



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

JACQUELYN A. SUÁREZ  
Commissioner

## FINAL DECISION

### June 25, 2024 Government Records Council Meeting

Stephen Schnitzer, Esq.  
(o/b/o Vito's Trattoria, Inc.)

Complainant

v.

NJ Transit

Custodian of Record

Complaint No. 2016-140

At the June 25, 2024 public meeting, the Government Records Council ("Council") considered the June 18, 2024 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 current Custodian complied with the Council's April 30, 2024 Interim Order because he responded in the prescribed time frame providing records and simultaneously provided certified confirmation of compliance to the Executive Director.
2. Although the Custodian unlawfully redacted a portion of the responsive records, he lawfully redacted most of the remaining records reviewed *in camera* by the Council. Additionally, the Custodian lawfully denied access to the remainder of the Complainant's request. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council's April 30, 2024 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423, 432 (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, 76 (2008). Specifically, the Custodian was ordered to provide responsive records in accordance with the Council's *in camera* review. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. at 432, and Mason, 196 N.J. at 76. **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.**

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 25<sup>th</sup> Day of June 2024

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: June 27, 2024**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
June 25, 2024 Council Meeting**

**Stephen Schnitzer, Esq.<sup>1</sup>  
(on Behalf of Vito's Trattoria, Inc.)  
Complainant**

**GRC Complaint No. 2016-140**

**v.**

**New Jersey Transit<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:**

"We request all documents in the possession of New Jersey Transit ["N.J. Transit"] of Greystone Properties within the stated period of time allowed by law pursuant to the Open Public Records Act (OPRA) concerning all bids made; all valuation of bids made for RFP 15-01 ["RFP"] and all amendments to it along with the original final and prior drafts of RFP 15-01 before it was let out for bid; all discussed bid issues with anyone; or any bidding party whether it be by [N.J. Transit] and/or Greystone Properties or anyone else since the time of the announcement of RFP 15-01 through the conclusion of the bid conclusions to date for a successful bid applicant for the leasehold property stated to be Space S Lease No. L0732-0865 or any other designated leasehold related to this RFP together with all bid responses in full. This information is sought in connection with a proposed bid protest hearing. I also wish to make sure that we get receive all communications and drafts of contracts including any final version with the deemed successful applicant and all rejections letters to all of the now prevailing bidders and any requests by them for a protest hearing."

**Custodian of Record:** Whitman J. Portillo<sup>3</sup>

**Requests Received by Custodian:** February 29, 2016

**Response Made by Custodian:** March 9, 2016; March 16, 2016

**GRC Complaint Received:** May 12, 2016

**Background**

**April 30, 2024 Council Meeting:**

At its April 30, 2024 public meeting, the Council considered the April 23, 2024 *In Camera* Findings and Recommendations 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:

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<sup>1</sup> The Complainant represents Vito's Trattoria, Inc.

<sup>2</sup> Represented by Deputy Attorney General Caroline Vachier.

<sup>3</sup> The current Custodian of Record is Rocio Munoz.

1. The current Custodian complied with the Council's November 8, 2023 Interim Order because he responded in the prescribed time frame providing nine (9) redacted and unredacted copies of the *in camera* documents and simultaneously provided certified confirmation of compliance to the Executive Director.
2. **On the basis of the Council's determination in this matter, the current Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order. Further, the current Custodian shall simultaneously deliver<sup>4</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>5</sup> to the Executive Director.<sup>6</sup>**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the current Custodian's compliance with the Council's Interim Order.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

#### Procedural History:

On May 2, 2024, the Council distributed its Interim Order to all parties. On May 9, 2024, the current Custodian responded to the Council's Interim Order. The current Custodian certified that he received the GRC's Interim Order on May 7, 2024. The current Custodian further certified that he provided the Complainant the relevant twelve (12) documents in accordance with the Council's *In Camera* Examination Findings simultaneously with his response to the Council. The current Custodian also provided certified confirmation of compliance with the Executive Director.

### Analysis

#### Compliance

At its April 30, 2024 meeting, the Council ordered the Custodian to comply with the Council's *in camera* findings and provide certification, in accordance with N.J. Court Rules, R. 1:4-4, to the Executive Director. On May 2, 2024, the Council distributed its Interim Order to all

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<sup>4</sup> The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

<sup>5</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>6</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.

parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on May 9, 2024.

On May 9, 2024, the date of the deadline, the Custodian responded to the Council's Order, providing records to the Complainant in accordance with the Order. The Custodian also provided certified confirmation of compliance to the Executive Director.

Therefore, the current Custodian complied with the Council's April 30, 2024 Interim Order because he responded in the prescribed time frame providing records and simultaneously provided certified confirmation of compliance to the Executive Director.

### **Knowing & Willful**

OPRA states that "[a] public official, officer, employee or custodian who knowingly and 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. 1983)); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

Although the Custodian unlawfully redacted a portion of the responsive records, he lawfully redacted most of the remaining records reviewed *in camera* Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 76 (2008). Additionally, the Custodian lawfully denied access to the remainder of the Complainant's request. 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 Appellate Division 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, 71 (2008), the 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.” (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. Further, the Supreme Court expressed concern that the catalyst theory would spawn extra litigation over attorney's fees. Id. at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

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

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

OPRA itself contains broader language on attorney's fees than the former RTKL did. OPRA provides that “[a] requestor who prevails in any proceeding shall be

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

[Mason at 73-76.]

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, New Jersey v. Singer, 469 U.S. 832 (1984).

[Id. at 76.]

Here, the Complainant’s request sought in part submitted bids for an RFP issued by N.J. Transit. In response, the Custodian provided copies of the requested bids with redactions. The Complainant then filed the instant action, challenging the redactions.

In determining whether the Complainant is a prevailing party entitled to attorney’s fees, the GRC is satisfied that the evidence of record supports a conclusion in the affirmative. The Custodian initially provided redacted bid proposals claiming the redactions were in part made to protect personal information. However, after conducting an *in camera* review the Council found that some of the redactions were improper and ordered the disclosure of the redacted information. Thus, a causal nexus exists between this complaint and the change in the Custodian’s conduct. Mason, 196 N.J. at 76.

Therefore, pursuant to the Council’s April 30, 2024 Interim Order, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters, 387 N.J. Super. 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, the Custodian was ordered to provide responsive records in accordance with the Council’s *in camera* review. 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.**

## Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The current Custodian complied with the Council's April 30, 2024 Interim Order because he responded in the prescribed time frame providing records and simultaneously provided certified confirmation of compliance to the Executive Director.
2. Although the Custodian unlawfully redacted a portion of the responsive records, he lawfully redacted most of the remaining records reviewed *in camera* by the Council. Additionally, the Custodian lawfully denied access to the remainder of the Complainant's request. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to the Council's April 30, 2024 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423, 432 (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, 76 (2008). Specifically, the Custodian was ordered to provide responsive records in accordance with the Council's *in camera* review. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. at 432, and Mason, 196 N.J. at 76. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Prepared By: Samuel A. Rosado  
Staff Attorney

June 18, 2024





PHILIP D. MURPHY  
Governor

TAHESHA L. WAY  
Lieutenant Governor

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

JACQUELYN A. SUÁREZ  
Acting Commissioner

## INTERIM ORDER

### April 30, 2024 Government Records Council Meeting

Stephen Schnitzer, Esq.  
(o/b/o Vito's Trattoria, Inc.)  
Complainant

Complaint No. 2016-140

v.  
NJ Transit  
Custodian of Record

At the April 30, 2024 public meeting, the Government Records Council ("Council") considered the April 23, 2024 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 current Custodian complied with the Council's November 8, 2023 Interim Order because he responded in the prescribed time frame providing nine (9) redacted and unredacted copies of the *in camera* documents and simultaneously provided certified confirmation of compliance to the Executive Director.
2. **On the basis of the Council's determination in this matter, the current Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order. Further, the current Custodian shall simultaneously deliver<sup>1</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>2</sup> to the Executive Director.<sup>3</sup>**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the current Custodian's compliance with the Council's Interim Order.

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<sup>1</sup> The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

<sup>2</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>3</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.

4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the  
Government Records Council  
On The 30<sup>th</sup> Day of April 2024

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 2, 2024**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director  
April 30, 2024 Council Meeting**

**Stephen Schnitzer, Esq.<sup>1</sup>  
(on Behalf of Vito's Trattoria, Inc.)  
Complainant**

**GRC Complaint No. 2016-140**

**v.**

**New Jersey Transit<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:**

"We request all documents in the possession of New Jersey Transit ["N.J. Transit"] of Greystone Properties within the stated period of time allowed by law pursuant to the Open Public Records Act (OPRA) concerning all bids made; all valuation of bids made for RFP 15-01 ["RFP"] and all amendments to it along with the original final and prior drafts of RFP 15-01 before it was let out for bid; all discussed bid issues with anyone; or any bidding party whether it be by [N.J. Transit] and/or Greystone Properties or anyone else since the time of the announcement of RFP 15-01 through the conclusion of the bid conclusions to date for a successful bid applicant for the leasehold property stated to be Space S Lease No. L0732-0865 or any other designated leasehold related to this RFP together with all bid responses in full. This information is sought in connection with a proposed bid protest hearing. I also wish to make sure that we get receive all communications and drafts of contracts including any final version with the deemed successful applicant and all rejections letters to all of the now prevailing bidders and any requests by them for a protest hearing."

