



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

RICHARD E. CONSTABLE, III  
Commissioner

**FINAL DECISION**

**September 25, 2012 Government Records Council Meeting**

Robert F. Edwards  
Complainant

Complaint Nos. 2008-183 & 2009-259

v.

Housing Authority of Plainfield (Union)  
Custodian of Record

At the September 25, 2012 public meeting, the Government Records Council (“Council”) considered the September 18, 2012 *Reconsideration* Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that the Complainant’s request for reconsideration be denied because the Complainant has failed to establish in his request for reconsideration of the Council’s April 25, 2012 Final Decision that 1) the GRC's decision is based upon a “palpably incorrect or irrational basis” or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, and has failed to show that the GRC acted arbitrarily, capriciously or unreasonably in adopting the Administrative Law Judge’s February 6, 2012 Initial Decision. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

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

Final Decision Rendered by the  
Government Records Council  
On The 25<sup>th</sup> Day of September, 2012

Robin Berg Tabakin, Chair  
Government Records Council



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

Denise Parkinson Vetti, Secretary  
Government Records Council

**Decision Distribution Date: October 1, 2012**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

*Reconsideration*  
**Supplemental Findings and Recommendations of the Executive Director  
September 25, 2012 Council Meeting**

**Robert F. Edwards<sup>1</sup>**  
**Complainant**

**GRC Complaint No. 2008-183 & 2009-259**

v.

**Housing Authority of Plainfield  
(Union)<sup>2</sup>**  
**Custodian of Records**

**GRC Complaint No. 2008-183:**

**Records Relevant to Complaint:** A copy of the Housing Authority of Plainfield (“PHA”) proposal on July 10, 2008 to the Plainfield Planning Board (“Planning Board”).

**Request Made:** July 22, 2008

**Response Made:** July 22, 2008

**Custodian:** Randall Wood

**GRC Complaint Filed:** August 19, 2008<sup>3</sup>

**GRC Complaint No. 2009-259:**

**Records Relevant to Complaint:** “For the purposes of this request, the term ‘documents’ includes, but is not limited to: correspondence, memos, reports, concept papers, maps, plans, site plans, layouts, sketches, photographs and/or any other materials in any format.

Please provide copies of the following public records:

Documents submitted to the [Planning Board] or any member thereof that were referenced during, pertained to, or were submitted for or as part of or in anticipation of, the presentation about Elmwood Gardens given by the PHA at the Plainfield Planning Board meeting on July 10, 2008. This includes documents that may have been submitted to the [Planning Board] prior to the July 10, 2008 meeting.”<sup>4</sup>

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

<sup>2</sup> Represented by Dan S. Smith, Esq. (Orange, NJ).

<sup>3</sup> The GRC received the Denial of Access Complaint on said date.

<sup>4</sup> This is a verbatim recitation of the Complainant’s records request.

**Request Made:** August 20, 2009  
**Response Made:** None  
**Custodian:** Randall Wood  
**GRC Complaint Filed:** September 16, 2009<sup>5</sup>

### Background

#### **April 25, 2012**

Government Records Council's ("Council") Final Decision. At its April 25, 2012 public meeting, the Council considered the April 18, 2012 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 "... because the credible evidence adduced during the hearing at the Office of Administrative Law outweighs the parties' exceptions, and because the Complainant failed to provide any legal basis for the GRC to reject the Administrative Law Judge's findings, the Council adopts the Administrative Law Judge's Initial Decision dated February 6, 2012:

'I **CONCLUDE** that the [PHA] and its custodian did not unlawfully deny [the Complainant] access to the records, because [the Complainant's] requests were invalid under OPRA.

I further **CONCLUDE** that [the Complainant] failed to meet the standard for a proper OPRA request, where the request sought documents that were not readily identifiable, and was of the nature of a blanket request for a class of various documents.

Although [the Custodian] failed to respond to [the Complainant's] second OPRA request, which is "deemed" a denial of that request, I **CONCLUDE** that imposition of a civil penalty is inappropriate, because neither the [C]ustodian nor any other official knowingly and willfully violated OPRA or unreasonably denied access under the totality of the circumstances.' (Emphasis in original)."

#### **April 27, 2012**

Council's Final Decision distributed to the parties.

#### **May 2, 2012**

E-mail from the Complainant to the GRC. The Complainant requests an extension of 30 days to submit a request for reconsideration based on a recent personal matter.

#### **May 3, 2012**

E-mail from the GRC to the Complainant. The GRC states that it is in receipt of the Complainant's request for a 30-day extension of time to submit a request for reconsideration. The GRC states that although *N.J.A.C. 5:105-2.10(b)* specifies that requests for reconsideration must be filed within ten (10) business days following receipt

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<sup>5</sup> The GRC received the Denial of Access Complaint on said date.

of a Council decision, the GRC will grant the Complainant's request for an extension based on extraordinary circumstances. The GRC thus grants the Complainant an extension of time until June 11, 2012 to submit a request for reconsideration.

