



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

May 24, 2016 Government Records Council Meeting

Michael A. D'Antonio
Complainant

Complaint No. 2014-220

v.

Borough of Allendale (Bergen)
Custodian of Record

At the May 24, 2016 public meeting, the Government Records Council ("Council") considered the May 24, 2016 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that this complaint should be dismissed because the Complainant failed to appear at a scheduled hearing on March 30, 2016, and further failed to submit to the GRC an explanation for his failure to appear within thirteen (13) days. N.J.A.C. 1:1-14.4.

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 24th Day of May, 2016

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: May 27, 2016



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Michael A. D’Antonio¹
Complainant**

GRC Complaint No. 2014-220

v.

**Borough of Allendale (Bergen)²
Custodial Agency**

Records Relevant to Complaint:

December 5, 2012 OPRA request: Copies of the document showing the closing of the “MBIA” account to include total of account at closure, total interest, where the money was transferred, new account and present balance in the new account.³

March 19, 2014 OPRA request: Inspection of:

1. Closing statement from the Bank of America showing the net amount of funds withdrawn from a specifically identified account (“Account”) and any records requiring a signature, Borough of Allendale (“Borough”) resolution, ordinance, *etc.*
2. New bank account number or numbers to which the money was transferred.
3. The document or physical page number in the current budget report reflecting the existence of the money.
4. The document indicating the distinction between cash and investments as designated on “[S]heet 39” of the current fund balance sheet dated December 31, 2013.
5. Current debt schedules for the last seven (7) years.
6. The document showing all current bonds issued to the Borough and their purpose, term and interest rate.
7. The last Annual Audit Report submitted to the Borough by Charles J. Ferraioli, Jr.

Custodian of Record: Frank Valenzuela⁴

Request Received by Custodian: December 5, 2012 and March 19, 2014

Response Made by Custodian: December 13, 2012 and March 24, 2014

GRC Complaint Received: June 3, 2014

¹ No legal representation listed on record.

² Represented by Raymond R. Wiss, Esq., of Wiss & Bouregy, P.C. (Westwood, NJ). Previously represented by David B. Bole, Esq., of Winne, Dooley & Bole, P.C. (Paramus, NJ).

³ The Complainant requested additional records that are not issue in this complaint.

⁴ There were two (2) prior custodians: Gwen McCarthy and Andrew Casais.

Background

May 26, 2015 Council Meeting:

At its May 26, 2015 public meeting, the Council considered the May 19, 2015 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of the edited findings and recommendations. The Council, therefore, found that:

[B]oth parties failed to establish in their request for reconsideration of the Council's March 31, 2015, Interim Order that either: 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The parties failed to establish that the complaint should be reconsidered based on based on their respective reasons. The parties also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Specifically, neither party provided evidence curing the question of municipal bank account numbers and their disclosability under OPRA. Thus, the parties' requests for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003). Based on the foregoing, the Council's March 31, 2015 Interim Order remains in effect and this complaint should be referred to the Office of Administrative Law.

Procedural History:

On May 28, 2015, the Council distributed its Interim Order to all parties. On July 22, 2015, this complaint was transmitted to the Office of Administrative Law ("OAL"). On March 31, 2016, the Honorable Danielle Pasquale, Administrative Law Judge ("ALJ"), issued an Initial Decision as follows:

A hearing was scheduled for March 30, 2016, at 10:00 a.m., notice of which was sent to the petitioner on or about January 7, 2016. Counsel for the Borough, and two representatives of the Borough timely appeared, and waited forty-five minutes for petitioner to arrive . . . After having them wait for forty-five minutes, I dismissed the Borough representatives and their counsel, and advised on the record that I intended to dismiss the petition for failure to appear.

Twenty-four hours have elapsed and petitioner has not explained his nonappearance. Accordingly, the petition must be **DISMISSED** for failure to appear under N.J.A.C. 1:1-14.4.

The ALJ therefore ordered that "the petition be **DISMISSED**."

On April 15, 2016, the ALJ issued an Amended Decision, memorializing that the parties had thirteen (13) days, or until April 28, 2016, to provide exceptions. The Complainant did not submit an explanation for his failure to appear within that time frame. N.J.A.C. 1:1-14.4.

