



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 23, 2017 Government Records Council Meeting**

Richard B. Henry (On behalf of Joseph Cordaro)  
Complainant

Complaint No. 2015-155

v.

Township of Hamilton Police Department (Atlantic)  
Custodian of Record

At the May 23, 2017 public meeting, the Government Records Council (“Council”) considered the May 16, 2017 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that the Executive Director respectfully recommends that the Council dismiss the complaint because the parties have agreed to a prevailing party fee amount, thereby negating the need for Complainant’s Counsel to submit a fee application in accordance with N.J.A.C. 5:105-2.13. Therefore, no further adjudication is required.

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

Final Decision Rendered by the  
Government Records Council  
On The 23<sup>rd</sup> Day of May, 2017

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: May 30, 2017**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
May 23, 2017 Council Meeting**

**Richard B. Henry, Esq.**  
**(On Behalf of Joseph Cordaro)<sup>1</sup>**  
**Complainant**

**GRC Complaint No. 2015-155**

v.

**Township of Hamilton Police Department (Atlantic)<sup>2</sup>**  
**Custodial Agency**

**Records Relevant to Complaint:** Sent via regular mail: any and all records, reports, notes, interviews, photographs, examinations, and post mortem autopsy and related documentation pertaining to the August 5, 2013 death of Justin Cordaro, Township of Hamilton Police Department Case #13-26319.

**Custodian of Record:** Michael T. Brandenberger  
**Request Received by Custodian:** March 6, 2015  
**Response Made by Custodian:** March 11, 2015  
**GRC Complaint Received:** June 1, 2015

**Background**

April 25, 2017 Council Meeting:

At its April 25, 2017 public meeting, the Council considered the April 18, 2017 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian's Counsel failed to establish that the complaint should be reconsidered based on a mistake and extraordinary circumstances. The Custodian's Counsel has also failed to show that the Council acted arbitrarily, capriciously, or unreasonably. *See D'Atria v. D'Atria*, 242 N.J. Super. 392 (Ch. Div. 1990). Specifically, Counsel failed to provide any new arguments proving that the Council's November 15, 2016 Interim Order was arbitrary or capricious. Instead, the request for reconsideration supported the Council's decision to send this complaint to the Office of Administrative Law. Thus, the Custodian Counsel's request 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*,

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Robert S. Sandman, Esq., Hankin, Sandman, Palladino, & Weintrob (Atlantic City, NJ).

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).

2. The Council should rescind conclusion Nos. 2 and 3, which referred the complaint to Office of Administrative Law. Referring this complaint to Office of Administrative Law would not garner any new evidence that would significantly change the outcome of this complaint. Specifically, the evidence of record supports that the Complainant possesses all records ordered to be disclosed by the Council and the unlawful denial of access issue is moot. Additionally, the Council should now determine whether the Custodian knowingly and willfully violated OPRA under the totality of the circumstances and whether the Complainant is a prevailing party entitled to an award of reasonable attorney's fees.
3. The Custodian's initial response was insufficient, and he failed to comply timely with the Council's May 26, 2016 Interim Order. However, the Custodian lawfully denied access to certain records under the criminal investigatory exemption and under Health Insurance Portability and Accountability Act of 1996. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9. Further, the evidence of record now supports that the Complainant is in possession of all remaining records alleged to be at issue. 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.
4. Pursuant to the Council's May 26, 2016 Interim Order and the Custodian's ensuing actions after filing of the request for reconsideration, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, 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). Specifically, following the Council's Interim Order, the Custodian disclosed responsive records 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. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13. The Complainant's Counsel will also be required to submit a *pro hoc vice* application in accordance with N.J.A.C. 1:1-5.2, because he is not licensed to practice law in the State of New Jersey.**

### Procedural History:

On April 18, 2017, the Council distributed its Interim Order to all parties. On May 15, 2017, the Complainant's Counsel confirmed via letter (sent by facsimile and e-mail), which was copied to all parties, that a settlement on prevailing party attorney's fees had been reached.

### Analysis

#### Prevailing Party Attorney's Fees

At its April 25, 2017 meeting, the Council determined that the Complainant was a prevailing party entitled to an award of reasonable attorney's fees. The Council thus ordered that the "parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days." The Council further ordered that the parties notify of any settlement prior to the expiration of the twenty (20) business day time frame. Finally, the Council ordered that, should the parties not reach an agreement, the Complainant's Counsel would be required to "submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13. The Council further required Complainant's Counsel to submit a *pro hoc vice* application in accordance with N.J.A.C. 1:1-5.2.

On April 18, 2017, the Council distributed its Interim Order to all parties; thus, the Custodian's response was due by close of business on May 25, 2017. On May 15, 2017, the Complainant's Counsel notified the GRC that the parties had reached a settlement on fees.

Accordingly, the Council should dismiss the complaint because the parties have agreed to a prevailing party fee amount, thereby negating the need for Complainant's Counsel to submit a fee application in accordance with N.J.A.C. 5:105-2.13. Therefore, no further adjudication is required.

### Conclusions and Recommendations

The Executive Director respectfully recommends that the Council dismiss the complaint because the parties have agreed to a prevailing party fee amount, thereby negating the need for Complainant's Counsel to submit a fee application in accordance with N.J.A.C. 5:105-2.13. Therefore, no further adjudication is required.

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

May 16, 2017



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

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

CHARLES A. RICHMAN  
Commissioner

**INTERIM ORDER**

**April 25, 2017 Government Records Council Meeting**

Richard B. Henry, Esq.  
(o/b/o Joseph Cordaro)  
Complainant

Complaint No. 2015-155

v.

Township of Hamilton Police Department (Atlantic)  
Custodian of Record

At the April 25, 2017 public meeting, the Government Records Council (“Council”) considered the April 18, 2017 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian’s Counsel failed to establish that the complaint should be reconsidered based on a mistake and extraordinary circumstances. The Custodian’s Counsel has also failed to show that the Council acted arbitrarily, capriciously, or unreasonably. *See D’Atria v. D’Atria*, 242 N.J. Super. 392 (Ch. Div. 1990). Specifically, Counsel failed to provide any new arguments proving that the Council’s November 15, 2016 Interim Order was arbitrary or capricious. Instead, the request for reconsideration supported the Council’s decision to send this complaint to the Office of Administrative Law. Thus, the Custodian Counsel’s request 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).
2. The Council should rescind conclusion Nos. 2 and 3, which referred the complaint to Office of Administrative Law. Referring this complaint to Office of Administrative Law would not garner any new evidence that would significantly change the outcome of this complaint. Specifically, the evidence of record supports that the Complainant possesses all records ordered to be disclosed by the Council and the unlawful denial of access issue is moot. Additionally, the Council should now determine whether the Custodian knowingly and willfully violated OPRA under the totality of the circumstances and whether the Complainant is a prevailing party entitled to an award of reasonable attorney’s fees.