**June 8, 2012**

E-mail from the Complainant to the GRC. The Complainant requests a second (2<sup>nd</sup>) extension of time until June 21, 2012 based on lingering issues from the personal matter.

**June 8, 2012**

E-mail from the GRC to the Complainant. The GRC grants the Complainant an extension of time until June 21, 2012 to submit a request for reconsideration based on extraordinary circumstances.

**June 21, 2012**

Complainant's request for reconsideration with the following attachments:

- Page 2 of the GRC's "OPRA Alert – Volume 1" for July 2008.
- PHA document (untitled and undated) and receipt of records dated July 8, 2008.
- Planning Board special meeting agenda dated July 10, 2008.
- Planning Board special meeting minutes dated July 10, 2008.
- Courier News article "120 Units May Be Razed" dated July 17, 2008.
- Complainant's OPRA request relevant to GRC Complaint No. 2008-183 dated July 22, 2008.
- Memorandum from Mr. Hurd to the Complainant dated July 22, 2008.
- E-mail from Ms. Fran Snyder ("Ms. Snyder"), previous GRC Mediator, to the Complainant dated January 7, 2009.
- The Custodian's Affidavit dated January 13, 2009.
- Complainant's amended Denial of Access Complaint relevant to GRC Complaint No. 2008-183 date-stamped June 12, 2009.<sup>6</sup>
- Mr. Bobby Conner, Esq.'s, Complainant's previous Counsel, OPRA request dated August 20, 2009.
- Mr. Rickey Williams' ("Mr. Williams") Affidavit dated September 30, 2009.

The Complainant requests that the Council reconsider its April 25, 2012 Final Decision based on a mistake, extraordinary circumstances, fraud, new evidence and illegality.

The Complainant recapitulates the facts of both complaints. The Complainant contends that said facts prove that the Custodian and Custodian's Counsel knowingly and willfully violated OPRA by committing multiple violations of the statute, submitting false certifications and failing to respond to the Complainant's OPRA requests and GRC's requests for Statements of Information ("SOI").

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<sup>6</sup> The Complainant attaches only the first page of said submission.

The Complainant first contends that the Custodian and Custodian's Counsel committed conspiracy pursuant to N.J.S.A. 2C:5-2. The Complainant contends that together the Custodian, Counsel and Mr. Williams agreed to knowingly and willfully impede access, submit false certifications and conceal records subject to access pursuant to N.J.S.A. 47:1A-1.1. The Complainant argues that in spite of the multiple certifications submitted to the GRC in which members of the PHA certified that no records responsive to the Complainant's OPRA request at issue in GRC Complaint No. 2008-183 existed, the Custodian provided the Complainant with one (1) sketch in response to his OPRA request relevant to GRC Complaint No. 2009-259. The Complainant states that Jacobs v. Harvey, Docket No. MER-L-3119-94 (Law Division, August 31, 2006), the Court held that defendant falsely stated that no records responsive existed and ruled in favor of plaintiff.<sup>7</sup> The Complainant thus argues that the Court's holding in Jacobs, supra, entitles him to a judgment in these complaints.

The Complainant next contends that the GRC failed to enforce the Appellate Division's holding in Paff v. NJ Department of Labor, 392 N.J. Super. 334 (App. Div. 2007) when the GRC did not require the Custodian to submit completed SOIs and responses to the Complainant's Denial of Access Complaints. The Complainant further contends that the GRC refused to require the Custodian to submit comprehensive document indexes as required by Paff, supra. The Complainant reiterates that Jacobs, supra, entitles him to a judgment in these complaints.

The Complainant next argues that Administrative Law Judge ("ALJ") Mumtaz Bari-Brown violated N.J.S.A. 2C:51-2(a)(1) by "... tampering with physical evidence is an offense involving ... inherently involves dishonesty." See State v. Kennedy, 419 N.J. Super. 475 (App. Div. 2011). The Complainant asserts that he is reiterating his allegations against the ALJ that he set forth in his objections dated February 19, 2012. The Complainant reiterates that Jacobs, supra, entitles him to a judgment in these complaints.

The Complainant next argues that the GRC improperly held that the Complainant's OPRA requests at issue herein were invalid. The Complainant asserts that his OPRA requests contained a brief description of the records sought pursuant to N.J.S.A. 47:1A-5.f. and were based on a Courier News article that identified the records by time, date, place and subject. The Complainant asserts that the Planning Board's July 10, 2008 minutes further corroborate the Courier News article. The Complainant also contends that his OPRA requests conformed with the GRC's "OPRA Alert – Volume 1" for July 2008 (stating that a valid OPRA request "... identifies a type of government record ... [and] states a specific time frame ..." *Id.* at pg. 2).

