



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

November 15, 2016 Government Records Council Meeting

Gregory W. Kasko
Complainant

Complaint No. 2014-389

v.

Town of Westfield (Union)
Custodian of Record

At the November 15, 2016 public meeting, the Government Records Council (“Council”) considered the November 9, 2016 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Counsel fails to say what, if any, was his fee arrangement with the client. There was no hourly rate, and Counsel does not suggest that his fee was contingent on any result. In fact, Counsel does not appear to be owed anything from the client. Counsel freely admits he gave advice to the Complainant in the context of their friendship and past and current business relationship on other matters. Counsel does not claim that he had a fee agreement with his client before or after performing any work. It is reasonable to conclude from his own affidavit that Counsel was simply helping a friend in his spare time. Although Counsel says an attorney with his background in northern New Jersey could easily charge between \$350.00 and \$500.00 an hour, he fails to give any evidence of that claim whatsoever. Nor does he claim to be experienced in OPRA matters. Therefore, Counsel has provided no evidence to prove his hourly rate is reasonable. To the contrary, he states that he has no hourly rate. As Counsel has, in his words, “no intention” of attempting to justify an hourly rate, the GRC has no intention of attempting to determine the reasonableness of a nonexistent hourly rate.
2. Counsel seeks \$2,000.00 for himself and \$3,000.00 made payable to a named charity. Whatever noble intentions Counsel wishes to ascribe to his application for fees, it is appropriate to consider once again that any costs imposed on a governmental entity are “ultimately borne by the public.” HIP (Heightened Independence and Progress, Inc.) v. K. Hovnanian at Mahwah VI, Inc., 291 N.J. Super. 144, 167 (quoting Furey v. Cnty. of Ocean, 287 N.J. Super. 42, 46 (App. Div. 1996)). The GRC finds that Counsel’s fee application does not at all conform to the requirements of N.J.A.C. 5:105-2.13 (b). The Council therefore cannot say that the fee is reasonable, and without objective support, it must be deemed unreasonable. After the Complainant named Counsel as his attorney on May 23, 2016, the only “work” performed thereafter was sending one letter to the GRC on May 24, 2016, repeating the Complainant’s position that the matter should be adjudicated



in May 2016. In sum, Counsel has failed to provide any reason for justifying any fee whatsoever. Accordingly, Counsel is entitled to no fee to be paid as a result of his client being a prevailing party.

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 15th Day of November, 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: November 17, 2016

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Prevailing Party Attorney's Fees
**Supplemental Findings and Recommendations of the Executive Director
November 15, 2016 Council Meeting**

Gregory W. Kasko¹
Complainant

GRC Complaint No. 2014-389

v.

Town of Westfield (Union)²
Custodial Agency

Records Relevant to Complaint: A non-redacted copy of the police department's emergency mobile command center specifications provided to all bidders, prior to the town of Westfield's purchase, in addition to the advertisement date, newspaper edition advertisement, proof of publication, tabulation sheet showing all responses, and the list of bidders to whom the emergency mobile command center specifications were provided.

Custodian of Record: Claire J. Gray

Request Received by Custodian: November 7, 2014

Response Made by Custodian: November 14, 2014

GRC Complaint Received: November 21, 2014

Background

July 26, 2016 Council Meeting:

At its July 26, 2016 public meeting, the Council considered the July 20, 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, found that:

1. The Custodian complied with the Council's June 29, 2016 Interim Order because she responded in the prescribed time frame by providing records and simultaneously providing certified confirmation of compliance.
2. Although the Custodian's initial response provided the document with the entirety of its content redacted pursuant to N.J.S.A. 47:1A-1.1, she disclosed bullet points 12 and 13 to the Complainant in a timely manner following the Council's determination that those items were not exempt under OPRA. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of

¹ Represented by A. John Blake, Esq. (Union, NJ).

² Represented by Russell M. Finestein, Esq. (Cranford, NJ).

conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

3. Pursuant to the Council's June 28, 2016 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters, 387 N.J. Super. at 432. Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. at 51. Specifically, the Council determined that two bullet pointed items contained in the record should be unredacted and provided to the Complainant. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. at 432, and Mason, 196 N.J. at 51. **Thus, the Complainant, or his attorney, is entitled to submit an application to the Council for an award of attorney's fees within twenty (20) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b). The Custodian shall have ten (10) business days from the date of service of the application for attorney's fees to object to the attorney's fees requested. N.J.A.C. 5:105-2.13(d). To the extent that the attorney has not already received compensation, the award for attorney's fees is limited to work provided in adjudicating this matter.**

Procedural History:

On July 27, 2016, the Council distributed its Interim Order to all parties. On August 3, 2016, the Complainant's Counsel, A. John Blake, Esq. ("Counsel"), filed an Affidavit of services in support of his application for fees. On August 5, 2016, Russell M. Feinstein, Esq., filed the Custodian's opposition to the application.

Analysis

Compliance

At its July 26, 2016 meeting, the Council permitted the Complainant "to submit an application to the Council for an award of attorney's fees within twenty (20) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b)." Further, the Council provided that the Custodian shall have ten (10) business days from the date of service of the application for attorney's fees to object to the fees requested. N.J.A.C. 5:105-2.13(d).

On August 3, 2016, the fifth (5th) day after receipt of the Council's Order, Counsel filed an application for fees ("Application") within the time frame permitted by the Interim Order. On August 5, 2016, the Custodian's Counsel filed opposition to the application.

Prevailing Party Attorney's Fees

Under the American Rule, “adhered to by the . . . courts of this state, the prevailing litigant is ordinarily not entitled to collect a reasonable attorney’s fee from the loser.” New Jerseyans for a Death Penalty Moratorium (“NJDPM”) v. N.J. Dep’t. of Corrections, 185 N.J. 137, 152 (2005) (quoting Rendine v. Pantzer, 141 N.J. 292, 322 (1995) (internal quotation marks omitted)). However, this principle is not without exception. NJDPM, 185 N.J. at 152. Some statutes, such as OPRA, incorporate a “fee-shifting measure: to ensure ‘that plaintiffs with bona fide claims are able to find lawyers to represent them[,] . . . to attract competent counsel in cases involving statutory rights, . . . and to ensure justice for all citizens.’” NJDPM, 185 N.J. at 153 (quoting Coleman v. Fiore Bros., 113 N.J. 594, 598 (1989)).

