See Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
5. **The Custodian must deliver⁵ to the Council in a sealed envelope nine (9) copies of the requested unredacted records identified in Paragraph No. 2, a document or redaction index⁶, as well as a legal certification from the Custodian, in**

⁵ 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.

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

accordance with N.J. Court Rule 1:4-4,⁷ 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.

6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
7. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On February 25, 2015, The Council distributed its Interim Order to all parties. On February 27, 2015, the Custodian requested an extension of time to respond to the Interim Order. The GRC granted the request to until March 11, 2015. On March 11, 2015, the GRC granted a second extension requested by the Custodian until March 13, 2015.

The Custodian responded to the Council's Interim Order on March 13, 2015, delivering to the GRC in a sealed envelope nine (9) copies of the requested records for an *in camera* inspection. The legal certification also addressed the Custodian's compliance with paragraph five (5) of the Interim Order.

On August 3, 2015, the GRC notified the Custodian that she failed to sign the certification accompanying her response to the Interim Order. Through subsequent oral and written correspondence, Counsel for the Custodian informed the GRC that the original Custodian is no longer with the Custodial Agency and that her signature would therefore be unattainable. The GRC then requested a signed certification from the current Custodian. On October 11, 2016, the GRC received a signed certification from the current Custodian. The certification reasserts the OPRA request's procedural history and the Custodian's justifications for withholding disclosure for each record at issue.

Analysis

Compliance

At its February 24, 2015 meeting, the Council ordered the Custodian to deliver to the GRC nine (9) copies of the requested records for an *in camera* inspection. The Council also ordered the Custodian to submit a certified confirmation of compliance to the Executive Director. On February 25, 2015, 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 March 4, 2015.

⁷ "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."

On February 27, 2015, the Custodian’s Counsel requested and was granted an extension of time to respond to the Council’s Interim Order; therefore, the return date was moved to March 11, 2015. On March 11, 2015, the Custodian’s Council was granted a second extension of time until March 13, 2015.

On March 13, 2015, the Custodian delivered nine (9) copies of the requested records, an index indicating the basis for withholding each record, and a legal certification with respect to paragraph (5) of the Interim Order. However, the original Custodian failed to sign her certification, and the GRC did not receive a signed certification until October 11, 2016.

Therefore, the original Custodian failed to comply with the Council’s February 24, 2015 Interim Order because she failed to provide a signed certification to the Executive Director within the prescribed extended 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.

ACD Material

OPRA provides that the definition of a government record “shall not include . . . inter-agency or intra-agency advisory, consultative, or deliberative [(“ACD”)] material.” N.J.S.A. 47:1A-1.1. When this exception is invoked, a governmental entity may “withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated.” Educ. Law Center v. N.J. Dep’t of Educ., 198 N.J. 274, 285 (2009) (citing NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975)). The custodian claiming an exception to the disclosure requirements under OPRA on this basis must initially satisfy two conditions: (1) the document must be pre-decisional, meaning that the document was generated prior to the adoption of the governmental entity’s policy or decision; and (2) the document must reflect the deliberative process, which means that it must contain opinions, recommendations, or advice about agency policies. Id. at 286 (internal citations and quotations omitted).

The key factor in this determination is whether the contents of the document reflect “formulation or exercise of . . . policy-oriented judgment or the process by which policy is formulated.” Id. at 295 (adopting the federal standard for determining whether material is “deliberative” and quoting Mapother v. Dep’t of Justice, 3 F.3d 1533, 1539 (D.C. Cir. 1993)). Once the governmental entity satisfies these two threshold requirements, a presumption of confidentiality is established, which the requester may rebut by showing that the need for the materials overrides the government’s interest in confidentiality. Id. at 286-87.