The Complainant further contends that the GRC did not invalidate a similar OPRA request in Rivera v. City of Plainfield (Union), GRC Complaint No. 2010-111 (April 2012). The Complainant states that in Burnett, supra, the Court held that a request submitted for a class of government records without identifying a particular document sought does not render the request overly broad, nor does it necessarily require

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<sup>7</sup> The GRC has been unable to locate a copy of the decision in question and thus does not know exactly how the Court chose to hold regarding defendant's false statement.  
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“research.” The Complainant contends that it is disingenuous to invalidate an OPRA request for a record that the Custodian swore did not exist. The Complainant contends that this is especially true when the GRC itself exposed the Custodian’s false certification by determining that responsive records existed.

**June 27, 2012<sup>8</sup>**

Complainant’s amended request for reconsideration with the following attachments:

- SOI form template.
- SOI for GRC Complaint No. 2008-183.

GRC Complaint No. 2008-183:

The Complainant contends that the Custodian has violated OPRA in its entirety. The Complainant states the GRC repeatedly attempted to obtain a completed copy of the SOI from the Custodian.<sup>9</sup> The Complainant asserts that the Custodian refused to provide same to the GRC; therefore, the Custodian failed to bear his burden of proving a lawful denial of access.

The Complainant further alleges that the GRC acted arbitrarily by requesting that the Custodian submit an SOI on July 31, 2009 and August 20, 2009 instead of adjudicating GRC Complaint No. 2008-183 based only on the evidence contained in record. The Complainant contends that the Custodian submitted fraudulent documents during the mediation process<sup>10</sup> that forfeited his right to defend himself by default and through false swearing. The Complainant contends that although the Custodian certified that no responsive records existed, the Planning Board’s minutes and Courier News article submitted as part of the Complainant’s initial request for reconsideration prove otherwise.

The Complainant contends that neither the GRC nor the Office of Administrative Law (“OAL”) has the authority to ignore the facts of a complaint and interject its own arbitrary and capricious holdings. The Complainant thus contends that the GRC’s acceptance of the ALJ’s February 6, 2012 Initial Decision is arbitrary and capricious and further not supported by the evidence of record.

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<sup>8</sup> The GRC notes that on August 20, 2012 the Custodian’s Counsel submitted an objection to the Complainant’s request for reconsideration; however, he did so well outside the required ten (10) business day time frame. *N.J.A.C. 5:105-2.10(d)*. Thus, the GRC will not consider same as said filing is tardy.

<sup>9</sup> The GRC notes that after sending the Custodian a request for the SOI for GRC Complaint No. 2008-183, the parties agreed to mediate the instant complaint. The GRC later requested an SOI after the complaint was referred back from mediation. The GRC additionally sent a letter of no defense to the Custodian after he failed to provide same to the SOI, as is the GRC’s procedure for all complaints.

<sup>10</sup> Pursuant to the GRC regulations (*N.J.A.C. 5:105-2.5(j)*) and the Uniform Mediation Act (*N.J.S.A. 2A:23C-1 et seq.*), the GRC cannot consider any submissions of records or arguments made by either party during mediation.

GRC Complaint No. 2009-259:

The Complainant asserts that this complaint is identical to GRC Complaint No. 2008-183 in that it is against the same agency for the same records. The Complainant contends that the GRC again forwarded to the Custodian several SOI forms.<sup>11</sup> The Complainant contends that the Custodian, emboldened by the GRC's failure to enforce OPRA, submitted eight (8) records sought by the Complainant as part of the SOI. The Complainant asserts that the inclusion of these records is a clear violation of OPRA and directly contradicts the Custodian's certification in both complaints that no records existed. The Complainant contends that the Custodian further altered the SOI form with a purpose to deceive the GRC and Complainant by not inputting responses to the specific questions on page 3 and omitting page 4 from the SOI. The Complainant asserts that the Custodian supplemented the SOI with a document index on October 16, 2009; however, the index failed to conform with the tenets of Paff, *supra*, and violates OPRA.

The Complainant thus contends that the Custodian's failure to submit a complete SOI for either complaint and other multiple violations of OPRA amounts to a knowing and willful violation of OPRA.

**Analysis**

**Whether the Complainant has met the required standard for reconsideration of the Council's April 25, 2012 Final Decision?**

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

In the matter before the Council, the Complainant filed the request for reconsideration of the Council's Final Decision dated April 25, 2012 on June 21, 2012, the last day of the second (2<sup>nd</sup>) extension of time to provide same.

Applicable case law holds that:

“[a] party should not seek reconsideration merely based upon dissatisfaction with a decision.” D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The

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<sup>11</sup> The GRC notes that the evidence of record indicates that it requested the SOI in GRC Complaint No. 2009-259 just once: on September 22, 2009.  
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moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D'Atria, supra, 242 N.J. Super. at 401. 'Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement.' Ibid." In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

In support of his request for reconsideration, the Complainant submitted several documents that he has previously submitted to the GRC on numerous occasions. These records were submitted as part of both complaints, the GRC's referral to OAL and as part of the Complainant's objections to the ALJ's February 6, 2012 Initial Decision. Thus, based on the multiple times the Complainant has submitted the same documents, it is clear that these documents do not constitute "new evidence."<sup>12</sup>

Regarding the Complainant's request for reconsideration and amendment thereto, the Complainant requested that the GRC reconsider its April 25, 2012 Final Decision based on a mistake, extraordinary circumstances, fraud, new evidence and illegality. The Complainant contended that the GRC and ALJ essentially ignored numerous facts indicating that the Custodian knowingly and willfully violated OPRA. The Complainant further contended that the GRC and ALJ erroneously determined that his OPRA requests were invalid under OPRA.

