



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
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TRENTON, NJ 08625-0819

PHILIP D. MURPHY  
Governor

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

FINAL DECISION

August 28, 2018 Government Records Council Meeting

Matthew B. Tully  
Complainant

Complaint No. 2016-100

v.

Borough of Avon-By-The-Sea (Monmouth)  
Custodian of Record

At the August 28, 2018 public meeting, the Government Records Council (“Council”) considered the August 21, 2018 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 evidence in the record indicates that the Custodian timely responded to the Complainant’s April 4, 2016 OPRA request within the statutorily mandated seven (7) business days. Thus, there was no “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007).
2. The Custodian’s response to the Complainant’s April 18, 2016 OPRA request was legally insufficient because he failed to provide a specific lawful basis for the redactions made to the employee card and Consent Form. Therefore, the Custodian violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and Paff v. Borough of Lavallette, GRC Complaint No. 2007-209 (Interim Order dated June 25, 2008).
3. The portion of the Complainant’s April 4, 2016 OPRA request asking the Custodian to “list any periods of unpaid status” and confirm the reason why the Intervenor was separation from the Borough is an invalid request seeking information and not specific government records. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 549 (App. Div. 2005); Smith v Dep’t of Corr., GRC Complaint No. 2013-337 (July 2014), LaMantia v. Jamesburg Pub. Library (Middlesex), GRC Complaint No. 2008-140 (February 2009). Therefore, the Custodian did not unlawfully deny access to this portion of the request. N.J.S.A. 47:1A-6.
4. The Custodian unlawfully denied access to the portion of the Complainant’s April 4, 2016 OPRA request seeking the title, position, salary, payroll record, length of service, date of separation and reason therefor of the Intervenor. N.J.S.A. 47:1A-6. Pursuant to Barkley v. Essex Cnty. Prosecutor’s Office, GRC Complaint: 2012-34 (Interim Order dated April 30, 2013), the Custodian should have retrieved the most comprehensive record(s) that contained the requested personnel information and provided same to the Complainant. N.J.S.A. 47:1A-10. See also Valdes v. Union City Bd. of Educ. (Hudson), GRC Complaint No. 2011-64 (Interim Order dated August 28, 2012). However, the GRC declines to order



disclosure of responsive records containing the information since the Custodian provided such records to the Complainant in response to the April 18, 2016 OPRA request.

5. Notwithstanding the Custodian's insufficient response, he lawfully denied access to the redacted portions of the records provided to the Complainant in response to his April 18, 2016 OPRA request. N.J.S.A. 47:1A-6. The evidence in the record demonstrates that the redacted records provided the Complainant with the requisite information sought pursuant to N.J.S.A. 47:1A-10, with the remainder of the information protected from disclosure as personnel records. Vaughn v. City of Trenton (Mercer), GRC Complaint No. 2009-177 (June 2010); Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (Interim Order dated March 11, 2004). As such, the Council need not address whether the redacted information was protected under an expungement order.
6. The Custodian unlawfully denied access to the Complainant's April 4, 2016 OPRA request. N.J.S.A. 47:1A-6. Additionally, the Custodian provided an insufficient response to the Complainant's April 18, 2016 OPRA request. N.J.S.A. 47:1A-5(g). However, the Custodian's response to the Complainant's April 18, 2016 OPRA request was responsive to the April 4, 2016 OPRA request. Additionally, the Custodian lawfully denied access to the redacted portions of the responsive records. Furthermore, the evidence of record does not indicate that the Custodian's technical 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.

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 28<sup>th</sup> Day of August, 2018

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: August 30, 2018**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff  
August 28, 2018 Council Meeting**

**Mathew B. Tully<sup>1</sup>  
Complainant**

**GRC Complaint No. 2016-100**

v.