3. The Custodian's initial response was insufficient, and he failed to comply timely with the Council's May 26, 2016 Interim Order. However, the Custodian lawfully denied access to certain records under the criminal investigatory exemption and under Health Insurance Portability and Accountability Act of 1996. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9. Further, the evidence of record now supports that the Complainant is in possession of all remaining records alleged to be at issue. 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.
  
4. Pursuant to the Council's May 26, 2016 Interim Order and the Custodian's ensuing actions after filing of the request for reconsideration, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, 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). Specifically, following the Council's Interim Order, the Custodian disclosed responsive records 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. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13. The Complainant's Counsel will also be required to submit a *pro hoc vice* application in accordance with N.J.A.C. 1:1-5.2, because he is not licensed to practice law in the State of New Jersey.**

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

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: April 27, 2017**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

*Reconsideration*

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

**Richard B. Henry, Esq.  
(On Behalf of Joseph Cordaro)<sup>1</sup>  
Complainant**

**GRC Complaint No. 2015-155**

v.

**Township of Hamilton Police Department (Atlantic)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Sent via regular mail: any and all records, reports, notes, interviews, photographs, examinations, and post mortem autopsy and related documentation pertaining to the August 5, 2013 death of Justin Cordaro, Township of Hamilton Police Department Case #13-26319.

**Custodian of Record:** Michael T. Brandenberger

**Request Received by Custodian:** March 6, 2015

**Response Made by Custodian:** March 11, 2015

**GRC Complaint Received:** June 1, 2015

**Background**

**November 15, 2016 Council Meeting:**

At its November 15, 2016 public meeting, the Council considered the November 8, 2016 Supplemental Findings and Recommendations<sup>3</sup> of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian did not timely comply with the Council's May 26, 2016 Interim Order because he did not respond with an appropriate certification within the prescribed time frame. Moreover, the Custodian failed to comply with the Interim Order because he did not establish in his certification that he disclosed records to the Complainant. Nor did the Custodian certify that item 1 and items 10-25 were withheld because the

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Robert S. Sandman, Esq., Hankin, Sandman, Palladino, & Weintrob (Atlantic City, NJ).

<sup>3</sup> This complaint was prepared for adjudication at the Council's August 30, 2016 meeting; however, the complaint could not be adjudicated due to lack of a quorum. Additionally, this complaint was prepared for adjudication at the Council's September 29, 2016 meeting; however, the complaint was tabled because legal counsel requested more time to review the matter.

Custodian has personal knowledge and can otherwise demonstrate that those items were in the possession of the Complainant at the time of his OPRA request.

2. Based on the inadequate evidence of record, the GRC does not have a complete set of facts upon which to determine whether or not the Custodian unlawfully denied access. As a result, the complaint remains a contested case.
3. The GRC should refer the complaint to the Office of Administrative Law for a fact-finding hearing to determine whether the Custodian unlawfully denied access to the requested records. Finally, the OAL shall determine whether the Complainant is a prevailing party and calculate reasonable attorney's fees as might be appropriate.

#### Procedural History:

On November 15, 2016, the Council distributed its Interim Order to all parties.

On November 29, 2016, the Custodian's Counsel filed a request for reconsideration of the Council's November 16, 2016 Interim Order based on a mistake and extraordinary circumstances. Therein, the Custodian's Counsel stated that the Custodian received a subpoena on January 8, 2015, from another attorney, Kathleen F. Beers, Esq., who previously represented Mr. Cordaro. According to the Custodian's Counsel, the subpoena sought "the same material" later requested in the subject OPRA request. Custodian's Counsel certified that he responded to the subpoena by disclosing all requested records in late January 2015. Custodian's Counsel further certified that "in late January or early February of 2015," Ms. Beers possessed all records subject to the subpoena and "identical" to those responsive to the Complainant's OPRA request. Custodian's Counsel argued that because Ms. Beers "represented [Mr. Cordaro]," the Complainant "constructively" possessed all responsive records through Mr. Cordaro. Custodian's Counsel reasoned that possession by one attorney for the same litigant/requestor is "actual and/or constructive possession by the requestor."

The Custodian's Counsel also attached an additional certification by Ms. Beers to his request for reconsideration. Therein, Ms. Beers certified that the Custodian's Counsel provided her a package of records "sometime in late January of 2015," which she reviewed and found to comply with the January 8, 2015 subpoena. Ms. Beers affirmed that she forwarded the records to Mr. Cordaro, who "questioned the completeness of the file." Ms. Beers certified that she then contacted the Custodian's Counsel regarding Mr. Cordaro's concerns, and the Custodian's Counsel offered to make the entire file available for review at the Township of Hamilton ("Township"). Ms. Beers certified that Mr. Cordaro "declined to view" the file in person. Ms. Beers further certified that she advised the Custodian's Counsel at that time that she, on behalf of Mr. Cordaro, was satisfied that he had fully complied with the subpoena.

On January 11, 2017, the Complainant wrote to the GRC, advising that he received additional records following the Council's Order. The Complainant stated that Mr. Cordaro reviewed the records and advised that the he had not yet received the following records:

1. Additional photos of the crime scene at 6551 Harding Highway, Mays Landing.



2. 9-1-1 dispatch to police and first responders.
3. Communication between responders and 9-1-1 from the scene.
4. Field notes from the officers on the scene.
5. Detective Wildow's on-scene filed notes, discovery, phone conversation transcripts and notes, and list of persons interviewed.
6. Detective Robison's interviews, including those of Deanna Potenski.
7. Detective Robison's full report, "including Justin's journal entries and text messages."

On February 3, 2017, the Custodian's Counsel sent a letter to the Complainant, attaching a letter from the Custodian that addressed the records allegedly not provided to Mr. Cordaro. The Custodian's response was as follows:

1. The Custodian stated that he was disclosing three (3) pictures on an enclosed CD.
2. The Custodian stated that in February 2016, the backup disc drives on the Township's 28 Channel NiceCall Focus III Recorder (which it utilized at the time of the incident in question) failed. The Custodian stated that the unit was replaced on August 30, 2016, with no way to retrieve dispatch recordings. The Custodian noted that two (2) 9-1-1 calls were previously burned to a DVD and are being provided.
3. See response to item No. 2 above.
4. The Custodian stated that he was providing field notes with redactions of personal information (birth dates, social security numbers, and cell phone numbers).
5. The Custodian stated that Detective Wildow worked with the Atlantic County Medical Examiner's Office at the time of the incident and, as such, no records exist in the Township's possession.
6. The Custodian stated that responsive records were previously provided. However, the Custodian noted that he was again disclosing Detective Robison's three (3) page report including the interview of Ms. Potenski.
7. The Custodian stated that, as noted above, Detective Robison's full report, as well as text messages that were previously disclosed, are again being disclosed. The Custodian also sought clarification to the portion of the request seeking "journal entries."