**Custodian of Record:** Whitman J. Portillo<sup>3</sup>

**Requests Received by Custodian:** February 29, 2016

**Response Made by Custodian:** March 9, 2016; March 16, 2016

**GRC Complaint Received:** May 12, 2016

**Records Submitted for *In Camera* Examination:** Four (4) redacted and unredacted copies of RFPs submitted for RFP 15-01 along with corresponding communications related to the success or rejection of such RFPs.

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<sup>1</sup> The Complainant represents Vito's Trattoria, Inc.

<sup>2</sup> Represented by Deputy Attorney General Caroline Vachier.

<sup>3</sup> The current Custodian of Record is Rocio Munoz.

Stephen Schnitzer, Esq. (on Behalf of Vito's Trattoria, Inc.) v. N.J. Transit, 2016-140 – *In Camera* Findings and Recommendations of the Executive Director

## Background

### November 8, 2023 Council Meeting:

At its November 8, 2023 public meeting, the Council considered the October 31, 2023<sup>4</sup> 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 portion of the Complainant's request seeking "documents" and "all discussed bid issues" is invalid. OPRA does not require the Custodian to perform the research necessary to locate responsive records. MAG Enm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Twp. of Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Assoc. v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); Feiler-Jampel v. Somerset Cnty. Prosecutor's Office, GRC Complaint No. 2007-190 (Interim Order dated March 26, 2008). Further, the portions of the Complainant's request seeking "communications" is invalid because they did not include all of the criteria required under Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010). See Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order dated May 24, 2011). Thus, the Custodian did not unlawfully deny access to the request seeking the aforementioned records. N.J.S.A. 47:1A-6.
2. With respect to draft RFPs and contracts, the Custodian did not unlawfully deny access to that portion of the Complainant's OPRA request. N.J.S.A. 47:1A-6. Such documents are protected from disclosure under the deliberative process privilege. N.J.S.A. 47:1A-1.1; Libertarians for Transparent Gov't v. Gov't Records Council, 453 N.J. Super. 83, 90-91 (App. Div.), certif. denied, 233 N.J. 484 (2018); O'Shea v. West Milford BOE, GRC Complaint No. 2004-93 (April 2006).
3. The GRC must conduct an *in camera* review of the redacted records to validate the Custodian's contention that they contain information protected by OPRA's competitive advantage exemption; confidential, trade secret, proprietary, commercial and financial information exemption; and privacy interests exemption. See Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005) and N.J.S.A. 47:1A-1.1.
4. **The Custodian must deliver<sup>5</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion no. 3 above), nine (9) copies of**

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<sup>4</sup> This complaint was prepared for adjudication since the Council's February 26, 2019 meeting, but could not be adjudicated due to lack of quorum.

<sup>5</sup> The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

the redacted records, a document or redaction index<sup>6</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,<sup>7</sup> that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within ten (10) business days from receipt of the Council's Interim Order.

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.
6. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

#### Procedural History:

On November 15, 2023, the Council distributed its Interim Order to all parties. On November 29, 2023, the current Custodian responded to the Council's Interim Order, providing an *in camera* package along with a certification and document index.

Within the legal certification, the current Custodian certified he was the Custodian's supervisor at the time of the request. The current Custodian certified that he provided redacted and unredacted copies of the proposals sought for *in camera* review. The current Custodian certified that the redactions were made under the following bases: N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-1.1; Executive Order 26 (Gov. McGreevey 2002).

#### Analysis

##### Compliance

At its November 8, 2023 meeting, the Council ordered the Custodian to submit nine (9) redacted and unredacted copies of the responsive bid proposals and communications at issue in this complaint for *in camera* review. The Council also ordered the Custodian to simultaneously provide certified confirmation of compliance, in accordance with R. 1:4-4 to the Executive Director. On November 15, 2023, the Council distributed its Interim Order to all parties, providing the Custodian ten (10) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on November 30, 2023.

On November 29, 2023, the ninth (9<sup>th</sup>) business day after receipt of the Council's Order, the current Custodian responded in writing, providing nine (9) redacted and unredacted copies of the requested bid proposals and accompanying information. The current Custodian also provided a redaction index and submitted certified confirmation of compliance to the Executive Director.

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<sup>6</sup> The document or redaction index should identify the record, and/or each redaction asserted and the lawful basis for the denial.

<sup>7</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."

Stephen Schnitzer, Esq. (on Behalf of Vito's Trattoria, Inc.) v. N.J. Transit, 2016-140 – *In Camera* Findings and Recommendations of the Executive Director

Therefore, the current Custodian complied with the Council's November 8, 2023 Interim Order because he responded in the prescribed time frame providing nine (9) redacted and unredacted copies of the *in camera* documents and simultaneously provided certified confirmation of compliance to the Executive Director.

### **Unlawful Denial of Access**

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request "with certain exceptions." N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful. N.J.S.A. 47:1A-6.

OPRA provides that "a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy . . ." N.J.S.A. 47:1A-1. The Supreme Court has explained that N.J.S.A. 47:1A-1's safeguard against disclosure of personal information is substantive and requires "a balancing test that weighs both the public's strong interest in disclosure with the need to safeguard from public access personal information that would violate a reasonable expectation of privacy." Burnett v. Cnty. of Bergen, 198 N.J. 408, 422-23, 427 (2009) (citing Doe v. Poritz, 142 N.J. 1, 88 (1995)).

However, in Brennan v. Bergen Cnty. Prosecutor's Office, 233 N.J. 330, 342 (2018), the Court held that before applying the balancing test, "a custodian must present a colorable claim that public access to the records requested would invade a person's objectively reasonable expectation of privacy." The Court found that if the custodian failed to show a "colorable claim" of privacy, "there is no need to resort to the Doe factors." Id. Therefore, the GRC must initially determine if the custodian passed the initial threshold of presenting a "colorable claim" of privacy, before moving forward with the balancing test.

In Brennan, the Bergen County Prosecutor's Office held a public auction for property seized by the agency. Id. at 333-34. To participate, bidders completed a registration form which listed their names, addresses, telephone numbers, and e-mail addresses. Id. The Court found that because the bidders voluntarily participated in a public auction for items forfeited by the government, it was unreasonable for them to expect that their information would remain private. Id. at 342-43. Moreover, the Court held that because the auction involved the sale of government property, the need for transparency was needed to "guard against possible abuses." Id. at 343. Thus, the Court found that "OPRA's plain terms call for the disclosure of . . . the names and addresses of successful bidders." Id.

OPRA also provides that the definition of a government record shall not include ". . . information which, if disclosed, would give an advantage to competitors or bidders . . ." N.J.S.A. 47:1A-1.1 (emphasis added). In situations where a requestor sought access to bids during the selection process, the Council has determined that same are exempt from disclosure under this exemption. See Renna v. Cnty. of Union, GRC Complaint No. 2003-100 (February 2004); Fisher v. Lakewood Bd. of Educ. (Ocean), GRC Complaint No. 2006-193 (Interim Order dated June 27,

2007); Bond v. Borough of Washington (Warren), GRC Complaint No. 2009-324 (Final Decision dated March 29, 2011); Taylor v. N.J. Dep't of Treasury, Div. of Purchase & Property, GRC Complaint No. 2015-395 (Interim Order dated January 25, 2022).

OPRA further provides that:

A government record shall not include . . . trade secrets and proprietary commercial or financial information obtained from any source. For the purposes of this paragraph, trade secrets shall include data processing software obtained by a public body under a licensing agreement which prohibits its disclosure (emphasis added).

[N.J.S.A. 47:1A-1.1.]

In Newark Morning Ledger Co. v. N.J. Sports & Exposition Auth., 423 N.J. Super. 140 (App. Div. 2011), the Appellate Division elaborated on defining trade secret and proprietary information and its application to OPRA's proprietary and trade secret exemption:

Relying on the Court's guidance set forth in Lamorte Burns & Co. v. Walters, 167 N.J. 285, 299-301, 770 A.2d 1158 (2001), we considered "the key elements" to determine when commercial financial information was proprietary. [CWA, 417 N.J. Super. at 356,]. Lamorte suggested we must analyze "the relationship of the parties at the time of disclosure[,] . . . the intended use of the information[,] and "the expectations of the parties." Ibid. (citing Lamorte, *supra*, 167 N.J. at 299-300, 770 A.2d 1158). "[U]nder OPRA, if the document contains commercial or proprietary information it is not considered a government record and not subject to disclosure." Id. at 358, 9 A.3d 1064. We concluded the investment agreements sought by the plaintiffs were proprietary as their content was not intended for wide dissemination, the "[d]efendants' expectation of confidentiality [was] manifest" and the agreements delineated the specific terms and specific persons who may review the information. Id. at 359, 9 A.3d 1064. Further,

[e]ach agreement contains specific information about the capitalization of the partnership, its commencement and termination date, and other information pertinent to the operational fortunes of the partnership. Finally, each agreement is a complex document. Each reflects years of experience and expertise by trained legal and financial professionals. Id. at 359-60, 9 A.3d 1064.

