



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

May 24, 2011 Government Records Council Meeting

Philip Charles
Complainant

Complaint No. 2009-169

v.

Plainfield Municipal Utilities Authority (Union)
Custodian of Record

At the May 24, 2011 public meeting, the Government Records Council (“Council”) considered the April 20, 2011 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:

Executive Director within five (5) business days of receiving the Council’s Interim Order, the Custodian failed to initially certify that Purchase Order No. 08-00527 and any supporting documentation exists, as was required in the Council’s Interim Order. *See* Conclusion No. 5. Therefore, the Custodian has not fully complied with the Council’s February 24, 2011 Interim Order.

2. The original Custodian’s initial response was insufficient because she failed to respond to each request item individually; thus, she violated N.J.S.A. 47:1A-5.g. pursuant to Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008). The original Custodian further violated N.J.S.A. 47:1A-5.e. by failing to immediately grant access or deny access to the requested invoices, salaries and contracts, request additional time to respond or seek clarification of the request. The original Custodian further unlawfully denied access to Purchase Order No. 08-00527 and any supporting documentation responsive to request Item No. 2 and 2008 salaries responsive to request Item No. 6. Additionally, although the current Custodian provided the 2008 salaries ordered to be disclosed by the Council’s Interim Order, and provided certified confirmation of same in a timely manner, the Custodian initially failed to certify that no Purchase Order No. 08-00527 and any supporting documentation existed; thus, the Custodian did not fully comply with the Council’s February 24, 2011 Interim Order. However, the original Custodian did not unlawfully deny access to the Complainant’s OPRA request Item No. 1 and seven (7) of the eleven (11) contracts requested in Item No. 7 because no records responsive existed. *See* Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). Moreover, the original Custodian did not unlawfully deny access to the remaining four (4) contracts responsive to Item No. 7 because she provided access to same. Further, request Items No. 3, No. 4 and No. 5 were deemed to be invalid under OPRA pursuant to MAG Entertainment, LLC v. Division of



Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005), and Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005) because each item sought information instead of a specific government record. *See* LaMantia v. Jamesburg Public Library (Middlesex), GRC Complaint No. 2008-140 (February 2009). Additionally, the evidence of record does not indicate that the original and current Custodians' violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the original and current Custodians' 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 24th Day of May, 2011

Robin Berg Tabakin, Chair
Government Records Council

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

Charles A. Richman, Secretary
Government Records Council

Decision Distribution Date: June 3, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
May 24, 2011 Council Meeting**

**Philip Charles¹
Complainant**

GRC Complaint No. 2009-169

v.

**Plainfield Municipal Utilities Authority (Union)²
Custodian of Records**

Records Relevant to Complaint:

1. Copies of Plainfield Municipal Utilities Authority (“PMUA”) 2009 first quarterly and second quarterly bills for the following addresses:
 - a. 1000 Kenyon Avenue.
 - b. 1358 East 2nd Street.
 - c. 1127 West 4th Street.
 - d. 316 Monroe Avenue.
 - e. 216 Netherwood Avenue.
2. Copies of purchase orders and all supporting documentation for the following:
 - a. 08-00467
 - b. 08-00468
 - c. 08-00077
 - d. 08-00525
 - e. 08-00526
 - f. 08-00527
 - g. 08-00528
 - h. 08-00529
 - i. 08-00532
 - j. 08-00563
 - k. 08-00564
 - l. 08-00565
 - m. 08-01724
 - n. 08-00637
3. Copies of any information related to health insurance payments by the PMUA for the Board of Commissioners for January 2008, April 2008, August 2008, December 2008, January 2009 and February 2009.
4. Copies of any information related to dental insurance payments by the PMUA for the Board of Commissioners for January 2008, April 2008, August 2008, December 2008, January 2009 and February 2009.

¹ No legal representation listed on record.

² Represented by Michael V. Camerino, Esq., of Mauro, Savo, Camerino & Grant, P.A. (Somerville, NJ).
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5. Copies of any information related to life insurance payments by the PMUA for Board of Commissioner members Ms. Carol Ann Brokaw, Mr. Jerry Green, Mr. Alex Toliver and Mr. Harold Mitchell for January 2008, April 2008, August 2008, December 2008, January 2009 and February 2009.
6. Copies of 2008 salaries for the following: Ms. Carol Ann Brokaw, Mr. Harold Mitchell, Mr. Alex Toliver, Mr. Eric C. Watson, the Custodian, Ms. Lana Carden, Mr. Eugene Dudley, Mr. James Green, Mr. David Ervin, Mr. James Perry and Mr. Duane Young.
7. Copies of employment contracts for the following: Ms. Carol Ann Brokaw, Mr. Harold Mitchell, Mr. Alex Toliver, Mr. Eric C. Watson, the Custodian, Ms. Lana Carden, Mr. Eugene Dudley, Mr. James Green, Mr. David Ervin, Mr. James Perry and Mr. Duane Young.³

Request Made: April 23, 2009

Response Made: April 28, 2009

Custodian: Tracee Joseph, Esq.⁴

GRC Complaint Filed: May 18, 2009⁵

Background

February 24, 2011

Government Records Council's ("Council") Interim Order. At its February 24, 2011 public meeting, the Council considered the February 15, 2011 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 responded in writing to the Complainant's April 23, 2009 OPRA request within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i., the Custodian's response was legally insufficient because she failed to respond to each request item contained in the request individually. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5.g. and Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008).
2. Because the Custodian failed to immediately grant or deny access to the requested invoices, salaries and contracts, request additional time to respond or request clarification of the request, the Custodian has violated N.J.S.A. 47:1A-5.e. pursuant to Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 28, 2007). *See also* Ghana v. New Jersey Department of Corrections, GRC Complaint No. 2008-154 (June 2009).

³ The Complainant requested additional records; however, the Complainant confirmed that such records were no longer at issue in this complaint in an e-mail to the GRC dated June 27, 2010.

⁴ The original Custodian of Record was Dollie Hamlin.

⁵ The GRC received the Denial of Access Complaint on said date.

3. The Custodian certified in the Statement of Information that no quarterly sewer bills responsive to the Complainant's OPRA request Item No. 1 exist and there is no credible evidence in the record to refute the Custodian's certification. Therefore, although the Custodian violated N.J.S.A. 47:1A-5.g. by providing an insufficient response to the Complainant's OPRA request, and violated N.J.S.A. 47:1A-5.e. by failing to immediately respond to the Complainant's OPRA request Item No. 1 for quarterly sewer bills, the Custodian has not unlawfully denied access to the Complainant's OPRA request for first and second quarterly bills for the addresses listed in the OPRA request pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), since no records exist.
4. Because the Complainant's request Item No. 2 identifies a type of government record (documents supporting each purchase order identified by number), MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005) do not apply to the request relevant to this complaint. The Custodian's search is not open-ended, nor does it require research, but rather requires the Custodian to provide the documentation attached to each requested invoice, if any documentation exists.
5. The Custodian has unlawfully denied access to the remaining purchase order because a record being voided is not an exemption afforded under OPRA. N.J.S.A. 47:1A-6. **If Purchase Order No. 08-00527 (and all supporting documentation) still exists, same shall be provided to the Complainant. If the purchase order has already been provided to the Complainant or the record does not exist, the Custodian must certify to such disclosure.**
6. Pursuant to the Council's holding in LaMantia v. Jamesburg Public Library (Middlesex), GRC Complaint No. 2008-140 (February 2009), the Complainant's request Items No. 3, No. 4 and No. 5 are invalid under OPRA pursuant MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005), and Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005), because said request items seek information rather than a specific identifiable government record. Therefore, the Custodian has not unlawfully denied access to the request information.
7. Based on the language of both N.J.S.A. 47:1A-5.e. and N.J.S.A. 47:1A-10, it is clear that the Complainant's request for salaries of eleven (11) employees is valid under OPRA and not an invalid request for information. The Custodian should have provided immediate access to the record containing the salaries sought by the Complainant pursuant to N.J.S.A. 47:1A-5.e. and failed to do so. Thus, the Custodian has unlawfully denied access to the requested 2008 salary information. N.J.S.A. 47:1A-6. **The Custodian shall disclose the salary information responsive to the Complainant. If the records have**

already been provided to the Complainant, the Custodian must certify to such disclosure.

8. The Custodian certified in the Statement of Information that no contracts exist for seven (7) of the eleven (11) employees identified by the Complainant in request Item No. 7 and the Complainant has submitted no credible evidence to refute the Custodian's certification. Therefore, although the Custodian violated N.J.S.A. 47:1A-5.g. by providing an insufficient response to the Complainant's OPRA request, and violated N.J.S.A. 47:1A-5.e. by failing to immediately respond to the Complainant's OPRA request Item No. 7 for contracts, the Custodian has not unlawfully denied access to the Complainant's OPRA request pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
9. Although the Custodian's insufficient response resulted in a violation of N.J.S.A. 47:1A-5.g. and the Custodian's failure to immediately grant access to the requested contracts resulted in a violation of N.J.S.A. 47:1A-5.e., the Custodian did not unlawfully deny access to the records responsive to the Complainant's OPRA request Item No. 7 pursuant to Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005), because the Complainant acknowledged receipt of all four (4) contracts that exist on July 21, 2010.
10. **The Custodian shall comply with Item No. 5 and No. 7 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions (if necessary), including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4⁶, to the Executive Director.⁷**
11. 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.

February 28, 2011

Council's Interim Order distributed to the parties.

March 2, 2011

E-mail from the Custodian to the Complainant. The Custodian states that in response to the Council's Interim Order, the Custodian is disclosing Purchase Order No.

⁶ "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."

⁷ 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.

08-00527 (without redactions) and the requested 2008 salaries for a copy cost of \$0.10. The Custodian states that these records can be retrieved at the Plainfield Municipal Utilities Authority (“PMUA”) office between 9:00 a.m. and 12:00 p.m. and 2:00 p.m. and 5:00 p.m.

The Custodian notes that if the Complainant wishes to receive the records via mail, the Custodian will apply an additional fee of \$5.54 for certified mail.

March 2, 2011

Custodian’s response to the Council’s Interim Order. The Custodian certifies that she is in receipt of the Council’s February 24, 2011 Interim Order and has complied with Item No. 5 and Item No. 7 of said order. The Custodian certifies that she notified the Complainant on March 2, 2011 that the records required to be provided were available for pickup or delivery via certified mail once payment is received.