As previously stated in the Council's April 25, 2012 Final Decision:

"The ultimate determination of the agency and the ALJ's recommendations must therefore be accompanied by basic findings of fact sufficient to support them. State, Dep't of Health v. Tegnazian, 194 N.J. Super. 435, 442-43 (App. Div. 1984). The purpose of such findings 'is to enable a reviewing court to conduct an intelligent review of the administrative decision and determine if the facts upon which the order is grounded afford a reasonable basis therefor.' Id. at 443." Id. at pg. 13.

In determining whether to adopt the ALJ's Initial Decision, the GRC looked to the preponderance of the credible evidence weighed by the ALJ, who stated that he "carefully considered the whole of the record and credible evidence and observed the witnesses' demeanor to determine whether the [C]ustodian ... for [the PHA] unlawfully denied [the Complainant] access to government records and, if so, whether the conduct knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances." ALJ's Initial Decision dated February 6, 2012 at pg. 7.<sup>13</sup>

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<sup>12</sup> On its reconsideration form, the Council explicitly defines new evidence as "... evidence that could not have been provided prior to the Council's Decision because the evidence did not exist at the time." (Emphasis in original).

<sup>13</sup> The GRC notes that the Complainant provided the ALJ with the same submissions that he provided to the GRC in his request for reconsideration.

This evidence included testimony from the Custodian, [Mr.] Lewis Hurd (“Mr. Hurd”), Executive Assistant to the PHA, and the Complainant. In fact, all arguments asserted by the Complainant herein and previously set forth in his objections to the Initial Decision were weighed by the ALJ. *Id.* at pg. 7-12. Further, the GRC copied directly into its Final Decision excerpts from the ALJ’s Initial Decision and extensively discussed how the ALJ’s Initial Decision weighed and rejected the Complainant’s objections. *See* Council’s April 25, 2012 Final Decision at pg. 11-13.

The Complainant participated in a hearing before the ALJ and submitted all relevant evidence and testimony that he presented to the GRC, both herein and previously as part of the Complainant’s objections to the ALJ’s Initial Decision, yet, the ALJ rejected the Complainant’s assertions and held that:

“I **CONCLUDE** that the [PHA] and its custodian did not unlawfully deny [the Complainant] access to the records, because [the Complainant’s] requests were invalid under OPRA.

I further **CONCLUDE** that [the Complainant] failed to meet the standard for a proper OPRA request, where the request sought documents that were not readily identifiable, and was of the nature of a blanket request for a class of various documents.

Although [the Custodian] failed to respond to [the Complainant’s] second OPRA request, which is “deemed” a denial of that request, I **CONCLUDE** that imposition of a civil penalty is inappropriate, because neither the [C]ustodian nor any other official knowingly and willfully violated OPRA or unreasonably denied access under the totality of the circumstances.” (Emphasis in original). *Id.*

That the Complainant is dissatisfied with the ALJ’s Initial Decision and the GRC’s adoption of such Decision does not meet the standard for reconsideration. *See Comcast, supra.*

Therefore, the Complainant failed to submit any new evidence in support of his motion. As the moving party, the Complainant was required to establish either of the necessary criteria set forth above; namely 1) that the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence. *See Cummings, supra.* The Complainant failed to do so. The Complainant has also failed to show that the GRC acted arbitrarily, capriciously or unreasonably in adopting the ALJ’s February 6, 2012 Initial Decision. *See D’Atria, supra.* Notably, the Complainant submitted documents and arguments that the Complainant previously provided to both the ALJ and GRC. Further, the Complainant failed to present any evidence that was not available at the time of the Council’s adjudication which would change the substance of the Council’s decision.

Therefore, the Complainant’s request for reconsideration should be denied because the Complainant has failed to establish in his request for reconsideration of the Council’s April 25, 2012 Final Decision that 1) the GRC's decision is based upon a

“palpably incorrect or irrational basis” or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, and has failed to show that the GRC acted arbitrarily, capriciously or unreasonably in adopting the ALJ’s February 6, 2012 Initial Decision. Thus, the Complainant’s request for reconsideration is denied. Cummings, supra; D'Atria, supra; Comcast, supra.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that the Complainant’s request for reconsideration be denied because the Complainant has failed to establish in his request for reconsideration of the Council’s April 25, 2012 Final Decision that 1) the GRC's decision is based upon a “palpably incorrect or irrational basis” or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, and has failed to show that the GRC acted arbitrarily, capriciously or unreasonably in adopting the Administrative Law Judge’s February 6, 2012 Initial Decision. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

Prepared By: Frank F. Caruso  
Senior Case Manager

Approved By: Karyn Gordon, Esq.  
Acting Executive Director

September 18, 2012



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET  
PO BOX 819  
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CHRIS CHRISTIE  
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KIM GUADAGNO  
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Acting Commissioner

**FINAL DECISION**

**April 25, 2012 Government Records Council Meeting**

Robert F. Edwards  
Complainant

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v.