In analyzing whether information qualifies as "trade-secrets," a term not defined by OPRA, Id. at 360, 9 A.3d 1064, we considered the Court's prior reliance on Comment b of the Restatement of Torts § 757 (1939). Id. at 361, 9 A.3d 1064 (citing Hammock v. Hoffmann-LaRoche, 142 N.J. 356, 384, 662 A.2d 546 (1995)). The comment provides: "[a] trade secret may consist of any . . . compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it." Ibid. (quoting Restatement of Torts § 757 cmt. b (1939)). Other considerations include the extent

to which the information is known outside of the owner's business, the extent to which it is known by employees of the owner, the measures taken to guard the secrecy of the information, the value of the information to the owner and competitors, the effort expended to develop the information, and the ease or difficulty by which the information can be duplicated. Ibid. (citing Hoffmann-LaRoche, 142 N.J. at 384, 662 A.2d 546).

“Trade secrets are a peculiar kind of property. Their only value consists in their being kept private. If they are disclosed or revealed, they are destroyed.” Trump's Castle Assocs. v. Tallone, 275 N.J. Super. 159, 163, 645 A.2d 1207 (App. Div. 1994) (quoting In re Iowa Freedom of Info. Council, 724 F.2d 658, 662 (8th Cir. 1983)).

[Newark Morning Ledger, 423 N.J. Super. at 169.]

Further, in McCormack v. State of N.J. Dep't of Treasury, GRC Complaint No. 2013-357 (Interim Order dated May 24, 2016), the Council performed an *in camera* review of bid proposals related to processing tax returns. The GRC notes that the bids disclosed there contained only redactions, as opposed to some of the records here being withheld in their entirety. Notwithstanding, the Council ultimately held that the Custodian lawfully denied access to multiple information redacted within those proposals, inclusive of the “Federal Employer Identification Number” (“FEIN”), employee and subcontractor contact information, and pertinent information relating to each bidder's internal processes and networks. N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-1.1; Burnett v. Cnty. of Bergen, 402 N.J. Super. 319 (App. Div. 2008); Comm'ns Workers of Am., AFL-CIO (“CWA”) v. Rousseau, 417 N.J. Super. 341, 357 (App. Div. 2010). See also Taylor, GRC 2015-395.

OPRA also provides that its provisions:

[S]hall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to [OPRA]; any other statute; resolution of either or both Houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law; federal regulation; or federal order.

[N.J.S.A. 47:1A-9(a) (emphasis added).]

In Taylor, Esq. v. New Jersey Dep't of Treas., Div. of Purchase & Property, GRC Complaint No. 2016-62 (August 2018), the complainant sought score sheets and evaluation sheets pertaining to a bid for services. The custodian provided the score sheets but redacted the names of the evaluation committee members. The complainant asserted there was no statutory provision which protects the identities of the members, or any reason to conceal them at the point of the request. However, the custodian certified that at the time of the request no contract had been awarded for the RFP at issue, because a bidder's protest was still being evaluated. The Council ultimately held that N.J.S.A. 52:34-10.3(c) protects the identities of the members until a contract is awarded, and therefore lawfully denied access.



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

| Record or Redaction Number               | Record Name/Date | Description of Record or Redaction   | Custodian's Explanation/ Citation for Non-disclosure or Redactions  | Findings of the <i>In Camera</i> Examination <sup>8</sup>   |
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| NR-017 to NR-025<br><br>NR-027 to NR-032 | Bronx House Bid  | Page 17 - Design Concept<br><br>Page 18 – Improvements to Location<br><br>Pages 19, 20 – Design Improvements<br><br>Page 21 – Signage<br><br>Page 22 – Additional Improvements<br><br>Page 23 – Cost of Improvements | Trade secret and proprietary commercial or financial information; advantage to competitors and bidders: <u>N.J.S.A. 47:1A-1.1</u> . | The redaction of these pages identifies Bronx House's proposed design concept, cost estimates, and estimated schedule for construction.<br><br>The removed material clearly falls within the parameters of the "advantage" and "trade secret" exemptions. Specifically, disclosure of the project details, costs, and designs details would have significantly hampered Bronx House's bidding position. Therefore, the Custodian lawfully denied access to this portion of the bid. <u>N.J.S.A. 47:1A-1.1</u> ; <u>N.J.S.A. 47:1A-6</u> . |

<sup>8</sup> **Unless expressly identified for redaction, everything in the record shall be disclosed.** For purposes of identifying redactions, unless otherwise noted a paragraph/new paragraph begins whenever there is an indentation and/or a skipped space(s). The paragraphs are to be counted starting with the first whole paragraph in each record and continuing sequentially through the end of the record. If a record is subdivided with topic headings, renumbering of paragraphs will commence under each new topic heading. Sentences are to be counted in sequential order throughout each paragraph in each record. Each new paragraph will begin with a new sentence number. If only a portion of a sentence is to be redacted, the word in the sentence which the redaction follows or precedes, as the case may be, will be identified and set off in quotation marks. If there is any question as to the location and/or extent of the redaction, the GRC should be contacted for clarification before the record is redacted. The GRC recommends the redactor make a paper copy of the original record and manually "black out" the information on the copy with a dark colored marker, then provide a copy of the blacked-out record to the requester.

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|                                |                 | <p>Page 24 – Construction Schedule</p> <p>Page 25 – Marketing Plan</p> <p>Page 27 – Menu</p> <p>Pages 28 to 31 – Design Renderings</p> <p>All above pages barring headers and titles were fully redacted.</p>  |  |  |
| NR-034<br><br>NR-036 to NR-044 | Bronx House Bid | <p>Page 34 – Titled, “Financial Capability”. The total net worth of the investors is redacted.</p> <p>Pages 36 to 43 – Appendices A-H containing financial information of each potential investor.</p> <p>Page 44 – Cover letter with net worth of the potential investors redacted. The mailing address and e-mail address of the author also redacted.</p> | <p>Privacy Interest: <u>N.J.S.A. 47:1A-1; Burnett v. Cnty. of Bergen</u>, 198 <u>N.J.</u> 408 (2009).</p> <p>Financial information: Executive Order No. 26 (Gov. McGreevey, 2002) (“EO 26”).</p> | <p>The redacted information contains the financial information of potential investors, including their combined net worth. On the cover letter, the mailing address and e-mail address of Mr. Kapoor, one of the lead investors, is redacted.</p> <p>1. The financial information and net worth of the investors clearly fall within the “financial information” considered exempt from disclosure under EO 26. Therefore, the Custodian lawfully denied access to this portion of the bid. <u>N.J.S.A. 47:1A-6; N.J.S.A 47:1A-9(a); EO 26.</u></p> <p>2. There is no colorable claim of privacy for the contact information even if personal since they are</p> |

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|                  |                 |   |   | used as the point of contact for a proposed business entity submitting a bid for a public contract.<br><b>Therefore, the Custodian unlawfully denied this portion of the bid and must disclose same. See <u>Brennan</u>, 230 <u>N.J.</u> 330.</b>  |
| NR-054 to NR-072 | Bronx House Bid | Pages 54 to 56 – Personal Financial Statement of Mr. Kapoor (pages withheld entirely)<br><br>Pages 58 to 72 – 2014 Tax Return of Mr. Kapoor (pages withheld entirely) | Financial information: EO 26.   | The financial information clearly falls within the “financial information” considered exempt from disclosure under EO 26. Therefore, the Custodian lawfully denied access to this portion of the bid. <u>N.J.S.A.</u> 47:1A-6; <u>N.J.S.A.</u> 47:1A-9(a); EO 26.  |
| NR-074           | Bronx House Bid | Cover letter from Chase Bank regarding Mr. Kapoor. His home address and amount of liquid assets were redacted.  | Privacy Interest: <u>N.J.S.A.</u> 47:1A-1; <u>Burnett v. Cnty. of Bergen</u> , 198 <u>N.J.</u> 408 (2009).<br><br>Financial information: EO 26. | 1. The financial information clearly falls within the “financial information” considered exempt from disclosure under EO 26 which expressly exempts a natural person’s assets and liabilities. Therefore, the Custodian lawfully denied access to this portion of the bid. <u>N.J.S.A.</u> 47:1A-6; <u>N.J.S.A.</u> 47:1A-9(a); EO 26.<br><br>2. Unlike the purported business address and e-mail address, Mr. Kapoor’s home address is not used a point of contact for the proposed business entity. Therefore, a |

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|                  |                 |  |   | colorable claim of privacy exists. Therefore, without a balancing test from the parties, the Custodian lawfully denied access to this information.  |
| NR-077 to NR-116 | Bronx House Bid | <p>Pages 77 to 78 – Personal Financial Statement of Mr. DiFabio (pages withheld entirely)</p> <p>Pages 80 to 116 – 2014 Tax Return of Mr. DiFabio (pages withheld entirely)</p>  | Financial information: EO 26.   | The financial information clearly falls within the “financial information” considered exempt from disclosure under EO 26. Therefore, the Custodian lawfully denied access to this portion of the bid. <u>N.J.S.A. 47:1A-6</u> ; <u>N.J.S.A. 47:1A-9(a)</u> ; EO 26. |
| NR-119 to NR-127 | Bronx House Bid | <p>Pages 119 to 120 – Personal Financial Statement of Mr. Cioffi (pages withheld entirely)</p> <p>Pages 122 to 127 – 2014 Tax Return of Mr. Cioffi (pages withheld entirely)</p> | Financial information: EO 26.   | The financial information clearly falls within the “financial information” considered exempt from disclosure under EO 26. Therefore, the Custodian lawfully denied access to this portion of the bid. <u>N.J.S.A. 47:1A-6</u> ; <u>N.J.S.A. 47:1A-9(a)</u> ; EO 26. |
| NR-128 to NR-132 | Bronx House Bid | 5-Year Pro Forma. Each page fully redacted.  | Trade secret and proprietary commercial or financial information; advantage to competitors and bidders: <u>N.J.S.A. 47:1A-1.1</u> . | <p>The “pro forma” is the vendor’s anticipated income and expenses for the first five (5) years of operation.</p> <p>The redacted information falls within the “advantage” exemption.</p>   |