Advantage to Bidders

OPRA provides that the definition of a government record shall not include “*information which, if disclosed, would give an advantage to competitors or bidders . . .*” N.J.S.A. 47:1A-1.1 (emphasis added). In Murray v. Twp. of Warren, GRC Complaint No. 2006-169 (February 2008), the complainant sought, among other records, “the appraisal report or reports . . . regarding the Facey property . . .” The custodian denied access to the record under N.J.S.A. 10:4-12(b)(5) of the Open Public Meetings Act,⁸ and argued in the SOI that disclosure of the records would also give an advantage to bidders and competitors. The Council held that the custodian lawfully denied access to the responsive appraisals under N.J.S.A. 47:1A-1.1, finding that:

[A]t the time of the request, the Township was negotiating the purchase of property belonging to a client of the Complainant. The records responsive to this request represent a part of the negotiation phase that gives a party interested in buying or selling a property a level of bargaining power . . . The Township of Warren is using the records to substantiate its offer of purchase to the Complainant’s client. Disclosure of the records requested could greatly hinder the Township’s position in the negotiating process by making public the price range at which the Township is willing to obtain the property and could be used to starting a bidding war by private companies.

[Id. at 7-8.]

Additionally, in Renna v. Cnty. of Union, GRC Complaint No. 2003-100, the GRC held that the custodian lawfully denied access to a proposal submitted by Xerox to run a print shop, stating that release of the information would give an unfair advantage to competitors.

The GRC conducted an *in camera* examination on the submitted records, which largely consisted of e-mail correspondence regarding a Request for Proposal (“RFP”), but also include records detailing agency printing and operating costs, draft job descriptions, and vendor financial information. The results of this examination are set forth in the following table:

| Record or Redaction Number | Record Name/Date | Description of Record or Redaction | Custodian’s Explanation/ Citation for Non-disclosure or Redactions | Findings of the <i>In Camera</i> Examination⁹ |
|-----------------------------------|-------------------------|---|---|---|
| | | | | |

⁸ N.J.S.A. 10:4-12(b)(5) states: “[a] public body may exclude the public only from that portion of a meeting at which the public body discusses . . . [a]ny matter involving the purchase, lease or acquisition of real property with public funds . . . where it could adversely affect the public interest if discussions of such matters were disclosed.”

⁹ **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,

| | | | | |
|----|--|--|---|--|
| 1) | Financial Analysis of Print Operations 1/9/2014 e-mail from Lynn Elliott to Hottman, Hager; Broeker, Gloria; Pagano, Sharon (1pg.) | Summary of pre-bid conference discussions, and speculation on the process to award a bid in an RFP | <u>N.J.S.A.</u> 47:1A-1.1 Inter-agency or intra-agency advisory, consultative, or deliberative material. | The Custodian lawfully denied access to the discussion in the e-mail, as it contains ACD material. <u>N.J.S.A.</u> 47:1A-1.1. |
| 2) | FY 13 July 2012 to January 2013 Printing Usage Costs w/ State Non-State splits.xlsx 2/26/2013 e-mail from Wowk, William to Alpert, Gary (4 pgs.) | Charts of client agency print lines and associated costs | <u>N.J.S.A.</u> 47:1A-1.1 Information which, if disclosed, would give an advantage to competitors or bidders. | The e-mail and attachment containing agency FY expenditures do not contain information that, if disclosed, would give an advantage to bidders as it is publically available information. Thus, the Custodian has unlawfully denied access to this e-mail and attachment and must disclose same. |
| 3) | Global Print RFP Evaluation 11/20/2012 e- | Bidder evaluation recommendations for Purchase and Property | <u>N.J.S.A.</u> 47:1A-1.1 Inter-agency or intra- | The Custodian lawfully denied access to the discussion in the e-mail, as it |

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.