**Borough of Avon-by-the-Sea (Monmouth)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:**

April 4, 2016 OPRA Request

“Any and all records pertaining to former Avon Police Officer Keith Sandull (Date of Birth 8-28-1967) to include but not limited to his: title, position, salary, payroll record, length of service, date of separation and the reason therefor – we believe Sandull was a Police Office from appx 1995 to sometime in 1997 or 1998. According to newspaper reporting this person was arrested while on duty as a Police Officer on or about March 22, 1996. Can you please list any periods of unpaid status (i.e. likely due to a suspension). To avoid any unnecessary delay, can you confirm his date of separation and the reason for separation was a 2C:51-2 forfeiture of his position as part of plea deal to resolve an indictment?”

April 18, 2016 OPRA Request

“The following records pertaining to former Police Officer Keith Sandull: title position, salary, payroll record, length of service, date of separation and the reason therefor.”

**Custodian of Record:** Timothy M. Gallagher

**Requests Received by Custodian:** April 4, 2016; April 15, 2016

**Response Made by Custodian:** April 5, 2016; April 11, 2016; April 15, 2016; April 25, 2016

**GRC Complaint Received:** April 14, 2016; May 04, 2016<sup>3</sup>

**Background<sup>4</sup>**

April 4, 2016 Request and Response:

On April 4, 2016, the Complainant submitted an Open Public Records Act (“OPRA”)

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

<sup>2</sup> Represented by Barry A. Cooke, Esq.

<sup>3</sup> On May 4, 2016, the Complainant submitted an Amended Denial of Access Complaint.

<sup>4</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 Council Staff the submissions necessary and relevant for the adjudication of this complaint.

request to the Custodian seeking the above-mentioned records. On April 5, 2016, the Custodian responded to the Complainant, informing him that the initial date of response was by April 11, 2016. On April 11, 2016, the Custodian responded in writing, denying the access to the records as personnel records under N.J.S.A. 47:1A-10, Parreott v. Asbury Park Police Dep't, GRC Complaint No. 2011-78 (May 2012), and Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (Interim Order dated March 11, 2004). Additionally, the Custodian stated that the request was invalid since it sought information and asked questions to the Custodian.

#### Denial of Access Complaint:

On April 14, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that he did not receive a response to his OPRA request within the allotted period of time.

#### April 18, 2016 Request and Response

The Complainant contended that on April 18, 2016, he submitted another OPRA request to the Custodian, seeking the following: “[t]he following records pertaining to former Police Officer Keith Sandull: title, position, salary, payroll record, length of service, date of separation and the reason therefor.” On April 25, 2016, the Custodian responded in writing providing four (4) records to the Complainant. The records consisted of Keith Sandull’s resignation letter, a “Consent to Release of Information” form (“Consent Form”) signed by Keith Sandull, an employee card, and an ordinance from the Borough of Avon-by-the-Sea (“Borough”) listing the salaries of Borough employees, including police officers. The Complainant stated that the Consent Form and the employee card contained redactions.

On April 27, 2016, the Custodian informed the Complainant that an expungement order prevented release of the redacted information contained in the records, which were previously available for public inspection, and other redactions were made to protect private personal information.

#### Amended Denial of Access Complaint

On May 4, 2016, the Complainant submitted an Amended Denial of Access Complaint to the GRC. The Complainant asserted that records disclosed to him on April 25, 2016 in response to his April 18, 2016 OPRA request were also responsive to the April 4, 2016 request. Additionally, the Complainant asserted that the redactions made to those records were improper pursuant to G.D. v. Kenny, 2015 N.J. 275 (2011), and that personnel records maintained by a non-criminal justice agency were not subject to the confidentiality provisions under N.J.S.A. 2C:52-1.

The Complainant argued that an expungement order does not mean that previously public information contained in official records are thereafter stricken and no longer subject to public scrutiny. The Complainant also argued that N.J.S.A. 2C:52-1 pertains to records originating from the judiciary, correctional facility, or law enforcement. The Complainant stated that he is instead seeking records maintained outside of the Borough’s police department on the reasons why the employee resigned. Thus, the Complainant argued that the records sought would not be subject to

N.J.S.A. 2C:52-1 since they were maintained by the Borough's administrator and not by a court or law enforcement agency.