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|        |                 |  |   | Specifically, disclosing Bronx House's projected expenses and earnings would be severely injured if revealed to other bidders. Thus, the Custodian lawfully denied access to this portion of the bid. <u>N.J.S.A. 47:1A-1.1</u> ; <u>N.J.S.A. 47:1A-6</u> .  |
| NR-133 | Bronx House Bid | Division of Purchase and Property Chapter 51/EO 117 Vender Certification and Disclosure of Political Contributions Form. Mr. Kapoor's e-mail address is redacted.  | Privacy Interest: <u>N.J.S.A. 47:1A-1</u> ; <u>Burnett v. Cnty. of Bergen</u> , 198 <u>N.J.</u> 408 (2009). | As noted in NR-034, because the e-mail address is the sole point of contact for the prospective business entity, it lacks a colorable claim of privacy, even if the e-mail address was personal. <b>Therefore, the Custodian unlawfully denied this portion of the bid and must disclose same.</b> See <u>Brennan</u> , 230 <u>N.J.</u> 330.   |
| NR-146 | Fratelli Bid    | Division of Purchase and Property Chapter 51/EO 117 Vender Certification and Disclosure of Political Contributions Form. The vendor's mailing address, e-mail address, and Federal Employer Identification Number ("FEIN") are redacted. | Privacy Interest: <u>N.J.S.A. 47:1A-1</u> ; <u>Burnett v. Cnty. of Bergen</u> , 198 <u>N.J.</u> 408 (2009). | As noted in NR-133, the contact information of a business entity submitting a public contract does not have a colorable claim of privacy. <b>Therefore, the Custodian unlawfully denied this portion of the bid and must disclose same.</b> See <u>Brennan</u> , 230 <u>N.J.</u> 330.<br><br>However, the FEIN is akin to a social security number, and therefore was lawfully redacted under the privacy interest exemption. See <u>McCormack</u> , GRC 2013-357. |

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| NR-149 to NR-155 | Fratelli Bid | <p>Pages 149 to 150 - Construction schedule and improvement costs. Fully redacted.</p> <p>Pages 152 to 155 – Proposed menu fully withheld from disclosure.</p> | Trade secret and proprietary commercial or financial information; advantage to competitors and bidders: <u>N.J.S.A. 47:1A-1.1</u> . | Like NR-017 <i>et seq.</i> , The removed material clearly falls within the parameters of the “advantage” and “trade secret” exemptions. Specifically, disclosure of the project details, costs, and designs would have significantly hampered Fratelli’s bidding position. Therefore, the Custodian lawfully denied access to this portion of the bid. <u>N.J.S.A. 47:1A-1.1</u> ; <u>N.J.S.A. 47:1A-6</u> . |
| NR-156 / NR-158  | Fratelli Bid | Articles of Organization. Process address redacted on both pages.  | Privacy Interest: <u>N.J.S.A. 47:1A-1</u> ; <u>Burnett v. Cnty. of Bergen</u> , 198 N.J. 408 (2009).                                | The point of contact for the business entity is a matter of public record, and therefore does not have a colorable claim of privacy. <b>Therefore, the Custodian unlawfully denied this portion of the bid and must disclose same.</b> See <u>Brennan</u> , 230 N.J. 330.  |
| NR-160 to NR-164 | Fratelli Bid | 5-Year Pro Forma. Each page fully redacted.  | Trade secret and proprietary commercial or financial information; advantage to competitors and bidders: <u>N.J.S.A. 47:1A-1.1</u> . | Like NR-128, the redacted information falls within the “advantage” exemption. Specifically, disclosing Bronx House’s projected expenses and earnings would be severely injured if revealed to other bidders. Thus, the Custodian lawfully denied access to this portion of the bid. <u>N.J.S.A. 47:1A-1.1</u> ; <u>N.J.S.A. 47:1A-6</u> .  |
| NR-165 to NR-166 | Fratelli Bid | Personal address of Alfred Catalanotto and Dominic   | Privacy Interest: <u>N.J.S.A. 47:1A-1</u> ; <u>Burnett v. Cnty.</u>   | Because the addresses are used as a point of contact for the business submitting a public contract, they do  |

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|                  |              | Catalanotto redacted.  | <u>of Bergen</u> , 198 N.J. 408 (2009).   | not have a colorable claim of privacy. <b>Therefore, the Custodian unlawfully denied this portion of the bid and must disclose same.</b> See <u>Brennan</u> , 230 N.J. 330.  |
| NR-167 to NR-171 | Fratelli Bid | 2014 Tax Returns of Messrs. Catalanotto withheld entirely.   | Financial information: EO 26.   | The financial information clearly falls within the “financial information” considered exempt from disclosure under EO 26. Therefore, the Custodian lawfully denied access to this portion of the bid. <u>N.J.S.A. 47:1A-6</u> ; <u>N.J.S.A. 47:1A-9(a)</u> ; EO 26.  |
| NR-172           | Fratelli Bid | Cover sheet of bid proposal. Contact information including mailing address, e-mail address, and phone number redacted. | Privacy Interest: <u>N.J.S.A. 47:1A-1</u> ; <u>Burnett v. Cnty. of Bergen</u> , 198 N.J. 408 (2009).                                | The point of contact for the business entity is a matter of public record, and therefore does not have a colorable claim of privacy. <b>Therefore, the Custodian unlawfully denied this portion of the bid and must disclose same.</b> See <u>Brennan</u> , 230 N.J. 330.  |
| NR-173 to NR-178 | Fratelli Bid | Pages 175 to 177 - Proposed menu pages entirely.<br><br>Page 178 – Venue layout page withheld entirely.                | Trade secret and proprietary commercial or financial information; advantage to competitors and bidders: <u>N.J.S.A. 47:1A-1.1</u> . | Like NR-149, the removed material clearly falls within the parameters of the “advantage” and “trade secret” exemptions. Specifically, disclosure of the project details and designs would have significantly hampered Fratelli’s bidding position. Therefore, the Custodian lawfully denied access to this portion of the bid. <u>N.J.S.A. 47:1A-1.1</u> ; <u>N.J.S.A. 47:1A-6</u> . |

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| NR-180            | Fratelli Bid | Improvement Schedule. Body redacted.                                      | Trade secret and proprietary commercial or financial information; advantage to competitors and bidders: <u>N.J.S.A. 47:1A-1.1</u> . | Like NR-149, the removed material clearly falls within the parameters of the “advantage” and “trade secret” exemptions. Specifically, disclosure of the project details and costs would have significantly hampered Fratelli’s bidding position. Therefore, the Custodian lawfully denied access to this portion of the bid. <u>N.J.S.A. 47:1A-1.1</u> ; <u>N.J.S.A. 47:1A-6</u> . |
| NR-182            | Fratelli Bid | Resumes of Messrs. Catalanotto. Education and family background redacted. | Privacy Interest: <u>N.J.S.A. 47:1A-1</u> ; <u>Burnett v. Cnty. of Bergen</u> , 198 <u>N.J.</u> 408 (2009).                         | The names of Messrs. Catalanotto’s family members, along with their education background and outside activity are redacted.<br><br>In this instance, there exists a reasonable expectation of privacy since this information is unrelated to the merits of the bid proposal. Thus, the Custodian lawfully denied access.   |
| NR-192 and NR-194 | Fratelli Bid | Personal addresses of Messrs. Catalanotto redacted.                       | Privacy Interest: <u>N.J.S.A. 47:1A-1</u> ; <u>Burnett v. Cnty. of Bergen</u> , 198 <u>N.J.</u> 408 (2009).                         | Like NR-165 and NR-166 because the addresses are used as a point of contact for the business submitting a public contract, they do not have a colorable claim of privacy. <b>Therefore, the Custodian unlawfully denied this portion of the bid and must disclose same.</b> See <u>Brennan</u> , 230 <u>N.J.</u> 330.  |



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| NR-193 and NR-195          | Fratelli Bid   | Personal financial details of Messrs. Catalanotto redacted.  | Financial information: EO 26.  | This information is explicitly identified as exempt under EO 26, and therefore, the Custodian lawfully denied access.   |
| NR-208                     | Fuel Pizza Bid | Page 208 - Copy of check made to NJ Transit. Account and Routing number redacted.  | Trade secret and proprietary commercial or financial information; advantage to competitors and bidders: <u>N.J.S.A. 47:1A-1.1.</u> | Bank account information of commercial entities fall within the trade secret and proprietary financial information, and therefore the Custodian lawfully denied access. <u>N.J.S.A. 47:1A-1.</u>  |
| NR-211<br>NR-213 to NR-219 | Fuel Pizza Bid | <p>Page 211 – Rendering of the establishment and description of the interior redacted.</p> <p>Pages 213 to 215 – Construction schedule and costs. Cost and details redacted.</p> <p>Pages 216 to 218 – Unique factors and proposed menu. Factors and items redacted.</p> <p>Page 219 – Rendering and description of exterior signage redacted.</p> | Trade secret and proprietary commercial or financial information; advantage to competitors and bidders: <u>N.J.S.A. 47:1A-1.1.</u> | Like NR-034 <i>et seq.</i> , the removed material clearly falls within the parameters of the “advantage” and “trade secret” exemptions. Specifically, disclosure of the project details and costs would have significantly hampered Fuel Pizza’s bidding position. Therefore, the Custodian lawfully denied access to this portion of the bid. <u>N.J.S.A. 47:1A-1.1</u> ; <u>N.J.S.A. 47:1A-6.</u> |