| | | | | |
|----|--|--|---|--|
| | mail from Hottmann, Hagen to Haberstick, Michael; Doohaluk, Ray; Lynn, Elliott; Alpert Gary (1pg.) | | agency advisory, consultative, or deliberative material. Information which, if disclosed, would give an advantage to competitors or bidders. | contains ACD material. <u>N.J.S.A. 47:1A-1.1.</u> Additionally, the e-mail contains information which, if disclosed, would give an advantage to competitors. <u>N.J.S.A. 47:1A-1.1.</u> |
| 4) | Untitled 10/9/2012 e-mail from Lynn, Elliott to Ridolfino, David; Broeker, Gloria; D'Autrechy, Jennifer (2pgs.) | Actions to be taken prior to RFP release | <u>N.J.S.A. 47:1A-1.1</u> Inter-agency or intra-agency advisory, consultative, or deliberative material. | The Custodian lawfully denied access to the discussion in the e-mail, as it contains ACD material. <u>N.J.S.A. 47:1A-1.1.</u> |
| 5) | RE: Global Print RFP 8/29/2012 e-mail from Doohaluk, Ray to Haberstick, Micahel; Dr. Elliott Lynn; Lynn, Elliott (2pages.) | RFP development and contents | <u>N.J.S.A. 47:1A-1.1</u> Inter-agency or intra-agency advisory, consultative, or deliberative material. | The Custodian lawfully denied access to the discussion in the e-mail, as it contains ACD material. <u>N.J.S.A. 47:1A-1.1.</u> |
| 6) | Global RFP Update 8/10/2012 e-mail from Lynn, Elliott to Pagano, Sharon; | RFP development and contents | <u>N.J.S.A. 47:1A-1.1</u> Inter-agency or intra-agency advisory, | The Custodian lawfully denied access to the discussion in e-mail, as it contains ACD material. <u>N.J.S.A. 47:1A-</u> |

| | | | | |
|----|--|--|---|--|
| | Hottmann, Hagen; Haberstick, Michael; Doohaluk, Ray; Tucker, Fred; Sydlo, Allan; Gallagher, Brian; Alpert, Gary; McNeill Ebony; Shilkevich, Natalia (2pgs.) | | consultative, or deliberative material. | 1.1. |
| 7) | Global RFP Update 8/8/2012 e-mail from Hottmann, Hagen to Lynn, Elliott; Pagano, Sharon; Haberstick, Michael; Doolahuk, Ray; Tucker, Fred; Sydlo, Alla; Gallagher, Brian (2pgs.) | RFP development and contents | <u>N.J.S.A. 47:1A-1.1</u> Inter-agency or intra-agency advisory, consultative, or deliberative material. | The Custodian lawfully denied access to the discussion in the e-mail, as it contains ACD material. <u>N.J.S.A. 47:1A-1.1.</u> |
| 8) | Job Descriptions and 2/9/2012 e-mail from Haberstick, Michael to Schulman, Linda (2pgs.) | Post RFP HUB QA positions | <u>N.J.S.A. 47:1A-1.1</u> Inter-agency or intra-agency advisory, consultative, or deliberative material. | The Custodian lawfully denied access to the e-mail discussion and attached job description draft, as they contain ACD material. <u>N.J.S.A. 47:1A-1.1.</u> |
| 9) | Ricoh pricing for State of NJ Outsourcing – RECAP OF | Follow up to print RFP waiver with Ricoh | <u>N.J.S.A. 47:1A-1.1</u> Information | The Custodian lawfully denied access to the discussion in the |

| | | | | |
|-----|--|---|--|--|
| | 12/6/2013 RICOH Waiver Meeting 12/9/2013 e-mail from Alpert, Gary to Doohaluk, Ray; Haberstick, Michael; Dodson, Steven; Pasternal, Michael; Shikevich, Natalie (2pgs.) | | which, if disclosed, would give an advantage to competitors or bidders. | e-mail chain, as it contains ACD material on the construction of a proposed RFP. <u>N.J.S.A. 47:1A-1.1.</u> Additionally, the e-mail chain contains information which, if disclosed, would give an advantage to competitors. <u>N.J.S.A. 47:1A-1.1. Renna, GRC 2003-100.</u> |
| 10) | RE: Scan from the NJ Division of Purchase & Propert 11/23/2012 e-mail with attachments from Alpert, Gary to Hottmann, Hagen (7pgs.) | Estimated cost of operating the NJOIT HUB – not finalized | <u>N.J.S.A. 47:1A-1.1</u> Inter-agency or intra-agency advisory, consultative, or deliberative material. Information which, if disclosed, would give an advantage to competitors or bidders. | The Custodian lawfully denied access to the body of the e-mail chain as it contains ACD material. <u>N.J.S.A. 47:1A-1.1.</u> However, the attachments containing agency FY expenditures do not contain information that, if disclosed, would give an advantage to bidders, as it is publically available information. Thus, the Custodian has unlawfully denied access to this e-mail and |