March 7, 2011

E-mail from the Complainant to the Custodian attaching the following:

- E-mail from the Custodian to the Complainant dated March 2, 2011.
- PMUA purchase order transaction inquiry for Purchase Order No. 08-00527.
- 2008 salary list.

The Complainant states that he has not received Purchase Order No. 08-00527 or any supporting documentation as required by the Council’s February 24, 2011 Interim Order. The Complainant states that he instead received a purchase order transaction inquiry printout. The Complainant states that when he inquired about the actual purchase order, the Custodian advised that the printout was all that existed. The Complainant asserts that a simple statement confirming that the purchase order and supporting documentation at issue are no longer retained by the PMUA would have been sufficient.

The Complainant states that this e-mail shall serve as a reminder that the certified confirmation supplied to the GRC by the Custodian should state that the purchase order was not provided.

March 8, 2011

E-mail from the Custodian to the Complainant. The Custodian states that in regard to Purchase Order No. 08-0527, a check was never generated so there would not be any supporting documentation associated with said purchase order. The Custodian further states that no purchase order exists and that the only record on file is the purchase order transaction inquiry provided which is a purchase order report.

March 8, 2011

E-mail from the GRC to the Custodian. The GRC states that it is in receipt of Custodian’s certification dated March 2, 2011. The GRC states that it is also in receipt of an e-mail from the Custodian to the Complainant dated March 8, 2011.

The GRC states that a review of the Custodian’s March 2, 2011 certification shows that the Custodian did not certify that Purchase Order No. 08-00527 (and any Philip Charles v. Plainfield Municipal Utilities Authority (Union), 2009-169 – Supplemental Findings and Recommendations of the Executive Director

supporting documentation) does not exist; however, the Custodian later states that the purchase order does not exist in her March 8, 2011 e-mail to the Complainant. The GRC states that the Council's February 24, 2011 Interim Order required that:

“If Purchase Order No. 08-00527 (and all supporting documentation) still exists, same shall be provided to the Complainant. If the purchase order has already been provided to the Complainant or *the record does not exist, the Custodian must certify to such ...*” (Emphasis added.)

The GRC requests that the Custodian legally certify to the following:

1. Whether Purchase Order No. 08-00527 and any supporting documentation ordered to be provided in the Council's February 24, 2011 Interim Order exists?
2. Whether the purchase order transaction sheet printout regarding Purchase Order No. 08-00527 and provided to the Complainant on March 2, 2011 represents the only record that exists?

The GRC requests that the Custodian provide the requested certification by close of business on March 10, 2011.

March 8, 2011

Custodian's second (2nd) legal certification. The Custodian certifies that Purchase Order No. 08-00527 and any supporting documentation ordered to be provided pursuant to the Council's February 24, 2011 Interim Order does not exist. The Custodian certifies that the purchase order transaction sheet printout provided to the Complainant on March 2, 2011 represents the only record responsive that exists.

Analysis

Whether the Custodian complied with the Council's February 24, 2011 Interim Order?

The Council's February 24, 2011 Interim Order specifically directed the Custodian to do the following:

“... If Purchase Order No. 08-00527 (and all supporting documentation) still exists, same shall be provided to the Complainant. If the purchase order has already been provided to the Complainant or the record does not exist, the Custodian must certify to such disclosure.

The Custodian shall disclose the salary information responsive to the Complainant. If the records have already been provided to the Complainant, the Custodian must certify to such disclosure.”

The Custodian responded to the Complainant on March 2, 2011 stating that she was disclosing the records ordered to be disclosed by the Council's Interim Order at a cost of \$0.10. The Custodian gave the Complainant the option of retrieving the records from the PMUA or having them mailed, for which the Custodian would charge an

additional \$5.54 for the cost of certified mail. The Custodian also submitted her certification of compliance with the Council's Interim Order on the same day.

On March 7, 2011, the Complainant e-mailed the Custodian attaching the records provided to him on March 2, 2011. The Complainant stated that the e-mail should serve as notification that the Custodian's certification to the GRC should reflect that the Complainant was not provided with Purchase Order No. 08-00527 and any supporting documentation; rather, the Custodian provided a purchase order transaction sheet printout and advised that this record was all that existed.

Based on the foregoing, the GRC e-mailed the Custodian on March 8, 2011 advising that the Council's February 24, 2011 Interim Order required that:

"If Purchase Order No. 08-00527 (and all supporting documentation) still exists, same shall be provided to the Complainant. If the purchase order has already been provided to the Complainant or *the record does not exist, the Custodian must certify to such ...*" (Emphasis added.)

The GRC requested that the Custodian provide a second (2nd) legal certification confirming that no purchase order existed and that the printout was the only record responsive that existed.

The Custodian submitted the requested certification to the GRC on March 8, 2011 certifying that Purchase Order No. 08-00527 and any supporting documentation does not exist and that the printout provided to the Complainant represented the only record responsive that existed.

In order to comply with the Council's Interim Order in the instant complaint, the Custodian was required to provide to the Complainant Purchase Order No. 08-00527 and any supporting documentation responsive to request Item No. 2 (and the 2008 salaries for the employees identified in the Complainant's OPRA request Item No. 6) within five (5) business days of receipt of the Council's Interim Order. Moreover, the Council's Interim Order required that if the voided purchase order was previously provided or did not exist, the Custodian was required to certify to such.

The evidence of record indicates that the Custodian initially provided in a timely manner certified confirmation that the voided purchase order was provided; however, the record actually provided was a purchase order transaction sheet printout. The Custodian subsequently certified that no purchase order existed and that the transaction sheet provided was the only record that existed. Although the Custodian provided this alternative record to the Complainant, she initially failed to certify that no purchase order existed; thus, she has not complied with the Council's February 24, 2011 Interim Order.

Therefore, although the Custodian provided 2008 salaries and a purchase order transaction sheet printout to the Complainant on March 2, 2011 and provided certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4 to the Executive Director within five (5) business days of receiving the Council's Interim Order, the Custodian failed to initially certify that Purchase Order No. 08-00527 and any supporting

documentation did not exist, as was required in the Council's Interim Order. *See* Conclusion No. 5. Therefore, the Custodian has not fully complied with the Council's February 24, 2011 Interim Order.

Whether the original and current Custodians' violations of OPRA rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

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:

“... If 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 (Berg); 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 instant complaint, the original Custodian's initial response was insufficient because she failed to respond to each request item individually; thus, she violated N.J.S.A. 47:1A-5.g. pursuant to Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008). The original Custodian further violated N.J.S.A. 47:1A-5.e. by failing to immediately grant access or deny access to the requested invoices, salaries and contracts, request additional time to respond or seek clarification of the request. The original Custodian further unlawfully denied access to Purchase Order No. 08-00527 and any supporting documentation responsive to request Item No. 2 and 2008 salaries responsive to request Item No. 6. Additionally, although

the current Custodian provided the 2008 salaries ordered to be disclosed by the Council's Interim Order, and provided certified confirmation of same in a timely manner, the Custodian initially failed to certify that no Purchase Order No. 08-00527 and any supporting documentation existed; thus, the Custodian did not fully comply with the Council's February 24, 2011 Interim Order. However, the original Custodian did not unlawfully deny access to the Complainant's OPRA request Item No. 1 and seven (7) of the eleven (11) contracts requested in Item No. 7 because no records responsive existed. *See Pusterhofer v. New Jersey Department of Education*, GRC Complaint No. 2005-49 (July 2005). Moreover, the original Custodian did not unlawfully deny access to the remaining four (4) contracts responsive to Item No. 7 because she provided access to same. Further, request Items No. 3, No. 4 and No. 5 were deemed to be invalid under OPRA pursuant to *MAG Entertainment, LLC v. Division of Alcoholic Beverage Control*, 375 N.J. Super. 534, 546 (App. Div. 2005), and *Bent v. Stafford Police Department*, 381 N.J. Super. 30, 37 (App. Div. 2005) because each item sought information instead of a specific government record. *See LaMantia v. Jamesburg Public Library (Middlesex)*, GRC Complaint No. 2008-140 (February 2009). Additionally, the evidence of record does not indicate that the original and current Custodians' violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the original and current Custodians' 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. Although the Custodian provided 2008 salaries and a purchase order transaction sheet printout to the Complainant on March 2, 2011 and provided certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4 to the Executive Director within five (5) business days of receiving the Council's Interim Order, the Custodian failed to initially certify that Purchase Order No. 08-00527 and any supporting documentation exists, as was required in the Council's Interim Order. *See Conclusion No. 5*. Therefore, the Custodian has not fully complied with the Council's February 24, 2011 Interim Order.
2. The original Custodian's initial response was insufficient because she failed to respond to each request item individually; thus, she violated N.J.S.A. 47:1A-5.g. pursuant to *Paff v. Willingboro Board of Education (Burlington)*, GRC Complaint No. 2007-272 (May 2008). The original Custodian further violated N.J.S.A. 47:1A-5.e. by failing to immediately grant access or deny access to the requested invoices, salaries and contracts, request additional time to respond or seek clarification of the request. The original Custodian further unlawfully denied access to Purchase Order No. 08-00527 and any supporting documentation responsive to request Item No. 2 and 2008 salaries responsive to request Item No. 6. Additionally, although the current Custodian provided the 2008 salaries ordered to be disclosed by the Council's Interim Order, and provided certified confirmation of same in a timely manner, the Custodian initially failed to certify that no Purchase Order No. 08-00527 and any

supporting documentation existed; thus, the Custodian did not fully comply with the Council's February 24, 2011 Interim Order. However, the original Custodian did not unlawfully deny access to the Complainant's OPRA request Item No. 1 and seven (7) of the eleven (11) contracts requested in Item No. 7 because no records responsive existed. *See Pusterhofer v. New Jersey Department of Education*, GRC Complaint No. 2005-49 (July 2005). Moreover, the original Custodian did not unlawfully deny access to the remaining four (4) contracts responsive to Item No. 7 because she provided access to same. Further, request Items No. 3, No. 4 and No. 5 were deemed to be invalid under OPRA pursuant to *MAG Entertainment, LLC v. Division of Alcoholic Beverage Control*, 375 N.J. Super. 534, 546 (App. Div. 2005), and *Bent v. Stafford Police Department*, 381 N.J. Super. 30, 37 (App. Div. 2005) because each item sought information instead of a specific government record. *See LaMantia v. Jamesburg Public Library (Middlesex)*, GRC Complaint No. 2008-140 (February 2009). Additionally, the evidence of record does not indicate that the original and current Custodians' violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the original and current Custodians' 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
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