New Jersey public policy, as codified in OPRA, is that “government records shall be readily accessible for inspection, copying, or examination by the citizens of this State.” NJDPM, 185 N.J. at 153 (citing N.J.S.A. 47:1A-1). 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. See generally, NJDPM, 185 N.J. at 137. “By making the custodian of the government record responsible for the payment of counsel fees to a prevailing requestor, the Legislature intended to even the fight.” Id. at 153 (quoting Courier News v. Hunterdon Cnty. Prosecutor’s Office, 378 N.J. Super. 539, 546 (App. Div. 2005)).

In the instant matter, the Council found that the Complainant 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. 432 (App. Div. 2006). Further, the Council found that a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Accordingly, the Council ruled that the Complainant was a prevailing party entitled to an award of a reasonable attorney’s fees and directed the Complainant to file an application for attorney’s fees.

A. Standards for Fee Award

The starting “‘point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate,’ a calculation known as the lodestar.” NJDPM, 185 N.J. at 153 (quoting Rendine, 141 N.J. at 324 (quoting Hensley v. Eckerhart, 461 U.S. 424, 433 (1983))). Hours, however, are not reasonably expended if they are excessive, redundant, or otherwise unnecessary. See Hensley, 461 U.S. at 434. When determining the reasonableness of the hourly rate charged, the GRC should consider rates for similar services by lawyers of reasonably comparable experience, skill, and reputation in the same geographical area. Walker v. Giuffre, 415 N.J. Super. 597, 606 (App. Div. 2010) (quoting Rendine, 141 N.J. at 337). What the fee-shifting statutes do not contemplate is that the losing

party has to pay for the learning experience of attorneys for the prevailing party. See HIP (Heightened Independence and Progress, Inc.) v. K. Hovnanian at Mahwah VI, Inc., 291 N.J. Super. 144, 160 (Law Div. 1996) (citing Council Enter., Inc. v. Atlantic City, 200 N.J. Super. 431, 441-42 (Law Div. 1984)). Nor do they contemplate redundancy. Ursic v. Bethlehem Mines, 719 F.2d 670, 677 (3d. Cir. 1983) (citations omitted).

Once the reasonable number of hours has been ascertained, the court should adjust the lodestar in light of the success of the prevailing party in relation to the relief sought. See Walker, 415 N.J. Super. at 606 (citing Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 22 (2004)). The loadstar amount may be adjusted, either upward or downward, depending on the degree of success achieved. See NJDPM, 185 N.J. at 153-55. OPRA neither mandates nor prohibits enhancements. Rivera v. Office of the Cnty. Prosecutor, 2012 N.J. Super. Unpub. LEXIS 2752 *1, *10 (Law Div. Dec. 2012) (citing NJDPM, 185 N.J. at 157 (applying Rendine to OPRA)). However, “[b]ecause enhancements are not preordained . . . enhancements should not be made as a matter of course.” NJDPM, 185 N.J. at 157.

Moreover, in all cases, an attorney’s fee must be reasonable when interpreted in light of the Rules of Professional Conduct. Rivera, 2012 N.J. Super. Unpub. LEXIS 2752, at *10-11 (citing Furst, 182 N.J. at 21-22 (applying R.P.C. § 1.5(a))).

To verify the reasonableness of a fee, courts must address: 1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; 2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; 3) the fee customarily charged in the locality for similar legal services; 4) the amount involved and the results obtained; 5) the time limitations imposed by the client or by the circumstances; 6) the nature and length of the professional relationship with the client; 7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and 8) whether the fee is fixed or contingent.

Rivera, at 11 (citing R.P.C. 1.5(a)).

In addition, N.J.A.C. 5:105-2.13(b) sets forth the information which counsel must provide in his or her application seeking fees in an OPRA matter. Providing the requisite information required by that Code section permits the reviewing tribunal to analyze the reasonableness of the requested fee. Finally, the Appellate Division has noted that “[i]n fixing fees against a governmental entity, the judge must appreciate the fact that ‘the cost is ultimately borne by the public’ and that ‘the Legislature . . . intended that the fees awarded serve the public interest as it pertains to those individuals who require redress in the context of a recognition that limited public funds are available for such purposes.’” HIP, 291 N.J. Super. at 167 (quoting Furey v. Cnty. of Ocean, 287 N.J. Super. 42, 46 (App. Div. 1996)).

B. Evaluation of Fee Application

1. Lodestar Analysis

a. Hourly Rate

N.J.A.C. 5:105-2.13 states that an application for the award of attorney's fees "**must** [emphasis supplied] include a certification from the attorney" containing...

- (b)
- 3. A statement of client representation
- 4. The hourly rates for all attorneys and support staff involved in the complaint
- 5. Copies of weekly time sheets for each professional involved in the complaint, which includes detailed description of all activities attributable to the project in 0.1 hour (six-minute) increments.
- 6. Evidence that the rates charged are in accordance with prevailing market rates in the relevant community. Such evidence shall include
 - i. Years of related or similar experience
 - ii. Skill level; and
 - iii. Reputation...

Counsel provided an Affidavit in which he requests an award of "\$2000.00, payable to me as attorney." Additionally he requests "a check for \$3,000.00, payable to 'Children's Specialized Hospital, Friends.'" Further he requests a check payable to his client for \$1001.00, for his client's "efforts."

Counsel prefaced his affidavit with a cover letter, which states in pertinent part:

As is obvious from a reading of the affidavit, my bill is somewhat unique in form as well as intent . . . I have no intention of trying to defend a specific hourly rate as "reasonable" for my services as an attorney. There is no desire to hurt the taxpayers of Westfield, yet the town should be required to pay something. There was never any doubt of either Mr. Kasko or myself, that charitable donation was the right course.

True to Counsel's stated intent, his affidavit fails to establish or "defend a specific hourly rate" for his services. In fact, his affidavit further implies that any service performed for the Complainant was not based on a professional relationship, where fees for services were ever intended. He states: "I have been friends with the Complainant for many years." With regard to this Complaint, he says, "[a]s it has been our custom, as friends, the complainant would stop at my house, ask me legal questions, and seek my advice on this as well as other matters. My office and practice are not set up on a time counting basis. There is no computation that has ever been made that I spent a certain amount of time with specific client on a specific date."

