



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

October 30, 2018 Government Records Council Meeting

Nicole Dory, Esq. (o/b/o Shipyard Associates, LP)
Complainant

Complaint No. 2014-200

v.

City of Hoboken
Custodian of Record

At the October 30, 2018 public meeting, the Government Records Council (“Council”) considered the October 23, 2018 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that the Council should dismiss the complaint because the Complainant’s Counsel has waived her right to prevailing party attorney fees in this matter. N.J.S.A. 47:1A-6. Therefore, no further adjudication is required.

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

Final Decision Rendered by the
Government Records Council
On The 30th Day of October, 2018

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: November 1, 2018



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Prevailing Party Attorney's Fees
**Supplemental Findings and Recommendations of the Council Staff
October 30, 2018 Council Meeting**

Nicole Dory, Esq. (on behalf of Shipyard Associates, L.P.)¹ GRC Complaint No. 2014-200
Complainant

v.

City of Hoboken (Hudson)²
Custodial Agency

Records Relevant to Complaint:

1. Request item number 3: Notes of Hoboken City Council members taken at the September 17, 2013, October 2, 2013, October 17, 2013, November 6, 2013, November 18, 2013, and December 18, 2013 Council hearing dates on the portion of the hearings pertaining to Hoboken Ordinance Z-253, “An Ordinance Amending Chapter 104 (Flood Damage Prevention) to Reflect Updates and Recommended (sic) by the New Jersey Department of Environmental Protection’s Latest Revised Model Ordinance,” Ordinance Z-263 and Ordinance Z-264.
2. Request item number 5: The presentation materials, including the exhibits, Power Point presentation, and handouts shown or distributed to the Hoboken City Council members by Princeton Hydro, LLC and RCQuinn Consulting, Inc. at the December 18, 2013 Hoboken City Council hearing.
3. Request item number 9: Reports, memorandums and notes authored by Hoboken Community Development Director Brandy Forbes discussing Ordinances Z-253, Z-263 and/or Z-264.
4. Request item number 10: Correspondence, letters, e-mails, reports, memorandums and notes discussing Ordinance Z-253, Ordinance Z-263 and/or Ordinance Z-264 authored by (a) any Hoboken City Council member; (b) Community Development Director Brandy Forbes; (c) the Hoboken Planning Board Planner; and (d) the Hoboken Planning Board Engineer.
5. Request item number 11: Correspondence, letters, e-mails, reports, memorandums and notes authored by Mayor Dawn Zimmer discussing Ordinance Z-253, Ordinance Z-263, Ordinance Z-264.³

¹ Represented by Nicole Dory, Esq., of Connell Foley, LLP (Roseland, NJ).

² Represented by Alyssa Bongiovanni, Esq. (Hoboken, NJ).

³ There were other records requested that are not relevant to this complaint.

Nicole Dory, Esq. (on behalf of Shipyard Associates, L.P.) v. City of Hoboken (Hudson), 2014-200 – Supplemental Findings and Recommendations of the Council Staff

Custodian of Record: James J. Farina
Request Received by Custodian: March 24, 2014
Response Made by Custodian: April 3, 2014
GRC Complaint Received: May 20, 2014

Background

July 31, 2018 Council Meeting:

At its July 31, 2018 public meeting, the Government Records Council (“Council”) considered the July 24, 2018 Supplemental Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian complied with the Council’s June 26, 2018 Interim Order because the Custodian in a timely manner e-mailed certified confirmation of compliance to the GRC, with a copy to the Complainant, wherein he averred that he had attached to the e-mail a true and accurate copy of the record the Council determined was not exempt from access based upon an *in camera* examination of the record.
2. Because the Custodian in a timely manner disclosed to the Complainant all records responsive to request item number 9 with appropriate redactions, including a document index explaining the lawful basis for each redaction, and simultaneously provided certified confirmation of compliance to the Executive Director, and because the Council did not find that there were any other records responsive to request item number 9 that were subject to disclosure, the Custodian complied with the provisions of Paragraph 8 of the of the Council’s November 18, 2014 Interim Order.
3. The Custodian (1) failed to respond to the Complainant’s OPRA request in a timely manner which resulted in a “deemed” denial of the request; (2) responded insufficiently to request item numbers 3 and 5; (3) failed to obtain and disclose presentation materials used at the December 18, 2013 hearing; (4) failed to bear his burden of proving that the denial of access to the records responsive to request item number 9 was authorized by law; and (5) denied the Complainant access to a record that the Council determined via *in camera* examination should have been disclosed. The Council notes, however, that the Custodian only missed the statutorily-mandated response time by one day and in a timely manner disclosed all records ordered for disclosure by the Council, except for the presentation materials. However, the Custodian through Counsel, candidly admitted he erred by not disclosing the presentation materials because he believed that he had no duty to obtain them from a third party. Thereafter, the Custodian did disclose the materials. The Custodian, through Counsel, also stated that he had no intention of preventing the Complainant from seeing the presentation because he directed the Complainant to an on-line video of the presentation in his April 3, 2014 response to the OPRA request. The Council therefore finds that the evidence of record does not indicate that the Custodian’s actions had a positive element of conscious wrongdoing or were intentional and deliberate. Accordingly, the Custodian’s actions did not rise to

the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

4. Pursuant to the Council's November 18, 2014 and June 26, 2018 Interim Orders, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant filing Denial of Access Complaints and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Custodian disclosed responsive records to the Complainant in accordance with the Council's Orders. 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. 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 August 2, 2018, the Council distributed its July 31, 2018 Interim Order to all parties. On August 21, 2018, the Complainant's Counsel e-mailed the Government Records Council staff ("GRC") seeking an extension of time until October 1, 2018, so that the parties could continue discussions to try to resolve the fee award. On August 21, 2018, the GRC granted the extension of time until October 1, 2018.

On September 27, 2018, the Custodian's Counsel forwarded a letter via e-mail to the GRC advising that the parties resolved the award of counsel fees in this matter because the Complainant's Counsel waived her right to said fees. On September 28, 2018, the Complainant's Counsel e-mailed the GRC confirming that she had waived any right to counsel fees.

Analysis

Prevailing Party Attorney's Fees

At its July 31, 2018 meeting, the Council determined that the Complainant was a prevailing party entitled to an award of reasonable attorney's fees. The Council thus ordered that 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 Council further ordered that the parties notify the GRC of any settlement prior to the expiration of the twenty (20) business day time frame. Finally, the Council ordered that, should the parties not reach an agreement, the Complainant's Counsel would be required to "submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13."

On August 2, 2018, the Council distributed its July 31, 2018 Interim Order to all parties; thus, the parties' response was due by close of business on August 30, 2018. On August 21, 2018, the Complainant's Counsel sought, and was granted, an extension of time until October 1, 2018. On September 27, 2018, the Custodian's Counsel e-mailed the GRC stating that the parties resolved the award of counsel fees because the Complainant's Counsel waived her right to any fees. On September 28, 2018, the Complainant's Counsel e-mailed the GRC confirming that she had waived any right to counsel fees.

Accordingly, the Council should dismiss the complaint because the Complainant's Counsel has waived her right to prevailing party attorney fees in this matter. N.J.S.A. 47:1A-6. Therefore, no further adjudication is required.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that the Council should dismiss the complaint because the Complainant's Counsel has waived her right to prevailing party attorney fees in this matter. N.J.S.A. 47:1A-6. Therefore, no further adjudication is required.

Prepared By: John E. Stewart

October 23, 2018



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

July 31, 2018 Government Records Council Meeting

Nicole Dory, Esq. (o/b/o Shipyard Associates, L.P.)
Complainant

Complaint No. 2014-200

v.

City of Hoboken (Hudson)
Custodian of Record

At the July 31, 2018 public meeting, the Government Records Council (“Council”) considered the July 24, 2018 Supplemental Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian complied with the Council’s June 26, 2018 Interim Order because the Custodian in a timely manner e-mailed certified confirmation of compliance to the GRC, with a copy to the Complainant, wherein he averred that he had attached to the e-mail a true and accurate copy of the record the Council determined was not exempt from access based upon an *in camera* examination of the record.
2. Because the Custodian in a timely manner disclosed to the Complainant all records responsive to request item number 9 with appropriate redactions, including a document index explaining the lawful basis for each redaction, and simultaneously provided certified confirmation of compliance to the Executive Director, and because the Council did not find that there were any other records responsive to request item number 9 that were subject to disclosure, the Custodian complied with the provisions of Paragraph 8 of the of the Council’s November 18, 2014 Interim Order.
3. The Custodian (1) failed to respond to the Complainant’s OPRA request in a timely manner which resulted in a “deemed” denial of the request; (2) responded insufficiently to request item numbers 3 and 5; (3) failed to obtain and disclose presentation materials used at the December 18, 2013 hearing; (4) failed to bear his burden of proving that the denial of access to the records responsive to request item number 9 was authorized by law; and (5) denied the Complainant access to a record that the Council determined via *in camera* examination should have been disclosed. The Council notes, however, that the Custodian only missed the statutorily-mandated response time by one day and in a timely manner disclosed all records ordered for disclosure by the Council, except for the presentation materials. However, the Custodian through Counsel, candidly admitted he erred by not disclosing the presentation materials because he believed that he had no duty to obtain them from a third party. Thereafter, the Custodian did disclose the



materials. The Custodian, through Counsel, also stated that he had no intention of preventing the Complainant from seeing the presentation because he directed the Complainant to an on-line video of the presentation in his April 3, 2014 response to the OPRA request. The Council therefore finds that the evidence of record does not indicate that the Custodian's actions had a positive element of conscious wrongdoing or were intentional and deliberate. Accordingly, the Custodian's actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

4. Pursuant to the Council's November 18, 2014 and June 26, 2018 Interim Orders, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant filing Denial of Access Complaints and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Custodian disclosed responsive records to the Complainant in accordance with the Council's Orders. 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. 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 31st Day of July, 2018

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: August 2, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Council Staff
July 31, 2018 Council Meeting**

**Nicole Dory, Esq. (on behalf of Shipyard Associates, L.P.)¹ GRC Complaint No. 2014-200
Complainant**

v.