April 20, 2011



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GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
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INTERIM ORDER

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Plainfield Municipal Utilities Authority (Union)
Custodian of Record

At the February 24, 2011 public meeting, the Government Records Council (“Council”) considered the February 15, 2011 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 responded in writing to the Complainant’s April 23, 2009 OPRA request within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i., the Custodian’s response was legally insufficient because she failed to respond to each request item contained in the request individually. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5.g. and Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008).
2. Because the Custodian failed to immediately grant or deny access to the requested invoices, salaries and contracts, request additional time to respond or request clarification of the request, the Custodian has violated N.J.S.A. 47:1A-5.e. pursuant to Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 28, 2007). *See also* Ghana v. New Jersey Department of Corrections, GRC Complaint No. 2008-154 (June 2009).
3. The Custodian certified in the Statement of Information that no quarterly sewer bills responsive to the Complainant’s OPRA request Item No. 1 exist and there is no credible evidence in the record to refute the Custodian’s certification. Therefore, although the Custodian violated N.J.S.A. 47:1A-5.g. by providing an insufficient response to the Complainant’s OPRA request, and violated N.J.S.A. 47:1A-5.e. by failing to immediately respond to the Complainant’s OPRA request Item No. 1 for quarterly sewer bills, the Custodian has not unlawfully denied access to the Complainant’s OPRA request for first and second quarterly bills for the addresses



listed in the OPRA request pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), since no records exist.

4. Because the Complainant's request Item No. 2 identifies a type of government record (documents supporting each purchase order identified by number), MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005) do not apply to the request relevant to this complaint. The Custodian's search is not open-ended, nor does it require research, but rather requires the Custodian to provide the documentation attached to each requested invoice, if any documentation exists.
5. The Custodian has unlawfully denied access to the remaining purchase order because a record being voided is not an exemption afforded under OPRA. N.J.S.A. 47:1A-6. **If Purchase Order No. 08-00527 (and all supporting documentation) still exists, same shall be provided to the Complainant. If the purchase order has already been provided to the Complainant or the record does not exist, the Custodian must certify to such disclosure.**
6. Pursuant to the Council's holding in LaMantia v. Jamesburg Public Library (Middlesex), GRC Complaint No. 2008-140 (February 2009), the Complainant's request Items No. 3, No. 4 and No. 5 are invalid under OPRA pursuant MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005), and Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005), because said request items seek information rather than a specific identifiable government record. Therefore, the Custodian has not unlawfully denied access to the request information.
7. Based on the language of both N.J.S.A. 47:1A-5.e. and N.J.S.A. 47:1A-10, it is clear that the Complainant's request for salaries of eleven (11) employees is valid under OPRA and not an invalid request for information. The Custodian should have provided immediate access to the record containing the salaries sought by the Complainant pursuant to N.J.S.A. 47:1A-5.e. and failed to do so. Thus, the Custodian has unlawfully denied access to the requested 2008 salary information. N.J.S.A. 47:1A-6. **The Custodian shall disclose the salary information responsive to the Complainant. If the records have already been provided to the Complainant, the Custodian must certify to such disclosure.**
8. The Custodian certified in the Statement of Information that no contracts exist for seven (7) of the eleven (11) employees identified by the Complainant in request Item No. 7 and the Complainant has submitted no credible evidence to refute the Custodian's certification. Therefore, although the Custodian violated N.J.S.A. 47:1A-5.g. by providing an insufficient response to the Complainant's OPRA request, and violated N.J.S.A. 47:1A-5.e. by failing to immediately respond to the Complainant's OPRA request Item No. 7 for contracts, the Custodian has not unlawfully denied access to the Complainant's OPRA request pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

9. Although the Custodian's insufficient response resulted in a violation of N.J.S.A. 47:1A-5.g. and the Custodian's failure to immediately grant access to the requested contracts resulted in a violation of N.J.S.A. 47:1A-5.e., the Custodian did not unlawfully deny access to the records responsive to the Complainant's OPRA request Item No. 7 pursuant to Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005), because the Complainant acknowledged receipt of all four (4) contracts that exist on July 21, 2010.
10. **The Custodian shall comply with Item No. 5 and No. 7 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions (if necessary), including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4¹, to the Executive Director.²**
11. 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 24th Day of February, 2011

Robin Berg Tabakin, Chair
Government Records Council

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

Charles A. Richman, Secretary
Government Records Council

Decision Distribution Date: February 28, 2011

¹ "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."

² 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
February 24, 2011 Council Meeting**

**Philip Charles¹
Complainant**

GRC Complaint No. 2009-169

v.

**Plainfield Municipal Utilities Authority (Union)²
Custodian of Records**

Records Relevant to Complaint:

1. Copies of Plainfield Municipal Utilities Authority (“PMUA”) 2009 first quarterly and second quarterly bills for the following addresses:
 - a. 1000 Kenyon Avenue.
 - b. 1358 East 2nd Street.
 - c. 1127 West 4th Street.
 - d. 316 Monroe Avenue.
 - e. 216 Netherwood Avenue.
2. Copies of purchase orders and all supporting documentation for the following:
 - a. 08-00467
 - b. 08-00468
 - c. 08-00077
 - d. 08-00525
 - e. 08-00526
 - f. 08-00527
 - g. 08-00528
 - h. 08-00529
 - i. 08-00532
 - j. 08-00563
 - k. 08-00564
 - l. 08-00565
 - m. 08-01724
 - n. 08-00637
3. Copies of any information related to health insurance payments by the PMUA for the Board of Commissioners for January 2008, April 2008, August 2008, December 2008, January 2009 and February 2009.
4. Copies of any information related to dental insurance payments by the PMUA for the Board of Commissioners for January 2008, April 2008, August 2008, December 2008, January 2009 and February 2009.

¹ No legal representation listed on record.

² Represented by Michael V. Camerino, Esq., of Mauro, Savo, Camerino & Grant, P.A. (Somerville, NJ).
Philip Charles v. Plainfield Municipal Utilities Authority (Union), 2009-169 – Findings and Recommendations of the Executive Director

5. Copies of any information related to life insurance payments by the PMUA for Board of Commissioner members Ms. Carol Ann Brokaw, Mr. Jerry Green, Mr. Alex Toliver and Mr. Harold Mitchell for January 2008, April 2008, August 2008, December 2008, January 2009 and February 2009.
6. Copies of 2008 salaries for the following: Ms. Carol Ann Brokaw, Mr. Harold Mitchell, Mr. Alex Toliver, Mr. Eric C. Watson, the Custodian, Ms. Lana Carden, Mr. Eugene Dudley, Mr. James Green, Mr. David Ervin, Mr. James Perry and Mr. Duane Young.
7. Copies of employment contracts for the following: Ms. Carol Ann Brokaw, Mr. Harold Mitchell, Mr. Alex Toliver, Mr. Eric C. Watson, the Custodian, Ms. Lana Carden, Mr. Eugene Dudley, Mr. James Green, Mr. David Ervin, Mr. James Perry and Mr. Duane Young.³

Request Made: April 23, 2009

Response Made: April 28, 2009

Custodian: Dollie Hamlin

GRC Complaint Filed: May 18, 2009⁴

Background

April 23, 2009

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

April 28, 2009

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the third (3rd) business day following receipt of such request. The Custodian states that the PMUA desires to comply with the Complainant's OPRA request for copies of the records requested; however, the request has created an undue burden on the operations of the PMUA's Purchasing/Contract Department. The Custodian states that to date, approximately thirty (30) staff hours have been expended by the agency to respond to the Complainant's requests and also states that the Complainant has filed numerous requests with the agency. The Custodian asserts that in one instance, eight (8) hours of staff time was necessary to monitor the Complainant's on-site inspection of records. The Custodian states that a \$250.00 fee is required to fulfill the Complainant's OPRA request.⁵

May 1, 2009

E-mail from the Complainant to the Custodian. The Complainant states that OPRA classifies "budgets, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information," as immediate access records pursuant to N.J.S.A. 47:1A-5.e.

³ The Complainant requested additional records; however, the Complainant confirmed that such records were no longer at issue in this complaint in an e-mail to the GRC dated June 27, 2010.

⁴ The GRC received the Denial of Access Complaint on said date.

⁵ The assessed fee also includes the Custodian's response to another request not relevant to the instant complaint.

Moreover, the Complainant states that OPRA requires a custodian to promptly respond to an OPRA request either granting access to the requested records or providing a specific basis for a denial of access. N.J.S.A. 47:1A-5.g. The Complainant contends that the Custodian has failed to grant access or provide a lawful basis for denying access to such.

The Complainant asserts that he has used many hours of his personal time to make requests, inspect or pick up records, submit inquiries and file complaints with the GRC and educate the PMUA about OPRA. The Complainant asserts that the Custodian cannot consider separate OPRA requests when assessing a special service charge.⁶

The Complainant states that he is advising the Custodian that he wants copies of the fourteen (14) vouchers and all supporting documents relevant to request Item No. 2 immediately and does not agree to pay any more than the copying costs associated with providing the records: an estimated thirty (30) to forty (40) pages. Further, the Complainant states that he is willing to wait a week for the remaining records responsive in lieu of the statutorily mandated seven (7) business days.

The Complainant reiterates that he will not pay any of the additional fees assessed by the PMUA and will file a complaint with the GRC if the Custodian insists on payment of any special service charge prior to providing access to the request records. The Complainant notes that the GRC has created a document entitled “Special Service Charge – 14 Point Analysis,” which helps the GRC to determine whether a special service charge is both warranted and reasonable.

May 14, 2009

E-mail from the Complainant to the Custodian. The Complainant states that he submitted an OPRA request to the PMUA on April 23, 2009. The Complainant states that the Custodian responded in writing on April 28, 2009 stating that fulfilling the OPRA request would require a special service charge. The Complainant states that the PMUA is a public agency under OPRA pursuant to N.J.S.A. 47:1A-1.1.; therefore, it must conform to the provisions set forth in OPRA. Further, the Complainant reiterates that some requested records are considered immediate access documents pursuant to N.J.S.A. 47:1A-5.e.