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that that this complaint should be dismissed because the Complainant failed to appear at a scheduled hearing on March 30, 2016, and further failed to submit to the GRC an explanation for his failure to appear within thirteen (13) days. N.J.A.C. 1:1-14.4.

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

May 17, 2016



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Acting Commissioner

INTERIM ORDER

May 26, 2015 Government Records Council Meeting

Michael A. D'Antonio
Complainant

Complaint No. 2014-220

v.

Borough of Allendale (Bergen)
Custodian of Record

At the May 26, 2015 public meeting, the Government Records Council ("Council") considered the May 19, 2015 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that the both parties failed to establish in their request for reconsideration of the Council's March 31, 2015, Interim Order that either: 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The parties failed to establish that the complaint should be reconsidered based on based on their respective reasons. The parties also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Specifically, neither party provided evidence curing the question of municipal bank account numbers and their disclosability under OPRA. Thus, the parties' requests for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003). Based on the foregoing, the Council's March 31, 2015 Interim Order remains in effect and this complaint should be referred to the Office of Administrative Law.

Interim Order Rendered by the
Government Records Council
On The 26th Day of May, 2015

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: May 28, 2015



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Michael A. D’Antonio¹
Complainant**

GRC Complaint No. 2014-220

v.

**Borough of Allendale (Bergen)²
Custodial Agency**

Records Relevant to Complaint:

December 5, 2012 OPRA request: Copies of the document showing the closing of the “MBIA” account to include total of account at closure, total interest, where the money was transferred, new account and present balance in the new account.³

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2. New bank account number or numbers to which the money was transferred.
3. The document or physical page number in the current budget report reflecting the existence of the money.
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5. Current debt schedules for the last seven (7) years.
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7. The last Annual Audit Report submitted to the Borough by Charles J. Ferraioli, Jr.

Custodian of Record: Frank Valenzuela⁴

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Response Made by Custodian: December 13, 2012 and March 24, 2014

GRC Complaint Received: June 3, 2014

¹ No legal representation listed on record.

² Represented by Raymond R. Wiss, Esq., of Wiss & Bouregy, P.C. (Westwood, NJ). Previously represented by David B. Bole, Esq., of Winne, Dooley & Bole, P.C. (Paramus, NJ).

³ The Complainant requested additional records that are not issue in this complaint.

⁴ There were two (2) prior custodians: Gwen McCarthy and Andrew Casais.

Background

March 31, 2015 Council Meeting:

At its March 31, 2015, public meeting, the Council considered the March 24, 2015, Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said edited findings and recommendations. The Council, therefore, found that:

[B]ecause of contested facts and an issue of first impression, the Council should refer this complaint to the Office of Administrative Law for a hearing to develop the record and resolve the following:

- Whether the Account actually existed and the Custodian should have complied with the Complainant's OPRA request seeking records memorializing the closing of same and transferring of monies to a new account.
- Whether a municipal bank account number is exempt from disclosure under OPRA or any other State statute, regulation or executive order.

Additionally, this complaint should be referred to Office of Administrative Law to determine, if necessary, whether McCarthy, Casais and/or Valenzuela knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Procedural History:

On April 1, 2015, the Council distributed its Interim Order to all parties. On the same day, the Complainant e-mailed the GRC expressing his intent to file a request for reconsideration. Therein, the Complainant argued that this complaint should not be referred to the Office of Administrative Law ("OAL") to determine the disclosability of agency account numbers because the Custodian previously provided him records inclusive of same without objections. The Complainant asserted that he does not believe this complaint is ripe for referral to the OAL because the responsive records are subject to disclosure. The Complainant also argued that municipal bank account numbers are subject to access because they belong to tax payers.

On April 2, 2015, the GRC provided the Complainant with the appropriate process for filing a request for reconsideration. On April 14, 2015, the GRC extended the Complainant's deadline for submission of his request for same until April 23, 2015.⁵

Reconsideration

On April 14, 2015, the Complainant filed a request for reconsideration of the Council's March 31, 2015, Interim Order based on extraordinary circumstances, fraud, and illegality. The

⁵ This extension was predicated on the Complainant's multiple attempts to submit his request for reconsideration via facsimile, which the GRC did not receive.