He further states, "I do not charge by the hour and do not have any bills as evidence of my previous charges." Without any supporting evidence, he represents that an attorney with his legal background in Northern Jersey could "easily charge anywhere from \$350.00 to \$500.00 an hour." Simply stated, Counsel fails to indicate what he charged his client in this case. He correctly concludes that the submission of his bill is "unique" to the GRC.

Although Counsel had “no intention” of justifying the fees he sought as reasonable, the Rules of Professional Conduct require, *inter alia*, when determining the reasonableness of fees, “the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer . . . the time limitations imposed by the client or by the circumstances . . . and whether the fee is fixed or contingent.” R.P.C. 1.5(a).

Counsel’s affidavit and letter imply that he offered, at unknown times throughout the litigation, advice to the Complainant during visits to Counsel’s house while also advising him on other matters. It is obvious that this “advice” did not preclude other employment by counsel. Indeed if anything, assuming the Complainant was paying Counsel for other matters on which advice was offered, Counsel’s advice to client would have enhanced, rather than precluded, other employment. As for time limitations imposed by the client or by the circumstances, Counsel provided no evidence that such factors weighed into his consideration of his representation of the Complainant.

In sum, Counsel fails to say what, if any, was his fee arrangement with the client. There was no hourly rate, and Counsel does not suggest that his fee was contingent on any result. In fact, Counsel does not appear to be owed anything from the client. Counsel freely admits he gave advice to the Complainant in the context of their friendship and past and current business relationship on other matters. Counsel does not claim that he had a fee agreement with his client before or after performing any work. It is reasonable to conclude from his own affidavit that Counsel was simply helping a friend in his spare time. Although Counsel says an attorney with his background in northern New Jersey could easily charge between \$350.00 and \$500.00 an hour, he fails to give any evidence of that claim whatsoever. Nor does he claim to be experienced in OPRA matters. Therefore, Counsel has provided no evidence to prove his hourly rate is reasonable. To the contrary, he states that he has no hourly rate. As Counsel has, in his words, “no intention” of attempting to justify an hourly rate, the GRC cannot determine the reasonableness of a nonexistent hourly rate.

b. Time Expended

To be compensable, hours expended must not be excessive, redundant, or otherwise unnecessary. See Hensley, 461 U.S. at 434. The New Jersey District Court, in PIRG v. Powell Duffryn Terminals, 1991 U.S. Dist. LEXIS 21199 (D.N.J. 1991), reduced plaintiff’s trial preparation fee request by 50%. The PIRG court, noting that plaintiff’s counsel had tried numerous similar cases, found the work performed to be both redundant and unnecessary. “The higher the allowed hourly rate commanded based upon skill and experience, the shorter the time it should require an attorney to perform a particular task.” HIP (Heightened Independence and Progress, Inc.) v. K. Hovnanian at Mahwah VI, Inc., 291 N.J. Super. 144, 167.

As indicated above, Counsel failed to provide, as required, any time-sheets with descriptions of the work performed. N.J.A.C. 5:105-2.13(b)(5). He simply estimated that he spent a “minimum of 20 hours with [the Complainant] both before and after” his letter of representation sent to the GRC on May 24, 2014.

The GRC awarded fees to the Complainant based upon the Council's ruling of prevailing party status. By necessity, a review of a fee application must be conducted on a case-by-case basis. While the Council does not comment of the strategy of an attorney's representation of his client, the Council indeed recognizes that any fees awarded will be paid from public funds. See HIP, 291 N.J. Super. at 167.

Although not mentioned in his affidavit, the only proof in the record that the GRC has regarding the value of any service rendered by Counsel to the Complainant is the May 24, 2016 letter he wrote the day after his client named him as his attorney. That letter restated Complainant's position that he did not want the adjudication of this matter to go any later than May 2016. As explained in the record by the GRC's staff attorney to the Complainant before Counsel entered his appearance, the GRC could not adjudicate the matter in May 2016. Based on the record, Counsel's one letter had no effect whatsoever on the Board's decision or the timing of it.

Counsel seeks \$2,000.00 for himself and \$3,000.00 made payable to a named charity.³ Whatever noble intentions Counsel wishes to ascribe to his application for fees, it is appropriate to consider once again that any costs imposed on a governmental entity are "ultimately borne by the public." HIP, 281 N.J. Super. at 167 (quoting Furey, 287 N.J. Super. at 46). The GRC finds that Counsel's fee application does not at all conform to the requirements of N.J.A.C. 5:105-2.13(b). The Council therefore cannot say that the fee is reasonable, and without objective support, it must be deemed unreasonable. After the Complainant named Counsel as his attorney on May 23, 2016, the only "work" performed thereafter was sending one letter to the GRC on May 24, 2016, repeating the Complainant's position that the matter should be adjudicated in May 2016. In sum, Counsel has failed to provide any reason for justifying any fee whatsoever. Accordingly, Counsel is entitled to no fee to be paid as a result of his client being a prevailing party.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Counsel fails to say what, if any, was his fee arrangement with the client. There was no hourly rate, and Counsel does not suggest that his fee was contingent on any result. In fact, Counsel does not appear to be owed anything from the client. Counsel freely admits he gave advice to the Complainant in the context of their friendship and past and current business relationship on other matters. Counsel does not claim that he had a fee agreement with his client before or after performing any work. It is reasonable to conclude from his own affidavit that Counsel was simply helping a friend in his spare time. Although Counsel says an attorney with his background in northern New Jersey could easily charge between \$350.00 and \$500.00 an hour, he fails to give any evidence of that claim whatsoever. Nor does he claim to be experienced in OPRA matters. Therefore, Counsel has provided no evidence to prove his hourly rate is reasonable. To

³ Counsel also states his client "would like" \$1001.00 for "his efforts." OPRA only permits allowable and reasonable fees payable to attorneys for their efforts, not the client's efforts, and does not award fees to the Complainants.

the contrary, he states that he has no hourly rate. As Counsel has, in his words, “no intention” of attempting to justify an hourly rate, the GRC has no intention of attempting to determine the reasonableness of a nonexistent hourly rate.