The Complainant states that OPRA permits the assessment of a special service charge:

“[w]henver the nature, format, manner of collation, or volume of a government record embodied in the form of printed matter to be inspected, examined, or copied pursuant to this section is such that the record cannot be reproduced by ordinary document copying equipment in ordinary business size or involves an extraordinary expenditure of time and effort to accommodate the request, the public agency may charge, in addition to the actual cost of duplicating the record, a special service charge that shall

⁶ The Complainant is referring to the Custodian’s response to the Complainant dated April 28, 2009 in which the Custodian states that the \$250.00 fee assessed is for a response to two (2) OPRA requests, one of which is not at issue in the instant complaint.

be reasonable and shall be based upon the actual direct cost of providing the copy or copies ; ...” N.J.S.A. 47:1A-5.c.

The Complainant further states that he contacted the Custodian via e-mail on May 1, 2009 stating that he did not agree with the assessment of a special service charge. The Complainant states that he also informed the Custodian that he was willing to wait for all of the records except those responsive to request Item No. 2; however, the Custodian has failed to provide or deny access to any of the requested records.

The Complainant reminds the Custodian that OPRA allows a custodian to be fined if found to have knowingly and willfully violated OPRA. N.J.S.A. 47:1A-11. The Complainant states that if he has not received a minimum of the records responsive to request Item No. 2 by the end of the day, the Complainant will file a Denial of Access Complaint with the GRC.

May 18, 2009

Denial of Access Complaint filed with the Government Records Council (“GRC”) with the following attachments:

- Complainant’s OPRA request dated April 23, 2009.
- Letter from the Custodian to the Complainant dated April 28, 2009.
- E-mail from the Complainant to the Custodian dated May 1, 2009.
- E-mail from the Complainant to the Custodian dated May 14, 2009.

The Complainant states that he submitted an OPRA request to the PMUA on April 23, 2009. The Complainant states that the Custodian responded on April 28, 2009, stating that access to the requested records would be granted upon payment of a special service charge of \$250.00. The Complainant states that he contacted the Custodian via e-mail on May 1, 2009 stating that he was not willing to pay the proposed special service charge. Further, the Complainant states that he advised the Custodian that he wanted access to the records responsive to request Item No. 2 immediately and would be willing to wait a week for the remainder of the records.

The Complainant states that he sent an e-mail to the Custodian on May 14, 2009 stating that if the records responsive to request Item No. 2 were not provided by the end of the day, the Complainant would file a Denial of Access Complaint with the GRC. The Complainant acknowledges that the Custodian did not respond to such e-mail and correspondence from the Custodian’s Counsel indicates that the Custodian was out of the office. The Complainant states that this fact is irrelevant because the Complainant previously sent an e-mail on May 1, 2009 informing the PMUA of his position.

The Complainant avers that he has received no records to date. The Complainant argues that the records requested cannot be in storage because they were from the current or previous year and that he inspected many of the records between two (2) days and approximately two (2) weeks prior to submitting the April 23, 2009 OPRA request. The Complainant contends that the total number of records requested can be no more than 100 pages. The Complainant argues that the PMUA employs 150 staff members in several

locations and that all records requested are from 2008 or 2009 (with the exception of one (1) record from 2007). The Complainant asserts that he does not believe his request involves an extraordinary amount of time warranting a special service charge under N.J.S.A. 47:1A-5.c.

The Complainant asserts that the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to provide access to the requested records and failing to provide a specific reason for denying access to same. Moreover, the Complainant asserts that the Custodian wrongly attempted to charge a special service charge for this request in combination with another request not relevant to the instant complaint and cites to O’Shea v. Township of West Milford, GRC Complaint No. 2004-17 (May 2005). The Complainant contends that the special service charge assessed by the Custodian is excessive, unreasonable and a deliberate attempt to discourage the Complainant from obtaining the records requested.⁷

The Complainant does not agree to mediate this complaint.

May 29, 2009

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated April 23, 2009.
- Letter from the Custodian to the Complainant dated April 28, 2009.⁸

The Custodian certifies that whether any records that may have been responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management (“DARM”) is not applicable in the instant complaint.⁹

The Custodian certifies that the Complainant’s OPRA request contains six (6) different categories of records and information ranging from quarterly bills and purchase orders to information related to staff salary and health insurance. The Custodian certifies that many of the records requested do not exist; however, some of the requested records could contain multiple pages.¹⁰

⁷ The Complainant also requests that the PMUA make their official OPRA request form available to the public either on the internet or via facsimile.

⁸ The SOI for this complaint was submitted to the GRC in connection with a separate, unrelated complaint; therefore, the GRC did not need to send a formal request for an SOI in this matter.

⁹ The Custodian initially argues that this OPRA request should not be viewed in a vacuum because the Complainant has filed numerous requests seeking over 200 plus documents in the past few months, which has required copying more than 1,000 pages of records. The Custodian argues that the Complainant’s numerous requests and aggressive approach in demanding records from the PMUA has caused a substantial disruption of agency operations. See N.J.S.A. 47:1A-5.g. The Custodian included a statement of facts that spans several requests not relevant to this complaint as well other complaints currently awaiting adjudication before the GRC.

¹⁰ The Custodian notes that if a responsive record existed for each of the request items, the total number of documents would number 151. Further, the Custodian asserts that this request, although voluminous in nature, could be satisfied without a special service charge; however, this request is one (1) of many OPRA requests filed by the Complainant over a short period of time.

The Custodian certifies that the response to each of the Complainant's request items is as follows:

Request Item No. 1 – First and second quarterly bills for five (5) addresses:

The Custodian certifies that no records responsive to this request item exist.

The Custodian notes that the GRC's Handbook for Records Custodians, 2nd Edition (August 2002), provides that OPRA does not require that a custodian create a record in order to respond to a request for government records.¹¹

The Custodian certifies that quarterly bills are sent out to each customer and no copies or duplicates are held by the PMUA due to cost and space restrictions. The Custodian certifies that a computer record known as a "customer account record" does exist. The Custodian asserts that although a custodian is not obligated to provide this alternative record, it was provided to the Complainant in the interest of accommodation. The Custodian avers that the Complainant advised that the "customer account record" for each of the five (5) addresses listed did not satisfy his request.¹²

Request Item No. 2 – Fourteen (14) purchase orders and supporting documentation:

The Custodian certifies that the requested purchase orders relate to travel allowances. The Custodian certifies that thirteen (13) of the requested purchase orders, which are from 2008, will be provided immediately without requiring a special service charge.

The Custodian certifies that the fourteenth (14th) purchase order, which is from 2007, is in storage and will require additional time and effort to retrieve. The Custodian certifies that it will take one (1) to two (2) hours to retrieve the record and make a copy. The Custodian certifies that the required special service charge will be based on the hourly rate of the employee who retrieves the record.

Additionally, the Custodian avers that the Complainant's request for all supporting documentation is overly broad because it fails to specify identifiable government records. The Custodian acknowledges that it is appropriate to seek clarification from the Complainant; however, the Custodian states that the court noted in New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007) that:

“[u]nder OPRA, the requestor's obligation to specifically describe the documents sought is essential to the agency's obligation and ability to provide a prompt response.”

¹¹ The Handbook for Records Custodians, currently in its third edition, was updated in October 2009.

¹² There is no evidence in the record to indicate that the Custodian provided the Complainant with a "customer account record." However, this record appears to be either similar to or is the exact record provided in response to a similar OPRA request that was the subject of GRC Complaint No. 2009-113. Philip Charles v. Plainfield Municipal Utilities Authority (Union), 2009-169 – Findings and Recommendations of the Executive Director

The Custodian avers that the court further held that in the absence of a request for an identifiable government record, the statutorily mandated time frame does not apply. The Custodian asserts that a number of the requested purchase orders will not have any documentation attached to them, which further supports the Custodian's argument that the Complainant must request specific identifiable government records.

Request Item No. 3, No. 4 and No. 5 – Health, dental and life insurance payments made by the PMUA for the Board of Commissioners:

The Custodian states that the Complainant requested copies of "any information..." related to health insurance, dental insurance and life insurance payments made by the PMUA for the Board of Commissioners for January, 2008, April, 2008, August, 2008, December, 2008, January, 2009 and February, 2009. The Custodian reiterates that the GRC's Handbook for Records Custodians, 2nd Edition (August 2002) notes that a custodian need not create a record in order to respond to a request for information. The Custodian asserts that because the Complainant's three (3) request items sought information rather than a specific identifiable government record, the Custodian was under no obligation to satisfy such.

The Custodian further certifies that no specific records documenting such payments as they relate to specific members of the Board of Commissioners or other employees exist. The Custodian avers that the PMUA does maintain a departmental account breakdown sheet which identifies the payments by department. The Custodian states that if the Complainant believes such record to be responsive to the request, such will be provided to him.¹³

Request Item No. 6 – 2008 Salaries for eleven (11) specific employees:

The Custodian states that the Complainant requested copies of "2008 salaries..." for eleven (11) employees of the PMUA. The Custodian avers that the Complainant's request seeks information and not a specific identifiable government record. The Custodian states that there is a document comprising approximately twenty-five (25) pages that includes the salaries of all employees, as opposed to the eleven (11) requested. The Custodian asserts that this record must be reviewed and redactions made so that only the requested salaries of the eleven (11) enumerated employees may be provided. The Custodian asserts that the PMUA may charge a special service charge for the extraordinary labor of such review and redaction.

The Custodian further avers that W-2s and other similar documents indicate the requested salary information. The Custodian asserts that, with respect to the W-2s, review and redaction of such documents would be necessary; therefore, the PMUA is entitled to impose a special service charge for the amount of time needed and possible involvement of the Custodian's Counsel.

¹³ The Custodian notes that in many instances, she could simply have denied some of the Complainant's request items as no records responsive existed; however, the Custodian made a good faith effort to provide other records as a substitute for those requested.

The Custodian finally notes that the PMUA's budget may also contain the requested information. The Custodian states that the budget can be provided to the Complainant if he is willing to accept the budget as responsive to the request.