### **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 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, the Custodian filed the request for reconsideration of the Council's Order dated November 16, 2016, on November 29, 2016, eight (8) business days from the issuance of the Council's Order.

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).

In Gordon v. City of Orange (Essex), GRC Complaint No. 2011-336, *et seq.* (May 2013), the Council determined that a hearing before the Office of Administrative Law (“OAL”) was required because the record lacked “uncontested and sufficient evidence in the record.” Id. The complainant subsequently filed a request for reconsideration wherein she provided additional evidence clarifying the facts, but failed to demonstrate the Council's decision was arbitrary and capricious. The Council denied the complainant's request for reconsideration but, armed with the new information, abandoned its Order to send the complaint to OAL and adjudicated the complaint to its conclusion instead.

In the instant matter, the Custodian's Counsel filed a request for reconsideration, asserting that the Council's Interim Order be reconsidered based on a mistake and extraordinary circumstances. As part of the reconsideration, Counsel argued that Mr. Cordaro possessed all records responsive to the subject OPRA request through Ms. Beers. Custodian's Counsel previously raised the same argument in response to the Council's May 26, 2016 Interim Order; however, this time he included a legal certification from Ms. Beers that he had not previously provided. Therein, Ms. Beers certified that she received and provided to Mr. Cordaro multiple records from Justin Cordaro's investigation file pursuant to a subpoena served on the Township in January 2015. Ms. Beers affirmed that Mr. Cordaro expressed concerns that the Township did not provide the entire investigation file but declined to pursue the matter any further. Ms. Beers certified that she subsequently advised the Township that it had satisfied the subpoena.

Thereafter, the parties exchanged correspondence that led to the Custodian addressing seven (7) items that the Complainant alleged to remain outstanding on February 3, 2017. The

Custodian disclosed records for item Nos. 1, 4, and 6. The Custodian also denied item No. 5 because no records existed. Additionally, the Custodian provided partial disclosure in item Nos. 2, 3, and 7. For item Nos. 2 and 3, the Custodian noted that the Township's 9-1-1 recorder system failed in February 2016 and that they were unable to retrieve communications between dispatchers and emergency personnel. For item No. 7, the Custodian noted that records provided for item No. 6 were responsive but that he needed clarification of "journal entries." To date, the GRC has received no correspondence from the Complainant disputing the sufficiency of the Custodian's response and disclosure of records.

Exclusively considering the Custodian's arguments and supporting documentation for reconsideration, the Council should reject Custodian Counsel's request for reconsideration of the Council's Order. Aside from not providing any explicit argument as to the relief sought, Custodian's Counsel merely reasserts arguments he proffered in response to the Council's May 26, 2016 Interim Order. While Ms. Beers' legal certification supporting Custodian Counsel's claims is new to the record, it certainly does not support that the Council's decision to send the complaint to OAL was either arbitrary or capricious. In fact, Ms. Beers' legal certification, in tandem with the Custodian's additional disclosures on February 3, 2017, supported the Council's determination at that time that it lacked adequate facts to address whether an unlawful denial of access occurred here. Thus, the Council's Interim Order sending this complaint to OAL for a fact-finding hearing was appropriate for all the reasons stated in its Order.

Notwithstanding the foregoing, as the moving party, the Custodian's Counsel was 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. In the instant matter, the Custodian's Counsel failed to establish that the complaint should be reconsidered based on a mistake and extraordinary circumstances. The Custodian's Counsel has also failed to show that the Council acted arbitrarily, capriciously, or unreasonably. *See D'Atria*, 242 N.J. Super. at 401. Specifically, Counsel failed to provide any new arguments proving that the Council's November 15, 2016 Interim Order was arbitrary or capricious. Instead, the request for reconsideration supported the Council's decision to send this complaint to OAL. Thus, the Custodian Counsel's request 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.

However, the Council should abandon its order to send the complaint to OAL as it did in *Gordon*, GRC 2011-336, because the parties submitted adequate facts during the pendency of the GRC's review of the request for reconsideration. Specifically, Ms. Beers' legal certification, as well as correspondence exchanged between the parties, supports that the Complainant reasonably possesses all records responsive to the subject OPRA request ordered by the Council to be disclosed in its May 26, 2016 Interim Order. It should be noted that the Complainant provided no clarification regarding the "journal entries" portion of item No. 7 per the Custodian's February 3, 2017 request for same. In the absence of any clarification, the Custodian was not obligated to provide any additional responses. *See Mayer v. Manchester Util. Auth. (Passaic)*, GRC Complaint No. 2013-44 (September 2013)(holding that the custodian did not unlawfully deny access to the complainant's OPRA request because he failed to provide clarification). Therefore,

the complaint no longer remains a contested case, and the issue of an unlawful denial of access is rendered moot.

Therefore, the Council should rescind conclusion Nos. 2 and 3, which referred the complaint to OAL. Referring this complaint to OAL would not garner any new evidence that would significantly change the outcome of this complaint. Specifically, the evidence of record supports that the Complainant possesses all records ordered to be disclosed by the Council and the unlawful denial of access issue is moot. Additionally, the Council should now determine whether the Custodian knowingly and willfully violated OPRA under the totality of the circumstances and whether the Complainant is a prevailing party entitled to an award of reasonable attorney's fees.

### **Knowing & Willful**

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

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

In the instant matter, the Custodian's initial response was insufficient, and he failed to timely comply with the Council's May 26, 2016 Interim Order. However, the Custodian lawfully denied access to certain records under the criminal investigatory exemption and consistent with the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”). N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9. Further, the evidence of record now supports that the Complainant possesses all remaining records alleged to be at issue. 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 (7<sup>th</sup> 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, an attorney licensed in Pennsylvania, filed the instant complaint (on behalf of his client) to dispute the Custodian's denial of access to all responsive records under the criminal investigatory exemption. N.J.S.A. 47:1A-1.1. As part of its May 26, 2016 Interim Order, the Council determined that the Custodian lawfully denied access to certain records under the criminal investigatory exemption and HIPAA. However, the Council also required that the Custodian either: 1) disclose records responsive to item Nos. 1 and 10 through 25 as identified in the Statement of Information (“SOI”) document index; or 2) provide a legal certification stating that those items were in the Complainant's possession.