2. Counsel seeks \$2,000.00 for himself and \$3,000.00 made payable to a named charity. Whatever noble intentions Counsel wishes to ascribe to his application for fees, it is appropriate to consider once again that any costs imposed on a governmental entity are “ultimately borne by the public.” HIP (Heightened Independence and Progress, Inc.) v. K. Hovnanian at Mahwah VI, Inc., 291 N.J. Super. 144, 167 (quoting Furey v. Cnty. of Ocean, 287 N.J. Super. 42, 46 (App. Div. 1996)). The GRC finds that Counsel’s fee application does not at all conform to the requirements of N.J.A.C. 5:105-2.13 (b). The Council therefore cannot say that the fee is reasonable, and without objective support, it must be deemed unreasonable. After the Complainant named Counsel as his attorney on May 23, 2016, the only “work” performed thereafter was sending one letter to the GRC on May 24, 2016, repeating the Complainant’s position that the matter should be adjudicated in May 2016. In sum, Counsel has failed to provide any reason for justifying any fee whatsoever. Accordingly, Counsel is entitled to no fee to be paid as a result of his client being a prevailing party.

Prepared By: Samuel A. Rosado
Staff Attorney

November 9, 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
Commissioner

INTERIM ORDER

July 26, 2016 Government Records Council Meeting

Gregory W.Kasko
Complainant

Complaint No. 2014-389

v.

Town of Westfield (Union)
Custodian of Record

At the July 26, 2016 public meeting, the Government Records Council (“Council”) considered the July 19, 2016 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian complied with the Council’s June 29, 2016 Interim Order because she responded in the prescribed time frame by providing records and simultaneously providing certified confirmation of compliance.
2. Although the Custodian’s initial response provided the document with the entirety of its content redacted pursuant to N.J.S.A. 47:1A-1.1, she disclosed bullet points 12 and 13 to the Complainant in a timely manner following the Council’s determination that those items were not exempt under OPRA. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council’s June 28, 2016 Interim Order, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters, 387 N.J. Super. at 432. Additionally, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. at 51. Specifically, the Council determined that two bullet pointed items contained in the record should be unredacted and provided to the Complainant. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. at 432, and Mason, 196 N.J. at 51. **Thus, the Complainant, or his attorney, is entitled to submit an application to the Council for an award of attorney’s fees within twenty (20) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b). The Custodian shall have ten (10) business days from the**



date of service of the application for attorney's fees to object to the attorney's fees requested. N.J.A.C. 5:105-2.13(d). To the extent that the attorney has not already received compensation, the award for attorney's fees is limited to work provided in adjudicating this matter.

Interim Order Rendered by the
Government Records Council
On The 26th Day of July, 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: July 27, 2016

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
July 26, 2016 Council Meeting**

**Gregory W. Kasko¹
Complainant**

GRC Complaint No. 2014-389

v.

**Town of Westfield (Union)²
Custodial Agency**

Records Relevant to Complaint: A non-redacted copy of the police department's emergency mobile command center specifications provided to all bidders, prior to the town of Westfield's purchase, in addition to the advertisement date, newspaper edition advertisement, proof of publication, tabulation sheet showing all responses, and the list of bidders to whom the emergency mobile command center specifications were provided.

Custodian of Record: Claire J. Gray

Request Received by Custodian: November 7, 2014

Response Made by Custodian: November 14, 2014

GRC Complaint Received: November 21, 2014

Background

June 28, 2016 Council Meeting:

At its June 28, 2016 public meeting, the Council considered the June 21, 2016 *In Camera* Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian complied with the Council's April 28, 2016 Interim Order because she responded in the prescribed extended time frame by providing the requested certification along with certified confirmation of compliance with respect to paragraph 2 of the Interim Order.
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 above within five (5) business days from receipt of this Order and**

¹ Represented by A. John Blake, Esq. (Union, NJ).

² Represented by Russell M. Finestein, Esq. (Cranford, NJ).

simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.³

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

Procedural History:

On June 29, 2016, the Council distributed its Interim Order to all parties. On June 30, 2016, the Custodian responded to the Council's Interim Order, providing the requested information and certified confirmation of compliance.

On July 6, 2016, Counsel for the Complainant wrote to the GRC, requesting a copy of the *in camera* line-item certification argument as to the two disclosed bullet points, proffered by the Custodian. That same day, Counsel for the Custodian wrote to the GRC, objecting to the request. On July 7, 2016, Counsel for the Complainant again wrote to the GRC, seeking a copy of the line-item certification submitted *in camera* to the Council. On July 11, 2016, the GRC responded to the request, advising that pursuant to N.J.A.C. 5:105-2.8(c)(2), the GRC cannot disclose materials submitted to the Council *in camera*.

Analysis

Compliance

At its June 28, 2016 meeting, the Council ordered the Custodian to disclose bullet points 12 and 13 contained under the "General" category on p. 49 of the document, finding that those bullet points do not contain information exempt from OPRA. The Council further ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4. On June 29, 2015, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on July 7, 2016.

On June 30, 2015, the first business day after receipt of the Council's Order, the Custodian provided the document to the Complainant and submitted certified confirmation of compliance.

Therefore, the Custodian complied with the Council's June 29, 2016 Interim Order because she responded in the prescribed time frame by providing records and simultaneously providing certified confirmation of compliance.

Knowing & Willful

³ 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.

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

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

Although the Custodian’s initial response provided the document with the entirety of its content redacted pursuant to N.J.S.A. 47:1A-1.1, she disclosed bullet points 12 and 13 to the Complainant in a timely manner following the Council’s determination that those items were not exempt under OPRA. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prevailing Party Attorney’s Fees

OPRA provides that:

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

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

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

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

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

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

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

Mason at 73-76 (2008).

The Court in Mason, further held that:

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

Id. at 76.

The Complainant filed the instant Complaint, disputing the Custodian's redactions. In its June 29, 2016 Interim Order, the Council determined that two (2) bullet pointed items of the responsive record were not, in fact, exempt under OPRA and ordered the Custodian to disclose those items to the Complainant. The Custodian submitted compliance of the Order on June 30, 2016, wherein she certified that she delivered a copy of the record, with those items disclosed, to the Complainant. Accordingly, the Complainant is a prevailing party, entitled to an award of attorney's fees.