**City of Hoboken (Hudson)²
Custodial Agency**

Records Relevant to Complaint:

1. Request item number 3: Notes of Hoboken City Council members taken at the September 17, 2013, October 2, 2013, October 17, 2013, November 6, 2013, November 18, 2013, and December 18, 2013 Council hearing dates on the portion of the hearings pertaining to Hoboken Ordinance Z-253, “An Ordinance Amending Chapter 104 (Flood Damage Prevention) to Reflect Updates and Recommended (sic) by the New Jersey Department of Environmental Protection’s Latest Revised Model Ordinance,” Ordinance Z-263 and Ordinance Z-264.
2. Request item number 5: The presentation materials, including the exhibits, Power Point presentation, and handouts shown or distributed to the Hoboken City Council members by Princeton Hydro, LLC and RCQuinn Consulting, Inc. at the December 18, 2013 Hoboken City Council hearing.
3. Request item number 9: Reports, memorandums and notes authored by Hoboken Community Development Director Brandy Forbes discussing Ordinances Z-253, Z-263 and/or Z-264.
4. Request item number 10: Correspondence, letters, e-mails, reports, memorandums and notes discussing Ordinance Z-253, Ordinance Z-263 and/or Ordinance Z-264 authored by (a) any Hoboken City Council member; (b) Community Development Director Brandy Forbes; (c) the Hoboken Planning Board Planner; and (d) the Hoboken Planning Board Engineer.
5. Request item number 11: Correspondence, letters, e-mails, reports, memorandums and notes authored by Mayor Dawn Zimmer discussing Ordinance Z-253, Ordinance Z-263, Ordinance Z-264.³

Custodian of Record: James J. Farina

Request Received by Custodian: March 24, 2014

Response Made by Custodian: April 3, 2014

GRC Complaint Received: May 20, 2014

¹ Represented by Nicole Dory, Esq., of Connell Foley, LLP (Roseland, NJ).

² Represented by Jeanne Ann McManus, Esq., of Weiner Lesniak, LLP (Parsippany, NJ).

³ There were other records requested that are not relevant to this complaint.

Nicole Dory, Esq. (on behalf of Shipyard Associates, L.P.) v. City of Hoboken (Hudson), 2014-200 – Supplemental Findings and Recommendations of the Council Staff

Background

June 26, 2018 Council Meeting:

At its June 26, 2018 public meeting, the Government Records Council (“Council”) considered the May 15, 2018 Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian did not fully comply with paragraphs 4 and 6 of the Council’s November 18, 2014 Interim Order because the Custodian failed to provide a document index to accompany the unredacted records submitted for the *in camera* examination as required per paragraph 4 of said Order, and failed in a timely manner to obtain presentation materials from Princeton Hydro, LLC and/or RCQuinn Consulting, Inc. and disclose those records to the Complainant, or certify that the records were not made, maintained, or kept on file by such third party on behalf of the City, as required per paragraph 6 of the Order. The Council finds, however, that the Custodian belatedly complied with the terms of paragraph 6, through Counsel, on February 20, 2015.
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 Government Records Council.**
3. The Council defers analysis of whether the Custodian complied with the provisions of Paragraph 8 of the Interim Order pending the Custodian’s compliance with the Council’s June 26, 2018 Interim Order.
4. 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 June 26, 2018 Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian’s compliance with the Council’s June 26, 2018 Interim Order.

Procedural History:

On June 28, 2018, the Council distributed its June 26, 2018 Interim Order to all parties. On July 3, 2018, the Custodian responded to the Council’s Interim Order by providing certified confirmation of compliance to the Council.

Analysis

Compliance

On June 26, 2018, the Council ordered the above-referenced compliance. On June 28, 2018, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Therefore, compliance was due on or before July 6, 2018. On July 3, 2018, the Custodian e-mailed certified confirmation of compliance to the GRC, with a copy to the Complainant, wherein he stated that he had attached to the e-mail a true and accurate copy of the record the Council determined was not exempt from access based upon an *in camera* examination of the records. Said record was identified by the Custodian as “Record #1, which was a ‘Cover sheet or exterior of an envelope stamped ‘confidential’ containing handwritten ‘From...’ and ‘To...’ notations.””

Therefore, the Custodian complied with the Council’s June 26, 2018 Interim Order because the Custodian in a timely manner e-mailed certified confirmation of compliance to the GRC, with a copy to the Complainant, wherein he averred that he had attached to the e-mail a true and accurate copy of the record the Council determined was not exempt from access based upon an *in camera* examination of the record.

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.

The Council deferred analysis of whether the Custodian complied with the provisions of Paragraph 8 of the Council’s November 18, 2014 Interim Order pending the Custodian’s compliance with the Council’s June 26, 2018 Interim Order. Paragraph 8 required the Custodian to disclose to the Complainant the records responsive to request item number 9 with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction.

As directed in the November 18, 2014 Interim Order, the Custodian provided certified confirmation of compliance dated November 21, 2014. In compliance with Paragraph 8, the Custodian disclosed to the Complainant on November 25, 2014, seven (7) documents responsive to request item number 9. The Custodian also included a document index which revealed that only one document, document number 7, was redacted to omit deliberative material. Then subsequent to the compliance, in a letter to the GRC dated February 20, 2015, the Custodian’s Counsel informed the GRC that the Custodian located two (2) additional e-mails related to request item number 9. However, Counsel stated that the e-mails were withheld from disclosure because they constituted advisory, deliberative or consultative material.

Document number 7, and the two additional e-mails, are not records responsive to request item number 9, which sought only “[r]eports, memorandums and notes ...” For this reason, the

GRC need not determine whether those records, in whole or in part, were lawfully denied. Further, the *in camera* examination of the records responsive to request item number 3 did not result in an order for disclosure of any records responsive to request item number 9.

Accordingly, because the Custodian in a timely manner disclosed to the Complainant all records responsive to request item number 9 with appropriate redactions, including a document index explaining the lawful basis for each redaction, and simultaneously provided certified confirmation of compliance to the Executive Director, and because the Council did not find that there were any other records responsive to request item number 9 that were subject to disclosure, the Custodian complied with the provisions of Paragraph 8 of the of the Council's November 18, 2014 Interim Order.

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 (Berg); 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 Custodian (1) failed to respond to the Complainant's OPRA request in a timely manner which resulted in a “deemed” denial of the request; (2) responded insufficiently to request item numbers 3 and 5; (3) failed to obtain and disclose presentation materials used at the December 18, 2013 hearing; (4) failed to bear his burden of proving that the denial of access to the records responsive to request item number 9 was authorized by law; and (5) denied the Complainant access to a record that the Council determined via *in camera* examination should have been disclosed. The Council notes, however, that the Custodian only missed the statutorily-mandated response time by one day and in a timely manner disclosed all records ordered for disclosure by the Council, except for the presentation materials. However, the Custodian through Counsel, candidly admitted he erred by not disclosing the presentation materials because he believed that he had no duty to obtain them from a third party. Thereafter, the Custodian did disclose the materials. The Custodian,

through Counsel, also stated that he had no intention of preventing the Complainant from seeing the presentation because he directed the Complainant to an on-line video of the presentation in his April 3, 2014 response to the OPRA request. The Council therefore finds that the evidence of record does not indicate that the Custodian's actions had a positive element of conscious wrongdoing or were intentional and deliberate. Accordingly, the Custodian's actions did 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. Further, the Supreme Court expressed 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 to compel the Custodian to disclose the records responsive to the Complainant’s request that the Complainant alleged were unlawfully denied by the Custodian. The Council, after reviewing the evidence of record, conducting an *in camera* examination, and applying the law, ordered the Custodian to disclose one record responsive to request item number 3, obtain and disclose the presentation materials comprising request item number 5, and disclose all records responsive to request item number 9. Thereafter, the Custodian disclosed all records ordered for disclosure by the Council, with accompanying certifications. Thus, the evidence of record supports that the Complainant is a prevailing party entitled to an award of attorney’s fees.

