



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**

**August 30, 2022 Government Records Council Meeting**

Jeffrey Voigt  
Complainant

Complaint No. 2021-65

v.

Village of Ridgewood (Bergen)  
Custodian of Record

At the August 30, 2022 public meeting, the Government Records Council (“Council”) considered the August 23, 2022 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. Custodian’s Counsel was required to establish either of the necessary criteria set forth above: either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. See Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). Counsel failed to establish that the complaint should be reconsidered based on a “change in circumstances.” Custodian’s Counsel has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. See D’Atria v. D’Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Specifically, and regardless of whether the invoices were ultimately disclosed to the Complainant, the Council has already determined that the “draft” document position was erroneous and that those invoices in existence should have been disclosed upon request. Thus, Custodian Counsel’s request for reconsideration should be denied. Cummings, 295 N.J. Super. at 384; D’Atria, 242 N.J. Super. at 401; In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).
2. The current Custodian did not fully comply with the Council’s June 28, 2022 Interim Order. Specifically, although the current Custodian responded within the prescribed time frame submitting compliance regarding the invoice responsive to OPRA request No. 1, she failed to address the Firm’s invoices responsive to OPRA request No. 2. However, the current Custodian simultaneously provided certified confirmation of compliance to the Executive Director for each response.
3. The Custodian unlawfully denied access to Custodian Counsel’s January 2021 invoice and the Firm’s January and February 2021 invoices. N.J.S.A. 47:1A-6. However, the Custodian’s response actions were lawful in accordance with N.J.S.A. 47:1A-5(i)(2);

she lawfully denied access to Counsel's February 2021 invoice because it did not exist, and the current Custodian certified that all three (3) invoices were disclosed to the Complainant on April 19, and 22, 2021. 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 August 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: September 1, 2022**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
August 30, 2022 Council Meeting**

**Jeffrey Voigt<sup>1</sup>  
Complainant**

**GRC Complaint No. 2021-65**

v.

**Village of Ridgewood (Bergen)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Copies of:

1. Invoices from Custodian’s Counsel for January and February 2021.
2. Invoices from William Northgrave, Esq. and McManimon, Scotland & Baumann, LLC (the “Firm”) for January and February 2021.

**Custodian of Record:** Donna Jackson<sup>3</sup>

**Request Received by Custodian:** March 11, 2021

**Response Made by Custodian:** March 19, 2021; March 26, 2021

**GRC Complaint Received:** March 24, 2021

**Background**

**June 28, 2022 Council Meeting:**

At its June 28, 2022 public meeting, the Council considered the June 21, 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, found that:

1. Although the Custodian did not timely respond to the Complainant’s two (2) OPRA requests seeking “immediate access” records, she adhered to N.J.S.A. 47:1A-5(i)(2) in making a reasonable effort to respond to such by extending the time frame. Furthermore, the explanation justifies the need for the extensions of time to provide the Complainant with responsive records. As such, the due to the extenuating extreme circumstances, the Custodian’s failure to timely respond and seeking multiple extensions of time does not constitute a “deemed” denial. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i)(2).

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

<sup>2</sup> Represented by Matthew S. Rogers, Esq. of Law Office of Matthew S. Rogers, LLC (Ridgewood, NJ).

<sup>3</sup> The Custodian retired in August 2021. The current Custodian of Record is Heather A. Mailander.

2. The Custodian unlawfully denied access Custodian Counsel's January 2021 invoice responsive to OPRA request No. 1 and the Firm's January and February 2021 invoices responsive to OPRA request No. 2. N.J.S.A. 47:1A-6. Specifically, the Custodian failed to bear her burden of proof that Village Council approval was required prior to disclosure. Thus, the Custodian shall disclose those invoices to the Complainant.
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>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. Because Custodian Counsel's February 2021 invoice did not exist within the Village's possession at the time of the Complainant's OPRA request, the Custodian was under no obligation to provide same once she obtained it. Paff v. City of Union City (Hudson), GRC Complaint No. 2012-262 (August 2013); Paff v. Neptune Twp. Hous. Auth. (Monmouth), GRC Complaint No. 2010-307 (Interim Order dated April 25, 2012). See also Driscoll v. Sch. Dist. of the Chathams (Morris), GRC Complaint No. 2007-303 (June 2008). Based on the foregoing, the Custodian did not unlawfully deny access to the February 2021 invoice. N.J.S.A. 47:1A-6.
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