Accordingly, pursuant to the Council's June 28, 2016 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters, 387 N.J. Super. at 432. Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. at 51. Specifically, the Council determined that two bullet pointed items contained in the record should be unredacted and provided to the Complainant. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. *See* N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. at 432, and Mason, 196 N.J. at 51. **Thus, the Complainant, or his attorney, is entitled to submit an application to the Council for an award of attorney's fees within twenty (20) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b). The Custodian shall have ten (10) business days from the date of service of the application for attorney's fees to object to the attorney's fees requested. N.J.A.C. 5:105-2.13(d). To the extent that the attorney has not already received compensation, the award for attorney's fees is limited to work provided in adjudicating this matter.**

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's June 29, 2016 Interim Order because she responded in the prescribed time frame by providing records and simultaneously providing certified confirmation of compliance.
2. Although the Custodian's initial response provided the document with the entirety of its content redacted pursuant to N.J.S.A. 47:1A-1.1, she disclosed bullet points 12 and 13 to the Complainant in a timely manner following the Council's determination that those items were not exempt under OPRA. Additionally, the evidence of record does

not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

3. Pursuant to the Council's June 28, 2016 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters, 387 N.J. Super. at 432. Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. at 51. Specifically, the Council determined that two bullet pointed items contained in the record should be unredacted and provided to the Complainant. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. at 432, and Mason, 196 N.J. at 51. **Thus, the Complainant, or his attorney, is entitled to submit an application to the Council for an award of attorney's fees within twenty (20) business days following the effective date of this decision. N.J.A.C. 5:105-2.13(b). The Custodian shall have ten (10) business days from the date of service of the application for attorney's fees to object to the attorney's fees requested. N.J.A.C. 5:105-2.13(d). To the extent that the attorney has not already received compensation, the award for attorney's fees is limited to work provided in adjudicating this matter.**

Prepared By: Husna Kazmir
Staff Attorney

July 19, 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
Commissioner

INTERIM ORDER

June 28, 2016 Government Records Council Meeting

Gregory W. Kasko
Complainant

Complaint No. 2014-389

v.

Town of Westfield (Union)
Custodian of Record

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

1. The Custodian complied with the Council’s April 28, 2016 Interim Order because she responded in the prescribed extended time frame by providing the requested certification along with certified confirmation of compliance with respect to paragraph 2 of the Interim Order.
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 above within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.¹**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order

¹ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If 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.

Interim Order Rendered by the
Government Records Council
On The 28th Day of June, 2016

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: June 29, 2016

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Gregory W. Kasko¹
Complainant**

GRC Complaint No. 2014-389

v.

**Town of Westfield (Union)²
Custodial Agency**

Records Relevant to Complaint: A non-redacted copy of the police department's emergency mobile command center specifications provided to all bidders, prior to the town of Westfield's purchase, in addition to the advertisement date, newspaper edition advertisement, proof of publication, tabulation sheet showing all responses, and the list of bidders to whom the emergency mobile command center specifications were provided.

Custodian of Record: Claire J. Gray

Request Received by Custodian: November 7, 2014

Response Made by Custodian: November 14, 2014

GRC Complaint Received: November 21, 2014

Records Submitted for *In Camera* Examination: Line-item certification outlining the specific basis for exemption of each bullet point listed in the redacted Technical Specifications for the Public Safety Equipment record.

Background

April 26, 2016 Council Meeting:

At its April 26, 2016 public meeting, the Council considered the March 22, 2016 *In Camera* Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian complied with both the Council's October 28, 2015 Interim Order and the GRC's subsequent request from February 26, 2016, because she responded in the prescribed extended time frame by providing the requested records and supporting material for the Council to conduct an *in camera* inspection, as well as certified confirmation of compliance with respect to paragraph 2 of the Interim Order.

¹ Represented by A. John Blake, Esq. (Union, NJ).

² Represented by Russell M. Finestein, Esq. (Cranford, NJ).

2. The GRC began conducting an *in camera* examination on the submitted record. In order for the Council to validate the Custodian's assertions that the document withheld is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1, the Council determined that the Custodian must provide a line-item certification outlining the specific basis for exemption of each bullet point item listed in the record. This certification must be submitted *in camera* to the GRC.
3. **On the basis of the Council's determination in this matter, the Custodian must deliver³ to the Council in a sealed envelope nine (9) copies of the requested legal certification (see item #2), as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,⁴ that the certification provided is what was 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.**
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 Interim Order.

Procedural History:

On April 28, 2016, the Council distributed its Interim Order to all parties. On April 29, 2016, the Custodian's Counsel requested an additional seven business days, until May 12, 2016 to respond to the Interim Order, which the GRC granted. On May 11, 2016, the Custodian's Counsel requested an additional extension until May 17, 2016, due to "schedule conflicts." The GRC granted the extension only until May 16, 2016.

On May 13, 2016 the Custodian responded to the Council's Interim Order by delivering to the GRC in a sealed envelope nine (9) copies for an *in camera* inspection of the requested line item certification regarding the responsive record. The legal certification also addressed the Custodian's compliance with paragraph 2 of the Interim Order.⁵

Analysis

Compliance

At its April 26, 2016 meeting, the Council ordered the Custodian to deliver to the GRC nine (9) copies for an *in camera* inspection of the requested line item certification. The Council also ordered the Custodian to deliver to the GRC a legal certification that the item provided is the certification requested by the Council for the *in camera* inspection and an additional certification of compliance with respect to paragraph 2 of the Interim Order. On April 28, 2016, the Council

³ 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.

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

⁵ The GRC received the submission on May 16, 2016.

distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on May 5, 2016.

On April 29, 2016, the Custodian's Counsel requested an extension of seven (7) additional days to respond to the Interim Order, which the GRC granted until May 12, 2016. Due to "schedule conflicts," on May 11, 2016, the Custodian's Counsel requested an additional extension until May 17, 2016. The GRC granted the extension only until May 16, 2016. The Custodian's response was ultimately submitted on May 13, 2016, and received by the GRC on May 16, 2016.

Accordingly, the Custodian complied with the Council's April 28, 2016 Interim Order because she responded in the prescribed extended time frame by providing the requested certification along with certified confirmation of compliance with respect to paragraph 2 of the Interim Order.

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.

The GRC conducted an *in camera* examination on the submitted record. Based on the statements of the Police Chief and Custodian, the GRC is not satisfied the Town adequately bore the burden of proof as to the legality of redactions for the following:

- Bullet points 12 and 13 contained under the "General" category on p. 49 of the document. **These bullet points do not contain information exempt from OPRA and shall be disclosed.**

The GRC finds that the remainder of the Custodian's redactions was lawful. See N.J.S.A. 47:1A-1.1(a), (b), and (c).