#### Statement of Information:

On May 6, 2016, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's first OPRA request on April 4, 2016. The Custodian certified that he responded in writing on April 11, 2016. The Custodian then certified that he received the Custodian's second OPRA request on April 18, 2016. The Custodian certified that he responded to the second request in writing on April 25, 2016, providing copies of the following records: 1) Resignation of Keith Sandull, 2) Consent to Release of Information, 3) Employee Card, and 4) Ordinance No. 13-1996. The Custodian did not elaborate further on the reasons for denying access, only referencing his letters dated April 11, 2016, April 15, 2016, and April 25, 2016. The Custodian also referenced a letter sent to the GRC on April 27, 2015, which sought guidance on the sufficiency of a response to an unrelated OPRA request submitted by the Complainant.

#### Additional Submissions:

On May 12, 2016, the Custodian sent correspondence to the GRC as a supplement to his SOI.<sup>5</sup> The Custodian noted that the OPRA request involves the New Jersey Expungement Act, N.J.S.A. 2C:52-1 et seq. The Custodian argued that N.J.S.A. 47:1A-9 requires OPRA's adherence to exemptions to public access to records established and recognized by statute, court rule, or case law. The Custodian also noted the utilization of the balancing test for release of information concerning personal details. The Custodian cited Livecchia v. Borough of Mount Arlington, 42 N.J. Super. 24 (App. Div. 2011) to identify the factors weighed in the test.

The Custodian asserted that in applying the balancing test, the matter should be dismissed, since the Borough provided the defendant with the documents and information requested. The Custodian also included a copy of the decision, Paff v. Borough of Gibbsboro, No. A-3300-11T2, 2013 N.J. Super. Unpub. LEXIS 1468 (App. Div. June 17, 2013), claiming the court held that OPRA could not override the expungement order's prohibition on access to requested records.

That same day, the Complainant responded to the Custodian's e-mail, asserting that the expungement order does not pertain to the Borough's clerk. Rather, the Complainant claimed that the expungement order pertained to the clerk for Monmouth County Superior Court, and the clerk for Howell Township Municipal Court. The Complainant also contended that the records subject to the expungement order are only for criminal justice records, and not for personnel records or other non-criminal records.

#### Intervenor Submissions:

On August 8, 2016, Keith Sandull<sup>6</sup> ("Intervenor") filed a notice of motion to intervene in

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<sup>5</sup> The correspondence was intended to also supplement Tully v. Avon-by-the-Sea (Monmouth), GRC Complaint No. 2016-101, and Tully v. Avon-by-the-Sea (Monmouth), GRC Complaint No. 2016-102, which are being adjudicated separately.

<sup>6</sup> Represented by Marguerite Kneisser, of Carluccio, Leone, Dimon, Doyle & Sacks, LLC (Toms River, NJ).

the current matter. The Intervenor asserted that the current matter directly involves him, since he is the subject of the Complainant's OPRA request. The Intervenor asserted that the Custodian properly denied access to the records since the requests sought "protected, confidential, and expunged information," and therefore not subject to access under OPRA. The Intervenor asserted that the information sought by the Complainant is protected by an expungement order dated January 11, 2002. The Intervenor also stated that the information sought was the subject of a civic action involving the Intervenor and the Complainant, in which the Complainant was seeking access to the information.

On September 8, 2016, the Complainant e-mailed the GRC, objecting to the Intervenor's motion to intervene. The Complainant asserted that the Intervenor's request is inappropriate, and potentially violated various federal laws and regulations.