Complainant contended that he already has the bank account number for the closed account and is only seeking the closing balance. The Complainant contended that disclosure of bank account numbers in this instance does not represent a security issue. Additionally, the Complainant contended that the Borough illegally over-appropriated taxes and committed fraud by not disclosing the Account on the annual budget report. The Complainant requested that the GRC reverse its decision and require the Borough to disclose the Account closing statement.

On April 15, 2015, the Custodian's Counsel e-mailed the GRC asking if the April 23, 2015, deadline could also be applied to the Borough based on their intent to also file a request for reconsideration. On April 16, 2015, the GRC allowed for an extension until April 23, 2015 to submit a request for reconsideration. Additionally, the GRC noted that the deadline to submit objections to the Complainant's request for reconsideration was April 28, 2015. N.J.A.C. 5:105-2.10.

On April 23, 2015, the Custodian's Counsel filed a request for reconsideration of the Council's decision based on a mistake. Counsel argued that the bank account numbers were lawfully redacted as financial information as well as security measures and surveillance techniques which, if disclosed, would create a risk to persons, property, electronic data or software. N.J.S.A. 47:1A-1.1.

Counsel noted that the Borough asserted both the security and financial information exemptions in the SOI; however, the Council only addressed the security exemption. However, Counsel acquiesced, noting that the Council properly referred this complaint to the OAL to generally determine whether bank account numbers are exempt from access under OPRA. To this end, Counsel argued that the numbers were exempt under the financial information exemption. *See also Communications Workers of America, AFL-CIO v. Rousseau*, 417 N.J. Super. 341, 358 (App. Div. 2010)(defining financial information as "information relating to the management of money, banking, investments and credit."). Counsel argued that it is undisputed that the redacted numbers meet the Court's definition of financial information in AFL-CIO. Counsel thus argues that sending this complaint to the OAL is moot because the numbers were properly redacted under N.J.S.A. 47:1A-1.1.

Further, Counsel argued that, if the GRC determines that the financial information exemption does not apply, the numbers were properly redacted under the security exemption because monies on deposit in a bank are considered "property." Counsel contended that disclosure of the numbers would create a risk to the Borough's monies in those accounts by allowing an unauthorized person to potentially gain access to same.

Counsel contended that McCarthy, Casais, and/or Valenzuela could not have knowingly and willfully violated OPRA because their actions did not meet the standard. Counsel notes that even the GRC admitted that the application of the security exemption is a matter of first impression. Thus, Counsel asserted that it would be impossible for McCarthy, Casais, and/or Valenzuela's actions to be knowing and willful in nature in the absence of any controlling case law or statutes.

Finally, Counsel requested that the Council: 1) vacate its Order to send this complaint to OAL for a determination of whether a municipal bank account number is exempt from disclosure under OPRA; 2) determine that the Custodians lawfully denied access to the bank account numbers on three (3) records provided to the Complainant; and 3) that the Custodians did not knowingly and willfully violate OPRA.

Objections

On April 23, 2015, the Complainant submitted objections to Custodian Counsel's request for reconsideration. The Complainant contended that nondisclosure of bank account numbers promotes fraud and deception in municipal finances and taxation.

On April 28, 2015, the Custodian's Counsel submitted objections to the Complainant's request for reconsideration. Counsel argued that the Complainant failed to prove that the Council's decision was the result of fraudulent or illegal submissions or that extraordinary circumstances exist that warrant reconsideration.

Specifically, Counsel argued that the Complainant's allegations of illegality and fraud as it pertained to over-appropriating taxes and disclosure of the account on the annual budget⁶ did not impact the adjudication of this complaint and the parties' submissions. Counsel also argued that the Complainant failed to articulate the extraordinary circumstances not known by the Council prior to issuing its Interim Order. Counsel also reiterated that the redacted account numbers are exempt from disclosure, regardless of whether the Complainant is in possession of the Account number.

On May 2, 2015, the Complainant submitted supplemental objections in which he reiterated that the security exemption does not apply to municipal bank account numbers. Further, the Complainant reiterated that he has been in possession of the Account number for twelve (12) years. The Complainant disputed that disclosure of the numbers would create a security risk, given that he has never breached the Borough's security or attempted to access their accounts. The Complainant presented other allegations that he believed amounted to fraud against the public interest. The Complainant thus requested that the GRC modify its order to: 1) require disclosure of the Account closing statement; and 2) determine that a knowing and willful violation occurred. The Complainant noted that the custodians were controlled by others in denying access to his OPRA requests.