Housing Authority of Plainfield (Union)  
Custodian of Record

At the April 25, 2012 public meeting, the Government Records Council (“Council”) considered the April 18, 2012 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 because the credible evidence adduced during the hearing at the Office of Administrative Law outweighs the parties’ exceptions, and because the Complainant failed to provide any legal basis for the GRC to reject the Administrative Law Judge’s findings, the Council adopts the Administrative Law Judge’s Initial Decision dated February 6, 2012:

“I **CONCLUDE** that the [PHA] and its custodian did not unlawfully deny [the Complainant] access to the records, because [the Complainant’s] requests were invalid under OPRA.

I further **CONCLUDE** that [the Complainant] failed to meet the standard for a proper OPRA request, where the request sought documents that were not readily identifiable, and was of the nature of a blanket request for a class of various documents.

Although [the Custodian] failed to respond to [the Complainant’s] second OPRA request, which is “deemed” a denial of that request, I **CONCLUDE** that imposition of a civil penalty is inappropriate, because neither the [C]ustodian nor any other official knowingly and willfully violated OPRA or unreasonably denied access under the totality of the circumstances.” (Emphasis in original).

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



Final Decision Rendered by the  
Government Records Council  
On The 25<sup>th</sup> Day of April, 2012

Robin Berg Tabakin, Chair  
Government Records Council

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

Denise Parkinson Vetti, Secretary  
Government Records Council

**Decision Distribution Date: April 27, 2012**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
April 25, 2012 Council Meeting**

**Robert F. Edwards<sup>1</sup>  
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**GRC Complaint No. 2008-183 & 2009-259**

v.

**Housing Authority of Plainfield  
(Union)<sup>2</sup>  
Custodian of Records**

**GRC Complaint No. 2008-183:**

**Records Relevant to Complaint:** A copy of the Housing Authority of Plainfield (“PHA”) proposal on July 10, 2008 to the Plainfield Planning Board (“Planning Board”).

**Request Made:** July 22, 2008

**Response Made:** July 22, 2008

**Custodian:** Randall Wood

**GRC Complaint Filed:** August 19, 2008<sup>3</sup>

**GRC Complaint No. 2009-259:**

**Records Relevant to Complaint:** “For the purposes of this request, the term ‘documents’ includes, but is not limited to: correspondence, memos, reports, concept papers, maps, plans, site plans, layouts, sketches, photographs and/or any other materials in any format.

Please provide copies of the following public records:

Documents submitted to the [Planning Board] or any member thereof that were referenced during, pertained to, or were submitted for or as part of or in anticipation of, the presentation about Elmwood Gardens given by the PHA at the Plainfield Planning Board meeting on July 10, 2008. This includes documents that may have been submitted to the [Planning Board] prior to the July 10, 2008 meeting.”<sup>4</sup>

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

<sup>2</sup> Represented by Dan S. Smith, Esq. (Orange, NJ).

<sup>3</sup> The GRC received the Denial of Access Complaint on said date.

<sup>4</sup> This is a verbatim recitation of the Complainant’s records request.

**Request Made:** August 20, 2009  
**Response Made:** None  
**Custodian:** Randall Wood  
**GRC Complaint Filed:** September 16, 2009<sup>5</sup>

### **Background**

#### **November 18, 2009**

Government Records Council's ("Council") Interim Order in GRC Complaint No. 2008-183. At its November 18, 2009 public meeting, the Council considered the November 10, 2009 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties for GRC Complaint No. 2009-259. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

"Because evidence exists which contradicts the asserted basis for the denial of access, and because the Custodian has failed to provide the requested Statement of Information in the instant matter, the GRC is unable to determine whether the Custodian unlawfully denied the Complainant access to the records responsive to his request. Thus, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts to determine whether the Custodian unlawfully denied the Complainant access to the records requested, and if so, for a further determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances."

#### **December 30, 2009**

GRC Complaint No. 2008-183 transmitted to the Office of Administrative Law ("OAL").

#### **December 21, 2010**

Government Records Council's ("Council") Interim Order in GRC Complaint No. 2009-259. At its December 21, 2010 public meeting, the Council considered the December 14, 2010 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties for GRC Complaint No. 2008-183. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. Because the Complainant has established that the Council's November 18, 2009 Final Decision was 1) based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, and has shown that the GRC acted arbitrarily, capriciously or unreasonably in failing to consolidate the instant matter with Edwards v. Housing Authority of Plainfield (Union), GRC Complaint No. 2008-183 (Interim Order [dated November 18, 2009]), said motion for reconsideration is granted. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242

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<sup>5</sup> The GRC received the Denial of Access Complaint on said date.