Therefore, pursuant to the Council’s November 18, 2014 and June 26, 2018 Interim Orders, 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. at 432. Additionally, a factual causal nexus exists between the Complainant filing Denial of Access Complaints and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, the Custodian disclosed responsive records to the Complainant in accordance with the Council’s Orders. 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. 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 Council Staff respectfully recommends the Council find that:

1. The Custodian complied with the Council's June 26, 2018 Interim Order because the Custodian in a timely manner e-mailed certified confirmation of compliance to the GRC, with a copy to the Complainant, wherein he averred that he had attached to the e-mail a true and accurate copy of the record the Council determined was not exempt from access based upon an *in camera* examination of the record.
2. Because the Custodian in a timely manner disclosed to the Complainant all records responsive to request item number 9 with appropriate redactions, including a document index explaining the lawful basis for each redaction, and simultaneously provided certified confirmation of compliance to the Executive Director, and because the Council did not find that there were any other records responsive to request item number 9 that were subject to disclosure, the Custodian complied with the provisions of Paragraph 8 of the of the Council's November 18, 2014 Interim Order.
3. The Custodian (1) failed to respond to the Complainant's OPRA request in a timely manner which resulted in a "deemed" denial of the request; (2) responded insufficiently to request item numbers 3 and 5; (3) failed to obtain and disclose presentation materials used at the December 18, 2013 hearing; (4) failed to bear his burden of proving that the denial of access to the records responsive to request item number 9 was authorized by law; and (5) denied the Complainant access to a record that the Council determined via *in camera* examination should have been disclosed. The Council notes, however, that the Custodian only missed the statutorily-mandated response time by one day and in a timely manner disclosed all records ordered for disclosure by the Council, except for the presentation materials. However, the Custodian through Counsel, candidly admitted he erred by not disclosing the presentation materials because he believed that he had no duty to obtain them from a third party. Thereafter, the Custodian did disclose the materials. The Custodian, through Counsel, also stated that he had no intention of preventing the Complainant from seeing the presentation because he directed the Complainant to an on-line video of the presentation in his April 3, 2014 response to the OPRA request. The Council therefore finds that the evidence of record does not indicate that the Custodian's actions had a positive element of conscious wrongdoing or were intentional and deliberate. Accordingly, the Custodian's actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

4. Pursuant to the Council’s November 18, 2014 and June 26, 2018 Interim Orders, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant filing Denial of Access Complaints and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Custodian disclosed responsive records to the Complainant in accordance with the Council’s Orders. 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. 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: John E. Stewart

July 24, 2018



State of New Jersey
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

June 26, 2018 Government Records Council Meeting

Nicole Dory, Esq. (o/b/o Shipyard Associates, L.P.)
Complainant

Complaint No. 2014-200

v.

City of Hoboken (Essex)
Custodian of Record

At the June 26, 2018 public meeting, the Government Records Council (“Council”) considered the May 15, 2018 Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian did not fully comply with paragraphs 4 and 6 of the Council’s November 18, 2014 Interim Order because the Custodian failed to provide a document index to accompany the unredacted records submitted for the *in camera* examination as required per paragraph 4 of said Order, and failed in a timely manner to obtain presentation materials from Princeton Hydro, LLC and/or RCQuinn Consulting, Inc. and disclose those records to the Complainant, or certify that the records were not made, maintained, or kept on file by such third party on behalf of the City, as required per paragraph 6 of the Order. The Council finds, however, that the Custodian belatedly complied with the terms of paragraph 6, through Counsel, on February 20, 2015.
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 Government Records Council.¹**
3. The Council defers analysis of whether the Custodian complied with the provisions of Paragraph 8 of the Interim Order pending the Custodian’s compliance with the Council’s June 26, 2018 Interim Order.

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 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 June 26, 2018 Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's June 26, 2018 Interim Order.

Interim Order Rendered by the
Government Records Council
On The 26th Day of June, 2018

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 28, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Council Staff
June 26, 2018 Council Meeting**

**Nicole Dory, Esq. (on behalf of Shipyard Associates, L.P.)¹ GRC Complaint No. 2014-200
Complainant**

v.

**City of Hoboken (Hudson)²
Custodial Agency**

Records Relevant to Complaint:

1. Request item number 3: Notes of Hoboken City Council members taken at the September 17, 2013, October 2, 2013, October 17, 2013, November 6, 2013, November 18, 2013, and December 18, 2013 Council hearing dates on the portion of the hearings pertaining to Hoboken Ordinance Z-253, “An Ordinance Amending Chapter 104 (Flood Damage Prevention) to Reflect Updates and Recommended (sic) by the New Jersey Department of Environmental Protection’s Latest Revised Model Ordinance,” Ordinance Z-263 and Ordinance Z-264.
2. Request item number 5: The presentation materials, including the exhibits, Power Point presentation, and handouts shown or distributed to the Hoboken City Council members by Princeton Hydro, LLC and RCQuinn Consulting, Inc. at the December 18, 2013 Hoboken City Council hearing.
3. Request item number 9: Reports, memorandums and notes authored by Hoboken Community Development Director Brandy Forbes discussing Ordinances Z-253, Z-263 and/or Z-264.
4. Request item number 10: Correspondence, letters, e-mails, reports, memorandums and notes discussing Ordinance Z-253, Ordinance Z-263 and/or Ordinance Z-264 authored by (a) any Hoboken City Council member; (b) Community Development Director Brandy Forbes; (c) the Hoboken Planning Board Planner; and (d) the Hoboken Planning Board Engineer.
5. Request item number 11: Correspondence, letters, e-mails, reports, memorandums and notes authored by Mayor Dawn Zimmer discussing Ordinance Z-253, Ordinance Z-263, Ordinance Z-264.³

Custodian of Record: James J. Farina

Request Received by Custodian: March 24, 2014

Response Made by Custodian: April 3, 2014

GRC Complaint Received: May 20, 2014

¹ Represented by Nicole Dory, Esq., of Connell Foley, LLP (Roseland, NJ).

² “Represented by Jeanne Ann McManus, Esq., of Weiner Lesniak, LLP (Parsippany, NJ).

³ There were other records requested that are not relevant to this complaint.

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Records submitted for *In Camera* examination: (1) a photocopy of a cover sheet or the exterior of an envelope; (2) copies of meeting agenda pages for October 2, 2013, October 17, 2013, November 18, 2013, December 4, 2013, December 18, 2013; (3) two undated meeting agenda pages; (4) a page from Princeton Hydro's presentation materials; and (5) a single page memorandum. All documents submitted display requested handwritten notations.

Background

November 18, 2014 Council Meeting:

At its November 18, 2014 public meeting, the Government Records Council ("Council") considered the November 10, 2014 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. 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. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. Because the Custodian failed to provide the Complainant with a detailed lawful basis for denying request item number 3, and failed to direct the Complainant with reasonable clarity to the specific location of the ustream video in responding to request item number 5, the Custodian's response to these two request items was insufficient. N.J.S.A. 47:1A-5(g). *See also* DeAppolonio v. Borough of Deal (Monmouth), GRC Complaint No. 2008-62 (September 2009); Rodriguez v. Kean University, GRC Complaint No. 2013-69 (March 2014).
3. Pursuant to Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the records that Councilwoman Mason determined are responsive to request item number 3, as well as an *in camera* review of any records responsive to request item number 3 that may be in the possession of Council members Castellano, Occhipinti, and Cunningham. The *in camera* review is necessary to determine if the records are government records as defined in OPRA, and if so, to determine the validity of the Custodian's assertion that the records contain ACD material exempt from access pursuant to N.J.S.A. 47:1A-1.1.
4. **The Custodian must deliver to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see paragraph 3 above), a document or redaction index, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the**

GRC within five (5) business days from receipt of the Council's Interim Order. If the Custodian determines that Council members Castellano, Occhipinti, and Cunningham do not have in their possession any records responsive to request item number 3, the Custodian shall also include a legal certification to that effect.

5. The Custodian must (a) obtain any presentation materials used at the December 18, 2013 hearing, including any exhibits, Power Point presentation materials, and handouts from any Council members that may have such records in their possession, regardless of the manner in which it was distributed; and/or (b) obtain said presentation materials from Princeton Hydro, LLC and/or RCQuinn Consulting, Inc. Upon obtaining the records, if any, the Custodian shall disclose those records to the Complainant. N.J.S.A. 47:1A-5.
6. **The Custodian shall comply with paragraph 5 above within five (5) business days from receipt of the Council's Interim Order with any appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. In the event no Council members have such records in their possession, and/or the records were not made, maintained, or kept on file by a third party on behalf of the City in the course of its official business, the Custodian shall submit a legal certification to that effect in lieu of his obligation pursuant to paragraph 5 above.**
7. Because the Complainant's request item number 9 is confined to a specific subject matter that was clearly and reasonably described with sufficient identifying information and was limited to particularized identifiable government records, the request is not vague, unclear, or overly broad, and the Custodian shall disclose the records responsive to said request. N.J.S.A. 47:1A-5.
8. **The Custodian shall comply with paragraph 7 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
9. The Complainant's request items numbered 10 and 11 are invalid because they fail to seek identifiable government records. MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30 (App. Div. 2005), N.J. Builders Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). Thus, the Custodian did not unlawfully deny access to said request items. N.J.S.A. 47:1A-6.
10. 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.

11. 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 November 19, 2014, the Council distributed its November 18, 2014 Interim Order ("Interim Order") to all parties. On November 25, 2014, the Custodian responded to the Council's Interim Order by providing certified confirmation of compliance dated November 21, 2014.

