



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**

**May 30, 2023 Government Records Council Meeting**

Dan Riordan  
Complainant

Complaint No. 2021-3

v.

Borough of Red Bank (Monmouth)  
Custodian of Record

At the May 30, 2023 public meeting, the Government Records Council (“Council”) considered the May 23, 2023 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 25, 2023 Interim Order because she responded in the prescribed time frame disclosing those pages required by the *In Camera* Examination Findings and simultaneously providing certified confirmation of compliance to the Executive Director.
2. The Custodian’s method of redaction was inappropriate under OPRA. N.J.S.A. 47:1A-5(g). Further, the Custodian unlawfully denied access to two (2) pages from the Dobco bid proposal and also failed to fully comply with the Council’s January 25, 2022 Interim Order. However, the Custodian lawfully denied access to the remainder of the withheld bid proposal sections and the Complainant now possesses those pages ordered to be disclosed through the *In Camera* Examination Findings. 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.

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 30<sup>th</sup> Day of May 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: June 6, 2023**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
May 30, 2023 Council Meeting**

**Dan Riordan<sup>1</sup>  
Complainant**

**GRC Complaint No. 2021-3**

v.

**Borough of Red Bank (Monmouth)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies via e-mail of a “complete copy of all proposals” submitted in response to the Borough of Red Bank’s (“Borough”) “Request for Proposal” (“RFP”) for the redevelopment of the White Street Parking Lot in their entirety.

**Custodian of Record:** Pamela Borghi<sup>3</sup>  
**Request Received by Custodian:** July 22, 2017  
**Response Made by Custodian:** July 24, 2017  
**GRC Complaint Received:** January 6, 2021

**Background**

April 25, 2023 Council Meeting:

At its April 25, 2023 public meeting, the Council considered the April 18, 2023 *In Camera* Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian did not fully comply with the Council’s January 25, 2022 Interim Order. Specifically, although the Custodian provided a document index, and certified confirmation of compliance to the Executive Director via e-mail on February 2, 2022, the GRC’s receipt of physical copies of the *in camera* documents on February 4, 2022 was untimely.
2. Pursuant to Scheeler, Jr. v. City of Cape May (Cape May), GRC Complaint No. 2015-91 (Interim Order dated December 15, 2015), the Custodian’s method of deleting sentences, paragraphs, and pages from the redacted proposals was not a “visually

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

<sup>2</sup> Represented by Daniel Antonelli, Esq. of Antonelli, Kantor, Rivera, P.C. (Livingston, NJ). Previously represented by Gregory J. Cannon, Esq., of Sobel, Han & Cannon, LLP (Aberdeen, NJ).

<sup>3</sup> The current Custodian of Record is Laura Reinertsen.

obvious method” showing “the specific location of any redacted material in the record” and is thus not appropriate under OPRA. N.J.S.A. 47:1A-5(g).

3. **On the basis of the Council’s determination in this matter, the Custodian shall comply with the Council’s Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order. Further, the 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>**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

#### Procedural History:

On April 27, 2023, the Council distributed its Interim Order to all parties. On April 28, 2023, the current Custodian e-mailed the Government Records Council (“GRC”) stating that she was not the custodian at the time of the OPRA request and was attempting to comply with the Interim Order. The current Custodian stated that the Order identified the portion of the Dobco bid proposal to be disclosed as “[e]xhibit G, pages 78-80” but that the description appears to match “Exhibit F, pages 68-70.” The current Custodian sought confirmation that the forgoing was correct. On the same day, the GRC confirmed that pages 68-70 were those ordered to be disclosed.

On May 2, 2023, the current Custodian responded to the Council’s Interim Order. Therein, the current Custodian certified that attached were the Dobco bid proposal pages required to be disclosed per the *In Camera* Examination Findings. The current Custodian simultaneously disclosed those pages to the Complainant by copying him on her certification.

#### Analysis

#### Compliance

At its April 25, 2023 meeting, the Council ordered the Custodian to comply with its *In Camera* Examination Findings and to submit certified confirmation of compliance, in accordance with R. 1:4-4, to the Executive Director. On April 27, 2023, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian’s response was due by close of business on May 4, 2023.