N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

2. This complaint should be consolidated with Edwards v. Housing Authority of Plainfield (Union), GRC Complaint No. 2008-183 (Interim Order [dated November 18, 2009]) and referred to the Office of Administrative Law for a hearing to resolve the facts to determine whether the Custodian unlawfully denied the Complainant access to the records requested, and if so, for a further determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

#### **December 21, 2010**

Council's Interim Order distributed to the parties.

#### **January 4, 2011**

GRC Complaint No. 2009-259 transmitted to OAL.

#### **February 6, 2012**

Administrative Law Judge ("ALJ") Mumtaz Bari-Brown's Initial Decision. The ALJ **FINDS** that although the Custodian possessed records regarding Elmwood Gardens that [Mr.] Lewis Hurd ("Mr. Hurd"), Executive Assistant to the PHA, provided to the Planning Board, he did not unlawfully deny access to the responsive records because the Complainant's two (2) OPRA requests are invalid under OPRA as blanket requests for a class of various documents. Specifically, the ALJ states that the GRC tasked him with determining:

"... whether the [C]ustodian ... unlawfully denied [the Complainant] access to [government records] allegedly utilized during a meeting held by the Planning Board, and if so, whether the [C]ustodian, or any other public official, knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances." *Id.* at pg. 5.

The ALJ stated that:

"I have carefully considered the whole of the record and credible evidence and observed the witnesses' demeanor to determine whether the [C]ustodian ... for [the PHA] unlawfully denied [the Complainant] access to government records and, if so, whether the conduct knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances. The circumstances in this matter include a record that reveals an ongoing contentious relationship between parties.

[Mr. Hurd] testified that prior to the Planning Board meeting he provided the Planning Board with documents, and pictures of the existing buildings and site. Thereafter, on July 28, 2008, he attended the Planning Board



meeting to discuss demolition and renovation of Elmwood Gardens. The Planning Board exchanged questions and answers, but took no action or vote concerning Elmwood Gardens. [Mr.] Hurd maintained that no decision to raze Elmwood Gardens had taken place before or at the meeting and that he did not intend to deprive [the Complainant] of documents.

Mr. Hurd further testified that at the time of [the Complainant's] first request, he did not recall providing documents relating to Elmwood Gardens to [Mr. William Nierstedt ("Mr. Nierstedt"), Director of Planning for the City of Plainfield]. He acknowledged at the hearing, however, that the documents consisted of a site plan displaying a layout of townhouses, a community building, parking lots, photographs of the present-day Elmwood Gardens complex, an exterior "street view" of potential townhouses at Elmwood Gardens, a first-floor plan for Elmwood Gardens, and a description of the existing structure, zoning, and potential townhouses at Elmwood Gardens drafted by [Mr.] Hurd, and perhaps he might have included a zoning map ... [Mr.] Hurd further testified that he submitted the documents individually, not as a single packet. [Mr.] Hurd did not believe that the material given to [Mr. Nierstedt] contained enough information to be considered a proposal or plan. [Mr.] Hurd further testified that the material he provided to [Mr.] Nierstedt was not given to [the Custodian] ... [The Custodian] maintained that no decision had been made regarding the disposition of Elmwood Gardens. However, discussions were had on the future of the housing complex. [The Custodian] kept a file of notes taken on discussions regarding capital procurement, rezoning, personnel needs, and other items regarding Elmwood Gardens.

Prior to the ... Planning Board meeting scheduled in July 200[8], [the Custodian] met with [Mr.] Nierstedt ... [the Custodian] acknowledged that the Planning Board would discuss Elmwood Gardens at their meeting in a format of a 'question-and-answer session.' [The Custodian] assigned [Mr.] Hurd to represent [the PHA] at the meeting, but he did not tell [Mr.] Hurd to bring any particular documents to the meeting. Moreover, [the Custodian] had a planned vacation and, thus, had no knowledge of what documents [Mr.] Hurd would bring to the meeting. At some point after the Planning Board meeting [Mr.] Hurd informed him that everyone at the meeting had folders with documents that [Mr.] Hurd provided to [Mr.] Nierstedt. When [the Custodian] learned of [the Complainant's] OPRA request, he maintained that no proposal existed for Elmwood Gardens. [The Custodian] defined a proposal to be a formal document, waiting for approval. [The Custodian] further claimed he did not see the newspaper article referenced in [the Complainant's] OPRA request until after submitting his affidavit in the GRC complaint.

[The Custodian] acknowledged that he has known [the Complainant] for many years and has provided [the Complainant] with certain requested

documents, including an architect's sketch of parking spaces. Indeed, in 2009 he met with [the Complainant] regarding a request for documents. Although [the Complainant's] request was unclear, [the Custodian] provide[d] a copy of the site plan from his file.