#### Procedural History:

On June 29, 2022, the Council distributed its Interim Order to all parties. On July 7, 2022, the current Custodian responded to the Council's Interim Order. The current Custodian certified that the invoice responsive to OPRA request No. 1 was disclosed to the Complainant via e-mail on April 22, 2021. The current Custodian also reasserted that the delay in disclosure was due to the invoice not being approved for payment by the Village of Ridgewood ("Village") Council.

#### Request for Reconsideration:

On July 14, 2022, Custodian's Counsel filed a request for reconsideration of the Council's Interim Order based on a "change in circumstances." Counsel requested that the Council

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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.

reconsider conclusion No. 2 of its Interim Order to hold that no unlawful denial of access occurred. Counsel argued that “through no fault of its own,” the Council held that an unlawful denial of access occurred; however, the Custodian disclosed the responsive invoice Complainant on April 22, 2021. Counsel contended that the timing of this complaint led to the filing of the Statement of Information (“SOI”) prior to the disclosure. Counsel argued that both the Custodian and current Custodian have explained multiple times that the delay in disclosure was because the Village Council had yet to approve the bills. Counsel. Counsel thus argued that the delay in disclosure was not intentional.

#### Additional Submissions:

On August 10, 2022, the Government Records Council (“GRC”) e-mailed the current Custodian acknowledging receipt of her July 7, 2022 response. The GRC noted that the current Custodian’s certification did not appear to address whether the invoices responsive to OPRA request No. 2 were disclosed to the Complainant. The GRC also stated that, regarding the request for reconsideration, it was unclear whether the Complainant was served with same. The GRC noted that not only did its regulations require that all parties be copied on a request for reconsideration, but that the service date was needed to calculate the objections time frame. N.J.A.C. 5:105-2.10(c); (d). The GRC thus requested that the current Custodian submit a supplemental legal certification by close of business on August 15, 2022 addressing OPRA request No. 2 and service of the request for reconsideration to the Complainant.

On August 15, 2022, the current Custodian submitted a supplemental legal certification to the GRC. Therein, the current Custodian certified that the Firm invoices responsive to OPRA request No. 2 were disclosed to the Complainant via e-mail on April 19, 2021. The current Custodian thus certified that all outstanding invoices have been disclosed to the Complainant. The current Custodian also certified that Custodian’s Counsel served a copy of the request for reconsideration to the Complainant via e-mail on July 18, 2022.

### Analysis

#### Reconsideration

Pursuant to N.J.A.C. 5:105-2.10, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. Requests must be in writing, delivered to the Council and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. N.J.A.C. 5:105-2.10(a) – (e).

In the matter before the Council, Custodian’s Counsel filed the request for reconsideration of the Council’s June 28, 2022 Interim Order on July 14, 2022, ten (10) business days from the issuance of the Council’s Order.

Applicable case law holds that:

“A party should not seek reconsideration merely based upon dissatisfaction with a decision.” D’Atria v. D’Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a “palpably incorrect or irrational basis;” or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D’Atria, . . . 242 N.J. Super. at 401. “Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement.” *Ibid.*

[In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).]

Here, Custodian’s Counsel has requested that the Council reconsider conclusion No. 2 based on a “change in circumstances:” the records sought in both OPRA requests were disclosed to the Complainant on April 19, and 22, 2021 respectively. Counsel argued that this fact was omitted because the disclosure occurred after submission of the SOI. Counsel argued that the delay was the result of the invoices not being approved by the Village Council. However, the Council has already rejected the Village approval argument as an unlawful basis for denial. Further, whether the Custodian ultimately disclosed the outstanding invoices prior to the Council’s Interim Order does not negate the unlawful nature of the original denial of access. Thus, the alleged change in circumstances does not warrant reconsideration here.