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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.

On April 28, 2023, the current Custodian e-mailed the GRC seeking confirmation of the pages required to be disclosed because the *In Camera* Examination identified an exhibit and pagination different from her copy. The GRC reviewed the document submitted for *in camera* review and determined that the pages identified by the current Custodian were those ordered to be disclosed.<sup>7</sup> On May 2, 2023, the third (3<sup>rd</sup>) business day after receipt of the Council’s Order, the current Custodian disclosed the required pages to the Complainant through her certified confirmation of compliance to the Executive Director. Based on the forgoing, the evidence of record supports that the current Custodian has achieved compliance with the Interim Order.

Therefore, the current Custodian complied with the Council’s April 25, 2023 Interim Order because she responded in the prescribed time frame disclosing those pages required by the *In Camera* Examination Findings and simultaneously providing 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)).

In the matter before the Council, the Custodian’s method of redaction was inappropriate under OPRA. N.J.S.A. 47:1A-5(g). Further, the Custodian unlawfully denied access to two (2) pages from the Dobco bid proposal and also failed to fully comply with the Council’s January 25, 2022 Interim Order. However, the Custodian lawfully denied access to the remainder of the withheld bid proposal sections and the Complainant now possesses those pages ordered to be disclosed through the *In Camera* Examination Findings. Additionally, the evidence of record does

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<sup>7</sup> The GRC confirmed that the two (2) pages of records ordered to be disclosed were contained within an “Exhibit G” at pages 78-80 within the copy of Dobco’s bid proposal sent to the GRC for the *in camera* review.

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.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The current Custodian complied with the Council's April 25, 2023 Interim Order because she responded in the prescribed time frame disclosing those pages required by the *In Camera* Examination Findings and simultaneously providing certified confirmation of compliance to the Executive Director.
2. The Custodian's method of redaction was inappropriate under OPRA. N.J.S.A. 47:1A-5(g). Further, the Custodian unlawfully denied access to two (2) pages from the Dobco bid proposal and also failed to fully comply with the Council's January 25, 2022 Interim Order. However, the Custodian lawfully denied access to the remainder of the withheld bid proposal sections and the Complainant now possesses those pages ordered to be disclosed through the *In Camera* Examination Findings. 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.

Prepared By: Frank F. Caruso  
Executive Director

May 23, 2023



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 25, 2023 Government Records Council Meeting

Dan Riordan  
Complainant

Complaint No. 2021-3

v.

Borough of Red Bank (Monmouth)  
Custodian of Record

At the April 25, 2023 public meeting, the Government Records Council (“Council”) considered the April 18, 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 Custodian did not fully comply with the Council’s January 25, 2022 Interim Order. Specifically, although the Custodian provided a document index, and certified confirmation of compliance to the Executive Director via e-mail on February 2, 2022, the GRC’s receipt of physical copies of the *in camera* documents on February 4, 2022 was untimely.
2. Pursuant to Scheeler, Jr. v. City of Cape May (Cape May), GRC Complaint No. 2015-91 (Interim Order dated December 15, 2015), the Custodian’s method of deleting sentences, paragraphs, and pages from the redacted proposals was not a “visually obvious method” showing “the specific location of any redacted material in the record” and is thus not appropriate under OPRA. N.J.S.A. 47:1A-5(g).
3. **On the basis of the Council’s determination in this matter, the Custodian shall comply with the Council’s Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order. 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 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 Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the  
Government Records Council  
On The 25<sup>th</sup> Day of April 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: April 27, 2023**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director  
April 25, 2023 Council Meeting**

**Dan Riordan<sup>1</sup>  
Complainant**

**GRC Complaint No. 2021-3**

v.

**Borough of Red Bank (Monmouth)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies via e-mail of a “complete copy of all proposals” submitted in response to the Borough of Red Bank’s (“Borough”) “Request for Proposal” (“RFP”) for the redevelopment of the White Street Parking Lot in their entirety.