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's April 28, 2016 Interim Order because she responded in the prescribed extended time frame by providing the requested certification along with certified confirmation of compliance with respect to paragraph 2 of the Interim Order.
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**

above within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.⁶

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

Prepared By: Husna Kazmir
Staff Attorney

June 21, 2016

⁶ 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.



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

INTERIM ORDER

April 26, 2016 Government Records Council Meeting

Gregory W. Kasko
Complainant

Complaint No. 2014-389

v.

Town of Westfield (Union)
Custodian of Record

At the April 26, 2016 public meeting, the Government Records Council (“Council”) considered the March 22, 2016 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian complied with both the Council’s October 28, 2015 Interim Order and the GRC’s subsequent request from February 26, 2016, because she responded in the prescribed extended time frame by providing the requested records and supporting material for the Council to conduct an *in camera* inspection, as well as certified confirmation of compliance with respect to paragraph 2 of the Interim Order.
2. The GRC began conducting an *in camera* examination on the submitted record. In order for the Council to validate the Custodian’s assertions that the document withheld is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1, the Council determined that the Custodian must provide a line-item certification outlining the specific basis for exemption of each bullet point item listed in the record. This certification must be submitted *in camera* to the GRC.
3. **On the basis of the Council’s determination in this matter, the Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested legal certification (see item #2), as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,² that the certification provided is what was 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.**

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

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

Interim Order Rendered by the
Government Records Council
On The 26th Day of April, 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: April 28, 2016

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
April 26, 2016 Council Meeting**

**Gregory W. Kasko¹
Complainant**

GRC Complaint No. 2014-389

v.

**Town of Westfield (Union)²
Custodial Agency**

Records Relevant to Complaint: A non-redacted copy of the police department's emergency mobile command center specifications provided to all bidders, prior to the town of Westfield's purchase, in addition to the advertisement date, newspaper edition advertisement, proof of publication, tabulation sheet showing all responses, and the list of bidders to whom the emergency mobile command center specifications were provided.

Custodian of Record: Claire J. Gray
Request Received by Custodian: November 7, 2014
Response Made by Custodian: November 14, 2014
GRC Complaint Received: November 21, 2014

Records Submitted for *In Camera* Examination: Previously redacted Technical Specifications for the Public Safety Equipment³

Background

October 27, 2015 Council Meeting:

At its October 27, 2015 public meeting, the Council considered the October 20, 2015 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The GRC must conduct an *in camera* review of the undisclosed records in order to determine the validity of the Custodian's assertions that the documents withheld are, in fact, exempt from disclosure based on OPRA's exemptions for administrative or technical information which would jeopardize computer security; emergency or security information which would jeopardize building or facility security; and

¹ No legal representation listed on record.

² Represented by Russell M. Finestein, Esq. (Cranford, NJ).

³ The Custodian mistakenly submitted an additional page (p. 53). No *in camera* review was conducted on that page and it may be disregarded.

security measures and surveillance techniques which would create a risk to the safety or persons, property, electronic data or software, pursuant to N.J.S.A. 47:1A-1.1 and Rivera v. Borough of Fort Lee Police Department (Bergen), GRC Complaint No. 2009-266.

2. **The Custodian must deliver⁴ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see #1 above), a document or redaction index⁵, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,⁶ 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.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On October 28, 2015, the Council distributed its Interim Order to all parties. On November 30, 2015, the Custodian responded to the Council's Interim Order by delivering to the GRC in a sealed envelope nine (9) copies for an *in camera* inspection of the non-redacted technical specifications that were responsive to the request. The legal certification also addressed the Custodian's compliance with paragraph 2 of the Interim Order.

On February 23, 2016, per the advice of legal counsel, the GRC requested that the Custodian re-submit⁷ the items requested for *in camera* inspection within five (5) business days. On February 25, 2016, the Custodian responded to this request by delivering to the GRC in a sealed envelope nine (9) copies for an *in camera* inspection of the non-redacted technical specifications that were responsive to the request. The legal certification also addressed the Custodian's compliance with paragraph 2 of the Interim Order.

Analysis

Compliance

At its October 27, 2015 meeting, the Council ordered the Custodian to deliver to the GRC nine (9) copies for an *in camera* inspection of the requested technical specifications responsive to the request. The Council also ordered the Custodian to deliver to the GRC a legal certification that the records provided are the records requested by the Council for the *in camera* inspection, a redaction index, and a certification of compliance with respect to paragraph 2 of the Interim

⁴ 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.

⁵ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

⁶ "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."

⁷ The Custodian clarified that the originally submitted documents were copies that did not reproduce well.

Order. On October 28, 2015, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on November 4, 2015.

Due to the Custodian being away on family leave until November 30, 2015, the Custodian's Counsel sought an extension of time to respond, which the GRC granted. On November 30, 2015, the Custodian delivered to the GRC nine (9) copies of the requested technical specifications, a legal certification that the records provided are the records requested by the Council for the *in camera* inspection, a redaction index, and a certification of compliance with respect to paragraph 2 of the Interim Order. Upon the advice of legal counsel, the GRC requested that the Custodian re-submit the requested materials on February 23, 2016, which she did on February 25, 2016.

Accordingly, the Custodian complied with the Council's October 28, 2015 Interim Order because she responded in the prescribed extended time frame by providing the requested records and supporting material for the Council to conduct an *in camera* inspection, along with certified confirmation of compliance with respect to paragraph 2 of the Interim Order. She additionally complied with the Council's February 23, 2016 request that she resubmit the requested records for the Council to conduct an *in camera* inspection.

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.

In the instant matter, the Custodian certified that she disclosed all records responsive to the Complainant's OPRA request. Those included: (1) Technical Specifications 2013, Furnish and Delivery of Public Safety Equipment, (2) Proof of Publication of bid notice, (3) Tabulation Sheet, showing list of bidders, and (4) a list showing to whom the specifications were provided. The Custodian certified that redactions were made to the technical specifications record, because the equipment on the unit is for "both overt and covert surveillance communications, including computer hardware and software, and information regarding a launch vehicle."

