



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

**PHILIP D. MURPHY**  
*Governor*

**LT. GOVERNOR SHEILA Y. OLIVER**  
*Commissioner*

**FINAL DECISION**

**July 27, 2021 Government Records Council Meeting**

Luis F. Rodriguez  
Complainant  
v.  
Kean University  
Custodian of Record

Complaint No. 2019-109

At the July 27, 2021 public meeting, the Government Records Council (“Council”) considered the July 26, 2021 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that the Council dismiss this matter since the Complainant withdrew this complaint on July 26, 2021 due to a settlement between the parties. Therefore, no further adjudication is required.

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

Final Decision Rendered by the  
Government Records Council  
On The 27<sup>th</sup> Day of July 2021

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: July 29, 2021**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

***Reconsideration***  
**Supplemental Findings and Recommendations of the Executive Director**  
**July 27, 2021 Council Meeting**

**Luis Rodriguez<sup>1</sup>**  
**Complainant**

**GRC Complaint No. 2019-109**

v.

**Kean University<sup>2</sup>**  
**Custodial Agency**

**Records Relevant to Complaint:** Electronic copies via e-mail of “the most recent lease agreements (*i.e.* contracts) between Kean University [“Kean”] and all occupants of the apartment units at 230-250 Surrey Road Hillside, NJ 07205.”

**Custodian of Record:** Laurie Barkley-Haelig  
**Request Received by Custodian:** August 18, 2017  
**Response Made by Custodian:** September 5, 2017  
**GRC Complaint Received:** June 10, 2019

**Background**

**April 27, 2021 Council Meeting:**

At its April 27, 2021 public meeting, the Council considered the April 20, 2021 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 instant matter is not barred by the Complainant’s prior Superior Court filing pertaining to the same OPRA request. N.J.S.A. 47:1A-6. The evidence of record demonstrates that the Superior Court action was administratively dismissed without prejudice before being adjudicated on the merits.
2. The Custodian unlawfully denied access to the redacted names and addresses of public employees leasing apartments owned by Kean. N.J.S.A. 47:1A-6. The Custodian failed to present a colorable claim of privacy in accordance with Brennan v. Bergen Cnty. Prosecutor’s Office, 233 N.J. 330, 341-342 (2018), and therefore shall provide the lease agreements without redactions to the names and addresses of the leaseholders.

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<sup>1</sup> Represented by Walter M. Luers, Esq., of Cohn, Lifland, Pearlman, Herrman & Knopf, LLP (Saddle Brook, NJ) (as of November 19, 2019).

<sup>2</sup> Represented by Kraig M. Dowd, Esq., of Weber Dowd Law, LLC (Woodland Park, NJ).

Additionally, the GRC declines to address the Complainant's other arguments in favor of disclosure.

3. **The Custodian shall comply with conclusion No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver<sup>3</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>4</sup> to the Executive Director.<sup>5</sup>**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. 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 April 28, 2021, the Council distributed its Interim Order to all parties. On May 3, 2021, the Custodian requested additional time to submit a request for reconsideration. That same day, the GRC granted the Custodian's request for an extension until May 18, 2021.

On May 18, 2021, the Custodian filed a request for reconsideration of the Council's April 27, 2021 Interim Order based on a mistake and extraordinary circumstances. The Custodian asserted that the instant matter was distinguishable from the facts in Brennan v. Bergen Cnty. Prosecutor's Office, 233 N.J. 330 (2018). The Custodian argued that in contrast with the Brennan transaction pertaining to a public proceeding, the lease agreements in the instant matter involved the personal decision regarding where to reside. The Custodian argued that the lessees have a greater privacy interest than the individuals in Brennan because the leases reveal whether the lessees live alone or with others. The Custodian also argued that because faculty lessees often post their teaching schedules online, disclosing their addresses would expose them to bad acts such as trespass and burglary while at home.

The Custodian asserted that she was not arguing that the lessees' individual privacy interest always outweighed the public's need for access, but was asking the Council to consider that there may be circumstances where the lessees of taxpayer-subsidized housing have a reasonable expectation of privacy in their home address.