**Custodian of Record:** Pamela Borghi  
**Request Received by Custodian:** July 22, 2017  
**Response Made by Custodian:** July 24, 2017  
**GRC Complaint Received:** January 6, 2021

**Records Submitted for *In Camera* Examination:** Five (5) unredacted RFPs.

**Background**

**January 25, 2022 Council Meeting:**

At its January 25, 2022 public meeting, the Council considered the January 18, 2022 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 (*or the amended*) findings and recommendations. The Council, therefore, found that:

1. The GRC must conduct an *in camera* review of the withheld sections, including those the Complainant asserted were “missing” if in existence, and the redacted Yellow Brook Executive Summary responsive to the Complainant’s OPRA request to validate the Custodian’s assertion that the records were exempt from disclosure under the trade secret and proprietary exemption. See Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005); N.J.S.A. 47:1A-1.1.

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

<sup>2</sup> Represented by Gregory J. Cannon, Esq., of Sobel, Han & Cannon, LLP (Aberdeen, NJ).

2. **The Custodian shall deliver<sup>3</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 1 above), nine (9) copies of the redacted records where applicable, a document or redaction index<sup>4</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,<sup>5</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 five (5) business days from receipt of the Council’s Interim Order.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

#### Procedural History:

On January 26, 2022, the Council distributed its Interim Order to all parties. On February 2, 2022, Custodian’s Counsel sent an e-mail to the Government Records Council (“GRC”) and Complainant advising that the *in camera* package had been sent via Federal Express Overnight. Counsel also noted that he was attaching the Custodian’s legal certification and document index.

Within the legal certification, the Custodian certified that she was providing nine (9) redacted and unredacted copies of the five (5) RFP proposals sought for *in camera* review. The Custodian noted that she redacted the proposals based on the Borough Redevelopment attorney’s recommendations and prior to posting them on the Borough’s website. The Custodian further certified that “there are no records ‘missing’ from any production.” The Custodian certified that the only records that existed were the filed proposals and redacted versions thereof that were posted to the Borough website. The Custodian also identified the following multiple bases for the redactions: N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-1.1; Executive Order No. 26 (Gov. McGreevey, 2002); Burnett v. Cnty. of Bergen, 198 N.J. 408 (2009).

On February 4, 2022, the GRC received the Borough’s *in camera* compliance package.

#### Analysis

##### Compliance

At its January 25, 2022 meeting, the Council ordered the Custodian to submit nine (9) redacted and unredacted copies of the responsive RFPs 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 January 26, 2022, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days

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<sup>3</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 the GRC physically receives them by the deadline.

<sup>4</sup> The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

<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."

to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on February 2, 2022.

On February 2, 2022, the fifth (5<sup>th</sup>) business day after receipt of the Council's Order, the Custodian notified the GRC that she sent the *in camera* compliance package via Federal Express Overnight. The Custodian also attached her legal certification and document index to that e-mail. Thereafter, on February 4, 2022, the GRC received the physical *in camera* compliance package, comprising of nine (9) redacted and unredacted copies of the responsive RFP proposals, the Custodian's legal certification, and a document index.

The Custodian's response to the Council's Order, while complete, was untimely and thus compliance was not fully met. The GRC notes that as part of its Interim Order, parties are advised that the GRC must "physically receive[ the *in camera* records] by the deadline." Here, the Custodian advised the GRC via e-mail on February 2, 2022 that she sent the *in camera* package out that day. Further, the GRC did not receive the records until February 4, 2022, or two (2) business days after the expiration of the compliance time frame.

Therefore, the Custodian did not fully comply with the Council's January 25, 2022 Interim Order. Specifically, although the Custodian provided a document index, and certified confirmation of compliance to the Executive Director via e-mail on February 2, 2022, the GRC's receipt of physical copies of the *in camera* documents on February 4, 2022 was untimely.

### **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.

As a threshold issue, the Complainant's Denial of Access Complaint assertions of potentially missing sections and pages are grounded in the fact that the Custodian appeared to have physically deleted sentences, paragraphs, and pages out of the proposals prior to posting the them to the Borough's website. Thus, the GRC first addresses proper redaction methods under OPRA and the Custodian's actions here.