| | | | | |
|-----|--|---|--|---|
| | | | | attachment and must disclose same. |
| 11) | FW: Scan from the NJ Division of Purchase and Property 10/23/2012 e-mail with attachments from Hottmann, Hagen to Alpert, Gary (9pgs.) | Estimated cost of operating the NJOIT HUB – not finalized | <u>N.J.S.A.</u> 47:1A-1.1 Inter-agency or intra-agency advisory, consultative, or deliberative material. Information which, if disclosed, would give an advantage to competitors or bidders. | The Custodian lawfully denied access to the body of the e-mail chain as it contains ACD material. <u>N.J.S.A.</u> 47:1A-1.1. However, the attachments containing agency FY expenditures do not contain information that, if disclosed, would give an advantage to bidders, as it is publically available information. Thus, the Custodian has unlawfully denied access to this e-mail and attachment and must disclose same. |
| 12) | RE: RFP 10/5/2012 e-mail from Alpert, Gary to Broeker, Gloria (4pgs.) | RFP development and outstanding items | <u>N.J.S.A.</u> 47:1A-1.1 Inter-agency or intra-agency advisory, consultative, or deliberative material. | The Custodian lawfully denied access to the discussion in the e-mail, as it contains ACD material. <u>N.J.S.A.</u> 47:1A-1.1. |

| | | | | |
|-----|---|--|---|--|
| 13) | Global RFP Update 8/23/2012 e-mail from Lynn, Elliott to Pagano, Sharon; Hottmann, Hagen; Haberstick, Michael; Doohaluk, Ray; Tucker, Fred; Sydlo, Allan; Gallagher, Brian; Alpert, Gary; McNeill Ebony; Shilkevich, Natalia (2pgs.) | RFP development and outstanding items | <u>N.J.S.A.</u> 47:1A-1.1 Inter-agency or intra-agency advisory, consultative, or deliberative material. | The Custodian lawfully denied access to the discussion in the e-mail, as it contains ACD material. <u>N.J.S.A.</u> 47:1A-1.1. |
| 14) | RE: Carroll Street Print Production Information 8/9/2012 e-mail from Lynn Elliott to Pagano, Sharon; Hottmann, Hagen; Haberstick, Michael; Doohaluk, Ray; Alpert, Gary (1pg.) | Reference to Carroll Street development and draft financials | <u>N.J.S.A.</u> 47:1A-1.1 Inter-agency or intra-agency advisory, consultative, or deliberative material. | The Custodian lawfully denied access to the discussion in the e-mail, as it contains ACD material. <u>N.J.S.A.</u> 47:1A-1.1. |
| 15) | FW: Print Shop 2/22/2012 e-mail from Broeker, Gloria to Hottmann, Hagen; Schulman, Linda; | Potential staff reassignments and HUB printing volume | <u>N.J.S.A.</u> 47:1A-1.1 Inter-agency or intra-agency advisory, consultative, | The Custodian lawfully denied access to the discussion in the e-mail chain, as it contains ACD material on the construction of a |

| | | | | |
|--|---|--|--|--|
| | Haberstick, Michael; Pagano, Sharon (2pgs.) | | or deliberative material. Information which, if disclosed, would give an advantage to competitors or bidders. | proposed RFP. <u>N.J.S.A. 47:1A-1.1.</u> Additionally, the e-mail chain contains information which, if disclosed, would give an advantage to competitors. <u>N.J.S.A. 47:1A-1.1. Renna, GRC 2003-100.</u> |
|--|---|--|--|--|

Thus, with few exceptions, the Custodian lawfully denied access to the requested e-mails and attachments because said records contain ACD material or would provide an advantage to competitors or bidders if disclosed. N.J.S.A. 47:1A-1.1. See Educ. Law Center, 198 N.J. at 285, Mapother, 3 F.3d at 1539, Murray, GRC 2006-169, Renna, GRC 2003-100. Specifically, the e-mail discussions and attachments pertain to the formulation of an RFP for printing services on behalf of the agency, including the process to create an RDP, cost estimations, organizational drafts, and job descriptions. Therefore, the e-mails and attachments invariably contain ACD material and/or would include information that would give potential bidders an advantage if disclosed.