As the moving party, Custodian’s Counsel was required to establish either of the necessary criteria set forth above: either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. *See Cummings*, 295 N.J. Super. at 384. Counsel failed to establish that the complaint should be reconsidered based on a “change in circumstances.” Custodian’s Counsel has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. *See D’Atria*, 242 N.J. Super. at 401. Specifically, and regardless of whether the invoices were ultimately disclosed to the Complainant, the Council has already determined that the “draft” document position was erroneous and that those invoices in existence should have been disclosed upon request. Thus, Custodian Counsel’s request for reconsideration should be denied. *Cummings*, 295 N.J. Super. at 384; *D’Atria*, 242 N.J. Super. at 401; *Comcast*, 2003 N.J. PUC at 5-6.

## **Compliance**

At its June 28, 2022 meeting, the Council ordered the Custodian to disclose those invoices responsive to the Complainant’s OPRA requests that remained outstanding and to submit certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Executive Director. On June 29, 2022, 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 July 7, 2022.

On July 7, 2021, the fifth (5<sup>th</sup>) business day after receipt of the Council's Order, the current Custodian certified that Custodian Counsel's January 2021 invoice was disclosed to the Complainant via e-mail on April 22, 2021. However, the certification did not address the Firm's invoices responsive to OPRA request No. 2. Thus, the GRC sought a supplemental certification regarding those invoices and received same on August 15, 2022. Therein, the current Custodian confirmed that the Firm's invoices were disclosed to the Complainant via e-mail on April 19, 2021. However, a review of the facts and submissions supports that the current Custodian did not fully comply here. Although the invoices were ultimately disclosed to the Complainant in April 2021, the current Custodian failed to timely certify to the disclosure of all invoices, as was required by the Council's Order.

Therefore, the current Custodian did not fully comply with the Council's June 28, 2022 Interim Order. Specifically, although the current Custodian responded within the prescribed time frame submitting compliance regarding the invoice responsive to OPRA request No. 1, she failed to address the Firm's invoices responsive to OPRA request No. 2. However, the current Custodian simultaneously provided certified confirmation of compliance to the Executive Director for each response.

### **Knowing & Willful**

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

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

Here, the Custodian unlawfully denied access to Custodian Counsel's January 2021 invoice and the Firm's January and February 2021 invoices. N.J.S.A. 47:1A-6. However, the Custodian's response actions were lawful in accordance with N.J.S.A. 47:1A-5(i)(2); she lawfully denied access to Counsel's February 2021 invoice because it did not exist, and the current Custodian certified that all three (3) invoices were disclosed to the Complainant on April 19, and 22, 2021. 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.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Custodian's Counsel was required to establish either of the necessary criteria set forth above: either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. See Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). Counsel failed to establish that the complaint should be reconsidered based on a "change in circumstances." Custodian's Counsel has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. See D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Specifically, and regardless of whether the invoices were ultimately disclosed to the Complainant, the Council has already determined that the "draft" document position was erroneous and that those invoices in existence should have been disclosed upon request. Thus, Custodian Counsel's request for reconsideration should be denied. Cummings, 295 N.J. Super. at 384; D'Atria, 242 N.J. Super. at 401; In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).
2. The current Custodian did not fully comply with the Council's June 28, 2022 Interim Order. Specifically, although the current Custodian responded within the prescribed time frame submitting compliance regarding the invoice responsive to OPRA request No. 1, she failed to address the Firm's invoices responsive to OPRA request No. 2. However, the current Custodian simultaneously provided certified confirmation of compliance to the Executive Director for each response.
3. The Custodian unlawfully denied access to Custodian Counsel's January 2021 invoice and the Firm's January and February 2021 invoices. N.J.S.A. 47:1A-6. However, the Custodian's response actions were lawful in accordance with N.J.S.A. 47:1A-5(i)(2); she lawfully denied access to Counsel's February 2021 invoice because it did not exist, and the current Custodian certified that all three (3) invoices were disclosed to the Complainant on April 19, and 22, 2021. 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

August 23, 2022



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**

**June 28, 2022 Government Records Council Meeting**

Jeffrey Voigt  
Complainant

Complaint No. 2021-65

v.