OPRA provides that if a Custodian is "unable to comply with a request for access, then the Custodian shall indicate the specific basis" for noncompliance. N.J.S.A. 47:1A-5(g). In Wolosky v. Andover Reg'l Sch. Dist. (Sussex), GRC Complaint No. 2009-94 (April 2010), the GRC discussed what constitutes an appropriate redaction under OPRA. There, the Council found that "redaction must be accomplished by using a visually obvious method that shows the requestor the specific location of any redacted material in the record." See also Paff v. Borough of Manasquan (Monmouth), GRC Complaint No. 2009-281 (Interim Order dated March 29, 2011)

Later, in Scheeler, Jr. v. City of Cape May (Cape May), GRC Complaint No. 2015-91 (Interim Order dated December 15, 2015), the custodian used a "white-out" method to redact arrest

reports. The Council drew a comparison to both Wolosky and Paff in finding that the custodian inappropriately redacted the responsive records. The Council reasoned that “such a method does not show the requestor the specific location of the redacted material or the volume of material redacted; thus, the specific location of the material underlying the redactions made was not visually obvious . . .” Id. at 3.

Here, the Custodian directed the Complainant to the exact location on the internet where the requested proposals were posted. Upon review, the Complainant contacted the Custodian asserting that information appeared to be missing from online postings. Roughly two and a half years later, the Complainant again sought to obtain those sections of the proposals he believed to be omitted because the “project was no longer being pursued” and filed this complaint upon the Custodian’s reiterated denial. In the Statement of Information, the Custodian contended that she lawfully denied access to the “redacted” material. The Council determined that an *in camera* review was required and has received the proposals in both redacted and unredacted form.

Upon review of the proposals, the Custodian physically deleted sentences, paragraphs, and whole pages of the proposals, with the exception of the “Executive Summary” redactions in the Yellow Brook proposal.<sup>6</sup> However, the deletion method is not appropriate under OPRA and the GRC’s case law requiring “visually obvious” redactions either through visual markings or placeholder pages indicating the withholding of whole pages. Thus, the effect of the deletions is akin to “whiting out” a record. It is also reasonable for the Complainant to have assuming that information or sections were “missing” from the proposals. Like the situation in Scheeler, and its progeny, the Custodian’s chosen method of redaction did not show the Complainant the specific location of the redacted material or the volume of material redacted; thus, the redactions were not visually obvious to her.

Accordingly, pursuant to Scheeler, GRC 2015-91, the Custodian’s method of deleting sentences, paragraphs, and pages from the redacted proposals was not a “visually obvious method” showing “the specific location of any redacted material in the record” and is thus not appropriate under OPRA. N.J.S.A. 47:1A-5(g).

Having address the redaction issue, the GRC now turns to whether the Custodian lawfully denied access to those withheld portions of the proposals.

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, 142 N.J. 1).

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<sup>6</sup> The GRC does not comment on the appropriateness of this action for the purpose of posting the proposals to the website, which is not within the purview of OPRA.

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); Commc’ns Workers of Am., AFL-CIO v. Rousseau, 417 N.J. Super. 341, 357 (App. Div. 2010). See also Taylor, GRC 2015-395.

The GRC conducted an *in camera* examination on the submitted record, noting that the Complainant sought these records in July 2017, prior to the Borough’s repeal of the RFP in September 2017. The results of this examination are set forth in the following table:

Record No.	Record Name	Description of Redaction	Custodian’s Explanation/ Citation for Redactions	Findings of the <i>In Camera</i> Examination <sup>7</sup>
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<sup>7</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