With respect to paragraph 4 of the Order, the Custodian submitted nine (9) copies of the requested unredacted records for *in camera* examination. The Custodian did not submit the required document index. Rather, the Custodian certifies that he continues to rely upon his legal position for denial set forth in the May 30, 2014 Statement of Information.⁴

With respect to paragraph 6 of the Order, the Custodian certifies that only Councilmember Cunningham had any Princeton Hydro LLC/RCQuinn Consulting presentation materials in his possession. As a result, the Custodian disclosed to the Complainant on November 25, 2014, a report titled "Flood Hazard Risk and Compliance Concerning Development on Piers and Platform" consisting of forty-six (46) pages inclusive of maps, photographs and curricula vitae.

With respect to paragraph 8 of the Order, the Custodian disclosed to the Complainant on November 25, 2014, seven (7) documents responsive to request item number 9. The Custodian also included a document index which revealed that only one document, document number 7, was redacted to omit deliberative material.

On January 30, 2015, the Complainant responded to the Custodian's certification of compliance by stating that the Custodian disclosed a limited number of records to the Complainant. The Complainant also states that she is awaiting the outcome of the *in camera* examination of the notes of Councilmembers Mason and Cunningham.

The Complainant next states that her client, Shipyard Associates, L.P., is involved in litigation with the City of Hoboken and has obtained certain documents from Hoboken during the litigation process. The Complainant states that she compared what was produced in litigation to what was disclosed by the Custodian in compliance with the Council's Interim Order (paragraph 6), and determined that the Custodian failed to disclose Princeton Hydro's presentation materials.⁵ For this reason, the Complainant requests that the GRC direct the Custodian to confirm by certification whether any other presentation materials, exhibits or handouts in response to request item number 5 are in the possession of Hoboken, Princeton Hydro, LLC, or RCQuinn Consulting.

⁴ The Custodian, in the Statement of Information, asserted that the records responsive to request item number 3 are not government records because the records sought are the handwritten notes which appear on various documents. The Custodian asserted that the notes were made as a memory aid, and therefore constitute advisory, consultative or deliberative ("ACD") material under N.J.S.A. 47:1A-1.1. The Custodian cited O'Shea v. West Milford Bd. of Educ., 391 N.J. Super. 534 (App. Div. 2007) and the Council's decision in Hardwick v. NJ Dep't of Transp., GRC Complaint No. 2007-164 (February 2008).

⁵ The Complainant enclosed a copy of Princeton Hydro's presentation materials obtained during litigation which is Bates stamped HOB001425 - HOB001441.

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Finally, the Complainant states that with respect to paragraph 8 of the Council's Interim Order, she has found other inconsistencies between what was produced in litigation and what was disclosed in response to request item number 9.⁶ The Complainant asks the Council to order the Custodian to disclose to her all of the records responsive to her requests and to provide a certification averring that he has indeed disclosed all such records. The Complainant also seeks from the Custodian a document or redaction index for all records denied in response to request item numbers 3, 5 and 9. The Complainant asks the Council to find that the Custodian violated OPRA and unreasonably denied access to the requested records. The Complainant states that she is renewing her request for prevailing party attorney's fees.

On February 20, 2015, the Custodian's Counsel submitted to the GRC a reply to the Complainant's January 30, 2015, response to the Custodian's certification of compliance. The Custodian's Counsel first states that the Custodian fully complied with the Council's order for production of records for an *in camera* examination. Counsel next admits that the Custodian erred by not disclosing Princeton Hydro's presentation materials to the Complainant. Counsel states that the Custodian was of the belief that he had no duty to obtain records from a third party, but subsequently learned that there existed a contractual relationship between Hoboken and Princeton Hydro, LLC and RCQuinn Consulting. The Custodian's Counsel disclosed a copy of Princeton Hydro's presentation materials Bates stamped HOB001425 - HOB001441. Counsel further states that there was no intent to prevent the Complainant, or any other member of the public, from seeing the content of the presentation because it was available via an on-line video to which the Complainant was directed on April 3, 2014.

The Custodian's Counsel also states that the Complainant failed to provide specific identifying information in her request item number 9; however, the Complainant subsequently provided such information in her January 30, 2015 letter to the GRC. For this reason, the Custodian's Counsel states that the Custodian has located two e-mails from Brandy Forbes that were highlighted in Hoboken's litigation privilege log. Counsel states that she has enclosed the records, which she asserts constitute ACD material, for an *in camera* examination by the GRC. Counsel also states that the said privilege log contains identical Bates numbers on different documents: a September 12, 2013 memorandum and a September 20, 2013 memorandum. Counsel states that the former memorandum was submitted to the GRC in response to the Interim Order for *in camera* examination. Counsel states she has enclosed another copy of the memorandum displaying the Bates stamp numbers and emphasizes that the memorandum is enclosed "... for *in camera* review only, being 'inter-agency or intra-agency advisory, deliberative or consultative' in nature." (Emphasis in original.) Counsel found other discrepancies in the litigation privilege log and also located a document she believes is responsive to request item number 11, a letter dated October 17, 2013 from Mayor Zimmer to City Councilmembers, that she enclosed for *in camera* examination by the GRC because she contends it is ACD material.⁷ Counsel concludes that the Custodian made an honest and diligent attempt to comply with the Interim Order.

⁶ The Complainant enclosed a copy of what was alleged to be Hoboken's privilege log obtained during litigation with certain records highlighted that she stated were not disclosed in response to the Council's Interim Order.

⁷ The GRC declines to conduct an *in camera* examination of the documents enclosed with Counsel's February 20, 2015 letter. First and foremost, the Council did not order an *in camera* examination of the documents. However, beyond that, the submitted e-mails are not records responsive to request item number 9. The request sought only "[r]eports, memorandums and notes ..." With respect to the September 12, 2013 memorandum, the GRC notes that Nicole Dory, Esq. (on behalf of Shipyard Associates, L.P.) v. City of Hoboken (Hudson), 2014-200 – *In Camera* Findings and Recommendations of the Council Staff

On April 23, 2015, the Complainant, by letter submitted to the GRC, states that the Custodian's Counsel has admitted in her February 20, 2015 letter that the Custodian did not disclose all of the records in compliance with the Interim Order. The Complainant further states that she has obtained confirmation from Hoboken's attorneys in the civil litigation that records that the Custodian certifies do not exist actually do exist. The Complainant also asserts that the Custodian's failure to disclose Princeton Hydro's presentation materials in response to the OPRA request and subsequent Interim Order is inexcusable, despite the excuses offered by Custodian's Counsel.

The Complainant also states that the Custodian has failed to provide a document index for all documents withheld from disclosure. The Complainant further argues that the asserted deliberative process privilege only applies within the executive branch; not between executive and legislative officials (citations omitted). As such, the Complainant argues, the privilege does not apply here and the records must be disclosed.

The Complainant asserts that Hoboken's legal counsel in the civil litigation confirmed that the September 20, 2013 and October 17, 2013 memoranda from Brandy Forbes to the City Council do exist, but that the Bates numbers on the log have been revised.⁸ The Complainant states that the Custodian failed to disclose the memoranda in response to the Interim Order. The Complainant again asks the Council to order the Custodian to disclose to her all withheld records and provide a certification that he has disclosed all records responsive to the requests. The Complainant renews her request for prevailing party attorney's fees.

On May 29, 2015, the Custodian's Counsel submitted a letter to the GRC. Counsel states that, contrary to the Complainant's assertions in her April 23, 2015 letter, the Custodian "made a valiant attempt to comply fully with the GRC's Interim Order within the stated time period." Counsel states that there are no September 20, 2013 or October 17, 2013 memoranda that are responsive to the request. Counsel argues that the Complainant misrepresented New Jersey law with respect to the deliberative process privilege applying only to the executive branch of government. Counsel states that New Jersey law does not limit the application of the deliberative process privilege to communications solely within the executive branch (cases omitted). Counsel further states that any communication that took place after the drafting or introduction of an ordinance, but prior to the adoption of the ordinance, is subject to protection under the deliberative process privilege.

Counsel obtained a letter from Maraziti Falcon, LLP dated May 19, 2015, wherein they make it clear that they had informed the Complainant that a September 20, 2013 memorandum

this record was disclosed by the Custodian in unredacted form to both the GRC and the Complainant on November 25, 2014. Finally, the October 17, 2013 letter from Mayor Zimmer is claimed by Counsel to be responsive to request item number 11, and the Council already determined in the Interim Order that request item number 11 is "... invalid because [it] fail[s] to seek identifiable government records ... [t]hus the Custodian did not unlawfully deny access to said request item[.]"

⁸ The Complainant enclosed a copy of a letter from Maraziti Falcon, LLP dated April 2, 2015, which she offers in support of her assertion. As the GRC understands the letter, however, it does not support the Complainant's assertion that a memorandum dated September 20, 2013 exists. To the contrary, it appears that a Bates number for a September 12, 2013 memorandum in a document index was also erroneously assigned to a purported September 20, 2013 memorandum in the index which has since been deleted.