Request Item No. 7 – Employment contracts for eleven (11) specific employees:

The Custodian certifies that no employee contracts exist for seven (7) of the eleven (11) employees identified. The Custodian certifies that employee contracts exist only for the following four (4) employees: Mr. Eric Watson, Mr. David Ervin, Mr. James Perry and Mr. Duane Young.

The Custodian asserts that the four (4) employee contracts that exist are subject to disclosure under OPRA with redactions for any information exempt from disclosure. The Custodian states that 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.

Further, the Custodian states that OPRA provides that:

“...the personnel or pension records of any individual ... including but not limited to records relating to any grievance ... shall not be considered a government record and shall not be made available for public access, except that: an individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefor, and the amount and type of any pension received shall be a government record...” N.J.S.A. 47:1A-10.

The Custodian asserts that while the four (4) contracts exist, they must be reviewed to determine whether any privileged or confidential information is included in the contracts and must be redacted. The Custodian asserts that the Custodian's Counsel has the level of expertise required in order to identify those portions of the contracts which are subject to redactions. The Custodian states that in NJ Builders, the court noted that:

“[e]ven though an agency's custodian of records ordinarily should be able to identify privileged material in a request under [OPRA], *there may be circumstances where review of the records by the agency's professional supervisory personnel is required to make this determination...*” (Emphasis added.)

The Custodian contends that the Custodian's Counsel is more properly qualified to identify the appropriate redactions in an employee contract. The Custodian asserts that based on the foregoing, the review and redaction of the four (4) employee contracts authorizes the PMUA to impose a special service charge.

The Custodian contends that the Complainant feels that he has an absolute right to all records requested, whether immediately or within seven (7) business days, and does not recognize this OPRA request (in conjunction with other requests not relevant to the instant complaint) as requiring an extraordinary expenditure of time and effort to fulfill. The Custodian further contends that the Complainant will not accept that some records do not exist or that any of his request items could be invalid under OPRA. The Custodian asserts that she has made a good faith effort to accommodate the Complainant's OPRA request.¹⁴

June 28, 2009

The Complainant's response to the Custodian's SOI attaching a PMUA salary list dated June 10, 2009.

The Complainant states that the Custodian identified several records in the SOI that would be provided immediately to the Complainant without the imposition of a special service charge. The Complainant states that he has not received those records as of this date. The Complainant avers that because the SOI submitted by the PMUA gives the appearance that some of the records at issue were provided and therefore are no longer at issue, the Complainant notes that he has not received the thirteen (13) purchase orders for 2008 responsive to request Item No. 2.

The Complainant states that it should be noted that the Custodian never mentioned to the Complainant in her written response dated April 28, 2009 that records responsive to some of the Complainant's request items did not exist. The Complainant notes that the Custodian's written response only indicated that the PMUA was imposing a special service charge of \$250.00.

In response to the SOI, the Complainant contends the following:

Request Item No. 1 – First and second quarterly bills for five (5) addresses:

The Complainant argues that the PMUA never provided him with a "customer account record" containing information for the five (5) addresses. The Complainant asserts that since the PMUA has certified that no records responsive exist, a copy of the payment stubs would show the information the Complainant is seeking. The Custodian states that pursuant to *N.J.A.C. 14:3-7.8*, payment stubs are to be maintained on file. The Complainant asserts that in lieu of the payment stubs, the Complainant will accept a register reflecting customer billing for both quarters for the five (5) addresses.

Request Item No. 2 – Supporting documentation for fourteen (14) purchase orders:

The Complainant argues that despite the Custodian's assertion that this portion of the request was vague and overly broad, the Complainant requested the purchase orders by number. The Complainant argues that even a person with limited knowledge of the

¹⁴ The Custodian asserts that this complaint should be seen as interrelated with GRC Complaint No. 2009-113 and No. 2009-141 and should be handled by the same case manager. Additionally, the Custodian notes that these three (3) complaints could have been collectively and amicably resolved in mediation.
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purchasing process can identify supporting documents. The Complainant avers that supporting documentation is typically defined as receipts, vendor invoices, business meal forms and any other documentation supporting the purchases made in the order.

The Complainant further points out that the August 2008 PMUA Travel Policy states that supporting documentation will be attached to the purchase orders where applicable. The Complainant acknowledges that he agrees with the Custodian that a requestor must identify with reasonable clarity the records being requested; however, the Custodian's application of New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007), does not apply to the Complainant's request item. The Complainant argues that the term "supporting documentation" is a broad term but encompasses any and all documentation that supports a purchase. The Complainant argues that it is contradictory to the spirit of OPRA to expect a member of the public to predict what type of supporting documentation was included with a purchase order.

The Complainant avers that when he inspected purchase orders prior to this request, most did not have supporting documentation. The Complainant avers that if no supporting documentation exists, then obviously the Complainant would be satisfied with receiving only the requested purchase order.

Request Item No. 3, No. 4 and No. 5 – Health, dental and life insurance payments made by the PMUA for the Board of Commissioners:

The Complainant contends that when he previously requested to inspect the health, dental and life insurance payment records, the PMUA granted access to those records, which he inspected on April 22, 2009. The Complainant contends that the PMUA now asserts that no records responsive exist because the Complainant now wants copies of the records he inspected one (1) day prior to submission of this request item. In support of his claim, the Complainant asserts that the health payment document invoice he reviewed listed a payment for Ms. Carol Ann Brokaw for January 2008 at \$1,106.04 for two (2) adults. The Complainant asserts that the same document listed a payment for Mr. Alex Toliver \$1,106.04 for two (2) adults. The Complainant further asserts that the April 2008 record listed a payment for Mr. Harold Mitchell at \$1,606.51 for family coverage.¹⁵

The Complainant contends the PMUA's position that no records responsive exist contradicts the fact that the Complainant inspected the requested records just one (1) day prior to submission of the instant request item. The Complainant asserts that it would be acceptable to provide him with copies of records which include all employees, as the Complainant would not expect the PMUA to review the records to excise the requested information. The Complainant notes that he is willing to pay copying fees but not a special service charge.

¹⁵ The Complainant includes additional figures based on the records he asserted were inspected on April 22, 2009.
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Request Item No. 6 – Salaries for eleven (11) specific employees:

The Complainant asserts that he also inspected the salaries of PMUA employees on April 22, 2009 (one (1) day prior to this request) and has attached a sample of the type of document he inspected. The Complainant notes that the attached salary list dated June 10, 2009 was given to him by another resident who received the document in response to an OPRA request to the PMUA. The Complainant asserts that the resident who procured the attached record was not charged a special service charge for review or redaction of information despite fashioning the request similar to the Complainant's request herein.

The Complainant argues that the PMUA is disingenuous in attempting to charge the Complainant a special service charge while other residents are not charged for the same information. Further, the Complainant asserts that prior to her statements in the SOI, the Custodian never offered him the entire salary guide, which would have been an acceptable substitute. The Complainant asserts that he also previously inspected documents that indicated 2008 year-end salary payments to commissioners of the PMUA and including breakdowns for insurance and taxes.

The Complainant notes that he did not request copies of W-2s because he knows that W-2s are not subject to disclosure pursuant to N.J.S.A. 47:1A-9.a. and 26 U.S.C. § 6103 (2004).

Request Item No. 7 – Employment contacts for eleven (11) specific employees:

The Complainant asserts that even though he has never had access to any PMUA employee contracts, the Complainant does not know what type of information contained within the contracts is subject to redaction. The Complainant asserts that he cannot imagine redactions for personal privacy matters would require a special service charge. The Complainant argues that the Custodian's assertions are an attempt to validate an unreasonable special service charge.

In closing, the Complainant asserts that contrary to the Custodian's assertions regarding mediation, the PMUA has never sought an amicable resolution to issues at hand.¹⁶ The Complainant argues that the PMUA continues to promise records and fails to deliver such. The Complainant asserts that the PMUA has not followed the spirit of OPRA in handling the Complainant's OPRA request.

June 15, 2010

Letter from GRC to Custodian's Counsel. The GRC requests that the Custodian provide a legal certification in response to the following questions regarding the special service charged assessed in this matter:

1. What records are requested?
2. Give a general nature description and number of the government records requested.

¹⁶ The Complainant asserts that this fact was apparent after both parties entered into mediation regarding another complaint.

3. What is the period of time over which the records extend?
4. Are some or all of the records sought archived or in storage?
5. What is the size of the agency (total number of employees)?
6. What is the number of employees available to accommodate the records request?
7. To what extent do the requested records have to be redacted?
8. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to locate, retrieve and assemble the records for copying?
9. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to monitor the inspection or examination of the records requested?
10. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to return records to their original storage place?
11. What is the reason that the agency employed, or intends to employ, the particular level of personnel to accommodate the records request?
12. Who (name and job title) in the agency will perform the work associated with the records request and that person's hourly rate?
13. What is the availability of information technology and copying capabilities?
14. Give a detailed estimate categorizing the hours needed to identify, copy or prepare for inspection, produce and return the requested documents.

June 19, 2010

E-mail from the Custodian to the GRC attaching a memorandum from Mr. Jim Perry ("Mr. Perry") to the Custodian dated September 17, 2009.

The Custodian states that the attached memorandum supplies the PMUA's basis for the special service charge. The Custodian states that the \$250.00 fee assessed was based on time spent by the PMUA's Finance Department as stated in the attached memorandum.

The Custodian states that in said memorandum, Mr. Perry provides a detailed explanation of the process undertaken to provide access to quarterly billing records.¹⁷ The Custodian further states that based on this memorandum, she calculated that fourteen (14) hours of time spent by the Finance Department at a cost of \$19.00 per hour equaled \$266.00, which the Custodian then rounded down to \$250.00.

June 22, 2010

Letter from the Custodian's Counsel to the GRC. Counsel states that pursuant to a telephone conversation on the same day, he is confirming that the GRC has granted an extension of time until June 25, 2010 to respond to the request for a legal certification regarding the PMUA's special service charge.

¹⁷ A thorough review of the memorandum shows that it relates to an OPRA request for fourth (4th) quarter bills for five (5) years for three (3) properties. The Complainant's OPRA request in this complaint does not contain a request item for such records.