1.	Bijou Properties 2017 RFP Proposal	<p>Page 5 of unredacted proposal: Executive Summary - Discussion of project and suggested cost options. (Part A – 3<sup>rd</sup> Paragraph)</p> <p>Page 18 of unredacted proposal: Potential Investors (Part B – 1 page withheld in entirety)</p> <p>Pages 55-61 of unredacted proposal: Project Costs (Part F – 7 pages withheld in entirety) ()</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>Trade secret and proprietary information; advantage to competitors and bidders; personal identifiers: <u>N.J.S.A. 47:1A-1.1.</u></p> <p>Financial information: Executive Order No. 26 (Gov. McGreevey, 2002) (“EO 26”)</p>	<p>The deletion of the paragraph on page 5 identifies the project scope and assumptions on available cost incentives. In its entirety, page 18 includes names of potential investors and net commitments. Withheld in their entirety, pages 55-61 provide a specific description of Bijou’s project plan, detailed cost estimate (inclusive of projected costs), investor/lender information, and additional funding sources.</p> <p>The removed material clearly falls into the perimeters of the “advantage” and “trade secret” exemptions. Specifically, disclosure of project details (scope, price, and strategy) at that time would have significantly injured Bijou’s bidding position. Further, the financial information included is distinctly “financial information” considered exempt under OPRA. Thus, the Custodian lawfully denied access to the three (3) portions of this bid. <u>N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6.</u></p>
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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.

2.	BNE Group 2017 Proposal	<p>Page 5 of unredacted proposal: Executive Summary (Part A – “Anticipated Costs &amp; Financing Mechanisms” paragraph)</p> <p>Page 23 of unredacted proposal: Current/Potential Lender Information (Part B – 1 page withheld in entirety)</p> <p>Pages 79-86 of the unredacted proposal: Project Costs (Part F – 8 pages withheld in entirety)</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>Trade secret and proprietary information; advantage to competitors and bidders; personal identifiers: <u>N.J.S.A. 47:1A-1.1.</u></p> <p>Financial information: EO 26</p>	<p>The deletion of the paragraph on page 5 identifies the project scope and assumptions on available cost incentives. In its entirety, page 23 identifies lenders, complete with specific individual contact information and examples of other projects financed. Withheld in their entirety, pages 79-86 provide a specific description of BNE’s project plan, detailed cost estimate (inclusive of projected costs), investor/lender information, bank letters, and additional funding sources.</p> <p>The removed material falls within the “advantage” and “trade secret” exemptions for the reasons substantially stated in the GRC’s analysis of Record No. 1. This includes the bank letters, which the Council has previously found to be exempt from disclosure. <u>Taylor</u>, GRC 2015-395. Thus, the Custodian lawfully denied access to the three (3) portions of this bid. <u>N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6.</u></p>
3.	Dobco, Inc. 2017 Proposal	<p>Page 7 of the unredacted proposal: Project Management (Part II – “Additional Parking Revenue to Red Bank” paragraph)</p> <p>Pages 9-11 of the unredacted proposal:</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>Trade secret and proprietary information;</p>	<p>The deletion of the paragraph on page 7 identifies the project scope and potential cost benefits to the Borough. The withheld pages 9 and 10 detail Dobco’s project plan and terms of agreement. The terms of agreement continue</p>