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<sup>3</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>4</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>5</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.

The Custodian also argued that even if the Council declines to reconsider its determination that the lessees have no reasonable expectation of privacy, she requests that Kean be allowed to redact the unit numbers of the apartments. The Custodian asserted that the public's interest in knowing how Kean is managing its property would not be diminished, while affording some level of safeguard to protect the lessee's privacy interests.

The Custodian also requested the Council clarify and/or reconsider the application of the Interim Order to occupants other than the individuals who signed the lease agreements. The Custodian asserted that the Interim Order required disclosure of the names and addresses of the "leaseholders," and noted that leaseholder can be defined as: "A tenant who has a possessory interest estate in realty; esp., someone who lives in a leasehold house, apartment, etc." Blacks Law Dictionary (11<sup>th</sup> Ed. 2019). The Custodian argued that it was unclear whether the Interim Order required the disclosure of anyone who was expressly authorized to live in the subject apartments, or just those individuals who signed the lease agreements. The Custodian contended that the lease agreements at issue come in multiple forms; one for single occupants, and another for when there would be multiple occupants. The Custodian asserted that the former would have the names of the additional occupants on the form, and could include spouses, significant others, children, or other dependents of the lessee. The Custodian argued that it would be unclear from the lease agreements whether those occupants made or had the capacity to make the decision to reside in taxpayer-subsidized housing.

On July 26, 2021, Complainant's Counsel e-mailed the GRC to notify that the matter had been settled between the parties and the Complainant has withdrawn this complaint in accordance with that settlement.

### **Analysis**

No analysis required.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council dismiss this matter since the Complainant withdrew this complaint on July 26, 2021 due to a settlement between the parties. Therefore, no further adjudication is required.

Prepared By: Samuel A. Rosado  
Staff Attorney

July 26, 2021



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

PHILIP D. MURPHY  
Governor

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

**INTERIM ORDER**

**April 27, 2021 Government Records Council Meeting**

Luis Rodriguez  
Complainant  
v.  
Kean University  
Custodian of Record

Complaint No. 2019-109

At the April 27, 2021 public meeting, the Government Records Council (“Council”) considered the April 20, 2021 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 instant matter is not barred by the Complainant’s prior Superior Court filing pertaining to the same OPRA request. N.J.S.A. 47:1A-6. The evidence of record demonstrates that the Superior Court action was administratively dismissed without prejudice before being adjudicated on the merits.
2. The Custodian unlawfully denied access to the redacted names and addresses of public employees leasing apartments owned by Kean. N.J.S.A. 47:1A-6. The Custodian failed to present a colorable claim of privacy in accordance with Brennan v. Bergen Cnty. Prosecutor’s Office, 233 N.J. 330, 341-342 (2018), and therefore shall provide the lease agreements without redactions to the names and addresses of the leaseholders. Additionally, the GRC declines to address the Complainant’s other arguments in favor of disclosure.
3. **The Custodian shall comply with conclusion No. 2 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the 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>**

<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

4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. 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 27<sup>th</sup> Day of April 2021

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: April 28, 2021**

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record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
April 27, 2021 Council Meeting**

**Luis Rodriguez<sup>1</sup>  
Complainant**

**GRC Complaint No. 2019-109**

v.

**Kean University<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies via e-mail of “the most recent lease agreements (*i.e.* contracts) between Kean University [ (“Kean”) ] and all occupants of the apartment units at 230-250 Surrey Road Hillside, NJ 07205.”

**Custodian of Record:** Laurie Barkley-Haelig  
**Request Received by Custodian:** August 18, 2017  
**Response Made by Custodian:** September 5, 2017  
**GRC Complaint Received:** June 10, 2019

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

**Request and Response:**

On August 18, 2017, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On August 29, 2017, the Custodian responded in writing stating that an extension of time was needed to process the request.

On September 5, 2017, the Custodian responded in writing, providing eighty-eight (88) pages of records with redactions made pursuant to OPRA’s privacy interest provision. N.J.S.A. 47:1A-1.