Village of Ridgewood (Bergen)  
Custodian of Record

At the June 28, 2022 public meeting, the Government Records Council (“Council”) considered the June 21, 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. Although the Custodian did not timely respond to the Complainant’s two (2) OPRA requests seeking “immediate access” records, she adhered to N.J.S.A. 47:1A-5(i)(2) in making a reasonable effort to respond to such by extending the time frame. Furthermore, the explanation justifies the need for the extensions of time to provide the Complainant with responsive records. As such, the due to the extenuating extreme circumstances, the Custodian’s failure to timely respond and seeking multiple extensions of time does not constitute a “deemed” denial. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i)(2).
2. The Custodian unlawfully denied access Custodian Counsel’s January 2021 invoice responsive to OPRA request No. 1 and the Firm’s January and February 2021 invoices responsive to OPRA request No. 2. N.J.S.A. 47:1A-6. Specifically, the Custodian failed to bear her burden of proof that Village Council approval was required prior to disclosure. Thus, the Custodian shall disclose those invoices to the Complainant.
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>**

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

**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>**

4. Because Custodian Counsel's February 2021 invoice did not exist within the Village's possession at the time of the Complainant's OPRA request, the Custodian was under no obligation to provide same once she obtained it. Paff v. City of Union City (Hudson), GRC Complaint No. 2012-262 (August 2013); Paff v. Neptune Twp. Hous. Auth. (Monmouth), GRC Complaint No. 2010-307 (Interim Order dated April 25, 2012). See also Driscoll v. Sch. Dist. of the Chathams (Morris), GRC Complaint No. 2007-303 (June 2008). Based on the foregoing, the Custodian did not unlawfully deny access to the February 2021 invoice. N.J.S.A. 47:1A-6.
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the  
Government Records Council  
On The 28<sup>th</sup> Day of June 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: June 29, 2022**

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<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.

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
June 28, 2022 Council Meeting**

**Jeffrey Voigt<sup>1</sup>  
Complainant**

**GRC Complaint No. 2021-65**

v.

**Village of Ridgewood (Bergen)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Copies of:

1. Invoices from Custodian's Counsel for January and February 2021.
2. Invoices from William Northgrave, Esq. and McManimon, Scotland & Baumann, LLC (the "Firm") for January and February 2021.

**Custodian of Record:** Donna Jackson

**Request Received by Custodian:** March 11, 2021

**Response Made by Custodian:** March 19, 2021; March 26, 2021

**GRC Complaint Received:** March 24, 2021

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

Request and Response:

On March 11, 2021, the Complainant submitted two (2) Open Public Records Act ("OPRA") requests to the Custodian seeking the above-mentioned records. On the same day, the Custodian acknowledged receipt of OPRA request No. 1, stated that same would need to be redacted, and noted that she would advise if the Village of Ridgewood ("Village") needed an extension.

On March 19, 2021, the Custodian responded in writing to the Complainant's OPRA request No. 1 advising that an extension until March 26, 2021 was needed. On the same day, the Complainant responded seeking an explanation for the extension, as the Village "consistently dragged its feet" in responding to his OPRA requests.

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

<sup>2</sup> Represented by Matthew S. Rogers, Esq. of Law Office of Matthew S. Rogers, LLC (Ridgewood, 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.

On March 22, 2021, the Custodian e-mailed the Complainant and scheduled a conference call to discuss his “various OPRA [r]equests.”

Denial of Access Complaint:

On March 26, 2021, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that although he submitted two (2) OPRA requests, the Custodian only addressed one of them. The Complainant further contended that the Custodian also sought an extension of time for only the Custodian Counsel’s January 2021 invoice but made no mention of the February 2021 invoices.