[The Complainant] is a resident of Elmwood Gardens and the director of The Civic Formation, Inc. [The Complainant] did not attend the Planning Board meeting. However, he read a newspaper article that referenced the Planning Board's discussion on the possible demolition of Elmwood Gardens, and then he decided to "investigate" the matter. [The Complainant] went to the Planning Board offices, listened to a recording of the meeting, and read the minutes and agenda of the meeting.

The Planning Board's agenda states, 'All documents are available for inspection at the Division of Planning and Community Development.' [The Complainant] testified that [Mr.] Nierstedt told him that the Planning Board was not the custodian of the proposal. [The Complainant] then concluded that [Mr.] Hurd's memo dated July 22, 2008, indicating that no proposal existed was contradicted by the minutes of the Planning Board meeting.

...

The minutes reflect that [Mr.] Hurd 'addressed a conceptual layout plan showing a photograph of the existing structure, a proposed layout of the townhouses, a first floor plan, open space area, a community building and a parking lot layout.'

At the hearing, [the Complainant] adopted his certification, in which he states that he met with [the Custodian] after the GRC's decision on June 8, 2009,<sup>6</sup> and he received a copy of the Elmwood Gardens site plan. [The Complainant] conceded that he never asked specifically for any particular document during that meeting or provided any clarification about what he was seeking or what he believed existed.

Subsequent to providing testimony in October 2011, [the Complainant] submitted several packets of documents. [The Complainant] also requested an adjournment to obtain legal advice and to amend his witness list. [The Complainant] further asserted that since 1991, [the PHA] has targeted him with 'reprisal, abus[e], and disparaging conduct' for filing 'appropriate complaints regarding unsafe conditions, code violations, etc.' [The Complainant] also submitted photographs of Elmwood Gardens and raised several objections to the proceedings before the OAL, including the manner in which he was cross-examined. [The Complainant] claimed he was subjected to opposing counsel's badgering and disparaging comments and remarks. Based on the arguments of the parties, I granted [the

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<sup>6</sup> The Council rendered all decisions concerning the two (2) complaints at issue herein after June 8, 2009. Robert F. Edwards v. Housing Authority of Plainfield (Union), 2008-183 & 2009-259 – Supplemental Findings and Recommendations of the Executive Director

Complainant's] request for an adjournment to retain legal consultation. I denied the remainder of [the Complainant's] requests because they were without merit.

The hearing continued on November 25, 2011, and I reiterated that the sole issue in this consolidated matter is whether the [C]ustodian unlawfully denied [the Complainant] access to the records requested, and if so, whether the [C]ustodian knowingly and willingly violated OPRA and unreasonably denied access under the totality of the circumstances.” (Footnote omitted). *Id.* at pg. 7 – 12.

The ALJ determined that based on the credible evidence:

“... I **CONCLUDE** that [the PHA] maintained documents concerning Elmwood Gardens, including discussions on the possible plans to demolish and or alter the housing complex. [Mr.] Hurd provided the [Planning Board] with some of the documents, which consisted of plans and discussions about changes to the housing development ...”

The ALJ further discussed the Complainant's request at issue in GRC Complaint No. 2008-183:

“While [Mr.] Hurd claimed initial forgetfulness on the details of [the Complainant's] request for ‘a proposal ... submitted ... to the Planning Board to raze Elmwood Gardens,’ [the Complainant's] request failed to reasonably identify the documents sought. Indeed, [the Complainant] in his first request merely sought a “proposal,” without specifically identifying any particular records sought. [Mr.] Hurd testified that he did not believe that the material given to [Mr.] Nierstedt contained enough information to be considered a plan or proposal ... and that he did not give any documents to the Planning Board directly. He explained that, at the time of [the Complainant's] first request, he did not recall previously giving documents to [Mr.] Nierstedt regarding Elmwood Gardens. In fact, he provided the material to [Mr.] Nierstedt individually as separate documents and not as a single plan or proposal. Whether those documents, taken together, meet the definition of a plan or proposal remains dubious. The documents addressed at the meeting, and previously supplied by [Mr.] Hurd to [Mr.] Nierstedt, consisted of a site plan, two photographs of the existing complex, an exterior rendering of potential townhouses, a first-floor plan of the existing complex, a brief description of the existing structure, zoning, potential townhouses and a zoning map. Thus, [the Complainant's] first ... request was not encompassed by OPRA because it failed to identify the specific government record sought. *See Morgano v. Essex County Prosecutor's Office*, GRC Complaint No. 2007-156 (February 2008).”

The ALJ next discussed the Complainant's request at issue in GRC Complaint No. 2009-259:

“The Complainant’s second request sought documents[:]

‘submitted to the ... Planning Board ... or any member thereof that were referenced during, pertained to, or were submitted for or as part of or in anticipation of, the presentation about Elmwood Gardens given by the [PHA] at the Planning Board [m]eeting on July 10, 2008 [including] documents that may have been submitted to the Planning Board prior to the July 10, 2008 meeting.’