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| NR-224           | Fuel Pizza Bid | Names of the Chief Operating Officer, Chief Financial Officer, and creator and designer of the 'Fuel' logo and existing restaurants redacted.  | Privacy Interest: <u>N.J.S.A. 47:1A-1; Burnett v. Cnty. of Bergen</u> , 198 N.J. 408 (2009).<br><br>Trade secret and proprietary commercial or financial information; advantage to competitors and bidders: <u>N.J.S.A. 47:1A-1.1</u> . | Although the Custodian did not elaborate, the GRC has previously held that redacting employee names was lawful because they implicate a privacy interest. Therefore, the Custodian lawfully denied access to the information. <u>See McCormack</u> , GRC 2013-357.  |
| NR-231 to NR-261 | Fuel Pizza Bid | Page 231 – 1 <sup>st</sup> page of Operating Agreement of Fuel Pizza Newark LLC. Header is unredacted; remainder is redacted.<br><br>Pages 232 to 260 – Operating Agreement pages fully withheld from disclosure.<br><br>Page 260 – Last page of Operating Agreement. Membership Interest percentage redacted. | Trade secret and proprietary commercial or financial information; advantage to competitors and bidders: <u>N.J.S.A. 47:1A-1.1</u> .<br><br>Financial information: EO 26.  | The operating agreement appears to be an internal agreement between the lead investor and the parent company.<br><br>In accordance with <u>CWA</u> , this information is protected and as trade secret. Thus, the Custodian lawfully denied access to this information. <u>See also McCormack</u> , GRC 2013-357.<br><br>Additionally, ownership interest percentage is exempt under EO 26, therefore the Custodian lawfully denied access to same. |
| NR-264           | Fuel Pizza Bid | 2014 revenue, income, and  | Trade secret and proprietary commercial or  | The revenue, income, and operating costs are financial information  |

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|                 |                             | operating costs redacted.  | financial information; advantage to competitors and bidders: <u>N.J.S.A. 47:1A-1.1</u> .   | contemplated by the exemption. Therefore, the Custodian lawfully denied access to same.   |
| NR-265 / NR-266 | Fuel Pizza Bid              | <p>Page 265 – Net Worth Statement redacted entirely.</p> <p>Page 266 – Pro Forma and projected profit and loss redacted entirely</p>                                     | <p>Trade secret and proprietary commercial or financial information; advantage to competitors and bidders: <u>N.J.S.A. 47:1A-1.1</u>.</p> <p>Financial information: EO 26.</p> | <p>The net worth, assets, and liabilities of a natural person are explicitly exempt under EO 26, therefore the Custodian lawfully denied access.</p> <p>Additionally, like NR-128 <i>et seq.</i>, the pro forma and projected profit and loss are exempt under the advantage and trade secret exemptions. Therefore, the Custodian lawfully denied access to this portion of the bid.</p> |
| NR-270          | Fuel Pizza Bid              | Division of Purchase and Property Chapter 51/EO 117 Vender Certification and Disclosure of Political Contributions Form. The vendor’s address and phone number redacted. | Privacy Interest: <u>N.J.S.A. 47:1A-1; Burnett v. Cnty. of Bergen</u> , 198 <u>N.J.</u> 408 (2009).  | As noted in NR-133, the contact information of a business entity submitting a public contract does not have a colorable claim of privacy. <b>Therefore, the Custodian unlawfully denied this portion of the bid and must disclose same.</b> See <u>Brennan</u> , 230 <u>N.J.</u> 330.   |
| NR-281          | Vito’s Trattoria (“VT”) Bid | Cover Letter. VT President’s personal address redacted.  | Privacy Interest: <u>N.J.S.A. 47:1A-1; Burnett v. Cnty. of Bergen</u> , 198 <u>N.J.</u> 408 (2009).  | There exists a privacy interest in the President’s personal address. Therefore, the Custodian lawfully denied access to same. <u>N.J.S.A. 47:1A-1</u> .   |

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|------------------|----------------------|--|---|--|
| NR-285 to NR-289 | Vito's Trattoria Bid | Improvements to Location - Each page fully redacted, to include projected construction costs, timeline, and unique aspects to the establishment. | Trade secret and proprietary commercial or financial information; advantage to competitors and bidders: <u>N.J.S.A. 47:1A-1.1</u> .                           | Like NR-017 <i>et seq.</i> , The removed material clearly falls within the parameters of the “advantage” and “trade secret” exemptions. Specifically, disclosure of the project details, costs, and designs would have significantly hampered VT's bidding position. Therefore, the Custodian lawfully denied access to this portion of the bid. <u>N.J.S.A. 47:1A-1.1</u> ; <u>N.J.S.A. 47:1A-6</u> . |
| NR-290 to NR-291 | Vito's Trattoria Bid | Concept Menu redacted.   | Trade secret and proprietary commercial or financial information; advantage to competitors and bidders: <u>N.J.S.A. 47:1A-1.1</u> .                           | Like NR-017 <i>et seq.</i> , The removed material clearly falls within the parameters of the “advantage” and “trade secret” exemptions. Specifically, disclosure of the proposed menu and design could significantly hamper VT's bidding position. Therefore, the Custodian lawfully denied access to this portion of the bid. <u>N.J.S.A. 47:1A-1.1</u> ; <u>N.J.S.A. 47:1A-6</u> .                   |
| NR-293           | Vito's Trattoria Bid | Experience Section - VT President's home address redacted.   | Privacy Interest: <u>N.J.S.A. 47:1A-1</u> ; <u>Burnett v. Cnty. of Bergen</u> , 198 <u>N.J.</u> 408 (2009).   | The Custodian lawfully denied access to the President's personal address for same reason noted in NR-281.  |
| NR-296           | Vito's Trattoria Bid | Experience Section - Names of manager and sales associates redacted.   | Privacy Interest: <u>N.J.S.A. 47:1A-1</u> ; <u>Burnett v. Cnty. of Bergen</u> , 198 <u>N.J.</u> 408 (2009).<br><br>Trade secret and proprietary commercial or | As noted in NR-224, the Custodian lawfully denied access to the responsive information because it implies a privacy interest. <u>McCormack</u> , GRC 2013-357  |

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|                  |                      |   | financial information; advantage to competitors and bidders: <u>N.J.S.A. 47:1A-1.1.</u>   |   |
| NR-302           | Vito's Trattoria Bid | Proposed Employee Schedule - Number of employees proposed to work each day redacted.  | Privacy Interest: <u>N.J.S.A. 47:1A-1; Burnett v. Cnty. of Bergen</u> , 198 <u>N.J.</u> 408 (2009).<br><br>Trade secret and proprietary commercial or financial information; advantage to competitors and bidders: <u>N.J.S.A. 47:1A-1.1.</u> | Disclosure of this information would reveal sensitive information on VT's work practices. Thus, the GRC lawfully denied access to this information.   |
| NR-314 to NR 316 | Vito's Trattoria Bid | VT President's Financial Statement - 1 <sup>st</sup> page fully redacted. Remaining pages withheld entirely.  | Financial information: EO 26.   | The net worth, assets, and liabilities of a natural person are explicitly exempt under EO 26, therefore the Custodian lawfully denied access.   |
| NR-321           | Vito's Trattoria Bid | Division of Purchase and Property Chapter 51/EO 117 Vender Certification and Disclosure of Political Contributions Form - Vendor's e-mail address redacted. | Privacy Interest: <u>N.J.S.A. 47:1A-1; Burnett v. Cnty. of Bergen</u> , 198 <u>N.J.</u> 408 (2009).   | As noted in NR-133 <i>et seq.</i> , the contact information of a business entity submitting a public contract does not have a colorable claim of privacy. <b>Therefore, the Custodian unlawfully denied this portion of the bid and must disclose same.</b> See <u>Brennan</u> , 230 <u>N.J.</u> 330. |

|                  |  |  |  |  |
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| NR-329 to NR-332 | Vito's Trattoria Bid   | Improvements to Location - Each page fully redacted, to include projected construction costs, timeline, and unique aspects to the establishment. | Trade secret and proprietary commercial or financial information; advantage to competitors and bidders: <u>N.J.S.A. 47:1A-1.1</u> .                              | Like NR-285 <i>et seq.</i> , The removed material clearly falls within the parameters of the “advantage” and “trade secret” exemptions. Specifically, disclosure of the project details, costs, and designs would have significantly hampered VT's bidding position. Therefore, the Custodian lawfully denied access to this portion of the bid. <u>N.J.S.A. 47:1A-1.1</u> ; <u>N.J.S.A. 47:1A-6</u> . |
| NR-335 to NR-337 | Vito's Trattoria Bid   | VT President's Financial Statement – Balance sheet - 1 <sup>st</sup> page entirely redacted; remaining pages completely withheld.                | Financial information: EO 26.  | The Custodian lawfully redacted the information for same reasons as stated in NR-314.  |
| NR-338 to NR-341 | Vito's Trattoria Bid   | Design Layout - Each page entirely withheld.   | Trade secret and proprietary commercial or financial information; advantage to competitors and bidders: <u>N.J.S.A. 47:1A-1.1</u> .                              | The Custodian lawfully redacted the information for same reasons as stated in NR-314.  |
| NR-342 to NR-347 | Rejection/Acceptance Letters (rejection letters also included copies of cashier's check) | Recipients' home address and cashier's check number redacted in each letter.<br><br>Account Number and Routing                                   | Privacy Interest: <u>N.J.S.A. 47:1A-1</u> ; <u>Burnett v. Cnty. of Bergen</u> , 198 N.J. 408 (2009).<br><br>Trade secret and proprietary commercial or financial | For the reasons stated above, the personal addresses of the parties were lawfully withheld by the Custodian due to an existing privacy interest.<br><br>Bank account information of commercial entities fall within the trade secret and   |