		<p>Financial Terms &amp; Offers (Part IV – first 2 pages withheld in entirety and last page partially redacted)</p> <p>Page 20 of the unredacted proposal: Program Requirement Check List (Part VI – item Nos. 31, 32, and 34)</p> <p>Pages 22-23 of the unredacted proposal: Financial Information (Part VII – “Financial References” on first page and “Financial Stability/Equity &amp; Financing on second page)</p> <p>Page 28 of the unredacted proposal: “Project Summary” (Pilot Revenue, Parking Revenue, and Fees paragraphs)</p> <p>Pages 71-77 of the unredacted proposal: Projects Costs (Exhibit F – 7 pages withheld in entirety)</p> <p>Pages 78-80 of the unredacted proposal: Violation and Litigation History (Exhibit G – 3 pages withheld in entirety)</p>	<p>advantage to competitors and bidders; personal identifiers: <u>N.J.S.A. 47:1A-1.1.</u></p> <p>Financial information: EO 26</p>	<p>into a deleted paragraph on page 11. On page 20, three (3) checklist rows addressing equity, financing, and incentives were deleted. Deletions on pages 22 and 23 contained financial lender contacts and additional company financial information. Deletions on pages 28 included definitive financial concession requests, revenue projects and fees. Withheld in their entirety, pages 71-77 provide a specific description of Dobco’s project plan, detailed cost estimate (inclusive of projected costs), investor/lender information, bank letters, and additional funding sources.</p> <p>The removed material falls within the “advantage” and “trade secret” exemptions for the reasons substantially stated in the GRC’s analysis of Record No. 1. As stated in the GRC’s analysis of Record No. 2, this includes the bank letters, which the Council has previously found to be exempt from disclosure. <u>Taylor</u>, GRC 2015-395. Thus, the Custodian lawfully denied access to the three (3) portions of this bid. <u>N.J.S.A. 47:1A-1.1</u>; <u>N.J.S.A. 47:1A-6.</u></p> <p>However, the GRC does not agree that the final three (3) pages labeled Exhibit G were</p>
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				lawfully withheld under any of the cited exemptions. Specifically, there is no evidence to suggest that N.J. Dep't of Labor/OSHA violations or current and resolved lawsuits meet the standards necessary to fall within any of the cited exemptions. <b>For Exhibit G, the Custodian has unlawfully denied access and must disclose same to the Complainant.</b>
4.	Mill Creek's 2017 Proposal	<p>Page 4 of the unredacted proposal: "Executive Summary" (1<sup>st</sup> sentence in the 4<sup>th</sup> paragraph redacted)</p> <p>Page 15 of the unredacted proposal: "Financial Capability" (1 page withheld in entirety)</p> <p>Pages 16 and 17 of the unredacted proposal: "Financial Strategy" (2 pages withheld in entirety)</p> <p>Page 18 of the unredacted proposal: "Financial Terms &amp; Offer" (1 page withheld in entirety)</p>	<p>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)</p> <p>Trade secret and proprietary information; advantage to competitors and bidders; personal identifiers: <u>N.J.S.A. 47:1A-1.1</u>.</p> <p>Financial information: EO 26</p>	<p>The deletion of the 1<sup>st</sup> sentence in paragraph 4 on page 4 identifies the potential incentives applicable to the project. Withheld in their entirety, pages 15-18 include Mill Creek's financial health, lenders, project details, and offer terms.</p> <p>The removed material falls within the "advantage" and "trade secret" exemptions for the reasons substantially stated above. Thus, the Custodian lawfully denied access to the three (3) portions of this bid. <u>N.J.S.A. 47:1A-1.1</u>; <u>N.J.S.A. 47:1A-6</u>.</p>
5.	Yellow Brook's 2017 Proposal	Page 6 of the unredacted proposal: "Executive Summary" (2 <sup>nd</sup> paragraph and last sentence in 3 <sup>rd</sup> paragraph 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 deletion of the 2 <sup>nd</sup> paragraph and last sentence in 3 <sup>rd</sup> paragraph on page 6 identifies project costs and potential incentives applicable to the project.

		Pages 102-107 of the unredacted proposal: Costs/Finances (Exhibit F – 6 pages withheld in entirety.	Trade secret and proprietary information; advantage to competitors and bidders; personal identifiers: <u>N.J.S.A. 47:1A-1.1.</u>  Financial information: EO 26	Withheld in their entirety, pages 102-107 include Yellow Brook’s project plan and detailed cost estimates (inclusive of projected costs).  The removed material falls within the “advantage” and “trade secret” exemptions for the reasons substantially stated above. Thus, the Custodian lawfully denied access to the three (3) portions of this bid. <u>N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6.</u>
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Thus, the Custodian lawfully denied access to most of the withheld RFP bid information under the “advantage” and “trade secret” exemptions. N.J.S.A. 47:1A-1.1; Taylor, GRC 2015-395. However, the Custodian unlawfully denied access to Dobco Inc.’s violation and litigation history and shall disclose those three (3) RFP pages accordingly.

**Knowing & Willful**

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

**Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not fully comply with the Council’s January 25, 2022 Interim Order. Specifically, although the Custodian provided a document index, and certified confirmation of compliance to the Executive Director via e-mail on February 2, 2022, the GRC’s receipt of physical copies of the *in camera* documents on February 4, 2022 was untimely.
2. Pursuant to Scheeler, Jr. v. City of Cape May (Cape May), GRC Complaint No. 2015-91 (Interim Order dated December 15, 2015), the Custodian’s method of deleting sentences, paragraphs, and pages from the redacted proposals was not a “visually obvious method” showing “the specific location of any redacted material in the record” and is thus not appropriate under OPRA. N.J.S.A. 47:1A-5(g).

3. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order. Further, the Custodian shall simultaneously deliver<sup>8</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>9</sup> to the Executive Director.<sup>10</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.

Prepared By: Frank F. Caruso  
Executive Director

April 18, 2023

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<sup>8</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>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> 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.



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PHILIP D. MURPHY  
Governor

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

INTERIM ORDER

January 25, 2022 Government Records Council Meeting

Dan Riordan  
Complainant

Complaint No. 2021-3

v.

Borough of Red Bank (Monmouth)  
Custodian of Record

At the January 25, 2022, public meeting, the Government Records Council (“Council”) considered the January 18, 2022, Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The GRC must conduct an *in camera* review of the withheld sections, including those the Complainant asserted were “missing” if in existence, and the redacted Yellow Brook Executive Summary responsive to the Complainant’s OPRA request to validate the Custodian’s assertion that the records were exempt from disclosure under the trade secret and proprietary exemption. See Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005); N.J.S.A. 47:1A-1.1.
2. **The Custodian shall deliver<sup>1</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 1 above), nine (9) copies of the redacted records where applicable, 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 five (5) business days from receipt of the Council’s Interim Order.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

<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 the GRC physically receives them 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."

Interim Order Rendered by the  
Government Records Council  
On The 25<sup>th</sup> Day of January 2022

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: January 26, 2022**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
January 25, 2022 Council Meeting**

**Dan Riordan<sup>1</sup>  
Complainant**

**GRC Complaint No. 2021-3**

v.

**Borough of Red Bank (Monmouth)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies via e-mail of a “complete copy of all proposals” submitted in response to the Borough of Red Bank’s (“Borough”) “Request for Proposal” (“RFP”) for the redevelopment of the White Street Parking Lot in their entirety.

**Custodian of Record:** Pamela Borghi  
**Request Received by Custodian:** July 22, 2017  
**Response Made by Custodian:** July 24, 2017  
**GRC Complaint Received:** January 6, 2021

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

**Request and Response:**

On July 22, 2017, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On July 24, 2017, the Custodian responded in writing directing the Complainant to the exact location on the Borough’s website where the responsive bids were posted, noting that no other records existed. The Custodian stated that should the Complainant believe that certain records were omitted from the posted bids, he should contact her identifying the name, date, and subject of such. On the same day, the Complainant stated that the posted files included redactions and/or missing pages and thus the files were not complete. The Complainant thus requested that the Custodian disclose the complete bid files. The Custodian again responded stating that the withheld portions of each bid were exempt from disclosure under the “trade secret and proprietary commercial or financial information” exemption. N.J.S.A. 47:1A-1.1.

On December 15, 2020, the Complainant e-mailed the Custodian requesting that the Custodian disclose those withheld portions of the responsive bids because the “project is no longer

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

<sup>2</sup> Represented by Gregory J. Cannon, Esq., of Sobel, Han & Cannon, LLP (Aberdeen, 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.

being pursued.” On December 23, 2020, the Custodian responded stating that per the Borough attorney, the withheld portions of the bids remained exempt from disclosure under the trade secret and proprietary exemption.

#### Denial of Access Complaint:

On January 6, 2021, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant argued that he was unlawfully denied access portions of multiple bids responsive to the subject OPRA request as follows:

- Bijou– Section F
- BNE– Section F.
- Dobco – Section IX (and maybe Section X).
- Mill Creek – Pages 13 through 15 and any additional missing pages.
- Yellow Brook – Section F and redacted portions of Executive Summary (page 5 of the bid submission).

The Complainant asserted while some of the bidders may have identified portions of their bids as trade secret or proprietary, not all financial information was included. The Complainant noted that at public meetings concerning the RFP, some bidders “revealed” financial information. The Complainant also argued that it was unclear whether the bidders expressly identified the withheld sections of the bids as trade secret or proprietary; however, he did not understand how their cost proposals could be withheld as exempt under OPRA.