Following the Custodian's failure to comply timely with the Council's Order, Custodian's Counsel filed a request for reconsideration. During the pendency of the GRC's review of said request, the Complainant identified several records he alleged remained outstanding. At least two (2) of those items (photographs, officer notes) align with items in the SOI document index. On February 3, 2017, the Custodian disclosed a number of items, including photographs and officer notes. Based on the foregoing, the GRC is satisfied that the Complainant, in part, prevailed in this complaint. Thus, as Mr. Cordaro's attorney, the Complainant is entitled to an award of reasonable attorney's fees.

Therefore, pursuant to the Council's May 26, 2016 Interim Order and the Custodian's ensuing actions after filing of the request for reconsideration, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the

custodian's conduct." Teeters, 387 N.J. Super. 432. Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, following the Council's Interim Order, the Custodian disclosed responsive records 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. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13. The Complainant's Counsel will also be required to submit a *pro hoc vice* application in accordance with N.J.A.C. 1:1-5.2, because he is not licensed to practice law in the State of New Jersey.**

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian's Counsel failed to establish that the complaint should be reconsidered based on a mistake and extraordinary circumstances. The Custodian's Counsel has also failed to show that the Council acted arbitrarily, capriciously, or unreasonably. *See* D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990). Specifically, Counsel failed to provide any new arguments proving that the Council's November 15, 2016 Interim Order was arbitrary or capricious. Instead, the request for reconsideration supported the Council's decision to send this complaint to the Office of Administrative Law. Thus, the Custodian Counsel's request 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).
2. The Council should rescind conclusion Nos. 2 and 3, which referred the complaint to Office of Administrative Law. Referring this complaint to Office of Administrative Law would not garner any new evidence that would significantly change the outcome of this complaint. Specifically, the evidence of record supports that the Complainant possesses all records ordered to be disclosed by the Council and the unlawful denial of access issue is moot. Additionally, the Council should now determine whether the Custodian knowingly and willfully violated OPRA under the totality of the circumstances and whether the Complainant is a prevailing party entitled to an award of reasonable attorney's fees.
3. The Custodian's initial response was insufficient, and he failed to comply timely with the Council's May 26, 2016 Interim Order. However, the Custodian lawfully denied access to certain records under the criminal investigatory exemption and under Health Insurance Portability and Accountability Act of 1996. N.J.S.A. 47:1A-6; N.J.S.A.

47:1A-1.1; N.J.S.A. 47:1A-9. Further, the evidence of record now supports that the Complainant is in possession of all remaining records alleged to be at issue. 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.

4. Pursuant to the Council's May 26, 2016 Interim Order and the Custodian's ensuing actions after filing of the request for reconsideration, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, 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). Specifically, following the Council's Interim Order, the Custodian disclosed responsive records 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. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13. The Complainant's Counsel will also be required to submit a *pro hoc vice* application in accordance with N.J.A.C. 1:1-5.2, because he is not licensed to practice law in the State of New Jersey.**

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

April 18, 2017





**State of New Jersey**  
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**CHRIS CHRISTIE**  
*Governor*

**KIM GUADAGNO**  
*Lt. Governor*

**CHARLES A. RICHMAN**  
*Commissioner*

**INTERIM ORDER**

**November 15, 2016 Government Records Council Meeting**

Richard B. Henry, Esq.  
(o/b/o Joseph Cordaro)  
Complainant

Complaint No. 2015-155

v.

Township of Hamilton Police Department (Atlantic)  
Custodian of Record

At the November 15, 2016 public meeting, the Government Records Council (“Council”) considered the August 23, 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 did not timely comply with the Council’s May 26, 2016 Interim Order because he did not respond with an appropriate certification within the prescribed time frame. Moreover, the Custodian failed to comply with the Interim Order because he did not establish in his certification that he disclosed records to the Complainant. Nor did the Custodian certify that item 1 and items 10-25 were withheld because the Custodian has personal knowledge and can otherwise demonstrate that those items were in the possession of the Complainant at the time of his OPRA request.
2. Based on the inadequate evidence of record, the GRC does not have a complete set of facts upon which to determine whether or not the Custodian unlawfully denied access. As a result, the complaint remains a contested case.
3. The GRC should refer the complaint to the Office of Administrative Law for a fact-finding hearing to determine whether the Custodian unlawfully denied access to the requested records. Finally, the OAL shall determine whether the Complainant is a prevailing party and calculate reasonable attorney’s fees as might be appropriate.



Interim Order Rendered by the  
Government Records Council  
On The 15<sup>th</sup> 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 16, 2016**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
November 15, 2016 Council Meeting**

**Richard B. Henry, Esq. (On Behalf of Joseph Cordaro)<sup>1</sup>      GRC Complaint No. 2015-155**  
**Complainant**

v.

**Township of Hamilton Police Department (Atlantic)<sup>2</sup>**  
**Custodial Agency**

**Records Relevant to Complaint:** Sent via regular mail: any and all records, reports, notes, interviews, photographs, examinations, and post mortem autopsy and related documentation pertaining to the August 4, 2015 death of Justin Cordaro, Township of Hamilton Police Department Case #13-26319.

**Custodian of Record:** Michael T. Brandenberger

**Request Received by Custodian:** March 6, 2015

**Response Made by Custodian:** March 11, 2015

**GRC Complaint Received:** June 1, 2015

**Background**<sup>3</sup>

May 24, 2016 Council Meeting:

At its May 24, 2016 meeting, the Government Records Council (“Council”) considered the May 17, 2015 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council therefore found that:

1. The Custodian denied the Complainant’s request on the basis that all of the records sought were criminal investigatory in nature. However, in his SOI, the Custodian only identified four items, three of which he described as criminal investigatory in nature and one of which a record that the Complainant already had. He described another twenty-five (25) as being withheld for other reasons. Accordingly, the Custodian’s initial response to the requestor, by which he justified denying access to all the records on the grounds that they were criminal investigatory in nature, was an insufficient response, as it did not contain specific reasons or the correct reason for

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Robert S. Sandman, Esq., Hankin, Sandman, Palladino, & Weintrob (Atlantic City, NJ).

<sup>3</sup> 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.

Richard N. Henry, Esq., (O.B.O Joseph Cordaro) v. Township of Hamilton Police Department (Atlantic), 2015-155 – Supplemental Findings and Recommendations of the Executive Director

the denial. DeAppolonio v Borough of Deal (Monmouth) GRC Complaint No. 2008-62 (September 2009).