Analysis

Reconsideration

Pursuant to N.J.A.C. 5:105-2.10, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. Requests must be in writing, delivered to the Council and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following

⁶ The Custodian's Counsel noted that the Borough denies these allegations.

receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. N.J.A.C. 5:105-2.10(a) – (e).

In the matter before the Council, both parties filed requests for reconsideration of the Council's Order dated March 31, 2015, on April 14 and April 23, 2015, respectively. Both submissions were within the extended time frame to submit same.

Applicable case law holds that:

“A party should not seek reconsideration merely based upon dissatisfaction with a decision.” D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a “palpably incorrect or irrational basis;” or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D'Atria, . . . 242 N.J. Super. at 401. “Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement.” Ibid.

In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

Upon review of all parties' submissions, no evidence has been presented to establish that the Council's decision was palpably incorrect or irrational or that the Council failed to consider significant probative, competent evidence. First, contested facts as to the nature and existence of the Account still exist. Second, the parties' submissions did not resolve the issue of municipal bank account numbers and disclosure. The GRC notes that the issue is not moot simply because the Complainant was already in possession of certain account numbers.

Additionally, Counsel correctly points out that the agency also asserted the financial information exemption, which the GRC did not specifically address. Counsel contended that the account numbers embodied the definition of “financial information” as stated in AFL-CIO, 417 N.J. Super. at 358. However, the Court's holding in AFL-CIO, did not address bank account numbers and thus does not provide any precedential holding on the issue. Further, it should be noted that Counsel agreed with the Council's Order to direct the OAL to determine whether municipal account numbers are exempt under OPRA or any other State statute, regulation, or executive order.

As moving parties, both the Complainant and Counsel were required to establish either of the necessary criteria set forth above: either 1) the Council's decision is based upon a “palpably incorrect or irrational basis;” or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. *See Cummings*, 295 N.J. Super. at 384. Neither party failed to

establish that the complaint should be reconsidered based on their respective reasons. The parties also failed to show that the Council acted arbitrarily, capriciously, or unreasonably. *See D'Atria*, 242 N.J. Super. at 401. Specifically, neither party provided evidence curing the question of municipal bank account numbers and their disclosability under OPRA. Thus, both parties' requests for reconsideration should be denied. *Cummings*, 295 N.J. Super. at 384; *D'Atria*, 242 N.J. Super. at 401; *Comcast*, 2003 N.J. PUC at 5-6. Based on the foregoing, the Council's March 31, 2015 Interim Order remains in effect and this complaint should be referred to the OAL.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the both parties failed to establish in their request for reconsideration of the Council's March 31, 2015, Interim Order that either: 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The parties failed to establish that the complaint should be reconsidered based on based on their respective reasons. The parties also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Specifically, neither party provided evidence curing the question of municipal bank account numbers and their disclosability under OPRA. Thus, the parties' requests for reconsideration should be denied. *Cummings v. Bahr*, 295 N.J. Super. 374 (App. Div. 1996); *D'Atria v. D'Atria*, 242 N.J. Super. 392 (Ch. Div. 1990); *In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J.*, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003). Based on the foregoing, the Council's March 31, 2015 Interim Order remains in effect and this complaint should be referred to the Office of Administrative Law.

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

Approved By: Dawn R. SanFilippo
Deputy Executive Director

May 19, 2015



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
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CHRIS CHRISTIE
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Commissioner

INTERIM ORDER

March 31, 2015 Government Records Council Meeting

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v.

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- Whether the Account actually existed and the Custodian should have complied with the Complainant's OPRA request seeking records memorializing the closing of same and transferring of monies to a new account.
- Whether a municipal bank account number is exempt from disclosure under OPRA or any other State statute, regulation or executive order.

Additionally, this complaint should be referred to Office of Administrative Law to determine, if necessary, whether McCarthy, Casais and/or Valenzuela knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Interim Order Rendered by the
Government Records Council
On The 31st Day of March, 2015

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: April 1, 2015



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
March 31, 2015 Council Meeting**

**Michael A. D’Antonio¹
Complainant**

GRC Complaint No. 2014-220

v.