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was mistakenly included in the (civil litigation) document index and was deleted. The letter further emphasizes that there is no September 20, 2013 memorandum.

The Custodian's Counsel contends that paragraph 7 of the Interim Order is not appropriate because Counsel disagrees with the Council's conclusion that request item number 9 is "... confined to a specific subject matter that was clearly and reasonably described with sufficient identifying information and was limited to particularized identifiable government records ..." ⁹ However, Counsel states that the Custodian produced all documents responsive to request item number 9 and that an award of prevailing party attorney's fees to the Complainant would be improper.

Analysis

Compliance

On November 18, 2014, the Council ordered the above-referenced compliance. On November 19, 2014, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Therefore, compliance was due on or before November 26, 2014. On November 25, 2014, the Custodian forwarded certified confirmation of compliance to the Executive Director, together with nine (9) copies of the requested unredacted records for *in camera* examination. As such, the Custodian provided the ordered submission to the Council in a timely manner.

Despite the Custodian's timely submission, however, the Custodian failed to provide a document or redaction index to accompany the unredacted records submitted for the *in camera* examination as required by the terms of paragraph number 4 of the Interim Order. The Custodian also failed to obtain presentation materials from Princeton Hydro, LLC and/or RCQuinn Consulting, Inc. and disclose those records to the Complainant, or certify that the records were not made, maintained, or kept on file by such third party on behalf of the City, until the Complainant raised the issue in her January 30, 2015 letter to the GRC. Only thereafter, on February 20, 2015, did the Custodian, through Counsel, comply with the terms of paragraph number 6 of the Interim Order.

Therefore, the Custodian did not fully comply with the Council's November 18, 2014 Interim Order because the Custodian failed to provide a document index to accompany the unredacted records submitted for the *in camera* examination as required per paragraph 4 of said Order, and failed in a timely manner to obtain presentation materials from Princeton Hydro, LLC and/or RCQuinn Consulting, Inc. and disclose those records to the Complainant, or certify that the records were not made, maintained, or kept on file by such third party on behalf of the City, as required per paragraph 6 of the Order. The Council finds, however, that the Custodian belatedly complied with the terms of paragraph 6, through Counsel, on February 20, 2015.

⁹ The GRC notes that neither the Custodian nor his legal representative sought reconsideration of the Interim Order. Nicole Dory, Esq. (on behalf of Shipyard Associates, L.P.) v. City of Hoboken (Hudson), 2014-200 – *In Camera* Findings and Recommendations of the Council Staff

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.

Paragraph 3 of the Interim Order – In Camera Examination of Submitted Records

In request item number 3, the Complainant sought notes of Hoboken City Council members taken during several meetings pertaining to Hoboken Ordinances Z-253, Z-263 and Z-264. The Custodian denied access, asserting that the records responsive to request item number 3 are handwritten notes which constitute ACD material under N.J.S.A. 47:1A-1.1.

OPRA *excludes from the definition of a government record* “inter-agency or intra-agency advisory, consultative or deliberative material.” N.J.S.A. 47:1A-1.1. Regarding handwritten notes, both the courts and the GRC have decided cases regarding handwritten notes. First, in O’Shea v. West Milford Bd. of Educ., 391 N.J. Super. 534 (App. Div. 2007), the complainant requested handwritten notes of a closed session meeting.¹⁰ The New Jersey Superior Court, Appellate Division, held that:

We reject [complainant’s] contention that the Secretary’s handwritten notes, jotted down as a memory aid to assist in preparing the formal minutes, are public records merely because they were ‘made’ by a government official. Under that rationale any Board member’s personal handwritten notes, taken during a meeting to assist the member to recall what occurred, would be a public record because the member might arguably refer to them later in reviewing the Secretary’s draft of the formal minutes. Taken further, every yellow-sticky note penned by a government official to help him or her remember a work-related task would be a public record. Such absurd results were not contemplated or required by OPRA.

[Id. at 538.]

Additionally, in Hardwick v. NJ Dep’t of Transp., GRC 2007-164 the GRC held:

[B]ecause no official meeting minutes exist for the requested staff meetings and the personal notes of the attendees, which are responsive to the request, are informal memory aids, said records are exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1 and [O’Shea]. Therefore, because the Custodian provided a lawful basis for the denial of access at the time of the denial, the Custodian has met his burden of proving a lawful denial of access to the personal notes of the meeting attendees pursuant to N.J.S.A. 47:1A-6.

¹⁰ Appealed from O’Shea v. West Milford Bd. of Educ., GRC Complaint No. 2004-96 (April 2006). Nicole Dory, Esq. (on behalf of Shipyard Associates, L.P.) v. City of Hoboken (Hudson), 2014-200 – *In Camera* Findings and Recommendations of the Council Staff

[Id. at 12.]

In paragraph number 3 of its November 18, 2014 Interim Order, the Council ordered the GRC to “conduct an *in camera* review of the records that Councilwoman Mason determined are responsive to request item number 3, as well as an *in camera* review of any records responsive to request item number 3 that may be in the possession of Council members Castellano, Occhipinti, and Cunningham. The *in camera* review was deemed necessary to determine if the records are government records as defined in OPRA, and if so, to determine the validity of the Custodian’s assertion that the records contain ACD material exempt from access pursuant to N.J.S.A. 47:1A-1.1.”

The GRC conducted an *in camera* examination on the above-referenced records. The results of this examination are set forth in the following table:

Record or Redaction Number¹¹	Record Name/Date	Description of Record or Redaction	Custodian’s Explanation/ Citation for Non-disclosure or Redactions	Findings of the <i>In Camera</i> Examination
1	Date stamped: April 4, 2014	Cover sheet or exterior of an envelope stamped “Confidential” containing handwritten “From ... ” and “To ... ” notations.	Not a government record pursuant to <u>N.J.S.A. 47:1A-1.1</u> because they are handwritten notes made as a memory aid, and therefore constitute ACD material. The Custodian cited <u>O’Shea v. West</u>	Does not contain handwritten <u>notes</u> and is not ACD material; therefore it must be disclosed.

¹¹ The Custodian failed to provide a document index; therefore, the GRC identified/described the records based only upon the information contained on each record. Moreover, because he did not provide a document index the Custodian failed to certify as to which particular Councilmember made notations on the submitted documents. However, the Interim Order sought records responsive to request item number 3 in the possession of Council members Mason, Castellano, Occhipinti, and Cunningham. The Custodian certified that neither Councilmember Castellano nor Councilmember Occhipinti had records responsive to request item number 3. The Custodian also identified the records responsive to request item number 3 that were in the possession of Councilmember Cunningham. Therefore, by process of elimination, all records in the chart not identified as records possessed by Councilmember Cunningham must be those possessed by Councilmember Mason. The GRC does note, however, that the notations on Record #2 and Record #3 (identical meeting agenda pages) appear to have been made by different individuals.

			<p><u>Milford Bd. of Educ.</u>, 391 <u>N.J. Super.</u> 534 (App. Div. 2007) and the Council's decision in <u>Hardwick v. NJ Dep't of Transp.</u>, GRC Complaint No. 2007-164 (February 2008) in support of his denial.</p>	
2	October 2, 2013	Meeting agenda page containing handwritten notations.	Same as the explanation for Record #1.	The personal notes responsive to the request are informal memory aids and are exempt from disclosure as ACD material pursuant to <u>N.J.S.A. 47:1A-1.1</u> . <i>See also</i> <u>O'Shea v. West Milford Bd. of Educ.</u> , 391 <u>N.J. Super.</u> 534 (App. Div. 2007) and <u>Hardwick v. NJ Dep't of Transp.</u> , GRC Complaint No. 2007-164 (February 2008).
3	October 2, 2013	Meeting agenda page containing handwritten notations. Same page as Record #1 but different notes.	Same as the explanation for Record #1.	Same as the findings for Record #2.

4	Undated	Meeting agenda page containing handwritten notations.	Same as the explanation for Record #1.	Same as the findings for Record #2.
5	Undated	Meeting agenda page containing handwritten notations.	Same as the explanation for Record #1.	Same as the findings for Record #2.
6	November 18, 2013	Meeting agenda page containing handwritten notations.	Same as the explanation for Record #1.	Same as the findings for Record #2.
7	December 4, 2013	Meeting agenda page containing handwritten notations.	Same as the explanation for Record #1.	Same as the findings for Record #2.
8	October 9, 2013	Memorandum containing handwritten notations which the Custodian certified were produced by Councilman Cunningham.	Same as the explanation for Record #1.	Same as the findings for Record #2.
9	October 17, 2013	Meeting agenda page containing handwritten notations which the Custodian certified were produced by Councilman Cunningham.	Same as the explanation for Record #1.	Same as the findings for Record #2.
10	October 2013	One page from Princeton Hydro's presentation materials (same page as the one Bates stamped HOB001425 that was enclosed with Complainant's January 30,	Same as the explanation for Record #1.	Same as the findings for Record #2.

		2015 letter to the GRC) containing handwritten notations which the Custodian certified were produced by Councilman Cunningham.		
11	December 18, 2013	Meeting agenda page containing handwritten notations which the Custodian certified were produced by Councilman Cunningham.	Same as the explanation for Record #1.	Same as the findings for Record #2.
12	Undated	Meeting agenda page containing handwritten notations which the Custodian certified were produced by Councilman Cunningham.	Same as the explanation for Record #1.	Same as the findings for Record #2.