**Denial of Access Complaint:**

On June 10, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant initially asserted that in October 2017, Complainant’s Counsel filed suit at Union County Superior Court disputing the redactions made

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<sup>1</sup> Represented by Walter M. Luers, Esq., of Cohn, Lifland, Pearlman, Herrman & Knopf, LLP (Saddle Brook, NJ) (as of November 19, 2019).

<sup>2</sup> Represented by Kraig M. Dowd, Esq., of Weber Dowd Law, LLC (Woodland Park, NJ).

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

to the responsive records. The Complainant asserted that Counsel misspelled the Custodian's name, but never corrected the pleadings and therefore the matter was never docketed.

The Complainant asserted that his request fell within the disclosure requirements under N.J.S.A. 47:1A-10, where an employee's "name, title, position, salary, payroll record, length of service, date of separation and the reason therefor, and the amount and type of any pension received shall be a government record." The Complainant argued that he requested the lease agreements for apartments owned by Kean, and whose tenants were Kean employees. The Complainant asserted that upon termination of employment, the leases end by their own terms and therefore comprise an employee's salary and compensation subject to disclosure under N.J.S.A. 47:1A-10.

The Complainant also asserted that Kean's privacy interest claims for the redactions conflict with N.J.S.A. 47:1A-10, and that an employee signing a lease for a faculty apartment would not have a reasonable expectation of privacy to keep their name private. The Complainant argued that at minimum, the leases should have been provided without redacting the names of the tenants.

Regarding the employee's address, the Complainant asserted that the New Jersey Supreme Court held that an individual's home address may not always be protected from disclosure under OPRA's privacy exemption. See Brennan v. Bergen Cnty. Prosecutor's Office, 233 N.J. 330 (2018). The Complainant also asserted that there is a public interest in knowing who leases the apartments to ensure that Kean does not abuse its policies by allowing unauthorized individuals to live in faculty housing. The Complainant asserted that managers at Kean are being allowed to reside at housing reserved only for faculty.

The Complainant requested the GRC to require that Kean provide the responsive records with at least the names of the lease holders unredacted, and to award counsel fees.

#### Statement of Information:

On July 18, 2019, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on August 17, 2017. The Custodian certified that her search included forwarding the request to the office of record that was responsible for Faculty Housing, who in turn conducted a search for responsive records. The Custodian certified that on August 28, 2017, she received potentially responsive documents from the office of record. The Custodian certified that she sent a letter to the Complainant on August 29, 2017 requesting a time extension to respond to allow for sufficient time for review of the documents. The Custodian certified that she responded in writing on September 5, 2017, providing eighty-eight (88) pages of records with redactions made to protect confidential personal information.

The Custodian first argued that this matter is barred under N.J.S.A. 47:1A-6, as the Complainant filed an action in Superior Court pertaining to the same OPRA request. The Custodian argued that the Complainant's action, Docket No. UNN-L-3746-17, was dismissed without prejudice on April 12, 2018. The Custodian therefore argued that the Complainant was barred from filing the instant matter under N.J.S.A. 47:1A-6.

The Custodian next argued that she lawfully redacted the names and addresses of the leaseholders under N.J.S.A. 47:1A-1. The Custodian asserted that the lease agreements did not constitute “salary” or “payroll records” under N.J.S.A. 47:1A-10. The Custodian argued that “salary” was defined as “monies received by a person on a fixed and continuous basis, i.e., normally paid in regular periodic intervals in specific regular amounts.” Wilson v. Bd. of Trustees of Police & Fireman’s Ret. Sys., 322 N.J. Super. 477, 481 (App. Div. 1998) (quoting Koribanics v. Clifton Bd. of Educ., 48 N.J. 1, 6 (1996)). The Custodian argued that “payroll records” under OPRA has been described by the GRC as including “[t]he total amount of remuneration paid to each employee showing separately cash, including commissions and bonuses; [and] *the cash value of all compensation in any medium other than cash . . .*” Baker v. N.J. State Parole Bd., GRC Complaint No. 2013-143 (November 2013) (emphasis).