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|------------------|-----------------------|--|---|--|
|                  |                       | Number of each check redacted.   | information; advantage to competitors and bidders: <u>N.J.S.A. 47:1A-1.1.</u>   | proprietary financial information exemption. Additionally, the bank account information of private individuals is exempt under EO 26. Therefore, the Custodian lawfully denied access to this information. <u>N.J.S.A. 47:1A-1.</u>  |
| NR-348           | Attendance Sheet      | Redactions made to phone numbers, fax numbers, and personal e-mail addresses.                        | Privacy Interest: <u>N.J.S.A. 47:1A-1; Burnett v. Cnty. of Bergen</u> , 198 <u>N.J.</u> 408 (2009).   | As noted above, a colorable claim of privacy exists for personal contact information not used as a point of contact for a participating vendor. Therefore, the Custodian lawfully denied access to this information. <u>N.J.S.A. 47:1A-1.</u>  |
| NR-349 to NR-352 | Score Sheets          | Redactions made to the names of the panelists.   | Advantage to competitors and bidders. <u>N.J.S.A. 47:1A-1.1.</u>  | In accordance with <u>Taylor</u> , GRC 2016-62, the names of the panelists are protected under <u>N.J.S.A. 52:34-10.3(c)</u> , as VT issued a protest against the bid award at the time of the request. Therefore, the Custodian lawfully denied access to this information. <u>N.J.S.A. 47:1A-9(a).</u> |
| NR-353 to NR-392 | Tenant Status Reports | Redactions made to personal e-mail addresses, home addresses, check numbers, and cell phone numbers. | Privacy Interest: <u>N.J.S.A. 47:1A-1; Burnett v. Cnty. of Bergen</u> , 198 <u>N.J.</u> 408 (2009).<br><br>Trade secret and proprietary information; advantage to competitors and | As noted above, a colorable claim of privacy exists for personal contact information not used as a point of contact for a participating vendor. Therefore, the Custodian lawfully denied access to this information. <u>N.J.S.A. 47:1A-1.</u>  |

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|------------------|---------------------------|--|---|---|
|                  |                           |  | bidders. <u>N.J.S.A.</u> 47:1A-1.1.   |   |
| NR-393 to NR-424 | Additional Correspondence | Redactions made to personal e-mails, home addresses, and cell phone numbers. | Privacy Interest: <u>N.J.S.A.</u> 47:1A-1; <u>Burnett v. Cnty. of Bergen</u> , 198 N.J. 408 (2009). | As noted above, a colorable claim of privacy exists for personal contact information not used as a point of contact for a participating vendor. Therefore, the Custodian lawfully denied access to this information. <u>N.J.S.A.</u> 47:1A-1. |

Thus, the Custodian lawfully denied access to most of the withheld bids' information under the "advantage" and "trade secret" exemptions. N.J.S.A. 47:1A-1.1; Taylor, GRC 2015-395; McCormack, GRC 2013-357. Further, the Custodian lawfully denied access to private information under OPRA's privacy interest exemption. N.J.S.A. 47:1A-1. However, the Custodian unlawfully denied access to some of the bidders' contact information and shall disclose same accordingly, as there is no colorable claim of privacy for such information in a public bid. Brennan, 230 N.J. 330.

### **Knowing & Willful**

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

### **Prevailing Party Attorney's Fees**

The Council defers analysis of whether the Complainant is a prevailing party pending the current Custodian's compliance with the Council's Interim Order.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The current Custodian complied with the Council's November 8, 2023 Interim Order because he responded in the prescribed time frame providing nine (9) redacted and unredacted copies of the *in camera* documents and simultaneously provided certified confirmation of compliance to the Executive Director.
2. **On the basis of the Council's determination in this matter, the current Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order. Further,**



**the current Custodian shall simultaneously deliver<sup>9</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>10</sup> to the Executive Director.<sup>11</sup>**

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

Prepared By: Samuel A. Rosado  
Staff Attorney

April 23, 2024

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<sup>9</sup> The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

<sup>10</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>11</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

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PHILIP D. MURPHY  
Governor

TAHESHA L. WAY  
Lieutenant Governor

JACQUELYN A. SUÁREZ  
Acting Commissioner

### INTERIM ORDER

#### November 8, 2023 Government Records Council Meeting

Stephen Schnitzer, Esq.  
(o/b/o Vito's Trattoria, Inc.)

Complaint No. 2016-140

Complainant

v.

NJ Transit

Custodian of Record

At the November 8, 2023 public meeting, the Government Records Council ("Council") considered the October 31, 2023 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 portion of the Complainant's request seeking "documents" and "all discussed bid issues" is invalid. OPRA does not require the Custodian to perform the research necessary to locate responsive records. MAG Enm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Twp. of Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Assoc. v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); Feiler-Jampel v. Somerset Cnty. Prosecutor's Office, GRC Complaint No. 2007-190 (Interim Order dated March 26, 2008). Further, the portions of the Complainant's request seeking "communications" is invalid because they did not include all of the criteria required under Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010). See Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order dated May 24, 2011). Thus, the Custodian did not unlawfully deny access to the request seeking the aforementioned records. N.J.S.A. 47:1A-6.
2. With respect to draft RFPs and contracts, the Custodian did not unlawfully deny access to that portion of the Complainant's OPRA request. N.J.S.A. 47:1A-6. Such documents are protected from disclosure under the deliberative process privilege. N.J.S.A. 47:1A-1.1; Libertarians for Transparent Gov't v. Gov't Records Council, 453 N.J. Super. 83, 90-91 (App. Div.), *certif. denied*, 233 N.J. 484 (2018); O'Shea v. West Milford BOE, GRC Complaint No. 2004-93 (April 2006).
3. The GRC must conduct an *in camera* review of the redacted records to validate the Custodian's contention that they contain information protected by OPRA's competitive advantage exemption; confidential, trade secret, proprietary, commercial and financial

information exemption; and privacy interests exemption. See Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005) and N.J.S.A. 47:1A-1.1.

4. **The Custodian must deliver<sup>1</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion no. 3 above), nine (9) copies of the redacted records, a document or redaction index<sup>2</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,<sup>3</sup> that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within ten (10) business days from receipt of the Council's Interim Order.**
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.
6. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the  
Government Records Council  
On The 8<sup>th</sup> Day of November 2023

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 9, 2023**

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<sup>1</sup> The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

<sup>2</sup> The document or redaction index should identify the record, and/or each redaction asserted and the lawful basis for the denial.

<sup>3</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."

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
November 8, 2023 Council Meeting**

**Stephen Schnitzer, Esq.<sup>1</sup>  
(on Behalf of Vito's Trattoria, Inc.)  
Complainant**

**GRC Complaint No. 2016-140**

**v.**

**New Jersey Transit<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:**

"We request all documents in the possession of New Jersey Transit ["N.J. Transit"] of Greystone Properties within the stated period of time allowed by law pursuant to the Open Public Records Act (OPRA) concerning all bids made; all valuation of bids made for RFP 15-01 ["RFP"] and all amendments to it along with the original final and prior drafts of RFP 15-01 before it was let out for bid; all discussed bid issues with anyone; or any bidding party whether it be by [N.J. Transit] and/or Greystone Properties or anyone else since the time of the announcement of RFP 15-01 through the conclusion of the bid conclusions to date for a successful bid applicant for the leasehold property stated to be Space S Lease No. L0732-0865 or any other designated leasehold related to this RFP together with all bid responses in full. This information is sought in connection with a proposed bid protest hearing. I also wish to make sure that we get receive all communications and drafts of contracts including any final version with the deemed successful applicant and all rejections letters to all of the now prevailing bidders and any requests by them for a protest hearing."

**Custodian of Record:** Whitman J. Portillo

**Requests Received by Custodian:** February 29, 2016

**Response Made by Custodian:** March 9, 2016; March 16, 2016

**GRC Complaint Received:** May 12, 2016

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

**Request and Response:**

On February 29, 2016, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On March 9, 2016, the Custodian

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<sup>1</sup> The Complainant represents Vito's Trattoria, Inc.

<sup>2</sup> Represented by Deputy Attorney Caroline Vachier.