#### Statement of Information:

On February 22, 2021, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on July 22, 2017. The Custodian certified that no search was necessary because the responsive records were posted on the Borough’s website. The Custodian certified that she responded in writing on July 24, 2017 directing the Complainant to the posted bids by website link. The Custodian affirmed that upon receiving the Complainant’s contention that certain portions of the bids were withheld, she responded stating that same were exempt under the trade secret and proprietary exemption. N.J.S.A. 47:1A-1.1. The Custodian certified that she subsequently received a “renewed” OPRA request from the Complainant on December 15, 2020. The Custodian certified that she responded in writing on December 23, 2020 stating that the denied portions of the bids remained exempt per advice of counsel.

The Custodian stated that in early 2017, the Borough advertised an RFP for redevelopment of the White Street Municipal Parking Lot: five (5) developers submitted bids. The Custodian stated that these bids were posted to the Borough’s website in July 2017. The Custodian affirmed that negotiations subsequently failed, and the Borough repealed the RFP on September 13, 2017 via Ordinance No. 2017-33.

The Custodian contended that her response at the time of the original OPRA request was “clearly valid” because the Borough was involved in ongoing negotiations. 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). The Custodian further argued that the Borough's RFP did not contain a confidentiality statement like the one discussed in Barth v. Rutgers Univ., GRC Complaint No. 2017-121 (Interim Order dated April 30, 2019). The Custodian also argued that unlike the records at issue in Newark Morning Ledger, Co. v. N.J. Sports & Exposition Auth., 423 N.J. Super. 140 (App. Div. 2011), the bidders' financial strategies, including banking partners, are not widely known or disseminated. The Custodian noted that some of the redacted material is expressly marked confidential. The Custodian argued that these same bidders are also "simultaneously engaged" in other redevelopment projects and regularly compete with each other on other redevelopment projects. The Custodian thus contended that she lawfully denied access to the withheld bid information. See Comment B, Restatement of Torts § 757 (1939); Hammock v. Hoffmann-LaRoche, 142 N.J. 356, 384 (1995).

### **Analysis**

#### **Unlawful Denial of Access**

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

In Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the Council<sup>4</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:

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<sup>4</sup> Paff v. N.J. Dep't of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

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.]

Here, the Custodian granted access to the bids submitted in response to the RFP, which were posted to the Borough’s website. The Complainant argued in the Denial of Access Complaint that certain sections of those bids were not included in the posted records, some additional pages may have been missing, and redactions were applied to at least one executive summary. The Complainant argued that these records should have been disclosed because bidders shared certain information during public meetings regarding the RFP. The Custodian argued in the SOI that her denial of lawful under the trade secret and proprietary exemption. N.J.S.A. 47:1A-1.1. The Custodian noted that per the Borough’s attorney, the exemption still applied regardless of whether the RFP was repealed.

Upon review of the submissions, a “meaningful review” is necessary to determine whether the withheld bid sections and information fall within the asserted exemption. Further, the GRC has routinely reviewed bid records *in camera* in complaints with facts like the present complaint. See McCormack v. State of N.J. Dep’t of Treasury, GRC Complaint No. 2013-357 (Interim Order dated September 30, 2014). Thus, the GRC must review same to determine the full applicability of the cited exemptions.

Therefore, the GRC must conduct an *in camera* review of the withheld sections, including those the Complainant asserted were “missing” if in existence, and the redacted Yellow Brook Executive Summary responsive to the Complainant’s OPRA request to validate the Custodian’s assertion that the records were exempt from disclosure under the trade secret and proprietary exemption. See Paff, 379 N.J. Super. at 346; 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.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The GRC must conduct an *in camera* review of the withheld sections, including those the Complainant asserted were “missing” if in existence, and the redacted Yellow Brook Executive Summary responsive to the Complainant’s OPRA request to validate

the Custodian's assertion that the records were exempt from disclosure under the trade secret and proprietary exemption. See Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005); N.J.S.A. 47:1A-1.1.

2. **The Custodian shall deliver<sup>5</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 1 above), nine (9) copies of the redacted records where applicable, 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 five (5) business days from receipt of the Council's Interim Order.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso  
Executive Director

January 18, 2022

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<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 the GRC physically receives them by the deadline.

<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."