The Custodian also argued that the Court recognized that the public disclosure of an individual’s home address “does implicate privacy interests.” Doe v. Poritz, 142 N.J. 1, 82 (1995). The Custodian also noted that the GRC has consistently held that home addresses were appropriately redacted from government records under N.J.S.A. 47:1A-1. Wolosky v. Twp. of Harding (Morris), GRC Complaint No. 2010-221 (June 2012).

The Custodian asserted that in Brennan, the names and addresses at issue were individuals who voluntarily provided their information to participate in a public auction. 233 N.J. at 343. The Custodian argued that in the current matter, the lease holders did not waive their privacy rights simply by their public employment. Thus, the Custodian argued that the tenants have a reasonable expectation of privacy, and the “Doe factors” enumerated in Burnett v. Cnty. of Bergen, 198 N.J. 408, 427 (2009) must be discussed. Regarding those factors, the Custodian provided responses as follows:

**1. The type of record(s) requested.**

**Response:** The Complainant requested copies of residential leases between Kean and tenants of certain apartment units operated by Kean.

**2. The information the requested records do or might contain.**

**Response:** The leases provide that if a tenant ceases to be employed by Kean, that tenant agrees to vacate the premises within fifteen (15) days unless otherwise directed by Kean.

**3. The potential harm in any subsequent non-consensual disclosure of the requested records.**

**Response:** The Custodian asserted that releasing unredacted leases would create the potential for the tenants’ personal information to be released widely to the public. The Custodian asserted that the potential for harm to the employees was obvious and includes the potential for harassment of those employees at their homes by disgruntled individuals such as students, co-workers, former employees, or other members of the public. The Custodian added that the potential harm was magnified by the fact that all the apartments were located on Kean’s campus.

The Custodian added that the Complainant has been barred from entering Kean's campus due to prior instances of harassment against Kean employees. The Custodian argued that the GRC has upheld the redactions of home addresses from government records when there was a likelihood of unsolicited contact. See Scheeler v. N.J. Dep't of Educ., GRC Complaint No. 2013-191 (July 2014).

**4. The injury from disclosure to the relationship in which the requested record was generated.**

**Response:** The Custodian argued that public disclosure of names and addresses contained on the leases would harm the relationship between Kean and its tenants, dissuading potential tenants from renting units from Kean.

**5. The adequacy of safeguards to prevent unauthorized disclosure.**

**Response:** The Custodian asserted that once the names and addresses were disclosed, there were no reasonable safeguards against their unauthorized disclosure.

**6. Whether there is an express statutory mandate, articulated public policy or other recognized public interest militating toward access.**

**Response:** The Custodian asserted that none were present in this matter.

The Custodian argued that the Doe factors weighed in favor of not disclosing the names and home addresses of the tenants on the leases at issue.

The Custodian next argued that the Complainant's minimum request for the names of the lease holders missed the issue of whether the inclusion of names and addresses implicate a privacy interest. Burnett, 198 N.J. at 430. The Custodian asserted that there were not many apartment units, and they were all located on Kean's campus. The Custodian thus argued that even the disclosure of just the names of the leaseholders would permit a potentially malicious actor to easily locate the lease holder's place of residence.

The Custodian argued that she did not unlawfully deny access to the records, and that the names and addresses of the leaseholders were lawfully redacted under OPRA's privacy interest provision. N.J.S.A. 47:1A-1. Additionally, the Custodian argued that the Complainant was not a prevailing party entitled to an award of attorney's fees.

Additional Submissions:

On July 19, 2019, the Complainant sent correspondence to the GRC, asserting that Kean should provide evidence that he engaged in harassment against Kean employees. The Complainant also added that Kean officials have lied in documents submitted in court and in other instances that should question Kean's credibility in this matter.