On September 12, 2016, Counsel for the Intervenor responded to the Complainant's e-mail. Counsel reiterated the Intervenor's position that he is entitled to intervene and protect his privacy interests under N.J.A.C. 1:1-16.1, which states that "[a]ny person or entity not initially a party, who has a statutory right to intervene or who will be substantially, specifically and directly affected by the outcome of a contested case, may on motion, seek leave to intervene." Counsel also referenced N.J.A.C. 1:1-16.6, which states that "any person or entity with a significant interest in the outcome of a case" is permitted to move to participate. Council asserted that because the Intervenor is the subject of the Complainant's OPRA request, he has a significant interest in its outcome.

On October 26, 2016, the GRC responded to all parties, informing them that upon reviewing the motion to intervene, the Executive Director found that the Intervenor has satisfied the standard set forth in N.J.A.C. 1:1-16.1, since the disclosure or non-disclosure of the information sought would directly impact the Intervenor. The GRC added that the documents submitted by the Intervenor and responses thereafter would be placed into the file for consideration.

## Analysis

### Timeliness

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian's failure to respond within the required seven (7) business days results in a "deemed" denial. Id. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).<sup>7</sup> Thus, a custodian's failure to respond in writing to a complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007).

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<sup>7</sup> A custodian's written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

The Complainant asserted that the Custodian failed to timely provide a response to his April 4, 2016 OPRA request. The Custodian confirmed in his April 5, 2016 letter to the Complainant that the response was due by April 11, 2016. In his SOI, the Custodian included a copy of a letter dated April 11, 2016, responding to the April 4, 2016 OPRA request.

Therefore, the evidence in the record indicates that the Custodian timely responded to the Complainant's April 4, 2016 OPRA request within the statutorily mandated seven (7) business days. Thus, there was no "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11.

### **Insufficient Response**

OPRA provides that a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g). Further, in Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008), the GRC held that ". . . [t]he Custodian's response was legally insufficient because he failed to respond to each request item individually. Therefore, the Custodian has violated N.J.S.A. 47:1A-5(g)."

Additionally, OPRA requires that, when providing access to redacted records, a custodian shall provide a specific lawful basis for redactions. In Paff v. Borough of Lavallette, GRC Complaint No. 2007-209 (Interim Order dated June 25, 2008), the custodian responded in a timely manner providing redacted records to the complainant; however, the custodian failed to provide a specific legal basis for said redactions. The Council held that "[t]he Custodian's response was legally insufficient under OPRA because he failed to provide a written response setting forth a detailed and lawful basis for each redaction . . . ." Id. at 4. See also Schwarz v. N.J. Dep't of Human Serv., GRC Complaint No. 2004-60 (February 2005) (setting forth the proposition that specific citations to the law that allows a denial of access are required at the time of the denial); Renna v. Union Cnty. Improvement Auth., GRC Complaint No. 2008-86 (May 2010) (noting that N.J.S.A. 47:1A-5(g) requires a custodian of record to indicate the specific basis for noncompliance).

Here, the Custodian responded to the Complainant's April 18, 2016 OPRA request in a timely manner. However, while the Custodian provided records containing the requested personnel information, he failed to cite a specific lawful basis for the redactions contained in the Consent Form and employee card. It was not until April 27, 2016 that the Custodian provided the basis for redactions.

Accordingly, the Custodian's response to the Complainant's April 18, 2016 OPRA request was legally insufficient because he failed to provide a specific lawful basis for the redactions made to the employee card and Consent Form. Therefore, the Custodian violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and Paff, GRC 2007-209.

### **Request Validity**

In LaMantia v. Jamesburg Pub. Library (Middlesex), GRC Complaint No. 2008-140 (February 2009), the complainant sought the number of Jamesburg residents that hold library cards. The Council found that the complainant's request was a request for information, holding

that “because request Item No. 2 of the Complainant’s June 25, 2008 OPRA request seeks information rather than an identifiable government record, the request is invalid[.]” Id. (citing MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 549 (App. Div. 2005)).