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4. The document indicating the distinction between cash and investments as designated on “[S]heet 39” of the current fund balance sheet dated December 31, 2013.
5. Current debt schedules for the last seven (7) years.
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7. The last Annual Audit Report submitted to the Borough by Charles J. Ferraioli, Jr.

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¹ No legal representation listed on record.

² Represented by David B. Bole, Esq. (Paramus, NJ).

³ The Complainant requested additional records that are not issue in this complaint.

⁴ There were two (2) prior custodians: Gwen McCarthy and Andrew Casais.

Background⁵

Request and Response:

On December 5, 2012, the Complainant submitted an Open Public Records Act (“OPRA”) request to Custodian McCarthy seeking the above-mentioned records. On December 13, 2012, Custodian McCarthy responded in writing providing three (3) pages of records (with redactions of account numbers) showing the total amount of closing, where the money was transferred, and the new account. Custodian McCarthy further stated that no record showing total interest exists and the new account number and present balance are not valid request items.

On March 19, 2014, the Complainant submitted a second (2nd) OPRA request to Custodian Casais seeking the above-mentioned records. On March 24, 2014, Custodian Casais responded in writing stating the following:

1. The referenced Bank of America Account number is not a Borough account and thus no statements of paperwork exist.
2. Because the Account is not a Borough account, this item does not apply.
3. Because the Account is not a Borough account, this item does not apply.
4. The records responsive to this item are “Sheet(s) 9 and 9a” of the 2013 Annual Financial Statement.
5. The records responsive to this item are Exhibits C-7 and C-8 of the Municipal Audit Report. This record is being produced because the 2013 Municipal Audit is not yet complete.
6. The records responsive to this item are being provided in response to item No. 5.
7. The records responsive to this item are being provided.

The Custodian offered to provide records for item Nos. 4 and 5 via fax or e-mail. Further, the Custodian suggested that the Complainant inspect the records responsive to item No. 7 or receive same via e-mail.

On the same day, the Complainant disputed that the referenced Account did not exist based on the documents he attached to the OPRA request. The Complainant also agreed to accept the records for item Nos. 4 and 5 via fax or e-mail. The Complainant also stated that he was only interested in the narrative parts of Mr. Ferraioli’s report, which is usually contained in the first five (5) pages.

The Custodian responded by providing the responsive records via facsimile. The Custodian also reiterated that no account matching the one provided by the Complainant existed. The Custodian noted that he arrived at this conclusion after reviewing records in the Borough’s Finance Department and speaking with Custodian’s Counsel.

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.

Denial of Access Complaint:

On June 3, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant argued that, notwithstanding proof that specifically identified bank account existed, Custodians McCarthy and Casias denied its existence and denied access to responsive records showing that the Account was closed and the balance moved to a new account. The Complainant contended that the Borough’s continued attempts to hide an account totaling more than \$277,000,000.00 (per 2007 statements) are against the public interest.

Statement of Information:⁶

On December 1, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that the Borough received the Complainant’s OPRA requests on December 5, 2012 and March 19, 2014 respectively. Further, the Custodian certified that Custodians McCarthy and Casais responded in writing on December 5, 2012 and March 24, 2014 respectively.

Regarding the Complainant’s December 5, 2012 OPRA request, the Custodian certified that no records exist showing the closing of the Account because the Borough did not maintain any records. The Custodian reiterated that the Account was not held by the Borough nor was it directly accessed by the Borough. *See also* M. Alissa Mayer, Chief Financial Officer (“CFO”), legal certification at ¶ 3. The Custodian affirmed that there was also no record showing interest accrued on this Account. Further, the Custodian contended that the portion of the request seeking the new account number and present balance therein failed to identify a specific record and was thus invalid. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005).

The Custodian certified that records were provided to the Complainant with account numbers redacted by CFO Mayer for security purposes. N.J.S.A. 47:1A-1.

Regarding the Complainant’s March 19, 2014 OPRA request, the Custodian contended that Custodian Casais properly responded by denying access to item Nos. 1, 2 and 3 while providing access to records responsive to 4, 5, 6 and 7. The Custodian reiterated that the alleged bank account was not held or directly accessed by the Borough.

Additional Submissions:

On December 2, 2014, the Complainant disputed that the redactions were lawful. The Complainant contended that financial and bank account information is not exempt under the security exemption.