On July 26, 2019, the Complainant e-mailed the GRC, requesting that if Kean did not elaborate on allegations of harassment, that they should be required to resubmit their SOI with that

section removed. The Complainant also provided additional information questioning Kean's credibility. On August 8, 2019, the Complainant e-mailed the GRC providing evidence that a former Kean employee was not following proper rules for leaseholders.<sup>4</sup>

On November 19, 2019, Complainant's Counsel submitted a brief in response to the Custodian's SOI. Therein, Counsel initially asserted that the matter was not barred from proceeding because the Superior Court action under Docket No. UNN-L-3746-17 was not an adjudication on the merits. Counsel argued that under the common-law doctrine of *res judicata*, "only a judgement 'on the merits' will preclude a later action on the same claim." Watkins v. Resorts Int'l Hotel & Casino, 124 N.J. 398, 415 (1991).

Counsel also asserted that under Brennan, a custodian must first "present a colorable claim that public access to the records requested would invade a person's reasonable expectation of privacy." 233 N.J. at 342. Counsel argued that if the custodian does not meet this threshold, then "there is no need to resort to the Doe factors." Id. Counsel argued that in the current matter, the Custodian failed to meet that threshold. Counsel asserted that the tenants of the apartments were public employees, and not students or private individuals. Counsel also asserted that the Custodian did not provide certifications or affidavits that would support a finding of privacy. Counsel argued that because public funds are being used to subsidize their housing, the public has the right to know the tenants' identities.

Counsel argued that even if the GRC found that a colorable claim existed, the records should still be disclosed under the Burnett factors. Counsel asserted that there were no cases where the identities of those who have signed leases in connection with their employment have been withheld. Counsel argued that if the tenants wanted their residences to remain private, they had the option of living in private housing, but chose to live in housing subsidized by the taxpayers. Counsel therefore argued that taxpayers were entitled to know who is benefitting from public dollars.

Counsel also contended that Kean has not provided evidence that non-faculty were residing in faculty housing. Counsel argued that nevertheless, those non-faculty tenants were still living in publicly funded housing, and there was no risk of harm or evidence of potential harm from the release of the names and addresses.

On February 3, 2021, the GRC requested that the Complainant provide a completed balancing test questionnaire by the close of business on February 8, 2021. On February 5, 2021, the Complainant submitted a balancing questionnaire providing the following responses:

**1. Why do you need the requested record(s) or information?**

**Response:** The Complainant asserted that he had reason to believe that non-faculty may have lived in those apartments. The Complainant asserted that while he was not sure if this practice was illegal, but it would raise questions as to Kean's stated need and justification for building the apartments.

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<sup>4</sup> The Complainant submitted additional correspondence raising Constitutional arguments and potential ethics violations. However, the GRC does not have the jurisdiction or authority to address those issues. N.J.S.A. 47:1A-7.

**2. How important is the requested record(s) or information to you?**

**Response:** The Complainant contended that there were plans to build more faculty apartments. The Complainant asserted that having information on who lived in these apartments would allow him to let Kean’s Board of Trustees know that the planned expansion was not necessary and could save students’ and taxpayers’ money.

**3. Do you plan to redistribute the requested record(s) or information?**

**Response:** The Complainant asserted that he would share it with Kean’s Board of Trustees.

**4. Will you use the requested record(s) or information for unsolicited contact of the individuals named in the government record(s)?**

**Response:** The Complainant stated that he had no interest in contacting or disturbing the individuals who may be residing in the apartments. The Complainant argued that his inquiry was limited solely to whether the tenant was employed by Kean: he had no need to contact the tenants to make that determination.

On March 5, 2021, the GRC requested from either party a copy of the order of dismissal pertaining to Docket No. UNN-L-3746-17. On March 15, 2021, Counsel provided the GRC with a copy of an administrative order dated April 12, 2018, dismissing the matter for failure to correct a deficiency error pursuant to N.J. Court Rules, R. 1:5-6.

**Analysis**

**Action Pending in Superior Court**

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 which shall be heard in the vicinage where it is filed by a Superior Court Judge . . . ; *or in lieu of filing an action in Superior Court*, file a complaint with the Government Records Council . . .” N.J.S.A. 47:1A-6 (emphasis added).