Supplemental Responses:

On March 26, 2021, the Custodian responded in writing to OPRA request No. 2 denying access to the requested Firm invoices because they “have yet to be approved by the Village Council” and suggested that the Complainant submit an OPRA request following the April 2021 Council meeting.

On March 29, 2021, the Complainant e-mailed the Custodian stating that her March 19, 2021 e-mail gave him the impression that Custodian Counsel’s January 2021 invoice would be disclosed. The Complainant expressed confusion as to why fourteen (14) business days was necessary for disclosure. On March 30, 2021, following the expiration of the extended time frame, the Custodian responded in writing to OPRA request No. 1 advising that per the March 22, 2021 conference call, there are no records to provide “at this time.” The Custodian further noted that the Complainant agreed to submit a new OPRA request following the April 2021 Council meeting.

Statement of Information:

On April 12, 2021, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request No. 1 on March 11, 2021. The Custodian certified that her search included contacting Custodian’s Counsel and Accounts Payable. The Custodian certified that she located the January 2021 invoice, but no February 2021 invoice had been submitted as of that date. The Custodian further affirmed that she determined that the January 2021 invoice “had not yet been approved by the” Village. The Custodian certified that she subsequently sought an extension of time to respond through March 26, 2021. The Custodian averred that following a March 22, 2021 conference call with the Complainant regarding his OPRA requests, she responded in writing on March 2

The Custodian further certified that she received the Complainant’s OPRA request No. 2 on March 11, 2021. The Custodian certified that her search included contacting the Treasurer, Firm, and Accounts Payable to locate the responsive invoices. The Custodian affirmed that she received redacted invoices on March 16, 2021. The Custodian certified that following a March 22, 2021 conference call with the Complainant regarding his OPRA requests, she responded in writing on March 26, 2021 denying OPRA request No. 2 because the responsive invoices “have yet to be approved by the Village Council . . .” The Custodian further affirmed that she advised the Complainant he could submit a new OPRA request following the April 2021 meeting.

The Custodian argued that her delay in disclosing the responsive records did not equate to a violation of OPRA for two reasons. The Custodian first argued that she could not disclose the requested invoices because they were not approved for payment by the Village Council. The Custodian noted that the Complainant, a Village Councilman from July 1, 2016 through June 30, 2020, was advised of the Village's bill payment process in a March 22, 2021 conference call. The Custodian further noted that the Complainant was advised that the Village does not "automatically pay bills," which resulted in a delay of disclosure here. The Custodian further certified that as of this date, none of the bills were "approved by Village Council."

The Custodian next argued that her actions were lawful and consistent with amendments made to OPRA on March 20, 2020 in response to the COVID-19 Public Health Emergency ("PHE"). The Custodian stated that on that day, the Legislature amended OPRA to waive the statutory response time frame during a PHE under the Emergency Health Powers Act (N.J.S.A. 26:13-1, et seq.) or other state of emergency under the Disaster Control Act (N.J.S.A. App. A. 9-33, et seq.). N.J.S.A. 47:1A-5(i)(2). The Custodian noted that the amendment nonetheless required a custodian to "make a reasonable effort" to respond during that time. The Custodian asserted that reasonable efforts include extensions of time, which she utilized here to ensure compliance with the subject OPRA requests. The Custodian thus argued that she conformed to the intent of OPRA as amended.

## Analysis

### Timeliness

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian's failure to respond within the required seven (7) business days results in a "deemed" denial. Id. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).<sup>4</sup> Thus, a custodian's failure to respond in writing to a complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

Likewise, barring extenuating circumstances, a custodian's failure to respond immediately in writing to a complainant's OPRA request for immediate access records, either granting access, denying access, seeking clarification, or requesting an extension of time, also results in a "deemed" denial of the request pursuant to N.J.S.A. 47:1A-5(e), N.J.S.A. 47:1A-5(g), and N.J.S.A. 47:1A-5(i).<sup>5</sup> See Cody v. Middletown Twp. Pub. Sch., GRC Complaint No. 2005-98 (December 2005) and Harris v. N.J. Dep't of Corr., GRC Complaint No. 2011-65 (August 2012). See also Herron v.