Paragraph 8 of the Interim Order – Disclosure of Records Responsive to Request Item Number 9

The Council defers analysis of whether the Custodian complied with the provisions of Paragraph 8 of the Interim Order pending the Custodian’s compliance with the Council’s June 26, 2018 Interim Order.

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 June 26, 2018 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 June 26, 2018 Interim Order.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. The Custodian did not fully comply with paragraphs 4 and 6 of the Council's November 18, 2014 Interim Order because the Custodian failed to provide a document index to accompany the unredacted records submitted for the *in camera* examination as required per paragraph 4 of said Order, and failed in a timely manner to obtain presentation materials from Princeton Hydro, LLC and/or RCQuinn Consulting, Inc. and disclose those records to the Complainant, or certify that the records were not made, maintained, or kept on file by such third party on behalf of the City, as required per paragraph 6 of the Order. The Council finds, however, that the Custodian belatedly complied with the terms of paragraph 6, through Counsel, on February 20, 2015.
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 Government Records Council.¹²**
3. The Council defers analysis of whether the Custodian complied with the provisions of Paragraph 8 of the Interim Order pending the Custodian's compliance with the Council's June 26, 2018 Interim Order.
4. 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 June 26, 2018 Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's June 26, 2018 Interim Order.

Prepared By: John E. Stewart

May 15, 2018¹³

¹² 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.

¹³ This complaint was prepared for adjudication at the Council's May 22, 2018 meeting but could not be adjudicated due to lack of a quorum.

Nicole Dory, Esq. (on behalf of Shipyard Associates, L.P.) v. City of Hoboken (Hudson), 2014-200 – *In Camera* Findings and Recommendations of the Council Staff



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

November 18, 2014 Government Records Council Meeting

Nicole Dory, Esq. (On behalf of Shipyard Associates, L.P.) Complaint No. 2014-200
Complainant
v.
City of Hoboken (Hudson)
Custodian of Record

At the November 18, 2014 public meeting, the Government Records Council (“Council”) considered the November 10, 2014 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant’s OPRA request. 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. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. Because the Custodian failed to provide the Complainant with a detailed lawful basis for denying request item number 3, and failed to direct the Complainant with reasonable clarity to the specific location of the ustream video in responding to request item number 5, the Custodian’s response to these two request items was insufficient. N.J.S.A. 47:1A-5(g). See also DeAppolonio v. Borough of Deal (Monmouth), GRC Complaint No. 2008-62 (September 2009); Rodriguez v. Kean University, GRC Complaint No. 2013-69 (March 2014).
3. Pursuant to Paff v. NJ Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the records that Councilwoman Mason determined are responsive to request item number 3, as well as an *in camera* review of any records responsive to request item number 3 that may be in the possession of Council members Castellano, Occhipinti, and Cunningham. The *in camera* review is necessary to determine if the records are government records as defined in OPRA, and if so, to determine the validity of the Custodian’s assertion that the records contain ACD material exempt from access pursuant to N.J.S.A. 47:1A-1.1.



4. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see paragraph 3 above), 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. If the Custodian determines that Council members Castellano, Occhipinti, and Cunningham do not have in their possession any records responsive to request item number 3, the Custodian shall also include a legal certification to that effect.**
5. The Custodian must (a) obtain any presentation materials used at the December 18, 2013 hearing, including any exhibits, Power Point presentation materials, and handouts from any Council members that may have such records in their possession, regardless of the manner in which it was distributed; and/or (b) obtain said presentation materials from Princeton Hydro, LLC and/or RCQuinn Consulting, Inc. Upon obtaining the records, if any, the Custodian shall disclose those records to the Complainant. N.J.S.A. 47:1A-5.
6. **The Custodian shall comply with paragraph 5 above within five (5) business days from receipt of the Council's Interim Order with any appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. In the event no Council members have such records in their possession, and/or the records were not made, maintained, or kept on file by a third party on behalf of the City in the course of its official business, the Custodian shall submit a legal certification to that effect in lieu of his obligation pursuant to paragraph 5 above.⁴**
7. Because the Complainant's request item number 9 is confined to a specific subject matter that was clearly and reasonably described with sufficient identifying information and was limited to particularized identifiable government records, the request is not vague, unclear, or overly broad, and the Custodian shall disclose the records responsive to said request. N.J.S.A. 47:1A-5.
8. **The Custodian shall comply with paragraph 7 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.⁵**

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."

⁴ See applicable footnotes in paragraph 4.

⁵ See applicable footnotes in paragraph 4.

9. The Complainant's request items numbered 10 and 11 are invalid because they fail to seek identifiable government records. MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30 (App. Div. 2005), N.J. Builders Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). Thus, the Custodian did not unlawfully deny access to said request items. N.J.S.A. 47:1A-6.
10. 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.
11. 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 18th Day of November, 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: November 19, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 18, 2014 Council Meeting**

**Nicole Dory, Esq. (on behalf of Shipyard Associates, L.P.)¹ GRC Complaint No. 2014-200
Complainant**

v.

**City of Hoboken²
Custodial Agency**

Records Relevant to Complaint:³

1. Request item number 3: Notes of Hoboken City Council members taken at the September 17, 2013, October 2, 2013, October 17, 2013, November 6, 2013, November 18, 2013, and December 18, 2013 Council hearing dates on the portion of the hearings pertaining to Hoboken Ordinance Z-253, “An Ordinance Amending Chapter 104 (Flood Damage Prevention) to Reflect Updates and Recommended (sic) by the New Jersey Department of Environmental Protection’s Latest Revised Model Ordinance,” Ordinance Z-263 and Ordinance Z-264.
2. Request item number 5: The presentation materials, including the exhibits, Power Point presentation, and handouts shown or distributed to the Hoboken City Council members by Princeton Hydro, LLC and RCQuinn Consulting, Inc. at the December 18, 2013 Hoboken City Council hearing.
3. Request item number 9: Reports, memorandums and notes authored by Hoboken Community Development Director Brandy Forbes discussing Ordinances Z-253, Z-263 and/or Z-264.
4. Request item number 10: Correspondence, letters, e-mails, reports, memorandums and notes discussing Ordinance Z-253, Ordinance Z-263 and/or Ordinance Z-264 authored by (a) any Hoboken City Council member; (b) Community Development Director Brandy Forbes; (c) the Hoboken Planning Board Planner; and (d) the Hoboken Planning Board Engineer.
5. Request item number 11: Correspondence, letters, e-mails, reports, memorandums and notes authored by Mayor Dawn Zimmer discussing Ordinance Z-253, Ordinance Z-263, Ordinance Z-264.⁴

Custodian of Record: James J. Farina

¹ Represented by Nicole Dory, Esq., of Connell Foley, LLP (Roseland, NJ).

² “Represented by Jeanne Ann McManus, Esq., of Weiner Lesniak, LLP (Parsippany, NJ).

³ The Complainant did not specify either the format of the requested records or the means of delivery.

⁴ There were other records requested that are not relevant to this complaint.

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Request Received by Custodian: March 24, 2014

Response Made by Custodian: April 3, 2014

GRC Complaint Received: May 20, 2014

Background⁵

Request and Response:

On March 24, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On April 3, 2014, the eighth (8th) business day following receipt of said request, the Custodian responded in writing informing the Complainant that:

- With respect to request item number 3, several Council members have responded to the Custodian informing him that they have no records responsive to the request. However, the Custodian stated that Council members Mello, Castellano, Occhipinti, Cunningham and Mason have not yet responded back to the Custodian.
- All items are available on the ustream video of the meeting for request item number 5; however, there are no responsive records for handouts.
- With respect to request items numbered 9, 10 and 11; the request is denied because it is vague, unclear, and overly broad. The Custodian cites to MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), Bent v. Stafford Police Dep’t, 381 N.J. Super. 30 (App. Div. 2005), N.J. Builders Ass’n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166 (App. Div. 2007), and several GRC decisions in support of his denial.

On this same date the Custodian sent a follow-up response to the Complainant, informing her that the City would need an extension of time until April 8, 2014 to fully respond to request item number 3 because Councilwoman Mason requested additional time to search through her files for records responsive to the request.⁶ On April 8, 2014, the Custodian e-mailed the Complainant to inform her that Councilwoman Mason provided the Custodian with copies of responsive records; however none of the records are government records under OPRA. The Custodian further stated that if any of the documents were determined to be government records, they would be exempt from disclosure as advisory, consultative, or deliberative (“ACD”) material.

Denial of Access Complaint:

On May 20, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that she filed her OPRA request on March 24, 2014 and the Custodian responded on April 8, 2014 and May 9, 2014.

⁵ 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.

⁶ The Custodian also addressed six other request items that are not relevant to this complaint.