<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 Council Staff the submissions necessary and relevant for the adjudication of this complaint.

Stephen Schnitzer, Esq. (on Behalf of Vito's Trattoria, Inc.) v. N.J. Transit, 2016-140 – Findings and Recommendations of the Executive Director

sought an extension of time to respond to the Complainant's OPRA request until March 16, 2016. On March 16, 2016, the Custodian responded in writing, providing records to the Complainant. The Custodian stated that certain records were redacted to protect personal information in accordance with N.J.S.A. 47:1A-1.1. The Custodian further stated that other records were redacted or withheld from disclosure because they contained "proprietary commercial or financial information" and "information which, if disclosed, would give an advantage to competitors or bidders." N.J.S.A. 47:1A-1, N.J.S.A. 47:1A-1.1, and Executive Order No. 26 (McGreevey) ("E.O. 26").

#### Supplemental Responses:

On March 21, 2016, the Complainant replied to the Custodian via letter. The Complainant noted that the Custodian did not provide records from Greystone Properties ("Greystone") and omitted other records. The Complainant mentioned that those omitted records were needed to complete a formal protest application against an RFP reward.

#### Denial of Access Complaint:

On May 12, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that he submitted his OPRA request in response to his client's unsuccessful bid with N.J. Transit. The Complainant asserted that the Custodian's redactions were "excessive" and "incomplete," and that the explanations for redacting or withholding records were generic and missing a Vaughn Index.

The Complainant asserted that these documents were needed to file a bid protest against N.J. Transit. The Complainant contended that because the records were not provided in full, they were unable to file their protest within the March 21, 2016 deadline. Additionally, the Complainant asserted that they had been previously involved in a similar matter against N.J. Transit in Superior Court, Docket No. ESX-L-7887-15. The Complainant contended that this was evidence of obstruction and intentional non-disclosure on the part of N.J. Transit officials.

The Complainant requested that the GRC order production of the omitted records; enjoin and restrain N.J. Transit officials from interfering from the Complainant's OPRA rights; have a hearing to determine that a violation occurred and whether additional documentation requires disclosure; and that a knowing and willful determination be found against N.J. Transit and Interim Executive Director Dennis J. Martin, but not against the Custodian.

#### Statement of Information:<sup>4</sup>

On December 8, 2016, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on February 29, 2016. The Custodian certified that on March 9, 2016, he sought an extension of time to respond. The Custodian certified that he responded in writing on March 16, 2016, providing some records with redactions, and denying other records in full.

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<sup>4</sup> The Complaint was referred to mediation on June 6, 2016. The Complaint was referred back from mediation on November 4, 2016.  
Stephen Schnitzer, Esq. (on Behalf of Vito's Trattoria, Inc.) v. N.J. Transit, 2016-140 – Findings and Recommendations of the Executive Director

The Custodian certified that the Complainant was under contract with N.J. Transit to operate a pizzeria at Newark Penn Station. The Custodian certified that on August 12, 2015, the Complainant was informed that an RFP would be issued for a new sublease for the pizzeria. The Custodian then certified that N.J. Transit informed the Complainant that it was not successful in winning the RFP on February 23, 2016, leading to the Complainant's OPRA request at issue.

The Custodian argued that he fulfilled the Complainant's OPRA request, providing responsive records. The Custodian argued that those records containing redactions were consistent with OPRA. The Custodian argued that any records withheld in full were because they did not exist or were exempt from disclosure as drafts or constituted "inter-agency or intra agency advisory, consultative or deliberative ("ACD") material." Paff v. Neptune Twp. Housing Auth., GRC Complaint No. 2011-174 (June 2012) (holding that "all these drafts, in their entirety, are reflective of the deliberative process") (quoting In re Amendments to N.J.A.C. 10A:23, 367 N.J. Super. 61, 75 (App. Div. 2004)). The Custodian also asserted that the Complainant's objections were meritless and are an attempt to stall the procurement process and other pending litigation between the parties.

Regarding the redactions, the Custodian asserted that they were made to prevent unfair competition amongst bidders and protect trade secrets. The Custodian argued that certain other redactions were made to protect privacy information. The Custodian included a Vaughn Index with his SOL.

The Custodian provided as an example that redactions were made to conceal floor plans submitted by other bidders, asserting that this information could give an unfair advantage to competitors if disclosed. N.J.S.A. 47:1A-1.1. The Custodian also stated that bidders' financial and background records were also redacted pursuant to N.J.S.A. 47:1A-1.1 and due to a reasonable expectation of privacy. The Custodian also noted that the contract award had not been finalized, as the award was under protest by the Complainant. The Custodian argued that disclosure without redaction would give the Complainant an unfair advantage, should its protest become successful and the RFP process needed to be restarted.

The Custodian noted that the Complainant's basis for requiring the records unredacted was immaterial as to whether such redactions are warranted, citing Spectraserv, Inc. v. Middlesex Cnty. Utilities Auth., 416 N.J. Super. 565 (App. Div. 2010). The Custodian asserted that the Complainant's ability to support its RFP protest should not be a factor in the GRC's determination as to whether the redactions were appropriate.

Regarding OPRA's trade secrets and proprietary commercial or financial information exemption and the unfair advantage to bidders exemption, the Custodian referenced Communication Workers of Am. v. Rousseau, 417 N.J. Super. 341 (App. Div. 2010). The Custodian noted that in that case, the Appellate Division held that "OPRA does not require an independent demonstration of confidentiality. Rather, under OPRA, if the document contains commercial or proprietary information it is not considered a government record and is not subject to disclosure." Id. at 358. The Custodian argued that bidders would be unwilling or unable to submit proposals to the State knowing that their confidential, financial, proprietary, and trade secret information may be disclosed to competitors.

The Custodian next argued that the portions of the Complainant's request seeking "all documents" in N.J. Transit's possession; records concerning "all discussed bid issues with anyone"; and "all communications and drafts of contracts" were properly denied as invalid. The Custodian cited MAG Enm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 539 (App. Div. 2005), where the court held that "OPRA does not countenance open-ended searches of an agency's files. The Custodian asserted that the Complainant expected him to engage in an expansive and exhaustive search for "any" records that would be responsive to the request, and thus lacked the specificity to be valid under OPRA.

### Analysis

#### Validity of Request

The New Jersey Appellate Division has held that:

While OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records "readily accessible for inspection, copying, or examination."* N.J.S.A. 47:1A-1.

[MAG, 375 N.J. Super. at 534 (emphasis added).]

The Court reasoned that:

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

[Id. at 549 (emphasis added).]

The court further held that "[u]nder OPRA, agencies are required to disclose only 'identifiable' government records not otherwise exempt . . . . In short, OPRA does not countenance open-ended searches of an agency's files." Id. at 549 (emphasis added). See also Bent v. Twp. of Stafford Police Dep't, 381 N.J. Super. 30, 38 (App. Div. 2005);<sup>5</sup> N.J. Builders Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

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<sup>5</sup> Affirming Bent v. Stafford Police Dep't, GRC Complaint No. 2004-78 (October 2004).  
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Regarding generic requests for “records,” the request at issue in MAG sought “all documents or records evidencing that the ABC sought, obtained or ordered revocation of a liquor license for the charge of selling alcoholic beverages to an intoxicated person in which such person, after leaving the licensed premises, was involved in a fatal auto accident” and “all documents or records evidencing that the ABC sought, obtained or ordered suspension of a liquor license exceeding 45 days for charges of lewd or immoral activity.” 375 N.J. Super. at 539-40. The court noted that plaintiffs failed to include additional identifiers such as a case name or docket number. See also Steinhauer-Kula v. Twp. of Downe (Cumberland), GRC Complaint No. 2010-198 (March 2012) (holding that the complainant’s request item No. 2 seeking “[p]roof of submission” was invalid); Edwards v. Hous. Auth. of Plainfield (Union), GRC Complaint No. 2008-183 *et seq.* (April 2012) (accepting the Administrative Law Judge’s finding that a newspaper article attached to a subject OPRA request that was related to the records sought did not cure the deficiencies present in the request). Id. at 12-13.

Moreover, in Feiler-Jampel v. Somerset Cnty. Prosecutor’s Office, GRC Complaint No. 2007-190 (Interim Order dated March 26, 2008), the Council similarly held that a request seeking “[a]ny and all documents and evidence” relating to an investigation being conducted by the Somerset County Prosecutor’s Office was invalid, reasoning that:

[B]ecause the records requested comprise an entire SCPO file, the request is overbroad and of the nature of a blanket request for a class of various documents rather than a request for specific government records. Because OPRA does not require custodians to research files to discern which records may be responsive to a request, the Custodian had no legal duty to research the SCPO files to locate records potentially responsive to the Complainant’s request pursuant to the Superior Court’s decisions in [MAG], [Bent] and the Council’s decisions in [Asarnow, GRC 2006-24] and Morgano v. Essex Cnty. Prosecutor’s Office, GRC Complaint No. 2007-190 (February 2008).

[Id. See also Schulz v. NJ State Police, GRC Complaint No. 2014-390 (Interim Order dated July 28, 2015) (holding that the portion of the request seeking “all documents” was overly broad and thus invalid).]