In Smith v Dep’t of Corr., GRC Complaint No. 2013-337 (July 2014), the requestor sought the number of hours weekly that an inmate had accessed the prison law library. In finding the request to be an invalid request for information, the Council stated: “[R]egardless of whether this information can be gleaned from a specific government record, the amount of time available to access legal assistance constitutes information.” Id. at 5 (citing LaMantia, GRC 2008-140).

In the current matter, part of the Complainant’s April 4, 2016 OPRA request asked the Custodian to “list any periods of unpaid status . . .” and to “confirm . . . the reason for separation was a 2C:51-2 forfeiture of [the Intervenor’s] position as part of plea deal to resolve an indictment?” Similar to the request in Smith, the answers to these questions could be gleaned from specific government records, including the records the Custodian provided. GRC 2013-337. However, these questions still constitute a request for information and do not seek specific government records.

Therefore, the portion of the Complainant’s April 4, 2016 OPRA request asking the Custodian to “list any periods of unpaid status” and confirm the reason why the Intervenor was separation from the Borough is an invalid request seeking information and not specific government records. MAG, 375 N.J. Super. at 549; Smith, GRC 2013-337, LaMantia, GRC 2008-140. Thus, the Custodian did not unlawfully deny access to this portion of the request. N.J.S.A. 47:1A-6.

### **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.

OPRA provides that:

[T]he personnel or pension records of any individual in the possession of a public agency, including but not limited to records relating to any grievance filed by or against an individual, shall not be considered a government record and shall not be made available for public access, *except that an individual’s name, title, position, salary, payroll record, length of service, date of separation and the reason therefore*, and the amount and type of pension received *shall be a government record*.

[N.J.S.A. 47:1A-10 (emphasis added).]



#### April 4, 2016 OPRA Request

In Barkley v. Essex Cnty. Prosecutor's Office, GRC Complaint: 2012-34 (Interim Order dated April 30, 2013), the complainant sought the "title, position, salary, payroll record, length of service, date of separation and the reason therefor" for several individuals. The custodian denied access, asserting that the complainant's request sought information and not government records. The Council disagreed, holding that in accordance with N.J.S.A. 47:1A-10, the custodian should have retrieved "the most comprehensive record that contained the requested personnel information and provided same to the Complainant." Id. (citing Valdes v. Union City Bd. of Educ. (Hudson), GRC Complaint No. 2011-64 (Interim Order dated August 28, 2012).

The facts in the current matter parallel those in Barkley, GRC 2012-34. The Custodian asserted that the entirety of the Complainant's OPRA request sought protected personnel information and/or was an invalid request. While part of the Complainant's request invalidly seeks information and not government records, the initial portion still requested the "title, position, salary, payroll record, length of service, date of separation and the reason therefor" of the Intervenor, information which is subject to disclosure under N.J.S.A. 47:1A-10.

Therefore, the Custodian unlawfully denied access to the portion of the Complainant's April 4, 2016 OPRA request seeking the title, position, salary, payroll record, length of service, date of separation and reason therefor of the Intervenor. N.J.S.A. 47:1A-6. Similar to Barkley, GRC 2012-34, the Custodian should have retrieved the most comprehensive record(s) that contained the requested personnel information and provided same to the Complainant. N.J.S.A. 47:1A-10. See also Valdes, GRC 2011-64. However, the GRC declines to order disclosure of responsive records containing the information since the Custodian provided such records to the Complainant in response to the April 18, 2016 OPRA request.

#### April 18, 2016 OPRA Request

In response to the Complainant's April 18, 2016 OPRA request, the Custodian provided four (4) records, with redactions to two (2) of them. When asked by the Complainant, the Custodian asserted that the redactions withheld personal identifiers, and/or was information subject to an expungement order. The Complainant objected specifically to the redactions allegedly done to comply with the expungement order.