On February 17, 2015, the Complainant e-mailed the GRC attaching a number of documents that he alleged proved that the Account existed. The Complainant asserted that his intent is to receive the closing statement for that Account and notes that he already received all

⁶ On June 16, 2014, this complaint was referred to mediation. On November 10, 2014, this complaint was referred back to the GRC for adjudication.

internal banking and account records. To this end, the Complainant argued that he is entitled to this record because it is public and not exempt under OPRA.⁷

Analysis

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.

As a threshold issue, the Complainant’s complaint is centered on records showing the closing of the Account and the new account or accounts to which this money was transferred. Specifically, the Borough provided to the Complainant records responsive to his March 19, 2014 OPRA request item Nos. 4 through 7. Thus, the GRC will focus on the issue of records showing the closing of the Account and transferring of monies to a new account.

The Administrative Procedures Act provides that the Office of Administrative Law (“OAL”) “shall acquire jurisdiction over a matter only after it has been determined to be a contested case by an agency head and has been filed with the [OAL] . . .” N.J.A.C. 1:1-3.2(a). In the past, when the issue of contested facts has arisen from a custodian’s compliance with an order, the Council has opted to send said complaint to the OAL for a fact-finding hearing. *See Hyman v. City of Jersey City (Hudson)*, GRC Complaint No. 2007-118 (Interim Order dated September 25, 2012); *Mayer v. Borough of Tinton Falls (Monmouth)*, GRC Complaint No. 2008-245 (Interim Order dated July 27, 2010); *Latz v. Twp. of Barnegat (Ocean)*, GRC Complaint No. 2012-241 *et seq.* (Interim Order dated January 28, 2014).

Further, in instances where an issue is a matter of first impression, contested facts exist regarding the disclosability of the requested records, and/or the issue is highly technological in nature thus warranting a fact-finding hearing, the Council has opted to refer such a complaint to the OAL. *See Owoh (on behalf of O.R.) v. West Windsor-Plainsboro Reg’l Sch. Dist. (Mercer)*, GRC Complaint No. 2012-91 (January 2013); *Owoh (on behalf of Delores Nicole Simmons) v. West Windsor-Plainsboro Reg’l Sch. Dist. (Mercer)*, GRC Complaint No. 2012-130 (January 2013).

In this matter, contested facts have been presented that warrant further review in the form of a fact-finding hearing. Specifically, the Borough contended and certified that the Account did not exist and was not maintained or accessed. However, the Complainant has provided evidence suggesting otherwise. This compelling information includes Bank of America account statements memorializing the Account, a 2008 Bank of America letter confirming the existence of an account by that same number, and Audit Trails related to the Account. Although the GRC

⁷ On February 18, 2015, the Custodian’s Counsel requested time to respond to the Complainant’s submission. The GRC provided him until March 9, 2015 to provide a response; however, the Custodian’s Counsel did not submit same.

generally will seek additional information in these instances, the evidence of record indicates that this basic disagreement as to the existence of the Account cannot be cured by obtaining additional information.

Also at issue in this complaint is the Complainant's contention that Custodian unlawfully denied access to Borough account numbers under the "security" exemption. This issue is one of first impression, as it is unclear whether disclosure of a municipal bank account can be a security risk to said municipality.

Accordingly, because of contested facts and an issue of first impression, the Council should refer this complaint to the OAL for a hearing to develop the record and resolve the following:

- Whether the Account actually existed and the Custodian should have complied with the Complainant's OPRA request seeking records memorializing the closing of same and transferring of monies to a new account.
- Whether a municipal bank account number is exempt from disclosure under OPRA or any other State statute, regulation, or executive order.

Additionally, this complaint should be referred to OAL to determine, if necessary, whether McCarthy, Casais and/or Valenzuela knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because of contested facts and an issue of first impression, the Council should refer this complaint to the Office of Administrative Law for a hearing to develop the record and resolve the following:

- Whether the Account actually existed and the Custodian should have complied with the Complainant's OPRA request seeking records memorializing the closing of same and transferring of monies to a new account.
- Whether a municipal bank account number is exempt from disclosure under OPRA or any other State statute, regulation or executive order.

Additionally, this complaint should be referred to Office of Administrative Law to determine, if necessary, whether McCarthy, Casais and/or Valenzuela knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

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March 24, 2015