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<sup>4</sup> A custodian's written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

<sup>5</sup> OPRA lists immediate access records as "budgets, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information." N.J.S.A. 47:1A-5(e). The Council has also determined that purchase orders and invoices are immediate access records. See Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2012-03 (April 2013).

Twp. of Montclair, GRC Complaint No. 2006-178 (February 2007) (holding that the custodian was obligated to notify the complainant immediately as to the status of “immediate access” records).

Additionally, the Legislature amended OPRA on March 20, 2020, in response to the global pandemic. P.L. 2020, c.10. Based on that amendment, N.J.S.A. 47:1A-5(i) now provides that:

During a period declared pursuant to the laws of this State as a state of emergency, public health emergency, or state of local disaster emergency, the deadlines by which to respond to a request for, or grant or deny access to, a government record under paragraph (1) of this subsection or subsection e. of this section shall not apply, provided, however, that the custodian of a government record shall make a reasonable effort, as the circumstances permit, to respond to a request for access to a government record within seven business days or as soon as possible thereafter.”

[Id. at (2).]

“Paragraph (1) of this subsection” refers to N.J.S.A. 47:1A-5(i) and “subsection e. of this section” refers to N.J.S.A. 47:1A-5(e).

In the instant matter, the Custodian certified that she received the subject OPRA requests, which sought “immediate access” items, on March 11, 2021. The Custodian first responded to OPRA request No. 1 on March 19, 2021 extending the response time frame through March 26, 2021. The Complainant questioned the need for this extension and eventually filed the instant Denial of Access Complaint on that issue on March 24, 2021, two (2) business days before expiration of the extended time frame for OPRA request No. 1. The GRC notes that the Custodian did not extend the time frame for OPRA request No. 2 but did respond within the extended time frame applied to OPRA request No. 1. The Custodian subsequently denied both OPRA requests because they were not “approved” by the Village Council.

Notwithstanding the presence of “immediate access” records in each of the OPRA requests and the Complainant’s dispute over the extension, the March 20, 2020 amendment to N.J.S.A. 47:1A-5 supports the Custodian’s actions here. Specifically, the Custodian’s non-adherence to N.J.S.A. 47:1A-5(e) and (i)(1) is excused pursuant to the PHE amendment. That is, there is no evidence to support that the Custodian’s response, which fell beyond the statutory time frames normally in place pursuant to N.J.S.A. 47:1A-5(e) and (i), was in some way unreasonable under the circumstances of the PHE. Further, the fact that the Custodian was required to contact multiple individuals and conduct a review, through Counsel and the Firm, colors the extended time frame as reasonable. Lastly, the Complainant, who previously served as a Village Councilmember during the early stages of the PHE, failed to submit any evidence to refute the Custodian’s certification.

Therefore, although the Custodian did not timely respond to the Complainant’s two (2) OPRA requests seeking “immediate access” records, she adhered to N.J.S.A. 47:1A-5(i)(2) in making a reasonable effort to respond to such by extending the time frame. Furthermore, the explanation justifies the need for the extensions of time to provide the Complainant with responsive records. As such, the due to the extenuating extreme circumstances, the Custodian’s

failure to timely respond and seeking multiple extensions of time does not constitute a “deemed” denial. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i)(2).

In closing, the GRC notes that while March 20, 2020 amendment offered flexibility here and thus supported the above finding, the evidence does indicate a particular difficulty on the part of the Custodian in properly tracking and responding to these OPRA requests. Specifically, the Custodian’s extension e-mail for OPRA request No. 1 caused obvious confusion over which parts of same were being extended. Further, the Custodian did not seek a similar extension for OPRA request No. 2. Also, the Custodian responded to OPRA request item No. 2 in the extended time frame applied to OPRA request item No. 1 but did not respond to the latter in writing until after the extension expiration. As such, the Village could benefit from a better tracking system to ensure the response process adheres to the basic provisions of OPRA.