Custodian's Counsel argued that the technical specifications record was properly redacted pursuant to N.J.S.A. 47:1A-1.1, particularly in line with the following exemptions: (1) administrative or technical information regarding computer hardware, software and networks which, if disclosed, would jeopardize computer security; (2) emergency or security information or procedures for any buildings which, if disclosed, would jeopardize security of the building or facility or persons therein; (3) security measures and surveillance techniques which, if disclosed, would create a risk to the safety of persons, property, electronic data or software.

Counsel additionally argued that the GRC's prior decision in Rivera v. Borough of Fort Lee Police Department (Bergen), GRC Complaint No. 2009-266, applied, citing in relevant part,

“Recognizing that such special equipment exists and realizing that a specific police department may possess such equipment are two different issues. It is, therefore, reasonable for the agency to have an interest in keeping special operations equipment away from prying eyes.” In support of these arguments, the Custodian included a certification from the Township’s Chief of Police, David Wayman, who argued that redaction of the technical specifications was proper because “to identify the sophisticated and highly technical equipment located within and employed by the Command Center would permit one to obtain the technical specifications of said equipment, and thus, further permit one to subsequently identify both its capabilities and limitations.”

Chief Wayman additionally opined that the technical specifications, which would imply the command center’s exact or even perceived capabilities and/or limitations, should not be known to the public, “so as not to announce, intimate or in any way suggest that its features or capabilities can be circumvented or defeated.”

The OPRA standard for such information, as articulated in Rivera where it pertained to police daily duty logs recording details of surveillance techniques and staffing levels, is whether disclosure would create a risk to the safety of persons, property, electronic data, or software. N.J.S.A. 47:1A-1.1

The GRC began conducting an *in camera* examination on the submitted record. In order for the Council to validate the Custodian’s assertions that the document withheld is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1, the Council determined that the Custodian must provide a line-item certification outlining the specific basis for exemption of each bullet point item listed in the record. This certification must be submitted *in camera* to the GRC.

Knowing & Willful

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with both the Council’s October 28, 2015 Interim Order and the GRC’s subsequent request from February 26, 2016, because she responded in the prescribed extended time frame by providing the requested records and supporting material for the Council to conduct an *in camera* inspection, as well as certified confirmation of compliance with respect to paragraph 2 of the Interim Order.
2. The GRC began conducting an *in camera* examination on the submitted record. In order for the Council to validate the Custodian’s assertions that the document withheld is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1, the Council determined that the Custodian must provide a line-item certification outlining the specific basis for exemption of each bullet point item listed in the record. This certification must be submitted *in camera* to the GRC.

3. **On the basis of the Council's determination in this matter, the Custodian must deliver⁸ to the Council in a sealed envelope nine (9) copies of the requested legal certification (see item #2), as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,⁹ that the certification provided is what was 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.**
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 Interim Order.

Prepared By: Husna Kazmir
Staff Attorney

March 22, 2016¹⁰

⁸ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

⁹ "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."

¹⁰ This complaint could not be adjudicated at the Council's March 29, 2016 meeting due to lack of a quorum.



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

INTERIM ORDER

October 27, 2015 Government Records Council Meeting

Gregory W. Kasko
Complainant

Complaint No. 2014-389

v.

Town of Westfield (Union)
Custodian of Record

At the October 27, 2015 public meeting, the Government Records Council (“Council”) considered the October 20, 2014 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The GRC must conduct an *in camera* review of the undisclosed records in order to determine the validity of the Custodian’s assertions that the documents withheld are, in fact, exempt from disclosure based on OPRA’s exemptions for administrative or technical information which would jeopardize computer security; emergency or security information which would jeopardize building or facility security; and security measures and surveillance techniques which would create a risk to the safety or persons, property, electronic data or software, pursuant to N.J.S.A. 47:1A-1.1 and Rivera v. Borough of Fort Lee Police Dep’t (Bergen), GRC Complaint No. 2009-266.
2. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see #1 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.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

¹ 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."



Interim Order Rendered by the
Government Records Council
On The 27th Day of October, 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: October 28, 2015

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
October 27, 2015 Council Meeting**

**Gregory W. Kasko¹
Complainant**

GRC Complaint No. 2014-389

v.

**Town of Westfield (Union)²
Custodial Agency**

Records Relevant to Complaint: A non-redacted copy of the police department's emergency mobile command center specifications provided to all bidders, prior to the town of Westfield's purchase, in addition to the advertisement date, newspaper edition advertisement, proof of publication, tabulation sheet showing all responses, and the list of bidders to whom the emergency mobile command center specifications was provided.

Custodian of Record: Claire J. Gray

Request Received by Custodian: November 7, 2014

Response Made by Custodian: November 14, 2014

GRC Complaint Received: November 21, 2014

Background³

Request and Response:

On November 7, 2014 the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On November 14, 2014, the Custodian's Counsel responded in writing, denying the request pursuant to N.J.S.A. 47:1A-1.1, exempting from disclosure records "deemed to be confidential," including "security measures and surveillance techniques which, if disclosed, would create a risk to the safety of persons, property, electronic data or software."

In the letter response, the Custodian's Counsel noted that the Complainant's OPRA request was "almost identical" to a request made on April 29, 2013, and that documents delivered to the Complainant at that time were once again enclosed. The Custodian's Counsel noted that the additional items requested were the tabulation sheets showing all responses and the list of bidders to whom the specifications were provided. Counsel stated that he enclosed the

¹ No legal representation listed on record.

² Represented by Russell M. Finestein, Esq.

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

documents responsive to this request. As to the request for a non-redacted copy of the specifications, the Custodian's Counsel denied that portion of the request, arguing that it sought security measures and surveillance techniques deemed to be confidential and exempt from production under OPRA.

Denial of Access Complaint:

On November 17, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that he was denied access to a "public record that was advertised in the local newspaper and available to any bidder prior to the purchase of the emergency mobile command center." The Complainant further argued that as the specifications of the mobile command center were allegedly available to the public prior to its purchase by the town of Westfield, the Custodian cannot "cite 'security risk' as a reason for denial."

Statement of Information:

On January 20, 2015, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on November 7, 2014. The Custodian's Counsel responded in writing on November 14, 2014, granting in part and denying in part.