However, consistent with N.J.S.A. 47:1A-5(g), if the custodian of a government record asserts that part of a particular record is exempt from public access pursuant to OPRA, the custodian must delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and must promptly permit access to the remainder of the record. Thus, the Custodian must disclose all other portions of the requested e-mails to the Complainant (i.e. sender, recipients, date, time, subject, and salutations where applicable). As to these portions of the requested e-mails, the Custodian has unlawfully denied access. See Ray v. Freedom Academy Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010).

Knowing & Willful

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The original Custodian failed to comply with the Council's February 24, 2015 Interim Order because she failed to provide a signed certification to the Executive Director within the prescribed extended time frame.
2. With few exceptions, the Custodian lawfully denied access to the requested e-mails and attachments because said records contain ACD material or would provide an advantage to competitors or bidders if disclosed. N.J.S.A. 47:1A-1.1. See Educ. Law Center v. N.J. Dep't of Educ., 198 N.J. 274, 285 (2009), Mapother v. Dep't of Justice, 3 F.3d 1533, 1539 (D.C. Cir. 1993)), Murray v. Twp. of Warren, GRC Complaint No. 2006-169 (February 2008), Renna v. Cnty. of Union, GRC Complaint No. 2003-100. Specifically, the e-mail discussions and attachments pertain to the formulation of an RFP for printing services on behalf of the agency, including the process to create an RDP, cost estimations, organizational drafts, and job descriptions. Therefore, the e-mails and attachments invariably contain ACD material and/or would include information that would give potential bidders an advantage if disclosed.
3. **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 conformation of compliance pursuant to N.J. Court Rule 1:4-4 to the Executive Director.**¹⁰
4. **The Custodian shall also disclose all other portions of the requested e-mails and memos to the Complainant (i.e., sender, recipients, date, time, subject, and closing salutations).**
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 Council defers analysis of whether the Complainant is a prevailing party, pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Samuel A. Rosado
Staff Attorney

January 24, 2017¹¹

¹⁰ 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.

¹¹ This matter was scheduled for adjudication on January 31, but the Council tabled the item because legal counsel requested more time for review.



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

February 24, 2015 Government Records Council Meeting

Dudley Burdge
Complainant

Complaint No. 2014-179

v.

NJ Office of Information Technology
Custodian of Record

At the February 24, 2015 public meeting, the Government Records Council (“Council”) considered the February 17, 2015 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 her burden of proof that she timely responded to the Complainant’s January 9, 2014 and January 16, 2014 OPRA requests. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007). Moreover, the Custodian violated N.J.S.A. 47:1A-5(e) by failing to immediately respond in writing to Item No. 2 of the Complainant’s January 9, 2014 OPRA request, which sought budgets and budget submissions. See Herron v. Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007).
2. The GRC must conduct an *in camera* review of responsive records withheld from disclosure *in toto* as containing advisory, consultative, or deliberative material, and/or the disclosure of which would give an advantage to competitors or bidders, to determine the validity of the Custodian’s assertions. See Paff v. NJ Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005); N.J.S.A. 47:1A-1.1.
3. Notwithstanding the Custodian’s “deemed” denial, she has borne her burden of proof that she did not unlawfully deny access to Item No. 2 of the Complainant’s January 9, 2014 OPRA request because she certified, and the record reflects, that no responsive documents exist. N.J.S.A. 47:1A-6; See Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
4. Notwithstanding the Custodian’s “deemed” denial, she has borne her burden of proof that she did not unlawfully deny access to the Complainant’s January 16, 2014 OPRA

request because she certified, and the record reflects, that no additional responsive documents exist. N.J.S.A. 47:1A-6; See Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

5. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records identified in Paragraph No. 2, 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 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.**
6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
7. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 24th Day of February, 2015

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: February 25, 2015

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."