2. In his certification, the Custodian identified and listed three records that are criminal investigatory in nature. The Complainant does not refute the Custodian's characterization but claims instead that because the Prosecutor indicated that there is no active ongoing homicide investigation, there is no legitimate reason to continue withholding the records. That position is inconsistent with settled law, and the Complainant advanced no arguments for why his request should be considered differently than under established law. Accordingly, the Custodian has sustained his burden that there was no unlawful denial of access to the three records that were criminal investigatory in nature. Janeczko v. NJ Dep't of Law and Pub. Safety, Div. of Crim. Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004). Hwang v. Bergen Cnty. Prosecutor's Office, GRC Complaint No. 2011-348 (January 2013).
3. The Custodian may have unlawfully denied access to item 1 and items 10-25 listed in his SOI, Section 2, as the Custodian has not demonstrated specifically what exemption justified withholding them. Therefore, the Custodian shall either disclose the aforesaid records to the Complainant or provide an affidavit stating that item 1 and items 10-25 were withheld because the Custodian has personal knowledge and can otherwise demonstrate that those items were in the possession of the Complainant at the time of his OPRA request. Paff v. City of Bayonne (Hudson), GRC Complaint No. 2012-245 (Interim Order dated July 23, 2013).
4. **The Custodian shall either: (a) comply with paragraph 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director, or (b) within five (5) business days from receipt of the Council's Interim Order, submit competent, credible evidence to the GRC which establishes that the Complainant had in his possession at the time of the request the records identified in paragraph # 3 above.**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

#### Procedural History:

On May 26, 2016, the Custodian received the Council's Interim Order. On the same day, the Custodian's Counsel wrote to the GRC, advising that "sometime in February 2016 . . . all of the requested government records [were] provided to the attorney for Mr. Cordero's estate." However, Custodian's Counsel's response to the GRC was not in affidavit format. Following the GRC's subsequent outreach, Custodian's Counsel provided his response in affidavit format on June 24, 2016.

## Analysis

### Compliance

At its May 24, 2016 meeting, the Council ordered the Custodian either: (1) to disclose records to the Complainant or (2) to provide an affidavit stating that item 1 and items 10-25 were withheld because the Custodian has personal knowledge and can otherwise demonstrate that those items were in the possession of the Complainant at the time of his OPRA request and (3) to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On May 26, 2016, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on June 3, 2016.

On May 26, 2016, the same business day after receipt of the Council's Order, the Custodian's Counsel wrote to the GRC, advising that "sometime in February 2016 . . . all of the requested government records [were] provided to the attorney for Mr. Cordero's estate." However, Custodian's Counsel's response to the GRC was not in affidavit format, as was explicitly required by the Interim Order. On June 24, 2016, fifteen (15) business days after the deadline for compliance, Custodian's Counsel provided his response in affidavit format. Custodian's Counsel certified to his personal knowledge that all records responsive to Item No. 1 and Item Nos. 10-25, as identified in the Order, were previously provided to the attorney for the Estate of Joseph Cordaro. Custodian's Counsel further asserted that "there is no further need for compliance with the Order."<sup>4</sup>

In the instant matter, the Custodian did not provide the GRC a certification within the required time frame, as required by the Interim Order. In addition, neither the Custodian nor Custodian's Counsel requested from the GRC an extension of time to comply with the Interim Order. Instead, the Custodian's counsel merely provided an uncertified letter to the GRC on May 26, 2016, stating that he gave the responsive records, specifically Item No. 1 and Item Nos. 10-25, to Kathleen Beers, Esq., the attorney for the Estate of Joseph Cordaro. Moreover, Custodian's Counsel's certification did not establish that the Custodian disclosed records to the Complainant. Nor did the certification state that item 1 and items 10-25 were withheld because the Custodian has personal knowledge and can otherwise demonstrate that those items were in the possession of the Complainant at the time of his OPRA request.

Therefore, the Custodian did not timely comply with the Council's May 26, 2016 Interim Order because he did not respond with an appropriate certification within the prescribed time frame. Moreover, the Custodian failed to comply with the Interim Order because he did not establish in his certification that he disclosed records to the Complainant. Nor did the certification prove that item 1 and items 10-25 were withheld because the Custodian has personal knowledge and can otherwise demonstrate that those items were in the possession of the Complainant at the time of his OPRA request.

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<sup>4</sup> On June 24, 2016, the Complainant responded to the Custodian's Counsel's certification, contending that the Custodian failed to comply with the Council's Interim Order.  
Richard N. Henry, Esq., (O.B.O Joseph Cordaro) v. Township of Hamilton Police Department (Atlantic), 2015-155 – Supplemental Findings and Recommendations of the Executive Director

## **Unlawful Denial of Access**

The Appellate Division has held that a complainant could not have been denied access to a requested record if he already had in his possession at the time of the OPRA request the document he sought pursuant to OPRA. Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609, (App. Div. 2008). The Appellate Division noted that “requiring a custodian to duplicate another copy of the requested record and send it to the complainant does not . . . advance the purpose of OPRA, which is to ensure an informed citizenry.” Bart, 403 N.J. Super., at 618 (citations omitted). The Appellate Division’s decision in Bart, however, turns upon the specific facts of that case. The Court stated it was “undisputed that Bart at all times had within his possession a copy of [the requested record] . . . Indeed, he attached a copy to the compliant he filed with the Council.” Id. (emphasis supplied).

Similarly, the GRC has held that when a Complainant admits that he was in possession of the requested record at the time he made the request, it is not a denial of access if the Custodian failed to provide another copy. Rodriguez v. Kean Univ., GRC Complaint No. 2014-121 (October 2014). *See also* Owoh (on behalf of O.R.) v. West-Windsor Reg’l Sch. Dist. (Mercer), GRC 2012-330 (February 2013). In addition, “[a]ny limitations on the right of access accorded by [OPRA] as amended and supplemented shall be construed in favor of the public’s right of access[.]” Paff v. City of Bayonne (Hudson), GRC Complaint No. 2012-245 (Interim Order dated July 23, 2013).

In response to the GRC’s May 24, 2015 Interim Order, the Counsel for the Custodian stated that he provided the “estate of Joseph Cordero” with the responsive records “sometime in February 2016.” The Custodian has not provided adequate proof, per the Interim Order, that the records were disclosed to the Complainant. Moreover, the Custodian did not establish that he disclosed records to the Complainant. Nor did his certification state that item 1 and items 10-25 were withheld because the Custodian has personal knowledge and can otherwise demonstrate that those items were in the possession of the Complainant at the time of his OPRA request. Finally, the Complainant has not admitted that he is in possession of the responsive records.