The Custodian certified that the documents requested were in the Town Clerk's office, since the requestor had previously requested the bid documents on April 29, 2013. At that time, the Police Department was sent a copy of the request and responded with a copy of the bid documents. The Custodian noted that the proof of publication and bids were filed in the Clerk's office and that the list of vendors picking up bid specifications was filed with the Police Department. The Custodian certified that she disclosed all records responsive to the Complainant's OPRA request. Those included: (1) Technical Specifications 2013 Furnish and Delivery of Public Safety Equipment, (2) Proof of Publication of bid notice, (3) Tabulation sheet showing list of bidders, and (4) List showing to whom the specifications were provided. The Custodian certified that redactions were made to the technical specifications record, because the equipment on the unit is for "both overt and covert surveillance communications, including computer hardware and software, and information regarding a launch vehicle."

Custodian's Counsel argued that the technical specifications record was properly redacted pursuant to N.J.S.A. 47:1A-1.1, particularly in line with the following exemptions:

"administrative or technical information regarding computer hardware, software and networks which, if disclosed, would jeopardize computer security,"

"emergency or security information or procedures for any buildings which, if disclosed, would jeopardize security of the building or facility or persons therein,"

"security measures and surveillance techniques which, if disclosed, would create a risk to the safety or persons, property, electronic data or software,"

The Custodian additionally argued that the GRC's prior decision in Rivera v. Borough of Fort Lee Police Dep't (Bergen), GRC Complaint No. 2009-266, applied, citing in relevant part, "Recognizing that such special equipment exists and realizing that a specific police department may possess such equipment are two different issues. It is, therefore, reasonable for the agency to have an interest in keeping special operations equipment away from prying eyes."

The Custodian's SOI contained an additional certification from the Township's Chief of Police, David Wayman, who argued that the technical specifications were properly redacted because "to identify the sophisticated and highly technical equipment located within and employed by the Command Center would permit one to obtain the technical specifications of said equipment, and thus, further permit one to subsequently identify both its capabilities and limitations."

Chief Wayman further averred that the placement and presence of the command center at the scene of large-scale incidents or events is both for the purpose of detecting criminal activities and terroristic threats and also deterring such events. Chief Wayman opined that the technical specifications, which would imply the command center's exact or even perceived capabilities and/or limitations, should not be known to the public, "so as not to announce, intimate or in any way suggest that its features or capabilities can be circumvented or defeated."

Chief Wayman additionally argued that, were the command center's capabilities and limitations widely known, the command center's ability to deter criminal and terroristic activities would be greatly and adversely affected, thereby presenting a greater risk to public safety, police, and other emergency service personnel, who may be present or operating in the area of such large-scale incidents or events.

Chief Wayman noted the command center was designed and built with direction from personnel from the Department of Defense and the Department of Homeland Security to help counter anti-terrorism. He additionally argued that revealing specifications as to its surveillance and communications equipment would possibly allow individuals to thwart these abilities by circumventing or disabling systems. He further noted the following: a wireless network connects the command center to the police department and its servers, risking a potential "hack" if specifications were revealed; the command center has the ability to communicate with all Homeland Security and anti-terrorism agencies, including the Department of Defense; knowledge of how power is distributed through the command center would create the possibility of disabling the command center; and, finally, the command center has the capabilities of, and can act, as the Township's Police Department, functioning as a portable headquarters.

Additional Party Submissions

On January 26, 2015, the Complainant submitted a response to the Custodian's SOI. The Complainant alleged that the bidding process had no stated qualifications for those allowed to bid, arguing that essentially anyone could have obtained that information. He further alleged that Chief Wyman had allowed guided tours of the mobile command center, including photos of the interior.

On September 9, 2015, the Custodian submitted a certification in response to a GRC request for additional information concerning the bidding process. The Custodian certified that in order to ascertain whether a vendor is a “responsible bidder,” a prospective bidder must provide a business card or name, company name, address, phone number, and e-mail address. The Custodian additionally stated that the two interested bidders who received bid packages by e-mail were Power Innovations International and Continental Fire. The Custodian again attached a copy of the original “Public Notice,” which was published in The Westfield Leader newspaper on or about April 4, 2013. With respect to the emergency command center’s specifications, the advertisement noted in relevant part, “Specifications may be seen or obtained at the office of the Town Clerk,” and thereafter stating the address of Westfield’s Town Hall.

That same day, the Complainant corresponded with the GRC concerning the Custodian’s certification with additional information. The Complainant again argued that “if any member of the public could obtain copies” of the requested specifications, he should be given same.

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.

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

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

Paff, 379 N.J. Super. at 354.

The court also stated that:

The statute...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 10:4-21, it also provides that the GRC “may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.”

N.J.S.A. 47:1A-7(f). This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.

Id. at 355.

Further, the court stated that:

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

Id.

Here, the Custodian has made several arguments, grounded in OPRA and other relevant cases, as to why the four (4) pages of records responsive to the request need not be disclosed. Without inspecting the withheld records, and in light of the Custodian's burden to prove a lawful denial of access, the GRC cannot conduct the "meaningful review of the basis for an agency's decision to withhold government records" contemplated under OPRA. Id. at 354.

Therefore, the GRC must conduct an *in camera* review of the undisclosed records in order to determine the validity of the Custodian's assertions that the documents withheld are, in fact, exempt from disclosure based on OPRA's exemptions for administrative or technical information which would jeopardize computer security; emergency or security information which would jeopardize building or facility security; and security measures and surveillance techniques which would create a risk to the safety or persons, property, electronic data or software, pursuant to N.J.S.A. 47:1A-1.1 and Rivera.

Knowing & Willful

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The GRC must conduct an *in camera* review of the undisclosed records in order to determine the validity of the Custodian's assertions that the documents withheld are, in fact, exempt from disclosure based on OPRA's exemptions for administrative or technical information which would jeopardize computer security; emergency or security information which would jeopardize building or facility security; and

security measures and surveillance techniques which would create a risk to the safety or persons, property, electronic data or software, pursuant to N.J.S.A. 47:1A-1.1 and Rivera v. Borough of Fort Lee Police Dep't (Bergen), GRC Complaint No. 2009-266.

2. **The Custodian must deliver⁴ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see #1 above), a document or redaction index⁵, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,⁶ 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.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Husna Kazmir
Staff Attorney

Reviewed By: Joseph D. Glover
Executive Director

October 20, 2015

⁴ 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.

⁵ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

⁶ "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."