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 24, 2015 Council Meeting**

**Dudley Burdge¹
Complainant**

GRC Complaint No. 2014-179

v.

**NJ Office of Information Technology²
Custodial Agency**

Records Relevant to Complaint: Hard or electronic copies of:

January 9, 2014 OPRA Request³

1. Copies of all correspondence including e-mails and reports assessing the costs of current [Office of Information Technology (“OIT”)] print operation & expected future costs.
2. Annual budgets and budget submissions concerning in whole or part OIT HUB print operations for 2013, 2014, and 2015.

January 16, 2014 OPRA Request

Studies of print privatization including reports on alternatives to privatization prepared by Elliot Lynn, Hagen Hottmann, Michael Haberstick and other OIT managers.

Custodian of Record: Shelley Bates

Request Received by Custodian: January 9, 2014; January 16, 2014

Response Made by Custodian: February 21, 2014; March 27, 2014; April 4, 2014; April 16, 2014; June 27, 2014; July 11, 2014

GRC Complaint Received: April 24, 2014

Background⁴

Request and Response:

On January 9, 2014, the Complainant submitted an Open Public Records Act (“OPRA”)

¹ Annemarie Pinarski, Esq. of Weissman & Mintz, LLC (Somerset, NJ).

² Represented by Schenk, Price, Smith, & King, LLP (Florham Park, NJ).

³ The Complainant requested other records, but they are not at issue in this matter.

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.

request to the Custodian seeking the records identified as Item Nos. 1 and 2. On January 16, 2014, the Complainant submitted a supplemental OPRA request to the Custodian seeking the records identified above. On February 19, 2014, counsel for the Complainant sent a letter to the Custodian stating that the Complainant has not received a response. Counsel further stated that the Custodian should produce responsive records by February 21, 2014 to avoid a filing of a Denial of Access Complaint or lawsuit in New Jersey Superior Court.

On February 21, 2014, twenty-nine (29) business days after receiving the Complainant's January 9, 2014 OPRA request, and twenty-three (23) business days after receiving the Complainant's January 16, 2014 OPRA request, the Custodian responded in writing, partially producing responsive records. However, for the items at issue, the Custodian sought an additional seven (7) business days to respond.

On March 27, 2014, the Custodian submitted an additional response to the Complainant's OPRA requests, providing partial responses to requested Item No. 1 and his January 16, 2014 OPRA request. The Complainant requested an additional six (6) business days to provide a complete response to Item Nos. 1 and 2, as well as the January 16, 2014 OPRA request.

On April 4, 2014, the Custodian responded further to the Complainant's OPRA requests, denying access to documents responsive requested Item No. 1 as containing inter-agency or intra-agency advisory, consultative, or deliberative material ("ACD"), and /or information which, if released, would give an advantage to competitors or bidders. N.J.S.A. 47:1A-1.1. The Custodian also stated that there were no responsive records to Item No. 2, and that all responsive records to the Complainant's January 16, 2014 OPRA request were provided on March 27, 2014.

The Complainant replied to the Custodian on April 7, 2014, stating that the record the Custodian claimed as responsive to the January 16, 2014 OPRA request pertains to a study of potential privatization of print operations for the State of Connecticut and not studies prepared by the individuals identified in the Complainant's request. Further, the Complainant challenged the Custodian's assertion that no responsive records exist regarding budgetary information for state agencies. The Custodian responded later that day advising the Complainant to forward any questions he has to the Government Records Council ("GRC").

On April 16, 2014, the Custodian e-mailed the Complainant, restating that there are no additional responsive records to the January 16, 2014 OPRA request. The Custodian added that the Complainant's request for budgets of the "OIT HUB print operations" is not the same as requesting the budget for an entire state agency. The Custodian included Internet links to OIT's annual budget for FY 2013, 2014, and 2015 as responsive to the request.

Denial of Access Complaint:

On April 24, 2014, the Complainant filed a Denial of Access Complaint with the GRC. The Complainant asserted that his e-mail dated April 4, 2014 conveys his arguments against the Custodian's denial of access to requested Item No. 2 and the January 16, 2014 OPRA request. The Complainant also contested the assertion that responsive records to Item No. 1 would contain ACD material or would give an advantage to competitors or bidders if disclosed.