In the current matter, the Custodian asserted that the Complainant filed an action under Docket No. UNN-L-3746-17 at Union County Superior Court pertaining to the request at issue but was thereafter dismissed without prejudice. The Complainant conceded that an action was filed prior to filing the instant matter but was dismissed due to a deficient filing. Counsel contended that because the matter was not adjudicated on the merits, the Complainant should not be barred from filing the instant complaint.

Although N.J.S.A. 47:1A-6 suggests that a requestor cannot “file” both in Superior Court and the GRC regarding the same OPRA request, the text of the statute, “which shall be heard . . . by a Superior Court Judge,” implies that the matter would be adjudicated by a judge if filed with the Superior Court. The evidence of record demonstrates that Docket No. UNN-L-3746-17 was

administratively dismissed under R. 1:5-6 for failing to cure a deficiency. There is no indication that the matter was adjudicated on the merits, or even that a single hearing took place in front of a judge. Therefore, it would be fundamentally unfair to administratively dismiss the instant matter when the Complainant has not had the chance to have his denial of access challenge heard before an adjudicative body, be it the GRC or the Superior Court.

Therefore, the instant matter is not barred by the Complainant's prior Superior Court filing pertaining to the same OPRA request. N.J.S.A. 47:1A-6. The evidence of record demonstrates that the Superior Court action was administratively dismissed without prejudice before being adjudicated on the merits.

### **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.

Additionally, 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 New Jersey 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, 198 N.J. at 422-23, 427.

However, the Brennan 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." 233 N.J. at 342. 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.

Upon review of the instant matter, the GRC does not find that the Custodian has made a “colorable claim” of privacy regarding the names and addresses of the leaseholders. According to the parties, only Kean employees can lease an apartment owned by same. Thus, since the names of public employees are explicitly subject to disclosure under N.J.S.A. 47:1A-10, the leaseholders possess a lesser reasonable expectation of privacy than the private citizens in Brennan.

Additionally, the Brennan Court found that “[t]o guard against possible abuses, the public has a right to know what [government] property was sold, at what price, and to whom.” 233 N.J. at 343. Similarly, the public has a right to know if Kean is operating and managing its public property appropriately, which includes knowing the identities of the leaseholders. Although the Custodian argued that the leaseholders did not waive their privacy interests by virtue of being employed by Kean, it is not their status as public employees but their voluntary decision to utilize taxpayer subsidized housing that lessens their reasonable expectation of privacy. Accordingly, because the Custodian did not adequately present a colorable claim of privacy, the GRC declines to apply the balancing test. See Brennan, 233 N.J. at 342.

Therefore, the Custodian unlawfully denied access to the redacted names and addresses of public employees leasing apartments owned by Kean. N.J.S.A. 47:1A-6. The Custodian failed to present a colorable claim of privacy in accordance with Brennan, 233 N.J. at 341-42, and therefore shall provide the lease agreements without redactions to the names and addresses of the leaseholders. Additionally, the GRC declines to address the Complainant’s other arguments in favor of disclosure.

### **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 instant matter is not barred by the Complainant’s prior Superior Court filing pertaining to the same OPRA request. N.J.S.A. 47:1A-6. The evidence of record demonstrates that the Superior Court action was administratively dismissed without prejudice before being adjudicated on the merits.
2. The Custodian unlawfully denied access to the redacted names and addresses of public employees leasing apartments owned by Kean. N.J.S.A. 47:1A-6. The Custodian failed to present a colorable claim of privacy in accordance with Brennan v. Bergen Cnty.

Prosecutor's Office, 233 N.J. 330, 341-342 (2018), and therefore shall provide the lease agreements without redactions to the names and addresses of the leaseholders. Additionally, the GRC declines to address the Complainant's other arguments in favor of disclosure.

3. **The Custodian shall comply with conclusion No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver<sup>5</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>6</sup> to the Executive Director.<sup>7</sup>**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. 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 20, 2021

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<sup>5</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>6</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>7</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.