The Council is permitted to raise additional defenses regarding the disclosure of records pursuant to Paff v. Twp. of Plainsboro, 2007 N.J. Super. Unpub. LEXIS 2135 (App. Div. 2007) (certif. denied, 193 N.J. 292 (2007)).<sup>8</sup> In Paff, the complainant challenged the GRC's authority to uphold a denial of access for reasons never raised by the custodian. Specifically, the Council did not uphold the basis for the redactions cited by the custodian. The Council, on its own initiative, determined that the Open Public Meetings Act prohibited the disclosure of the redacted portions to the requested executive session minutes. The Council affirmed the custodian's denial to portions of the executive session minutes but for reasons other than those cited by the custodian. The complainant argued that the GRC did not have the authority to do anything other than determine whether the custodian's cited basis for denial was lawful. The Court held that:

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<sup>8</sup> On appeal from Paff v. Township of Plainsboro, GRC Complaint No. 2005-29 (March 2006).

The GRC has an independent obligation to “render a decision as to whether the record which is the subject of the complaint is a government record which must be made available for public access pursuant to’ OPRA . . . The GRC is not limited to assessing the correctness of the reasons given for the custodian’s initial determination; it is charged with determining if the initial decision was correct.”

The Court further stated that:

Aside from the clear statutory mandate to decide if OPRA requires disclosure, the authority of a reviewing agency to affirm on reasons not advanced by the reviewed agency is well established. Cf. Bryant v. City of Atl. City, 309 N.J. Super. 596, 629-30 (App. Div. 1998) (citing Isko v. Planning Bd. of Livingston, 51 N.J. 162, 175 (1968) (lower court decision may be affirmed for reasons other than those given below)); Dwyer v. Erie Inv. Co., 138 N.J. Super. 93, 98 (App. Div. 1975) (judgments must be affirmed even if lower court gives wrong reason), certif. denied, 70 N.J. 142 (1976); Bauer v. 141-149 Cedar Lane Holding Co., 42 N.J. Super. 110, 121 (App. Div. 1956) (question for reviewing court is propriety of action reviewed, not the reason for the action) (aff’d, 24 N.J. 139 (1957)).

In Merino, GRC 2003-110, the Council held that:

[t]he Complainant’s request to review the records of complaints filed against Officer Tuttle were properly denied by the Custodian. N.J.S.A. 47:1A-10 provides in pertinent [part] that “the personnel or pension records of any individual in the possession of a public agency, *including but not limited to* records relating to *any grievance filed by or against an individual*, shall not be considered a public record and shall not be made available for public access” [emphasis added]. As a result, records of complaints filed against Officer Tuttle and/or reprimands he has received are not subject to public access.

Further, in Vaughn v. City of Trenton (Mercer), GRC Complaint No. 2009-177 (June 2010), the Council held that:

[a]lthough the Custodian violated OPRA at N.J.S.A. 47:1A-5.g by failing to provide a response to the Complainant’s request for the disciplinary history for Trenton Police Department Detective, Robert Sheehan (retired), said record is exempt from disclosure as a personnel record pursuant to N.J.S.A. 47:1A-10 and [Merino, GRC No. 2003-110].

The Custodian asserted that the redactions made to the Consent Form and employee card were pursuant to the expungement order, which pertained to an incident involving the Intervenor. Although the Complainant disputed the redactions, the unredacted portions of the records contained all the information permitted to be disclosed under N.J.S.A. 47:1A-10; namely, the employee’s position, salary, payroll record, length of service, date of separation, and the reason therefor. The remainder of the record is protected from disclosure as a personnel record.

Therefore, notwithstanding the Custodian's insufficient response, he lawfully denied access to the redacted portions of the records provided to the Complainant in response to his April 18, 2016 OPRA request. N.J.S.A. 47:1A-6. The evidence in the record demonstrates that the redacted records provided the Complainant with the requisite information sought pursuant to N.J.S.A. 47:1A-10, with the remainder of the information protected from disclosure as personnel records. Vaughn, GRC 2009-177; Merino, 2003-110. As such, the Council need not address whether the redacted information was protected under an expungement order.