The Complainant further contended that the Custodian's fragmentary responses and significant delays demonstrated a willful denial of access.

Statement of Information:

On August 15, 2014, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she did not willfully deny access to the requested records, and that any denial of access was lawful.⁵

January 9, 2014 OPRA Request Item No. 1

The Custodian certified that at the time the Complainant submitted his January 9, 2014 OPRA request, OIT was preparing a Request for Proposal ("RFP") regarding printing operations at its HUB location. The Custodian certified that responsive records to Item No. 1 contain ACD material, including the procedural details on the RFP's creation, as well as opinions and comments of personnel in charge thereof.

Additionally, the Custodian certified that responsive records also contain data essential in determining the RFP's terms. According to the Custodian, such data included the page rate cost, the cost of moving printing operations, and overall cost analysis. The Custodian asserted that revealing such data would give an advantage to anyone interested in the award under the RFP.

January 9, 2014 OPRA Request Item No. 2

The Custodian certified that OIT does not possess records constituting a separate budget for printing operations at its HUB location. The Custodian contended that such costs are captured under various line items within OIT's overall budget, which in turn becomes part of the State of New Jersey's budget. Therefore, the Custodian certified no responsive records exist for Item No. 2.

January 16, 2014 OPRA Request

On June 27, 2014, the Custodian submitted a letter to the Complainant, stating that she located one (1) additional responsive document to his January 16, 2014 request. The Custodian also requested clarification on the phrase "[s]tudies of print privatization" in the Complainant's request. The Custodian stated that the RFP on printing services do not refer to privatization.

That same day, the Complainant responded to the Custodian, stating that he is requesting "studies . . . concerning the print operations envisioned in the RFP . . . [as] well as studies . . . that explore alternatives to the contracting of print operations envisioned in the RFP."

⁵ The Custodian included additional information regarding correspondence between the parties while this complaint was in mediation. Pursuant to the Uniform Mediation Act, N.J.S.A. 2A:23C-1 et seq., communications that take place during the mediation process are not deemed to be public records subject to disclosure under OPRA. N.J.S.A. 2A:23C-2. All communications which occur during the mediation process are privileged from disclosure and may not be used in any judicial, administrative, or legislative proceeding, or in any arbitration, unless all parties and the mediator waive the privilege. N.J.S.A. 2A:23C-4.

On July 11, 2014, the Custodian responded to the Complainant, stating that an additional review failed to produce any other responsive documents to his January 16, 2014 request.

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).⁶ Thus, a custodian's failure to respond in writing to a complainant's OPRA request either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007).

OPRA also provides that:

Immediate access ordinarily shall be granted to *budgets*, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information. (Emphasis added.)

N.J.S.A. 47:1A-5(e).

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.

In the instant matter, the Custodian acknowledged that she received the Complainant's first (1st) OPRA request on January 9, 2014, and his second (2nd) OPRA request on January 16, 2014. The Custodian also certified that she partially responded to both requests on February 21, 2014, twenty-nine (29) and twenty-three (23) business days later, respectively. Moreover, requested Item No. 2 of the Complainant's January 9, 2014 request sought the "budgets and budget submissions" for OIT's printing operations for the years 2013, 2014, and 2015.

⁶ 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.

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant's January 9, 2014 and January 16, 2014 OPRA requests. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC No. 2007-11. Moreover, the Custodian violated N.J.S.A. 47:1A-5(e) by failing to immediately respond in writing to Item No. 2 of the Complainant's January 9, 2014 OPRA request which sought budgets and budget submissions. *See Herron*, GRC No. 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.

January 9, 2014 OPRA Request Item No. 1

In Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the GRC⁷ in which the GRC dismissed the complaint by accepting the custodian's legal conclusion for the denial of access without further review. The court stated that:

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

Id. at 354.

The court also stated that:

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

Id. at 355.

⁷ Paff v. NJ Dep't of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

Further, the court stated that:

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

Id.