### **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 the matter before the Council, the Custodian’s reason for denying access to three (3) of the four (4) sets of invoices is that the Village Council had not yet approved them, presumably for payment. The Custodian further certified in the SOI that as of that date, those invoices remained “not approved.” The Custodian also certified that Custodian Counsel’s February 2021 invoice had not yet been received at the Village. The forgoing sets up two (2) specific issues: 1) whether an agency can deny access to attorney invoices on the basis that the governing body had not yet approved payment; and 2) whether an agency is required to disclose a record it had not received prior to submission of the OPRA request.

As for the first issue, the Custodian does not identify a specific lawful basis attached to her assertion that the invoices were exempt from disclosure. However, the idea of governing body approval is most often synonymous with the disclosability of meeting minutes. To that end, OPRA excludes from the definition of a government record “inter-agency or intra-agency advisory, consultative or deliberative [(“ACD”)] material.” N.J.S.A. 47:1A-1.1. It is evident that this phrase is intended to exclude from the definition of a government record the types of documents that are the subject of the “deliberative process privilege.”

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

[N]either the statute nor the courts have defined the terms . . . ACD in the context of the public records law. The Council looks to an analogous concept, the deliberative process privilege, for guidance in the implementation of OPRA’s ACD exemption. Both the ACD exemption and the deliberative process privilege enable a governmental entity to shield from disclosure material that is pre-decisional and



deliberative in nature. Deliberative material contains opinions, recommendations, or advice about agency policies. In Re the Liquidation of Integrity Ins. Co., 165 N.J. 75, 88 (2000); In re Readoption With Amendments of Death Penalty Regulations, 182 N.J. 149 (App. Div. 2004).

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

The applicability of the deliberative process privilege is government by a two-prong test. The judge must determine both that a document is (1) “pre-decisional,” meaning it was “generated before the adoption of an agency’s policy or decision;” and (2) deliberative, in that it “contain[s] opinions, recommendations, or advice about agency policies.” [Educ. Law Ctr. v. Dep’t of Educ., 198 N.J. 274, 276 (2009) (quoting Integrity, 165 N.J. at 83)]. If a document stratifies both prongs, it is exempt from disclosure under OPRA pursuant to the deliberative process privilege.

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

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

Turning to other types of “draft” records, in Dalesky v. Borough of Raritan (Somerset), GRC Complaint No. 2008-61 (November 2009), the Council, in upholding the custodian’s denial as lawful, determined that the requested study of the local police department was a draft document and that draft documents in their entirety are ACD material pursuant to N.J.S.A. 47:1A-1.1. Subsequently, in Shea v. Village of Ridgewood (Bergen), GRC Complaint No. 2010-79 (February 2011), the custodian certified that a requested letter was in draft form and had not yet been reviewed by the municipal engineer. The Council, looking to relevant case law, concluded that the requested letter was exempt from disclosure under OPRA as ACD material. See also Ciesla v. N.J. Dep’t of Health and Senior Serv., GRC Complaint No. 2010-38 (May 2011) (aff’d Ciesla, 429 N.J. Super. 127 (holding that a draft staff report was exempt from disclosure as ACD material)).

The question raised here is whether invoices for professional services can be considered a “draft” document until that time which a governing body agrees to the veracity of same through authorizing payment by formal action. After careful review, the GRC is not persuaded that the Custodian’s denial of Custodian Counsel’s January 2021 and the Firm’s January and February 2021 invoices was lawful. Initially, there is no evidence in the record to suggest that the invoices

were somehow a “draft” document as contemplated in Libertarians, 453 N.J. Super. 83 and Dalesky, GRC 2008-61. Additionally, there is no statutory or precedential case law supporting that an agency can withhold invoices simply because they have not been approved for payment. In the absence of any other compelling arguments, the GRC finds that the invoices should have been disclosed regardless of their payment status.