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The Complainant asserts that she was unlawfully denied access to the records relevant to the complaint. The Complainant states that with respect to request item number 3, she was unsatisfied with the Custodian's response that some Council members did not respond back to the Custodian confirming or denying whether they had responsive records in their possession. The Complainant states she was also dissatisfied with the Custodian's response regarding Councilwoman Mason's possession of records responsive to the request that were alleged to either not be government records or, if government records, withheld from disclosure as ACD material. The Complainant states that during the week of April 9, 2014 and May 9, 2014 she telephoned the Custodian seeking a Vaughn Index for the records alleged by the Custodian to be ACD material. The Complainant states that she was referred by the Custodian to Alyssa Proko, Esq. in the Hoboken Law Department. The Complainant also states that on May 9, 2014, she e-mailed Ms. Proko seeking the Vaughn Index but that she never received a reply. The Complainant further states that on May 9, 2014, the Custodian e-mailed the Complainant to advise her that all responsive records were provided or are publicly available, and therefore no Vaughn Index is required.

The Complainant states that she was denied access to request item number 5 because after she downloaded the videos as instructed by the City's clerical staff, she found that none of the presentation materials had been posted on the website. The Complainant asserts that there was a Power Point presentation at the December 18, 2013 meeting, and that the slides from the presentation must be disclosed, as well as any other materials presented, distributed or used at the meeting.

The Complainant states that the Custodian denied her access to request items numbered 9, 10 and 11 because the Custodian stated the requests were vague, unclear, and overly broad. The Complainant argues that the requests were not overly broad because the three Superior Court decisions cited by the Custodian are distinguishable on their facts from the facts in the instant complaint. Furthermore, the Complainant states that even if some portions of the requests were deemed to be vague, the Custodian should have granted access to those portions of the requests which sought identifiable records.

The Complainant seeks (1) production of any records found to be responsive to the request, (2) production of a Vaughn Index for request item number 3, and (3) prevailing party attorney fees.

Statement of Information:

On May 30, 2014, the Custodian filed a Statement of Information ("SOI"). The Custodian certifies that he received the Complainant's request of March 24, 2014 and responded in writing to the request on April 3, 2014.

Concerning request item number 3, the Custodian certifies, and attaches to the SOI proof in the form of memoranda, that Council members Bhalla, Giattino, Doyle, Russo, and Mello have responded to the Custodian informing him that they have no records responsive to the request. The Custodian certifies that Councilwoman Mason does have records responsive to the request but the Custodian certifies that those records are not government records; therefore not

subject to disclosure. The Custodian further certifies that if the records are determined to be government records, they would be exempt as ACD material because they are notes. The Custodian cites to O’Shea v. West Milford, 391 N.J. Super. 534, 538-39 (App. Div. 2007) in support of his argument. In O’Shea, the Custodian argues, the court found that requiring disclosure of a Board member’s handwritten notes taken during a meeting is not required under OPRA.

The Custodian certifies that the only record responsive to request item number 5 is the publicly available video recording of the presentation. The Custodian certifies that he directed the Complainant to the video. The Custodian further certifies that “[n]o ‘presentation materials’ were submitted by the presenters [to him] for distribution to Council members so no such records exist.”

The Custodian certifies that the Complainant’s request for items numbered 9, 10 and 11 is vague, unclear, and overly broad. The Custodian certifies that like the request deemed invalid in MAG, 375 N.J. Super. 534, the Complainant’s request would require him to manually review the contents and analyze large numbers of documents in order to identify whether any particular document matched the description in the request. The Custodian contends that he would then have to compile those potentially responsive documents into a sub file of the larger group of documents, and review and analyze each potentially responsive document to determine whether any were privileged. The Custodian asserts that this is the type of research he is not obligated to perform; therefore the request is not valid.

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

Here, the Complainant submitted the OPRA request to the Custodian on March 24, 2014, and the Custodian responded on April 3, 2014, which was the eighth (8th) business day following receipt of the request.

Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in

⁷ 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.

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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 2007-11.

Sufficiency of Response

OPRA provides that if a "...custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor ... on the request form and promptly return it to the requestor." N.J.S.A. 47:1A-5(g). In DeAppolonio v. Borough of Deal (Monmouth), GRC Complaint No. 2008-62 (September 2009), the complainant argued that the custodian failed to provide a specific lawful basis for denying access to requested records. The GRC held that:

Pursuant to N.J.S.A. 47:1A-5(g), a custodian must indicate the specific basis for a denial of access to government records. Moreover, the Council's decisions have repeatedly supported this statutory mandate by holding that custodians must provide a legally valid reason for any denial of access to records (citations omitted). The Council also held that for a denial of access to be in compliance with OPRA, it must be specific and must be sufficient to prove that a custodian's denial is authorized by OPRA.

Id. at 7.

Here, the Custodian responded in writing to the Complainant's request item number 3 by informing the Complainant that he requested records from the Council members and that some members replied to him while others failed to reply. By doing so, the Custodian failed to provide the Complainant with a detailed lawful basis for denying request item number 3.

In responding to request item number 5, the Custodian informed the Complainant that the requested records were available on the ustream video, but failed to instruct the Complainant how to access the video. In Rodriguez v. Kean University, GRC Complaint No. 2013-69 (March 2014), the Council provided guidance for a custodian when disclosing records online by making it clear that:

[A] custodian shall direct a requestor, with reasonable clarity, to the specific location on the Internet where the responsive records reside. This shall include, if necessary, directions for accessing the responsive document that would be comprehensible to a reasonable person, including but not limited to providing a link to the exact location of the requested document.

Id.

Therefore, because the Custodian failed to provide the Complainant with a detailed lawful basis for denying request item number 3, and failed to direct the Complainant with reasonable clarity to the specific location of the ustream video in responding to request item

number 5, the Custodian's response to these two request items was insufficient. N.J.S.A. 47:1A-5(g). See also DeAppolonio, GRC 2008-62; Rodriguez, GRC 2013-69.

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.

Request item number 3 - Notes of Hoboken City Council members taken at the September 17, 2013, October 2, 2013, October 17, 2013, November 6, 2013, November 18, 2013, and December 18, 2013 Council hearing dates on the portion of the hearings pertaining to Hoboken Ordinance Z-253, "An Ordinance Amending Chapter 104 (Flood Damage Prevention) to Reflect Updates and Recommended (sic) by the New Jersey Department of Environmental Protection's Latest Revised Model Ordinance," Ordinance Z-263 and Ordinance Z-264.

The Custodian, in a search for records responsive to this request item, certified that he contacted all of the Council members. The Custodian certified that he received a reply from Council members Bhalla, Giattino, Doyle, Russo, and Mello. The Custodian further certified that these five Council members informed the Custodian that they had no records responsive to the request. There is no evidence in the record that the Custodian attempted to obtain records from the Council members who ignored his request. Therefore, Council members Castellano, Occhipinti, and Cunningham may or may not have responsive records in their possession. The Custodian also certified that Councilwoman Mason did have records responsive to the request but that those records are not government records; therefore, they are not subject to disclosure. The Custodian further certified that if the records are determined to be government records, they would be exempt as ACD material because they consist of notes.

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 Council⁸ dismissing 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. The Court also stated that:

The 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.'

⁸ Paff v. NJ Dep't of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

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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 stated 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, records responsive to the request are in the possession of Councilwoman Mason. There may also be records responsive to the request in the possession of Council members Castellano, Occhipinti, and Cunningham.

Therefore, pursuant to Paff, 379 N.J. Super. at 346, the GRC must conduct an *in camera* review of the records that Councilwoman Mason determined are responsive to request item number 3, as well as an *in camera* review of any records responsive to request item number 3 that may be in the possession of Council members Castellano, Occhipinti, and Cunningham. The *in camera* review is necessary to determine if the records are government records as defined in OPRA, and if so, to determine the validity of the Custodian's assertion that the records contain ACD material exempt from access pursuant to N.J.S.A. 47:1A-1.1.

Request item number 5 - The presentation materials, including the exhibits, Power Point presentation, and handouts shown or distributed to the Hoboken City Council members by Princeton Hydro, LLC and RCQuinn Consulting, Inc. at the December 18, 2013 Hoboken City Council hearing.

With respect to this request the Custodian merely directed the Complainant to the ustream video of the meeting. The Custodian informed the Complainant that all items are available on that site. Conversely, the Complainant stated that she found none of the presentation materials posted on the site. The Custodian stated in the SOI that no presentation materials were submitted by the presenters to him for distribution to the Council members, therefore no other responsive records exist. The Custodian did not properly interpret the Complainant's request. The Complainant identified the presentation materials as "exhibits, Power Point presentation, and handouts *shown or distributed* to the Hoboken City Council members by Princeton Hydro, LLC and RCQuinn Consulting, Inc." (Emphasis added.) As such, if any identified presentation materials were distributed to the Council members *via any channel of distribution* or shown to the Council members at the December 18, 2013 hearing, then those records are responsive to the request.

In Burnett v. County of Gloucester, 415 N.J. Super. 506 (App. Div. 2010), the court found that settlement agreements in the possession of a third party that had been made by, or on behalf of, the Board of Chosen Freeholders in the course of its official business does not excuse the agency from its obligation to produce the records under OPRA. The court went on to say, ...[w]ere we to conclude otherwise, a governmental agency seeking to protect its records from scrutiny could simply delegate their creation to third parties or relinquish possession to such parties, thereby thwarting the policy of transparency that underlies OPRA.” Id. at 517.