Here, the Custodian asserted that responsive records to requested Item No. 1 were withheld from disclosure on the basis that they contain ACD material, and/or would give an unfair advantage to competitors or bidders if disclosed. N.J.S.A. 47:1A-1.1.

Therefore, the GRC must conduct an *in camera* review of responsive records withheld from disclosure *in toto*, as containing ACD material and/or the disclosure of which would give an advantage to competitors or bidders, to determine the validity of the Custodian's assertions. *See Paff*, 379 N.J. Super. at 346; N.J.S.A. 47:1A-1.1.

January 9, 2014 OPRA Request Item No. 2

The Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. *See Pusterhofer v. N.J. Dep't of Educ.*, GRC Complaint No. 2005-49 (July 2005). Here, the Custodian certified that OIT does not create or maintain a budget specifically regarding printing operations at its HUB location. The Custodian further stated that budget information related to printing operations are captured within other fiscal number which comprise OIT's overall budget, which in turn is made public during the State of New Jersey's budget process. The Complainant has failed to provide evidence to rebut the Custodian's certification.

Notwithstanding the Custodian's "deemed" denial, she has borne her burden of proof that she did not unlawfully deny access to Item No. 2 of the Complainant's January 9, 2014 OPRA request because she certified, and the record reflects, that no responsive documents exist. N.J.S.A. 47:1A-6; *See Pusterhofer*, GRC No. 2005-49.

January 16, 2014 OPRA Request

As referenced above, Pusterhofer provides a custodian cannot unlawfully deny access to records that do not exist. GRC No. 2005-49. Here, the Custodian certified that no additional responsive records to the Complainant's January 16, 2014 OPRA request exist, beyond what was provided to the Complainant on March 27, 2014 and June 27, 2014. Furthermore, the Complainant has failed to provide any evidence to rebut the Custodian certification.

Notwithstanding the Custodian's "deemed" denial, she has borne her burden of proof that she did not unlawfully deny access to the Complainant's January 16, 2014 OPRA request because she certified, and the record reflects, that no additional responsive documents exist. N.J.S.A. 47:1A-6; *See Pusterhofer*, GRC No. 2005-49.

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.

Prevailing Party Attorney's Fees

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant's January 9, 2014 and January 16, 2014 OPRA requests. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007). Moreover, the Custodian violated N.J.S.A. 47:1A-5(e) by failing to immediately respond in writing to Item No. 2 of the Complainant's January 9, 2014 OPRA request, which sought budgets and budget submissions. *See Herron v. Twp. of Montclair*, GRC Complaint No. 2006-178 (February 2007).
2. The GRC must conduct an *in camera* review of responsive records withheld from disclosure *in toto* as containing advisory, consultative, or deliberative material, and/or the disclosure of which would give an advantage to competitors or bidders, to determine the validity of the Custodian's assertions. *See Paff v. NJ Dep't of Labor, Bd. of Review*, 379 N.J. Super. 346 (App. Div. 2005); N.J.S.A. 47:1A-1.1.
3. Notwithstanding the Custodian's "deemed" denial, she has borne her burden of proof that she did not unlawfully deny access to Item No. 2 of the Complainant's January 9, 2014 OPRA request because she certified, and the record reflects, that no responsive documents exist. N.J.S.A. 47:1A-6; *See Pusterhofer v. N.J. Dep't of Educ.*, GRC Complaint No. 2005-49 (July 2005).
4. Notwithstanding the Custodian's "deemed" denial, she has borne her burden of proof

that she did not unlawfully deny access to the Complainant's January 16, 2014 OPRA request because she certified, and the record reflects, that no additional responsive documents exist. N.J.S.A. 47:1A-6; *See Pusterhofer v. N.J. Dep't of Educ.*, GRC Complaint No. 2005-49 (July 2005).

5. **The Custodian must deliver⁸ to the Council in a sealed envelope nine (9) copies of the requested unredacted records identified in Paragraph No. 2, 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.**
6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
7. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Samuel A. Rosado
Staff Attorney

Approved By: Dawn R. SanFilippo
Deputy Executive Director

February 17, 2015

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."