June 23, 2010

Letter from the Custodian's Counsel to the GRC. Counsel states that this letter serves as the PMUA's response to the GRC's request for a legal certification regarding the PMUA's special service charge. Counsel states that the special service charge assessed by the PMUA is no longer being pursued; in fact, most of the charge issue was abandoned in the SOI.

Counsel states that the Custodian responded in writing to the Complainant on April 28, 2009 stating that a \$250.00 special service charge was being assessed. Counsel further states that the Complainant identified vouchers and contracts as the records at issue. Counsel states that the issue relating to vouchers and contracts was addressed in the SOI.

Request Item No. 2 – Fourteen (14) purchase orders and supporting documentation:

Counsel states that the Custodian certified in the SOI that thirteen (13) of the requested vouchers are from 2008 and would be provided immediately without any special service charge. Counsel states that the Custodian further stated that the fourteenth (14th) voucher dated 2007 was in storage; therefore, a special service charge was applicable.

Request Item No. 6 – Employment contracts for eleven (11) specific employees:

Counsel states that the Custodian certified that seven (7) of the eleven (11) employees that the Complainant identified in his request for contracts have no employment contracts. Counsel states that the Custodian certified that four (4) responsive contracts did exist but that redactions were necessary; therefore, a special service charge was applicable.

Counsel states that all fourteen (14) vouchers and four (4) contracts were previously provided to the Complainant.¹⁸ Counsel states that no redactions were made to the contracts and only one (1) voucher would have been subject to a special service charge. Counsel avers it is not economically justifiable to expend time, effort and cost to defend the special service charge based on only one (1) voucher and four (4) contracts. Counsel reiterates that based on the foregoing, the PMUA is no longer pursuing payment of a special service charge.¹⁹

June 25, 2010

E-mail from the Complainant to the GRC. The Complainant asserts that the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to provide access to the requested records or provide a specific reason for denying access to such within the statutorily mandated time frame. The Complainant contends that although the

¹⁸ Counsel did not provide a specific date on which said records were provided to the Complainant.

¹⁹ Counsel requests that the GRC review the arguments made in the SOI referencing the voluminous requests made by the Complainant over a three (3) month period during the spring of 2009 which the Custodian contends sought a substantial amount of records.

PMUA now asserts that records were provided, the following records have not been provided as of this date:

- Mr. James Perry's employment contract.
- Purchase Order No. 08-00467 and 08-00468 and applicable invoices or receipts.
- Purchase Order No. 08-00525, 08-00526, 08-00527, 08-00529, 08-00563 and all supporting documentation for such.
- Purchase Order No. 08-01724 and applicable invoice or receipt for a hotel in the amount of \$6, 257.00.
- Copies of 2008 salaries Ms. Carol Ann Brokaw, Mr. Harold Mitchell, Mr. Alex Toliver, Mr. Eric C. Watson, the Custodian, Ms. Lana Carden, Mr. Eugene Dudley, Mr. James Green, Mr. David Ervin, Mr. James Perry and Mr. Duane Young.

The Complainant states that OPRA allows a public agency to charge "... a special service charge that shall be reasonable and shall be based upon the actual direct cost of providing the copy or copies." N.J.S.A. 47:1A-5.c. The Complainant argues that his OPRA request did not warrant a special service charge. Conversely, the Complainant contends that the \$250.00 special service charge imposed by the PMUA was nothing more than a deliberate effort to deter the Complainant from obtaining access to public records. *See Renna v. County of Union*, GRC Complaint No. 2004-134 (April 2006). The Complainant argues that this fact was proved by the Custodian Counsel's admission that no redactions to the employee contracts were needed. The Complainant argues that said special service charge was also excessive and unreasonable.

Moreover, the Complainant asserts that some of the purchase orders and the employment contract noted above were obtained through a lawsuit, through other members of the public and through subsequent OPRA requests. The Custodian reiterates that the PMUA has failed to provide those records listed above.

Finally, the Complainant asserts that the PMUA attempted to combine separate OPRA requests, which the GRC previously held to be unlawful. *See O'Shea v. Township of West Milford*, GRC Complaint No. 2004-17 (May 2005). The Complainant further states that OPRA does not limit the number of requests or the number of records requested.

July 6, 2010

Letter from the Custodian's Counsel to the GRC. Counsel states that the following is in response to the Complainant's e-mail dated June 25, 2010. Counsel states that the Complainant identified that he has still not received the following records:

- Mr. James Perry's employment contract.
- Purchase Order No. 08-00467 and 08-00468 and applicable invoices or receipts.
- Purchase Order No. 08-00525, 08-00526, 08-00527, 08-00529, 08-00563 and all supporting documentation for such.
- Purchase Order No. 08-01724 and applicable invoice or receipt for a hotel in the amount of \$6,257.00.

- Copies of 2008 salaries for Ms. Carol Ann Brokaw, Mr. Harold Mitchell, Mr. Alex Toliver, Mr. Eric C. Watson, the Custodian, Ms. Lana Carden, Mr. Eugene Dudley, Mr. James Green, Mr. David Ervin, Mr. James Perry and Mr. Duane Young.

Counsel states that he will inquire of the Custodian whether any of the records listed have been provided to the Complainant. Counsel acknowledges that the PMUA stated in the SOI that said records would be made available. Counsel states that to the extent that the seven (7) above-referenced purchase orders and the hotel receipt have not been provided, Counsel requests that the Custodian provide same. Counsel states that with respect to Mr. Perry's employment contract, Counsel requests that the Custodian provide the contract to him for review for possible redactions and subsequent disclosure to the Complainant.

Counsel states that with respect to the 2008 salaries for eleven (11) employees, Counsel argues that the request seeks information and not a specific identifiable government record. Counsel states that he requests that the Custodian provide him with records containing the requested information to review for possible redactions. Counsel states that as an alternative, Counsel requests that the Custodian create a separate one (1) page document containing the eleven (11) requested salaries.

Counsel states that he stands by the PMUA's SOI, except that the records identified in the Complainant's letter dated June 25, 2010 have not yet been provided. Counsel states that said records will be provided if they exist.²⁰

July 14, 2010

E-mail from the Complainant to the Custodian's Counsel. The Complainant states that he has not been provided with the records identified in his letter to the GRC dated June 25, 2010.

July 21, 2010

E-mail from the Complainant to the GRC. The Complainant states that he received a copy of Mr. Perry's contract on July 19, 2010. The Complainant states that he has not yet received the requested purchase orders.

August 10, 2010

Letter from the Custodian's Counsel to the GRC with the following attachments:

- Purchase Order No. 08-00467 and accompanying purchase requisition form.
- Purchase Order No. 08-00468 and accompanying purchase requisition form.
- Purchase Order No. 08-00525 and accompanying purchase requisition form.
- Purchase Order No. 08-00526 and accompanying purchase requisition form.
- Purchase Order No. 08-00529 and accompanying purchase requisition form.
- Purchase Order No. 08-00563.
- Purchase Order No. 08-01724 and accompanying purchase requisition form.

²⁰ Counsel reiterates that the imposition of a special service charge is no longer at issue.
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Counsel states that Mr. Perry's employment contract was forwarded to the Complainant on July 19, 2010, as confirmed by the Complainant's e-mail to the GRC dated July 21, 2010. Counsel states that the only remaining outstanding items are the invoices, of which seven (7) of eight (8) are attached to this letter. Counsel notes that no purchase requisition form is available for Purchase Order No. 08-00563. Counsel further notes that Purchase Order No. 08-00527 (a travel allowance for Mr. Harold Mitchell) is not being provided to the Complainant because it was voided.

Counsel states that the Complainant is being simultaneously provided with this letter and all attachments. Counsel states that the purchase requisition forms are the only existing supporting documentation for each purchase order.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

"...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*" (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

"... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ..." (Emphasis added.) N.J.S.A. 47:1A-1.1.

Moreover, OPRA provides that:

"[i]mmediate access ordinarily shall be granted to budgets, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and *public employee salary* and overtime information." (Emphasis added) N.J.S.A. 47:1A-5.e.

OPRA also provides that:

"[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof ..." N.J.S.A. 47:1A-5.g.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

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.

First, the GRC will address the Custodian’s response to the Complainant’s OPRA request. Specifically, the GRC will address whether the Custodian’s response was sufficient pursuant to OPRA and precedential case law. Further, the GRC will address whether the Custodian appropriately responded to the Complainant’s request items seeking immediate access records.

In the instant complaint, the Complainant submitted an OPRA request for multiple items on April 23, 2009. The Custodian responded on April 28, 2009 stating that the PMUA was imposing a \$250.00 special service charge to fulfill the Complainant’s OPRA request. OPRA allows for a public agency to charge a special service charge for requests that involve “an *extraordinary expenditure of time and effort to accommodate the request...*” (Emphasis added.) N.J.S.A. 47:1A-5.c. The determination of what constitutes an “extraordinary expenditure of time and effort” under OPRA must be made on a case by case basis and requires an analysis of a variety of factors identified initially in The Courier Post v. Lenape Regional High School, 360 N.J. Super. 191, 199 (Law Div. 2002). The GRC notes that in this complaint, the Custodian arbitrarily imposed a special service charge of \$250.00 without proving that said charge was reasonable and warranted. However, the GRC declines to address this issue because the Custodian’s Counsel wrote to the GRC on June 23, 2010 advising that the PMUA was abandoning the proposed special service charge.

Moreover, the Custodian failed to respond to each request item individually. In Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008), the Complainant’s Counsel asserted that the Custodian violated OPRA by failing to respond to each of the Complainant’s request items individually within seven (7) business days. The GRC contemplated how the facts in Paff applied to its prior holding in O’Shea v. Township of West Milford, GRC Complaint No. 2004-17 (April 2005)(that the Custodian’s initial response that the Complainant’s request was a duplicate of a previous request was legally insufficient because the Custodian has a duty to answer each request individually). The Council reasoned that, “[b]ased on OPRA and the GRC’s holding in O’Shea, a custodian is vested with the responsibility to respond to each individual request item within seven (7) business days after receipt of such request.” The GRC ultimately held that:

“[a]lthough the Custodian responded in writing to the Complainant’s August 28, 2007 OPRA request within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i., the Custodian’s response was legally insufficient because he failed to respond to each request item individually. Therefore, the Custodian has violated N.J.S.A. 47:1A-5.g.” *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-166 (April 2009) *and* Kulig v. Cumberland County Board of Chosen Freeholders, GRC Complaint No. 2008-263 (November 2009).