### **Knowing & Willful**

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

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (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)).

Here, the Custodian unlawfully denied access to the Complainant's April 4, 2016 OPRA request. N.J.S.A. 47:1A-6. Additionally, the Custodian provided an insufficient response to the Complainant's April 18, 2016 OPRA request. N.J.S.A. 47:1A-5(g). However, the Custodian's response to the Complainant's April 18, 2016 OPRA request was responsive to the April 4, 2016 OPRA request. Additionally, the Custodian lawfully denied access to the redacted portions of the responsive records. Furthermore, the evidence of record does not indicate that the Custodian's technical 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.

### **Conclusions and Recommendations**

The Council Staff respectfully recommends the Council find that:

1. The evidence in the record indicates that the Custodian timely responded to the Complainant's April 4, 2016 OPRA request within the statutorily mandated seven (7) business days. Thus, there was no "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order dated October 31, 2007).
2. The Custodian's response to the Complainant's April 18, 2016 OPRA request was legally insufficient because he failed to provide a specific lawful basis for the redactions made to the employee card and Consent Form. Therefore, the Custodian violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and Paff v. Borough of Lavallette, GRC Complaint No. 2007-209 (Interim Order dated June 25, 2008).
3. The portion of the Complainant's April 4, 2016 OPRA request asking the Custodian to "list any periods of unpaid status" and confirm the reason why the Intervenor was separation from the Borough is an invalid request seeking information and not specific government records. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 549 (App. Div. 2005); Smith v Dep't of Corr., GRC Complaint No. 2013-337 (July 2014), LaMantia v. Jamesburg Pub. Library (Middlesex), GRC Complaint No. 2008-140 (February 2009). Therefore, the Custodian did not unlawfully deny access to this portion of the request. N.J.S.A. 47:1A-6.
4. The Custodian unlawfully denied access to the portion of the Complainant's April 4, 2016 OPRA request seeking the title, position, salary, payroll record, length of service, date of separation and reason therefor of the Intervenor. N.J.S.A. 47:1A-6. Pursuant to Barkley v. Essex Cnty. Prosecutor's Office, GRC Complaint: 2012-34 (Interim Order dated April 30, 2013), the Custodian should have retrieved the most comprehensive record(s) that contained the requested personnel information and provided same to the Complainant. N.J.S.A. 47:1A-10. See also Valdes v. Union City Bd. of Educ. (Hudson), GRC Complaint No. 2011-64 (Interim Order dated August 28, 2012). However, the GRC declines to order disclosure of responsive records containing the information since the Custodian provided such records to the Complainant in response to the April 18, 2016 OPRA request.
5. Notwithstanding the Custodian's insufficient response, he lawfully denied access to the redacted portions of the records provided to the Complainant in response to his April 18, 2016 OPRA request. N.J.S.A. 47:1A-6. The evidence in the record demonstrates that the redacted records provided the Complainant with the requisite information sought pursuant to N.J.S.A. 47:1A-10, with the remainder of the information protected from disclosure as personnel records. Vaughn v. City of Trenton (Mercer), GRC Complaint No. 2009-177 (June 2010); Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (Interim Order dated March 11, 2004). As such, the Council need not address whether the redacted information was protected under an expungement order.
6. The Custodian unlawfully denied access to the Complainant's April 4, 2016 OPRA request. N.J.S.A. 47:1A-6. Additionally, the Custodian provided an insufficient

response to the Complainant's April 18, 2016 OPRA request. N.J.S.A. 47:1A-5(g). However, the Custodian's response to the Complainant's April 18, 2016 OPRA request was responsive to the April 4, 2016 OPRA request. Additionally, the Custodian lawfully denied access to the redacted portions of the responsive records. Furthermore, the evidence of record does not indicate that the Custodian's technical 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.

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