Accordingly, the Custodian unlawfully denied access Custodian Counsel’s January 2021 invoice responsive to OPRA request No. 1 and the Firm’s January and February 2021 invoices responsive to OPRA request No. 2. N.J.S.A. 47:1A-6. Specifically, the Custodian failed to bear her burden of proof that Village Council approval was required prior to disclosure. Thus, the Custodian shall disclose those invoices to the Complainant.

Turning to the remaining outstanding invoice, the Council has previously determined that a custodian is not required to provide records that came into existence after the submission of an OPRA request. Paff v. City of Union City (Hudson), GRC Complaint No. 2012-262 (August 2013). Further, OPRA does not contemplate on-going requests for records. *See* Paff v. Neptune Twp. Hous. Auth. (Monmouth), GRC Complaint No. 2010-307 (Interim Order dated April 25, 2012) (*citing* Blau v. Union Cnty., GRC Complaint No. 2003-75 (January 2005)).

Here, the Complainant’s OPRA request No. 1 sought, in part, Custodian Counsel’s February 2021 invoice. The Custodian initially extended the time frame and penultimately denied OPRA request No. 1 for the reasons addressed above. However, in the SOI, the Custodian certified that she determined during her search for the responsive records that the Village did not possess a February 2021 invoice as of the date of the subject OPRA request. Additionally, there is no evidence in the record to refute that the invoice was not received by the Village at the time of the Complainant’s OPRA request No. 1. Thus, the Custodian was under no obligation to disclose the invoice once the Village received same. *See also* Driscoll v. Sch. Dist. of the Chathams (Morris), GRC Complaint No. 2007-303 (June 2008).

Accordingly, because Custodian Counsel’s February 2021 invoice did not exist within the Village’s possession at the time of the Complainant’s OPRA request, the Custodian was under no obligation to provide same once she obtained it. Paff, GRC 2010-307; Paff, 2012-262. *See also* Driscoll, GRC 2007-303. Based on the foregoing, the Custodian did not unlawfully deny access to the February 2021 invoice. N.J.S.A. 47:1A-6.

### **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. Although the Custodian did not timely respond to the Complainant’s two (2) OPRA

requests seeking “immediate access” records, she adhered to N.J.S.A. 47:1A-5(i)(2) in making a reasonable effort to respond to such by extending the time frame. Furthermore, the explanation justifies the need for the extensions of time to provide the Complainant with responsive records. As such, the due to the extenuating extreme circumstances, the Custodian’s failure to timely respond and seeking multiple extensions of time does not constitute a “deemed” denial. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i)(2).

2. The Custodian unlawfully denied access Custodian Counsel’s January 2021 invoice responsive to OPRA request No. 1 and the Firm’s January and February 2021 invoices responsive to OPRA request No. 2. N.J.S.A. 47:1A-6. Specifically, the Custodian failed to bear her burden of proof that Village Council approval was required prior to disclosure. Thus, the Custodian shall disclose those invoices to the Complainant.
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>6</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>7</sup> to the Executive Director.<sup>8</sup>**
4. Because Custodian Counsel’s February 2021 invoice did not exist within the Village’s possession at the time of the Complainant’s OPRA request, the Custodian was under no obligation to provide same once she obtained it. Paff v. City of Union City (Hudson), GRC Complaint No. 2012-262 (August 2013); Paff v. Neptune Twp. Hous. Auth. (Monmouth), GRC Complaint No. 2010-307 (Interim Order dated April 25, 2012). See also Driscoll v. Sch. Dist. of the Chathams (Morris), GRC Complaint No. 2007-303 (June 2008). Based on the foregoing, the Custodian did not unlawfully deny access to the February 2021 invoice. N.J.S.A. 47:1A-6.
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

Prepared By: Frank F. Caruso  
Executive Director

June 21, 2022

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<sup>6</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>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."

<sup>8</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.