Further, the GRC has established specific criteria deemed necessary under OPRA to request an e-mail communication. See Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010). The Council determined that, to be valid, such requests must contain: (1) the content and/or subject of the e-mail, (2) the specific date or range of dates during which the e-mail(s) were transmitted, and (3) the identity of the sender and/or the recipient thereof. See Elcavage, GRC 2009-07; see also Sandoval v. N.J. State Parole Bd., GRC Complaint No. 2006-167 (Interim Order March 28, 2007). The Council later applied the criteria set forth in Elcavage to other forms of correspondence, such as letters. See Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order dated May 24, 2011).

In the current matter, the request sought in part all “documents,” “all discussed bid issues with anyone,” and “communications” related to Greystone Properties and RFP 15-01. The



Custodian argued that these portions of the request were crafted to be a request for documents in civil discovery, and not for specifically identifiable records.

As to the portion of the request for “documents” and “discussed bid issues,” the GRC concurs with the Custodian in that these terms insufficiently identify the records sought. The Complainant did not specify which records he requested which “discussed bid issues with anyone.” Additionally, a search for “documents” would necessarily require the Custodian to research every record within the agency to determine whether it references the RFP at issue. MAG, 375 N.J. Super. 534; Steinhauer-Kula, GRC 2010-198.

Regarding the portions of the request seeking “communications,” the Complainant failed to include all required criteria as prescribed in Elcavage, GRC 2009-07 and Armenti, GRC 2009-154. Specifically, the request sought “all communications,” presumably related to the RFP, but no time period was identified.

Accordingly, the portion of the Complainant’s request seeking “documents” and “all discussed bid issues” is invalid. OPRA does not require the Custodian to perform the research necessary to locate responsive records. MAG, 375 N.J. Super. at 546; Bent, 381 N.J. Super. at 37; N.J. Builders, 390 N.J. Super. at 180; Schuler, GRC 2007-151; Feiler-Jampel, GRC 2007-190. Further, the portions of the Complainant’s request seeking “communications” is invalid because they did not include all of the criteria required under Elcavage. See Armenti, GRC 2009-154. Thus, the Custodian did not unlawfully deny access to the request seeking the aforementioned records. 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.

### **Draft RFPs/Contracts**

OPRA excludes from the definition of a government record “inter-agency or intra-agency advisory, consultative or deliberative material.” N.J.S.A. 47:1A-1.1. It is evident that this phrase is intended to exclude from the definition of a government record the types of documents that are the subject of the “deliberative process privilege.”

In O’Shea v. West Milford BOE, GRC Complaint No. 2004-93 (April 2006), the Council stated that:

[N]either the statute nor the courts have defined the terms ... “advisory, consultative, or deliberative” in the context of the public records law. The Council looks to an analogous concept, the deliberative process privilege, for guidance in the implementation of OPRA’s ACD exemption. Both the ACD exemption and the

deliberative process privilege enable a governmental entity to shield from disclosure material that is pre-decisional and deliberative in nature. Deliberative material contains opinions, recommendations, or advice about agency policies. In Re the Liquidation of Integrity Ins. Co., 165 N.J. 75, 88 (2000); In re Readoption With Amendments of Death Penalty Regulations, 182 N.J. 149 (App. Div. 2004).

In Libertarians for Transparent Gov't v. Gov't Records Council, 453 N.J. Super. 83 (App. Div.), certif. denied, 233 N.J. 484 (2018), the Appellate Division discussed the deliberative process privilege at length regarding a request for draft meeting minutes, stating:

The applicability of the deliberative process privilege is government by a two-prong test. The judge must determine both that a document is (1) “pre-decisional,” meaning it was “generated before the adoption of an agency’s policy or decision;” and (2) deliberative, in that it “contain[s] opinions, recommendations, or advice about agency policies.” [Educ. Law Ctr. v. Dep’t of Educ., 198 N.J. at 276 (quoting Integrity, 165 N.J. at 83)]. If a document stratifies both prongs, it is exempt from disclosure under OPRA pursuant to the deliberative process privilege.

Regarding the first prong, the court stated that “a draft is not a final document. It has been prepared for another person or persons’ editing and eventual approval.” Id. at 90. Therefore, the court held that by their very nature, draft meeting minutes are pre-decisional since they are subject to revision and not yet approved for public release. Id. at 90-91.

Regarding the second prong, the court held that “the document must be shown to be closely related to the ‘the formulation or exercise of . . . policy-oriented judgment or [to] the process by which policy is formulated.’” [Ciesla v. N.J. Dep’t of Health & Sr. Servs., 429 N.J. Super. 127, 138 (App. Div. 2012) (quoting McGee v. Twp. of E. Amwell, 416 N.J. Super. 602, 619-20 (App. Div. 2010)). Id. at 91. The court found that the requested draft minutes, as compiled by the writer in attendance at the meeting, were subject to additions, suggestions, and other edits from the members of the public body. Id. Thus, the draft minutes satisfied the second prong of the test. Id. at 92.

Here, the Complainant explicitly sought “drafts” of the RFP at issue as well as draft contracts with the successful bidder. Therefore, the requested records satisfy the first prong of the test. Libertarians, 453 N.J. Super. at 90. As to the second prong, draft RFPs and contracts can be subject to change by N.J. Transit. Furthermore, such documents and their revisions invariably reflect upon N.J. Transit’s public policy deliberations when crafting an RFP and executing an agreement with a vendor. Therefore, draft RFPs and contracts satisfy the second prong of the test. Id. at 91.

Therefore, with respect to draft RFPs and contracts, the Custodian did not unlawfully deny access to that portion of the Complainant’s OPRA request. N.J.S.A. 47:1A-6. Such documents are protected from disclosure under the deliberative process privilege. N.J.S.A. 47:1A-1.1; Libertarians, 453 N.J. Super. at 90-91; O’Shea, GRC 2004-93.

### Redacted Records

In Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the Council<sup>6</sup> that accepted the custodian's legal conclusion for the denial of access without further review. The Appellate Division noted that "OPRA contemplates the GRC's meaningful review of the basis for an agency's decision to withhold government records . . . . When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers." Id. The Court stated that:

[OPRA] also contemplates the GRC's *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the 'Open Public Meetings Act,' N.J.S.A. 10:4-6 to -21, it also provides that the GRC 'may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.' N.J.S.A. 47:1A-7(f). This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.

[Id. at 355.]

Further, the Court found that:

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

[Id.]

In the instant matter, the Custodian argued that the redactions within the records provided to the Complainant were made to protect trade secrets and proprietary information and/or information that would provide an unfair advantage to bidders. See N.J.S.A. 47:1A-1.1. The Custodian also stated that some of the redactions were made under the privacy interest exemption. Id. Without inspecting the withheld records, and in light of the Custodian's burden to prove a lawful denial of access, the GRC cannot conduct the "meaningful review of the basis for an agency's decision to withhold government records" contemplated under OPRA. Paff, 379 N.J. Super. at 354.

Accordingly, the GRC must conduct an *in camera* review of the redacted records to validate the Custodian's contention that they contain information protected by OPRA's

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<sup>6</sup> Paff v. NJ Dep't of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).  
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competitive advantage exemption; confidential, trade secret, proprietary, commercial and financial information exemption; and privacy interests exemption. See Paff, 379 N.J. Super. at 346 and N.J.S.A. 47:1A-1.1.

### **Knowing & Willful**

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

### **Prevailing Party Attorney's Fees**

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

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The portion of the Complainant's request seeking "documents" and "all discussed bid issues" is invalid. OPRA does not require the Custodian to perform the research necessary to locate responsive records. MAG Enm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Twp. of Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Assoc. v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); Feiler-Jampel v. Somerset Cnty. Prosecutor's Office, GRC Complaint No. 2007-190 (Interim Order dated March 26, 2008). Further, the portions of the Complainant's request seeking "communications" is invalid because they did not include all of the criteria required under Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010). See Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order dated May 24, 2011). Thus, the Custodian did not unlawfully deny access to the request seeking the aforementioned records. N.J.S.A. 47:1A-6.
2. With respect to draft RFPs and contracts, the Custodian did not unlawfully deny access to that portion of the Complainant's OPRA request. N.J.S.A. 47:1A-6. Such documents are protected from disclosure under the deliberative process privilege. N.J.S.A. 47:1A-1.1; Libertarians for Transparent Gov't v. Gov't Records Council, 453 N.J. Super. 83, 90-91 (App. Div.), cert. denied, 233 N.J. 484 (2018); O'Shea v. West Milford BOE, GRC Complaint No. 2004-93 (April 2006).
3. The GRC must conduct an *in camera* review of the redacted records to validate the Custodian's contention that they contain information protected by OPRA's competitive advantage exemption; confidential, trade secret, proprietary, commercial and financial

information exemption; and privacy interests exemption. See Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005) and N.J.S.A. 47:1A-1.1.

4. **The Custodian must deliver<sup>7</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion no. 3 above), nine (9) copies of the redacted records, a document or redaction index<sup>8</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,<sup>9</sup> that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within ten (10) business days from receipt of the Council's Interim Order.**
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.
6. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Samuel A. Rosado  
Staff Attorney

October 31, 2023<sup>10</sup>

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<sup>7</sup> The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

<sup>8</sup> The document or redaction index should identify the record, and/or each redaction asserted and the lawful basis for the denial.

<sup>9</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>10</sup> This complaint was prepared for adjudication since the Council's February 26, 2019 meeting, but could not be adjudicated due to lack of quorum.

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