Based on the inadequate evidence of record, the GRC does not have a complete set of facts upon which to determine whether or not the Custodian unlawfully denied access. As a result, the complaint remains a contested case.

## **Contested Facts**

The Administrative Procedures Act provides that the 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 contested facts have 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).

In the matter currently before the Council, both the Custodian's failure to comply with the Council's Interim Order and the incomplete evidence of record create contested facts in the instant complaint. The GRC does not have enough information in the record to determine whether or not the Custodian lawfully denied access to the requested records. It is thus apparent that a fact-finding hearing will provide the most efficient and effective method for developing the record. *See also Gordon v. City of Orange (Essex)*, GRC Complaint No. 2011-256 (Interim Order dated November 18, 2014).

Accordingly, the GRC should refer the complaint to the OAL for a fact-finding hearing to determine whether the Custodian unlawfully denied access to the requested records. Finally, the OAL shall determine whether the Complainant is a prevailing party and, if so, calculate reasonable attorney's fees as might be appropriate.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not timely comply with the Council's May 26, 2016 Interim Order because he did not respond with an appropriate certification within the prescribed time frame. Moreover, the Custodian failed to comply with the Interim Order because he did not establish in his certification that he disclosed records to the Complainant. Nor did the Custodian certify that item 1 and items 10-25 were withheld because the Custodian has personal knowledge and can otherwise demonstrate that those items were in the possession of the Complainant at the time of his OPRA request.
2. Based on the inadequate evidence of record, the GRC does not have a complete set of facts upon which to determine whether or not the Custodian unlawfully denied access. As a result, the complaint remains a contested case.
3. The GRC should refer the complaint to the Office of Administrative Law for a fact-finding hearing to determine whether the Custodian unlawfully denied access to the requested records. Finally, the OAL shall determine whether the Complainant is a prevailing party and calculate reasonable attorney's fees as might be appropriate.

Prepared By: Husna Kazmir  
Staff Attorney

August 23, 2016<sup>5</sup>

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<sup>5</sup> This complaint was prepared for adjudication at the Council's August 30, 2016 meeting; however, the complaint could not be adjudicated due to lack of a quorum. Additionally, this complaint was prepared for adjudication at the Council's September 29, 2016 meeting; however, the complaint was tabled based on legal advice.

Richard N. Henry, Esq., (O.B.O Joseph Cordaro) v. Township of Hamilton Police Department (Atlantic), 2015-155 – Supplemental Findings and Recommendations of the Executive Director



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CHARLES A. RICHMAN  
Commissioner

**INTERIM ORDER**

**May 24, 2016 Government Records Council Meeting**

Richard B. Henry, Esq. (o/b/o Joseph Cordaro)  
Complainant

Complaint No. 2015-155

v.

Township of Hamilton Police Department (Atlantic)  
Custodian of Record

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

1. The Custodian denied the Complainant’s request on the basis that all of the records sought were criminal investigatory in nature. However, in his SOI, the Custodian only identified four items, three of which he described as criminal investigatory in nature and one of which a record that the Complainant already had. He described another twenty-five (25) as being withheld for other reasons. Accordingly, the Custodian’s initial response to the requestor, by which he justified denying access to all the records on the grounds that they were criminal investigatory in nature, was an insufficient response, as it did not contain specific reasons or the correct reason for the denial. DeAppolonio v Borough of Deal (Monmouth) GRC Complaint No. 2008-62 (September 2009).
2. In his certification, the Custodian identified and listed three records that are criminal investigatory in nature. The Complainant does not refute the Custodian’s characterization but claims instead that because the Prosecutor indicated that there is no active ongoing homicide investigation, there is no legitimate reason to continue withholding the records. That position is inconsistent with settled law, and the Complainant advanced no arguments for why his request should be considered differently than under established law. Accordingly, the Custodian has sustained his burden that there was no unlawful denial of access to the three records that were criminal investigatory in nature. Janeczko v. NJ Dep’t of Law and Pub. Safety, Div. of Crim. Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004). Hwang v. Bergen Cnty. Prosecutor’s Office, GRC Complaint No. 2011-348 (January 2013).
3. The Custodian may have unlawfully denied access to item 1 and items 10-25 listed in his SOI, Section 2, as the Custodian has not demonstrated specifically what exemption justified withholding them. Therefore, the Custodian shall either disclose





the aforesaid records to the Complainant or provide an affidavit stating that item 1 and items 10-25 were withheld because the Custodian has personal knowledge and can otherwise demonstrate that those items were in the possession of the Complainant at the time of his OPRA request. Paff v. City of Bayonne (Hudson), GRC Complaint No. 2012-245 (Interim Order dated July 23, 2013).

4. **The Custodian shall either: (a) comply with paragraph 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>1</sup> to the Executive Director,<sup>2</sup> or (b) within five (5) business days from receipt of the Council's Interim Order, submit competent, credible evidence to the GRC which establishes that the Complainant had in his possession at the time of the request the records identified in paragraph # 3 above.**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

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

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: May 26, 2016**

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<sup>1</sup> 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."

<sup>2</sup> 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  
GOVERNMENT RECORDS COUNCIL**

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

**Richard B. Henry, Esq. (On Behalf of Joseph Cordaro)<sup>1</sup>  
Complainant**

**GRC Complaint No.2015-155**

v.

**Township of Hamilton Police Department (Atlantic)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Sent via regular mail: any and all records, reports, notes, interviews, photographs, examinations, and post mortem autopsy and related documentation pertaining to the August 4, 2015 death of Justin Cordaro, Township of Hamilton Police Department Case #13-26319.

**Custodian of Record:** Michael T. Brandenberger

**Request Received by Custodian:** March 6, 2015

**Response Made by Custodian:** March 11, 2015

**GRC Complaint Received:** June 1, 2015

**Background<sup>3</sup>**

**Request and Response:**

On March 2, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian,<sup>4</sup> seeking the above-mentioned records. On March 11, 2015, the Custodian responded in writing, denying the request on the basis that the documents requested constituted exempt criminal investigatory records.

**Denial of Access Complaint:**

On June 1, 2015<sup>5</sup>, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the records should not

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<sup>1</sup> Joseph Cordaro, represented by Richard B. Henry, Esq. (Honesdale, PA).

<sup>2</sup> Represented by Robert S. Sandman, Esq., Hankin, Sandman, Palladino, & Weintrob (Atlantic City, NJ).

<sup>3</sup> 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.

<sup>4</sup> The Custodian’s response stated that he had received the OPRA request on March 6, 2015, but he subsequently certified in his Statement of Information that he had received the OPRA request on March 2, 2016. In either event, the Custodian’s response was timely.