Based on OPRA and the GRC’s holding in Paff, *supra*, a custodian is vested with the responsibility to respond to each individual request item contained in an OPRA request within the statutorily mandated time frame.

Here, the Custodian responded to the OPRA request by simply stating that the PMUA was imposing a special service for the requested records; however, the Custodian did not respond to each request item individually. OPRA provides that a custodian shall comply or indicate the specific basis thereof in the event that a record cannot be disclosed. N.J.S.A. 47:1A-5.g. The Custodian’s written response failed to indicate whether records responsive to each request item existed and whether access to such records was being denied.

Therefore, based on the evidence of record, although the Custodian responded in writing to the Complainant’s April 23, 2009 OPRA request within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i., the Custodian’s response was legally insufficient because she failed to respond individually to each request item contained in the request. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5.g. and Paff, *supra*.

Additionally, the bills, invoices, salaries and contracts requested are specifically classified under OPRA as “immediate access” records pursuant to N.J.S.A. 47:1A-5.e. In Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 28, 2007), the GRC held that “immediate access language of OPRA (N.J.S.A. 47:1A-5.e.) suggests that the Custodian was still obligated to immediately notify the Complainant...” Inasmuch as OPRA requires a custodian to respond within a statutorily required time frame, when immediate access records are requested, a custodian must respond to the request for those records immediately, granting or denying access, requesting additional time to respond or requesting clarification of the request.

In this complaint, the Custodian responded on the third (3rd) business day following receipt of the Complainant’s request; however, the Custodian failed to grant or deny access to the requested immediate access records. Further, the Custodian did not request additional time to respond based on the breadth of the immediate access records requested.

Therefore, because the Custodian failed to immediately grant or deny access to the requested invoices, salaries and contracts, request additional time to respond or request clarification of the request, the Custodian has violated N.J.S.A. 47:1A-5.e.

pursuant to Herron, *supra*. See also Ghana v. New Jersey Department of Corrections, GRC Complaint No. 2008-154 (June 2009).

Next, the GRC will address whether the Custodian unlawfully denied access to the records sought by the Complainant.

Request Item No. 1 – First and second quarterly bills for five (5) addresses:

The Custodian certified in the SOI that no records responsive to this request item exist. The Custodian certified that a “customer account record” exists and was provided to the Complainant.²¹

In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the complainant sought telephone billing records showing a call made to him from the New Jersey Department of Education. The custodian certified in the SOI that no records responsive to the complainant’s request existed. The complainant did not submit any evidence to refute the custodian’s certification. The GRC determined that, because the custodian certified that no records responsive to the request existed, there was no unlawful denial of access to the requested records.

In this complaint, the Custodian certified in the SOI that no quarterly sewer bills responsive to the Complainant’s OPRA request Item No. 1 exist and the Complainant has submitted no credible evidence to refute the Custodian’s certification. Therefore, although the Custodian violated N.J.S.A. 47:1A-5.g. by providing an insufficient response to the Complainant’s OPRA request, and violated N.J.S.A. 47:1A-5.e. by failing to immediately respond to the Complainant’s OPRA request Item No. 1 for quarterly sewer bills, the Custodian has not unlawfully denied access to the Complainant’s OPRA request for first and second quarterly bills for the addresses listed in the OPRA request pursuant to Pusterhofer, *supra*, since no records exist.

Request Item No. 2 – Fourteen (14) purchase orders and supporting documentation:

The Custodian certified in the SOI that the requested purchase orders relate to travel allowances. The Custodian further certified in the SOI that thirteen (13) of the requested purchase orders, which are from 2008, would be provided immediately without the Complainant incurring a special service charge. The Custodian certified that the fourteenth (14th) purchase order, which is from 2007, is in storage and will require additional time and effort to retrieve. The Custodian further argued that the portion of the request seeking supporting documentation of the purchase orders is overly broad because it failed to specify any identifiable government records. The Custodian asserted that a number of the purchase orders will not have any documentation attached.

The Complainant subsequently argued in a letter to the GRC dated June 28, 2009 that the portion of the request for supporting documentation was in no way overly broad.

²¹ The GRC reiterates that there is no evidence in the record to indicate that the “customer account record” was actually provided to the Complainant. However, the Complainant does not indicate that this request item is at issue in his June 25, 2010 e-mail to the GRC. See Footnote No. 12.

The Complainant argued that he requested each purchase order by number. The Complainant argued that even a person with limited knowledge of the purchasing process can identify supporting documents, such as receipts, vendor invoices, business meal forms and other documentation supporting the purchases. The Complainant acknowledged that most of the invoices have no supporting documentation based on the fact that he previously inspected same.

In a letter to the GRC dated June 25, 2010, the Complainant identified eight (8) purchase orders that had not been disclosed. The Custodian's Counsel responded on July 6, 2010 stating that he would order the Custodian to provide the Complainant with the outstanding purchase orders. The Complainant advised the GRC on July 14, 2010 that he was not yet in receipt of the outstanding purchase orders.

In a letter to the GRC dated August 10, 2010, Counsel simultaneously provided access to seven (7) of the eight (8) outstanding invoices with purchase requisition forms attached to the Complainant. Counsel stated that the requisition forms represented all supporting documentation attached and that no form accompanied Purchase Order No. 08-00563. Counsel further stated that Purchase Order No. 08-00527 was not being provided because it had been voided.

The Custodian argues in the SOI that the portion of the Complainant's request Item No. 2 seeking "supporting documentation" is overly broad. Although "documentation" is a generic term, the responsive records are easily identifiable because they should be attached to the requested purchase orders which have been identified by number.

The New Jersey Superior Court has held that "[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records 'readily accessible for inspection, copying, or examination.'* N.J.S.A. 47:1A-1." (Emphasis added.) MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005). The Court further held that "[u]nder OPRA, agencies are required to disclose only 'identifiable' government records not otherwise exempt ... In short, OPRA does not countenance open-ended searches of an agency's files." (Emphasis added.) *Id.* at 549.

Further, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),²² the Superior Court references MAG in that the Court held that a requestor must specifically describe the document sought because OPRA operates to make identifiable government records "accessible." "As such, a proper request under OPRA must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting all of an agency's documents."²³

²² Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

²³ As stated in Bent, *supra*.

Additionally, in New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007) the court cited MAG by stating that "...when a request is 'complex' because it fails to specifically identify the documents sought, then that request is not 'encompassed' by OPRA..." The court also quoted N.J.S.A. 47:1A-5.g in that "[i]f a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency." The court further stated that "...the Legislature would not expect or want courts to require more persuasive proof of the substantiality of a disruption to agency operations than the agency's need to...generate new records..."

Furthermore, in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009) the Council held that "[b]ecause the Complainant's OPRA requests # 2-5 are not requests for identifiable government records, the requests are invalid and the Custodian has not unlawfully denied access to the requested records pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005)."

The Complainant here sought "documentation" which is a generic term. Nevertheless, the responsive records are easily identifiable because they should be attached to the requested purchase orders, which have been identified by number. Therefore, because the Complainant identifies a type of government record (documents supporting each purchase order identified by number), MAG and Bent do not apply to the request relevant to this complaint. The Custodian's search is not open-ended, nor does it require research, but rather requires the Custodian to provide the documentation attached to each requested invoice, if any documentation exists.

The Custodian's Counsel subsequently provided the Complainant with all of the purchase orders requested, save Purchase Order No. 08-00527, on August 10, 2010. Counsel advised the GRC that Purchase Order No. 08-00527 (and all supporting documentation) was not provided because the purchase order was voided. However, OPRA does not contain an exemption from disclosure for records that have been voided. Therefore, the Custodian has unlawfully denied access to the remaining purchase order because a record being voided is not a valid exemption from disclosure under OPRA. N.J.S.A. 47:1A-6. If Purchase Order No. 08-00527 (and all supporting documentation) still exists, same shall be provided to the Complainant. If the purchase order has already been provided to the Complainant or the record does not exist, the Custodian must certify to such.

Request Item No. 3, No. 4 and No. 5 – Health, dental and life insurance payments made by the PMUA for the Board of Commissioners:

The Custodian argued in the SOI that the Complainant's request sought information rather than specific identifiable government records. The Custodian certified that no specific records documenting such payments as they relate to specific Board members and other employees exist. The Custodian averred that the PMUA does

maintain a departmental account breakdown sheet which identifies payment by department, which would be provided to the Complainant if such would satisfy his request.

The Complainant subsequently argued in a letter to the GRC dated June 28, 2009 that he previously inspected the requested records on April 22, 2009 in response to an OPRA request not at issue in this complaint. In support of his claim that these records exist, the Complainant provided monetary figures derived from his inspection, which he asserts occurred one (1) day prior to the filing of the Complainant's OPRA request.²⁴

Items No. 3, 4, and 5 of the Complainant's request seek payments made by the PMUA. These request items seek a type of information, *i.e.*, payments, rather than a specific identifiable government record. As such, these request items are invalid under OPRA.

As previously discussed, the New Jersey Superior Court has held that "[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records 'readily accessible for inspection, copying, or examination.'* N.J.S.A. 47:1A-1." (Emphasis added.) MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005). The Court further held that "[u]nder OPRA, *agencies are required to disclose only 'identifiable' government records not otherwise exempt ... In short, OPRA does not countenance open-ended searches of an agency's files.*" (Emphasis added.) *Id.* at 549.

Further, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),²⁵ the Superior Court references MAG in that the Court held that a requestor must specifically describe the document sought because OPRA operates to make identifiable government records "accessible." "As such, a proper request under OPRA must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting all of an agency's documents."²⁶

Moreover, in LaMantia v. Jamesburg Public Library (Middlesex), GRC Complaint No. 2008-140 (February 2009), the complainant requested the number of Jamesburg residents who held library cards. The Council deemed that the complainant's request was a request for information, holding that:

"because request Item No. 2 of the Complainant's June 25, 2008 OPRA request seeks information rather than an identifiable government record, the request is invalid pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005) and

²⁴ The Complainant did not identify any records responsive to these three (3) requests as outstanding in his letter to the GRC dated June 25, 2010.

²⁵ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

²⁶ As stated in Bent, *supra*.

Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005)...” *Id.* at pg. 6.