There is nothing in the evidence of record to indicate that Princeton Hydro, LLC and/or RCQuinn Consulting, Inc. were uninvited participants at the hearing; therefore, it follows that these two entities were either retained by the City to make the presentation or made the presentation at the behest of the City. In either case, it appears that their presentation materials would have been made by the presenters on behalf of the City and in the course of its official business. As such, the presentation materials would constitute government records.

Accordingly, the Custodian must (a) obtain any presentation materials used at the December 18, 2013 hearing, including any exhibits, Power Point presentation materials, and handouts from any Council members that may have such records in their possession, regardless of the manner in which it was distributed; and/or (b) obtain said presentation materials from Princeton Hydro, LLC and/or RCQuinn Consulting, Inc. Upon obtaining the records, if any, the Custodian shall disclose those records to the Complainant. N.J.S.A. 47:1A-5.

Request item number 9 - Reports, memorandums and notes authored by Hoboken Community Development Director Brandy Forbes discussing Ordinances Z-253, Z-263 and/or Z-264.

Request item number 10 - Correspondence, letters, e-mails, reports, memorandums and notes discussing Ordinance Z-253, Ordinance Z-263 and/or Ordinance Z-264 authored by (a) any Hoboken City Council member; (b) Community Development Director Brandy Forbes; (c) the Hoboken Planning Board Planner; and (d) the Hoboken Planning Board Engineer.

Request item number 11 - Correspondence, letters, e-mails, reports, memorandums and notes authored by Mayor Dawn Zimmer discussing Ordinance Z-253, Ordinance Z-263, Ordinance Z-264

The Custodian denied request items numbered 9, 10 and 11 because he asserted that the request was vague, unclear, and overly broad. The Custodian cited MAG, 375 N.J. Super. 534; Bent, 381 N.J. Super. 30; N.J. Builders Ass’n, 390 N.J. Super. 166, and several GRC decisions in support of the denial.

The New Jersey Superior Court has held that “[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records readily accessible for inspection, copying, or examination.” MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005) (citing N.J.S.A. 47:1A-1) (quotations omitted). The Court reasoned that:

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

Id. at 549 (emphasis added).

The Court further held that “[u]nder OPRA, agencies are required to disclose only ‘identifiable’ government records not otherwise exempt In short, OPRA does not countenance open-ended searches of an agency's files.” Id. (emphasis added). See also Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005), N.J. Builders Ass’n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

More recently, the Appellate Division has found a request for “EZ Pass benefits afforded to retirees of the Port Authority, including all . . . correspondence between the Office of the Governor . . . and the Port Authority . . .” to be valid under OPRA because it “was confined to a specific subject matter that was clearly and reasonably described with sufficient identifying information . . . [and] was limited to particularized identifiable government records, namely, correspondence with another government entity, rather than information generally.” Burke v. Brandes, 429 N.J. Super. 169, 172, 176 (App. Div. 2012).

In request item number 9, the Complainant requested three specific types of records prepared by one government official identified by name and title. The request was limited to documents prepared by the official discussing three City Ordinances identified by number. Here, not unlike the facts of Burke, 429 N.J. Super. 169, the request was confined to a specific subject matter that was clearly and reasonably described with sufficient identifying information; to wit, the Ordinances, and was limited to particularized identifiable government records. The Custodian was not required to perform research because his search for the records would be restricted to specific types of records prepared by one individual discussing three clearly identified City Ordinances.

The Custodian’s argument in the SOI that request item number 9 is vague, unclear, overly broad and therefore invalid is not persuasive because he addressed item numbers 9, 10 and 11 in the aggregate. If the Custodian had addressed request item number 9 separately, his argument would have been considerably weaker.

Accordingly, because the Complainant’s request item number 9 is confined to a specific subject matter that was clearly and reasonably described with sufficient identifying information and was limited to particularized identifiable government records, the request is not vague,

unclear, or overly broad, and the Custodian shall disclose the records responsive to said request. N.J.S.A. 47:1A-5.

The Complainant's request item number 10 also seeks records concerning the same City Ordinances listed in request item number 9; however, this request is considerably broader in scope because it seeks correspondence, letters, e-mails, reports, memorandums and notes authored by numerous City officials discussing the Ordinances. In order to fulfill this type of request, the Custodian would have to research all City files for an undetermined period of time in an effort to locate all correspondence responsive to the request. This would be a daunting task, and one not required under the law because "...OPRA does not countenance open-ended searches of an agency's files." MAG at 549. As such, the Complainant's request is invalid under OPRA.

Moreover, with respect to the requested e-mails, the GRC established criteria deemed necessary to specifically identify an e-mail communication in Elcavage v. West Milford Township (Passaic), GRC Complaint No. 2009-07 (April 8, 2010). In Elcavage, the Council determined that "[i]n accordance with MAG, and its progeny, in order to specifically identify an e-mail the OPRA request must contain (1) the content and/or subject of the e-mail, (2) the specific date or range of dates during which the e-mail was transmitted or the e-mails were transmitted, and (3) identification of the sender and/or the recipient thereof." Id.

Here, it is questionable whether the Complainant adequately identified the content and/or subject of the requested e-mails by merely stating that they discussed the referenced Ordinances. However, the Complainant failed to identify the specific date or range of dates during which the e-mails were transmitted, and also failed to identify the sender and/or the recipient of said e-mails. The person who authored a communication may not necessarily have been the sender and/or the recipient, as frequently happens when a communication prepared by a third party is an attachment to an e-mail. Therefore, the Complainant's request for e-mails in item numbers 10 and 11 is also overly broad and invalid. Elcavage, 2009-07.

Request item number 11 is narrower than request item number 10 only to the extent that it seeks records authored by one named individual, rather than several. This request still seeks the same extensive types of records, and as such is invalid for the same reasons as request item number 10.

Therefore, the Complainant's request items numbered 10 and 11 are invalid because they fail to seek identifiable government records. MAG, 375 N.J. Super. 534 at 546; Bent, 381 N.J. Super. 30 at 37; N.J. Builders Ass'n, 390 N.J. Super. 166 at 180; Schuler, GRC 2007-151. Thus, the Custodian did not unlawfully deny access to said request items. N.J.S.A. 47:1A-6.

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 his burden of proof that he timely responded to the Complainant's OPRA request. 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. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. Because the Custodian failed to provide the Complainant with a detailed lawful basis for denying request item number 3, and failed to direct the Complainant with reasonable clarity to the specific location of the ustream video in responding to request item number 5, the Custodian's response to these two request items was insufficient. N.J.S.A. 47:1A-5(g). *See also* DeAppolonio v. Borough of Deal (Monmouth), GRC Complaint No. 2008-62 (September 2009); Rodriguez v. Kean University, GRC Complaint No. 2013-69 (March 2014).
3. Pursuant to Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the records that Councilwoman Mason determined are responsive to request item number 3, as well as an *in camera* review of any records responsive to request item number 3 that may be in the possession of Council members Castellano, Occhipinti, and Cunningham. The *in camera* review is necessary to determine if the records are government records as defined in OPRA, and if so, to determine the validity of the Custodian's assertion that the records contain ACD material exempt from access pursuant to N.J.S.A. 47:1A-1.1.
4. **The Custodian must deliver⁹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see paragraph 3 above), a document or redaction index¹⁰, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,¹¹ that the records provided are the**

⁹ 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.

¹⁰ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

¹¹ "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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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. If the Custodian determines that Council members Castellano, Occhipinti, and Cunningham do not have in their possession any records responsive to request item number 3, the Custodian shall also include a legal certification to that effect.

5. The Custodian must (a) obtain any presentation materials used at the December 18, 2013 hearing, including any exhibits, Power Point presentation materials, and handouts from any Council members that may have such records in their possession, regardless of the manner in which it was distributed; and/or (b) obtain said presentation materials from Princeton Hydro, LLC and/or RCQuinn Consulting, Inc. Upon obtaining the records, if any, the Custodian shall disclose those records to the Complainant. N.J.S.A. 47:1A-5.
6. **The Custodian shall comply with paragraph 5 above within five (5) business days from receipt of the Council's Interim Order with any appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. In the event no Council members have such records in their possession, and/or the records were not made, maintained, or kept on file by a third party on behalf of the City in the course of its official business, the Custodian shall submit a legal certification to that effect in lieu of his obligation pursuant to paragraph 5 above.**¹²
7. Because the Complainant's request item number 9 is confined to a specific subject matter that was clearly and reasonably described with sufficient identifying information and was limited to particularized identifiable government records, the request is not vague, unclear, or overly broad, and the Custodian shall disclose the records responsive to said request. N.J.S.A. 47:1A-5.
8. **The Custodian shall comply with paragraph 7 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**¹³
9. The Complainant's request items numbered 10 and 11 are invalid because they fail to seek identifiable government records. MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30 (App. Div. 2005), N.J. Builders Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166 (App. Div. 2007); Schuler v. Borough of

¹² See applicable footnotes in paragraph 4.

¹³ See applicable footnotes in paragraph 4.

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Bloomsbury, GRC Complaint No. 2007-151 (February 2009). Thus, the Custodian did not unlawfully deny access to said request items. N.J.S.A. 47:1A-6.

10. 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.
11. 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: John E. Stewart, Esq.

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

November 10, 2014