<sup>5</sup> The Complainant signed his Denial of Access Complaint on May 5, 2015, but the GRC did not receive it until June 1, 2015.

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be considered exempt because the Atlantic County Prosecutor advised the Custodian on April 14, 2015 that “a homicide investigation should not be opened at this time.” The Complainant further argued that he understood that there was no ongoing investigation and therefore no reason why his request should be refused.

#### Statement of Information:

On July 2, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on March 6, 2015. The Custodian certified that he responded in writing on March 11, 2015, and denied access to the requested documents, stating that they constituted exempt criminal investigatory records. *Citing Janeczko v. NJ Dep’t of Law and Pub. Safety, Div. of Crim. Justice*, GRC Complaint No. 2002-79 and 80. In Item 9 of his SOI, the Custodian described four records that he withheld, claiming that three of them were exempt as criminal investigatory records and that the other was a record already in the Complainant’s possession. He also described another twenty-five (25) records he withheld. The Custodian certified that some of those records could not be disclosed to the Complainant, as the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) requires the estate of Justin Cordaro to sign a form releasing the documents. Others, he argued, were documents given to the Custodian’s Office by the Complainant; therefore, the Custodian did not have to provide records already in the Complainant’s possession.

#### Additional Submissions:

On December 15, 2015, the GRC sought additional information from the Custodian. The GRC asked the Custodian to clarify which items were withheld from the requestor because of the Custodian’s claim that a signed HIPAA medical release must first be obtained. On December 22, 2015, the Custodian wrote to the GRC, stating his reasonable belief that items 2 through 9 in his Document Index, Section 2, were all records that could only be released if accompanied by a proper HIPAA form. The Custodian did not specifically address the reason for withholding the other seventeen (17) items.

### Analysis

#### Insufficient Response

OPRA provides that if a “custodian is unable to comply with a request for access, the custodian *shall indicate the specific basis therefor . . .* on the request form and promptly return it to the requestor.” N.J.S.A. 47:1A-5(g)(emphasis added). The Council has held that for a denial of access to be in compliance with OPRA, the custodian must definitively state that records did not exist at the time of the initial response.

As stated in DeAppolonio v Borough of Deal (Monmouth) GRC Complaint No. 2008-62 (September 2009), GRC decisions have repeatedly supported the statutory mandate of N.J.S.A. 47:1A-5(g) as requiring that a custodian must “provide a legally valid reason” for any denial of access. To comply with OPRA, the denial “must be specific and must be sufficient to prove that a custodian’s denial is authorized by OPRA.” DeAppolonio, citing Morris v. Trenton Police Dep’t, GRC Complaint No. 2007-160 (May 2008).

In Morris, the complainant requested several records. Without further elaboration, the custodian, denied access to the requested records. The Council, in finding that the custodian violated OPRA, stated “the Custodian’s failure to supply the requestor with a detailed lawful basis for denial violates N.J.S.A. 47:1A-5(g).” Subsequently, in Rader v. Twp. of Willingboro (Burlington), GRC Complaint No. 2007-239 (June 2008), the Council, upon finding that the custodian’s written response was insufficient, noted that, “if a custodian is ‘unable to comply with a request for access, then the custodian shall indicate the specific basis’ for noncompliance.” N.J.S.A. 47:1A-5(g).

In the present case, the Custodian denied the Complainant’s request on the basis that all of the records sought were criminal investigatory in nature. However, in his SOI, the Custodian only identified four items, three of which he described as criminal investigatory in nature and one of which a record that the Complainant already had. He described another twenty-five (25) as being withheld for other reasons. Accordingly, the Custodian’s initial response to the requestor, by which he justified denying access to all the records on the grounds that they were criminal investigatory in nature, was an insufficient response, as it did not contain specific reasons or the correct reason for the denial. DeAppolonio, 2008-62.

### **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 Janeczko v. NJ Dep’t of Law and Pub. Safety, Div. of Crim. Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004), the GRC examined the status of records purported to fall under the criminal investigatory records exemption pursuant to N.J.S.A. 47:1A-1.1. There, the complainant sought access to copies of records related to alleged criminal actions committed by her son, who was allegedly killed by police officers. The Council found that under OPRA, criminal investigatory records “include records involving all manner of crimes, resolved or unresolved, and includes information that is part and parcel of an investigation, confirmed and unconfirmed” and are not accessible under N.J.S.A. 47:1A-1.1. Consequently, the complainant’s request was denied, and the Council found no violation by the Custodian, stating: “[the criminal investigatory records exemption] does not permit access to investigatory records once the investigation is complete . . . and the Council does not have a basis to withhold from access only currently active investigations and release those where the matter is resolved or closed.” *Id.*

Further, in Hwang v. Bergen Cnty. Prosecutor’s Office, GRC Complaint No. 2011-348 (January 2013), the complainant requested all reports regarding an arrest and incident report of Hwang and a codefendant. The complainant also requested all police logs for the day of the arrest. The custodian agreed to disclose the requested arrest report because it merely recorded the basic factual data for the arrest, which required only a 35-cents copy fee; however, he refused to disclose the “narrative” police logs, as they pertained to an open and ongoing criminal

investigation. The complainant disagreed with the proposition that police reports constitute exempt criminal investigatory records. The complainant asserted that the case resulted in his arrest and has since been closed.

Relying on the holding in Janeczko, the GRC stated that:

[I]n the instant matter the Custodian has certified that Item No. 1 of the Complainant's request constitutes criminal investigatory files. The Complainant has not provided any competent evidence to refute this certification. Therefore, because the requested law enforcement reports . . . constitute criminal investigatory files, the Custodian has borne his burden of proof that the denial of access was lawful pursuant to N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. [citations omitted].

Id.

OPRA also states that:

“[t]he provisions of [OPRA] shall not abrogate any exemption of a public record...from public access made pursuant to [OPRA]...regulation promulgated under the authority of any statute...” N.J.S.A. 47:1A-9(a).

In accordance with HIPAA, the New Jersey Administrative Code's provisions regarding the State Health Benefits Program state in part that:

“records considered confidential include all matters related to the coverage of individual participants and their families, mailing addresses of active and retired participants and individual files related to claims.” (Emphasis added.) N.J.A.C. 17:9-1.2.

HIPAA, 45 C.F.R. 160.103, provides that the Privacy Rule protects all individually identifiable health information held or transmitted by a covered entity or its business associate, in any form or media, whether electronic, paper, or oral. The Privacy Rule calls this information “protected health information (PHI).” *See also Schilling v. Twp. of Little Egg Harbor (Ocean)*, GRC Complaint No. 2011-294 (February 2013) and Beaver v. Twp. of Middletown, GRC Complaint No. 2005-243 (August 2006).

In Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609 (App. Div. 2008), the Appellate Division held that a complainant, who attached to his Denial of Access Complaint a copy of the record allegedly denied, could not have been denied access to a requested record if he already had it in his possession. The purposes of OPRA, it stated, are not advanced by requiring a custodian to duplicate another copy of the requested record and send it to the complainant.

Here, the Custodian advances three different reasons for denying the records. Some, he says, are criminal investigatory records and therefore exempt from release. Others, he claims,

cannot be released because the estate of Justin Cordaro would first have to sign a HIPPA release form. Still other records should not be released to the Complainant because the Complainant has those documents already in his possession.

*Documents which are Criminal Investigatory Records in nature:*

In his certification, the Custodian identified and listed three records that are criminal investigatory in nature. The Complainant does not refute the Custodian's characterization but claims instead that because the Prosecutor indicated that there is no active ongoing homicide investigation, there is no legitimate reason to continue withholding the records. That position is inconsistent with settled law, and the Complainant advanced no arguments for why his request should be considered differently than under established law. Accordingly, the Custodian has sustained his burden that there was no unlawful denial of access to the three records that were criminal investigatory in nature. Janeczko, GRC 2002-79 and 80; Hwang, GRC 2011-348.<sup>6</sup>

*Documents requiring HIPPA form release and other documents which the Complainant may already have in his possession:*

In Paff v. City of Bayonne (Hudson), GRC Complaint No. 2012-245 (Interim Order dated July 23, 2013), the custodian initially denied access to the requested court orders, complaints, and settlement agreements and directed the complainant to the Superior Court. However, in the SOI, the custodian certified that outside counsel maintained responsive records and that the City would incur additional time and legal fees to obtain, review, and disclose same. The custodian argued that the City attempted to accommodate the request by directing the complainant to the Court. However, the Council held that:

The Custodian unlawfully denied access to the responsive records because he has an obligation to obtain them from outside counsel and provide same. N.J.S.A. 47:1A-6; Paff, *supra*. Thus, the Custodian must obtain and disclose same to the Complainant, if they exist. If certain records do not exist, the Custodian must certify to this fact.

Id.

In his SOI, the Custodian certified to, identified, and listed an additional twenty-five (25) records, some of which were documents he had received from the requestor and therefore were already "in [the Complainant's] possession." The Custodian stated that some others were medical records that the Custodian could not release absent a duly authorized HIPPA release form. He added that those records were available to the Complainant "from other sources."<sup>7</sup> To clarify which items were withheld for a specific reason or reasons, the GRC requested the

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<sup>6</sup> In the SOI, the Custodian identified a fourth document as already having been supplied to the Complainant. There is nothing of record refuting that part of the Custodian's certification. Accordingly, that item was also lawfully denied. Bart, 403 N.J. Super. 609.

<sup>7</sup> A custodian may not deny access simply because the requestor could obtain the records from other and perhaps more convenient sources. See Paff v. City of Bayonne (Hudson), GRC Complaint No. 2012-245 (Interim Order dated July 23, 2013).

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Custodian to answer in a “precise” manner which items he had withheld for what reason and to explain whether multiple reasons might apply. Although the Custodian answered the request by stating he reasonably believed items 2-9 were such records that could require a signed HIPPA form before they are released, he did not address the remaining seventeen (17) items.

While a few of those remaining seventeen (17) items might arguably be in the possession of the Complainant, such as the birth certificate of Justin Cordaro and an email from Joseph Cordaro to a Detective, it remains unclear, despite the GRC’s efforts to clarify any uncertainty, which of the remaining records were withheld because they are already in the Complainant’s possession.

Accordingly, the Custodian may have unlawfully denied access to item 1 and items 10-25 listed in his SOI, Section 2, as the Custodian has not demonstrated specifically what exemption justified withholding them. Paff v. City of Bayonne (Hudson), GRC Complaint No. 2012-245 (Interim Order dated July 23, 2013). Therefore, the Custodian shall either disclose the aforesaid records to the Complainant or provide an affidavit stating that item 1 and items 10-25 were withheld because the Custodian has personal knowledge and can otherwise demonstrate that those items were in the possession of the Complainant at the time of his OPRA request.

### **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 denied the Complainant’s request on the basis that all of the records sought were criminal investigatory in nature. However, in his SOI, the Custodian only identified four items, three of which he described as criminal investigatory in nature and one of which a record that the Complainant already had. He described another twenty-five (25) as being withheld for other reasons. Accordingly, the Custodian’s initial response to the requestor, by which he justified denying access to all the records on the grounds that they were criminal investigatory in nature, was an insufficient response, as it did not contain specific reasons or the correct reason for the denial. DeAppolonio v Borough of Deal (Monmouth) GRC Complaint No. 2008-62 (September 2009).
2. In his certification, the Custodian identified and listed three records that are criminal investigatory in nature. The Complainant does not refute the Custodian’s characterization but claims instead that because the Prosecutor indicated that there is no active ongoing homicide investigation, there is no legitimate reason to continue withholding the records. That position is inconsistent with settled law, and the Complainant advanced no arguments for why his request should be considered

differently than under established law. Accordingly, the Custodian has sustained his burden that there was no unlawful denial of access to the three records that were criminal investigatory in nature. Janeczko v. NJ Dep't of Law and Pub. Safety, Div. of Crim. Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004). Hwang v. Bergen Cnty. Prosecutor's Office, GRC Complaint No. 2011-348 (January 2013).

3. The Custodian may have unlawfully denied access to item 1 and items 10-25 listed in his SOI, Section 2, as the Custodian has not demonstrated specifically what exemption justified withholding them. Therefore, the Custodian shall either disclose the aforesaid records to the Complainant or provide an affidavit stating that item 1 and items 10-25 were withheld because the Custodian has personal knowledge and can otherwise demonstrate that those items were in the possession of the Complainant at the time of his OPRA request. Paff v. City of Bayonne (Hudson), GRC Complaint No. 2012-245 (Interim Order dated July 23, 2013).
4. **The Custodian shall either: (a) comply with paragraph 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>8</sup> to the Executive Director,<sup>9</sup> or (b) within five (5) business days from receipt of the Council's Interim Order, submit competent, credible evidence to the GRC which establishes that the Complainant had in his possession at the time of the request the records identified in paragraph # 3 above.**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Ernest Bongiovanni  
Staff Attorney

May 17, 2016

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<sup>8</sup> 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."

<sup>9</sup> 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.