Here, the Complainant is seeking health, dental and life insurance payments. Pursuant to the Council’s holding in LaMantia, the Complainant’s request Items No. 3, No. 4 and No. 5 are invalid under OPRA pursuant MAG, *supra*, and Bent, *supra*, because said request items seek information rather than a specific identifiable government record. Therefore, the Custodian has not unlawfully denied access to the request information pursuant to N.J.S.A. 47:1A-6.

Request Item No. 6 – Salaries for eleven (11) specific employees:

The Custodian argued in the SOI that the Complainant’s request sought information instead of an identifiable government record. The Custodian averred that although it is the Township’s position that the Complainant’s request for salary information is invalid, a salary document exists that includes the salary of all employees. The Custodian further averred that the salary record would need to be redacted so that only the salaries for the eleven (11) identified employees would be provided.

The Complainant argued in a letter to the GRC dated June 28, 2009 that one (1) day prior to the submission of the OPRA request herein he inspected a document which contained the requested salaries. The Complainant attached a sample of the document he inspected and noted that the document was obtained from another resident who received the document in response to an OPRA request. Subsequent to a second letter from the Complainant regarding those records that had not yet been provided, the Custodian’s Counsel reiterated that although the Complainant’s OPRA request item sought information rather than an identifiable government record, Counsel nonetheless directed the Custodian to provide a record to Counsel for review or to create a document listing the requested eleven (11) salaries.

OPRA provides that, “immediate access shall ...be granted to ... *vouchers, contracts ... public employee salary and overtime information.*” (Emphasis added.) N.J.S.A. 47:1A-5.e. Salary information is expressly subject to immediate access pursuant to N.J.S.A. 47:1A-5.e. While the court in MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005) held that “*agencies are required to disclose only ‘identifiable’ government records* not otherwise exempt,” the plain language of OPRA has identified certain types of information that fall under the definition of a government record. Pursuant to N.J.S.A. 47:1A-5.e., salary information is expressly identified as an immediate access record.

OPRA further provides that “personnel ... records ... shall not be considered a government record ... except that ... an individual's name, title, position, *salary*, payroll record, length of service, date of separation and the reason therefor, and the amount and type of any pension received ... *shall be a government record[.]*” N.J.S.A. 47:1A-10. Here, salary information has again been identified as a government record subject to disclosure under OPRA.

Therefore, based on the language of N.J.S.A. 47:1A-5.e. and N.J.S.A. 47:1A-10, it is clear that the Complainant's request for salaries of eleven (11) specific employees is valid under OPRA. As previously discussed, pursuant to N.J.S.A. 47:1A-5.e., the Custodian should have provided immediate access to the record containing the salaries sought by the Complainant and failed to do so. Thus, the Custodian has unlawfully denied access to the requested 2008 salary information. N.J.S.A. 47:1A-6. The Custodian shall disclose the salary information responsive to the Complainant. If the records have already been provided to the Complainant, the Custodian must certify to such disclosure.

Request Item No. 7 – Employment contracts for eleven (11) specific employees:

The Custodian certified in the SOI that no contracts exist for seven (7) of the eleven (11) employees identified by the Complainant in request Item No. 7 and the Complainant has submitted no credible evidence to refute the Custodian's certification. Therefore, while the Custodian violated N.J.S.A. 47:1A-5.g. by providing an insufficient response to the Complainant's OPRA request, and violated N.J.S.A. 47:1A-5.e. by failing to immediately respond to the Complainant's OPRA request Item No. 7 for contracts, the Custodian has not unlawfully denied access to the Complainant's OPRA request pursuant to Pusterhofer, supra.

Moreover, the Custodian certified in the SOI that contracts for four (4) employees of the eleven (11) employees identified in request Item No. 7 exist. The Custodian asserted that the four (4) contracts would need to be reviewed by Counsel to determine whether any confidential information is included and must be redacted.

The Custodian's Counsel, in a letter to the GRC dated June 23, 2010, stated that the four (4) contracts were previously provided to the Complainant; however, Counsel did not provide a date for when the contracts were provided to the Complainant. Counsel further stated that no redactions were made to the four (4) contracts. However, the Complainant contended in a letter to the GRC dated June 25, 2009 that the Custodian only provided three (3) of the four (4) existing contracts. Counsel confirmed on July 6, 2010 that he would review the one contract responsive but not previously provided for redactions and make the record available to the Complainant. The Complainant confirmed on July 21, 2010 that he received the outstanding contract on July 19, 2010.

In Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005), the custodian stated in the SOI that one (1) record responsive to the complainant's March 2, 2005 OPRA request was provided and that no other records responsive existed. The complainant contended that she believed more records responsive did, in fact, exist. The GRC requested that the custodian certify as to whether all records responsive had been provided to the complainant. The custodian subsequently certified on August 1, 2005 that the record provided to the complainant was the only record responsive. The GRC held that:

“[t]he Custodian certified that the Complainant was in receipt of all contracts and agreements responsive to the request. The Custodian has met the burden of proving that all records in existence responsive to the

request were provided to the Complainant. Therefore there was no unlawful denial of access.”

The facts of this complaint are slightly different from those in Burns, supra. Specifically, the Custodian here certified in the SOI that four (4) contracts responsive to request Item No. 7 existed and would need to be reviewed for possible redactions. The Complainant advised the GRC on June 25, 2010 that he had only been provided with (3) of the four (4) contracts. Counsel subsequently ordered that the Custodian provide the remaining contract to the Complainant. The Complainant confirmed receipt of the outstanding contract in a letter to the GRC dated July 21, 2009. Even though the Custodian here did not certify in the SOI that all records responsive were provided, the Complainant confirmed that he received all four (4) of the contracts responsive; therefore, all records responsive that existed were provided. Although the facts of this complaint and Burns, supra, are slightly different, the basic tenet of Burns applies here.

Therefore, although the Custodian’s insufficient response resulted in a violation of N.J.S.A. 47:1A-5.g. and the Custodian’s failure to immediately grant access to the requested contracts resulted in a violation of N.J.S.A. 47:1A-5.e., the Custodian did not unlawfully deny access to the records responsive to the Complainant’s OPRA request Item No. 7 pursuant to Burns, supra, because the Complainant acknowledged receipt of all four (4) contracts that exist on July 21, 2010.

Whether the Custodian’s delay in access to the requested records rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

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 responded in writing to the Complainant’s April 23, 2009 OPRA request within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i., the Custodian’s response was legally insufficient because she failed to respond to each request item contained in the request individually. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5.g. and Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008).
2. Because the Custodian failed to immediately grant or deny access to the requested invoices, salaries and contracts, request additional time to respond or request clarification of the request, the Custodian has violated N.J.S.A. 47:1A-5.e. pursuant to Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 28, 2007). *See also* Ghana v. New Jersey Department of Corrections, GRC Complaint No. 2008-154 (June 2009).

3. The Custodian certified in the Statement of Information that no quarterly sewer bills responsive to the Complainant's OPRA request Item No. 1 exist and there is no credible evidence in the record to refute the Custodian's certification. Therefore, although the Custodian violated N.J.S.A. 47:1A-5.g. by providing an insufficient response to the Complainant's OPRA request, and violated N.J.S.A. 47:1A-5.e. by failing to immediately respond to the Complainant's OPRA request Item No. 1 for quarterly sewer bills, the Custodian has not unlawfully denied access to the Complainant's OPRA request for first and second quarterly bills for the addresses listed in the OPRA request pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), since no records exist.
4. Because the Complainant's request Item No. 2 identifies a type of government record (documents supporting each purchase order identified by number), MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005) do not apply to the request relevant to this complaint. The Custodian's search is not open-ended, nor does it require research, but rather requires the Custodian to provide the documentation attached to each requested invoice, if any documentation exists.
5. The Custodian has unlawfully denied access to the remaining purchase order because a record being voided is not an exemption afforded under OPRA. N.J.S.A. 47:1A-6. **If Purchase Order No. 08-00527 (and all supporting documentation) still exists, same shall be provided to the Complainant. If the purchase order has already been provided to the Complainant or the record does not exist, the Custodian must certify to such disclosure.**
6. Pursuant to the Council's holding in LaMantia v. Jamesburg Public Library (Middlesex), GRC Complaint No. 2008-140 (February 2009), the Complainant's request Items No. 3, No. 4 and No. 5 are invalid under OPRA pursuant MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005), and Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005), because said request items seek information rather than a specific identifiable government record. Therefore, the Custodian has not unlawfully denied access to the request information.
7. Based on the language of both N.J.S.A. 47:1A-5.e. and N.J.S.A. 47:1A-10, it is clear that the Complainant's request for salaries of eleven (11) employees is valid under OPRA and not an invalid request for information. The Custodian should have provided immediate access to the record containing the salaries sought by the Complainant pursuant to N.J.S.A. 47:1A-5.e. and failed to do so. Thus, the Custodian has unlawfully denied access to the requested 2008 salary information. N.J.S.A. 47:1A-6. **The Custodian shall disclose the salary information responsive to the Complainant. If the records have**

already been provided to the Complainant, the Custodian must certify to such disclosure.

8. The Custodian certified in the Statement of Information that no contracts exist for seven (7) of the eleven (11) employees identified by the Complainant in request Item No. 7 and the Complainant has submitted no credible evidence to refute the Custodian's certification. Therefore, although the Custodian violated N.J.S.A. 47:1A-5.g. by providing an insufficient response to the Complainant's OPRA request, and violated N.J.S.A. 47:1A-5.e. by failing to immediately respond to the Complainant's OPRA request Item No. 7 for contracts, the Custodian has not unlawfully denied access to the Complainant's OPRA request pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
9. Although the Custodian's insufficient response resulted in a violation of N.J.S.A. 47:1A-5.g. and the Custodian's failure to immediately grant access to the requested contracts resulted in a violation of N.J.S.A. 47:1A-5.e., the Custodian did not unlawfully deny access to the records responsive to the Complainant's OPRA request Item No. 7 pursuant to Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005), because the Complainant acknowledged receipt of all four (4) contracts that exist on July 21, 2010.
10. **The Custodian shall comply with Item No. 5 and No. 7 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions (if necessary), including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4²⁷, to the Executive Director.²⁸**
11. 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
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

²⁷ "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."

²⁸ 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.

February 15, 2011