The request does not cure the deficiency. [The Complainant’s] request did not identify any specific government record. Rather, the request referenced an attached copy of the Courier News article, which erroneously suggested that [Mr.] Hurd presented a package to the Planning Board at the meeting. However, the article merely indicated the existence of a package that included ‘an outline of the current layout of the one-, two-, three- and four-bedroom unit complex as well as sketches of possible designs for the town houses [sic].’ The inclusion of the article did not cure the defect in specificity, because it only noted the inclusion of some undefined number of ‘sketches’ and an ‘outline’ of the current layout of the complex in the undefined packaged ‘presented’ by [Mr.] Hurd.

Essentially, [the Complainant] requested all of the records that may have been related to the potential demolition of Elmwood Gardens. [The Complainant’s] request is similar to the blanket request made in Morgano for a class of various documents ... Thus, [the Complainant’s] second OPRA request was not encompassed by OPRA because it failed to identify the specific government record sought.

The ALJ thus holds that:

“I **CONCLUDE** that the [PHA] and its custodian did not unlawfully deny [the Complainant] access to the records, because [the Complainant’s] requests were invalid under OPRA.

I further **CONCLUDE** that [the Complainant] failed to meet the standard for a proper OPRA request, where the request sought documents that were not readily identifiable, and was of the nature of a blanket request for a class of various documents.

Although [the Custodian] failed to respond to [the Complainant’s] second OPRA request, which is “deemed” a denial of that request, I **CONCLUDE** that imposition of a civil penalty is inappropriate, because neither the [C]ustodian nor any other official knowingly and willfully violated OPRA or unreasonably denied access under the totality of the circumstances.” (Emphasis in original).

## **February 19, 2012**

Complainant's exceptions to the ALJ's Initial Decision with the following attachments:

- PHA document (untitled and undated) and receipt of records dated July 8, 2008.
- Planning Board special meeting agenda dated July 10, 2008.
- Planning Board special meeting minutes dated July 10, 2008.
- Courier News article "120 Units May Be Razed" dated July 17, 2008.
- Memorandum from Mr. Hurd to the Complainant dated July 22, 2008.
- E-mail from Ms. Fran Snyder ("Ms. Snyder"), previous GRC Mediator, to the Complainant dated January 7, 2009.
- The Custodian's Affidavit dated January 13, 2009.
- Mr. Hurd's Affidavit dated September 30, 2009.
- MyCentralJersey.com article "Plainfield Housing Complex's Demolition Approaches Amid Lingerin g Tenant Concerns" dated April 19, 2011.
- MyCentralJersey.com article "Plainfield Pushing Ahead on Plans to Demolish Housing Complex" dated October 11, 2010.
- Plaintiff post "Elmwood Gardens Needs Redevelopment" dated October 20, 2011.

The Complainant states that he received the ALJ's Initial Decision on February 10, 2012 and is submitting exceptions to said Decision.

### Complainant's first (1<sup>st</sup>) exception:

The Complainant first excepts to the ALJ's Initial Decision as palpably incorrect or irrational. The Complainant contends that the ALJ did not consider the significance of probative, competent evidence and acted arbitrarily and capriciously. The Complainant contends that the ALJ ignored the Council's holding that evidence existed within the record that contradicted the Custodian's asserted basis for denying access to his OPRA request relevant to GRC Complaint No. 2008-183. The Complainant further argues that the ALJ ignored the Custodian's failure to submit a Statement of Information ("SOI").

The Complainant states that Mr. Hurd responded in writing to the Complainant's July 22, 2008 OPRA request on the same day stating that no responsive records exist. The Complainant states that the Custodian further certified on January 13, 2009 that no responsive records existed. The Complainant contends that the Courier News article, "120 Units May Be Razed," contradicts Mr. Hurd's response and the Custodian's certification. The Complainant contends that the article was attached to the OPRA request and clearly identifies each record sought by time, date, place and subject. The Complainant argues that the Planning Board's minutes further contradict the asserted denial of access along with several subsequent articles about the demolition of Elmwood Gardens that refer to the Planning Board's initial meeting in July 2008. The Complainant further asserts that Mr. Hurd contradicted himself and the Custodian in an Affidavit dated September 30, 2009 in which he certified that he made an inadvertent error by not recalling 'all' of the materials provided to the Planning Board prior to the July 2008 meeting.

Moreover, the Complainant contends that the Custodian failed to properly respond to the Complainant's July 22, 2008 OPRA request specifically stating the basis for said denial of access as is required pursuant to N.J.S.A. 47:1A-5.g. The Complainant contends that the ALJ further ignored the Council's holding that the Custodian failed to respond to the Complainant's August 20, 2009 OPRA request, thus resulting in a "deemed" denial and violation of N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.

Complainant's second (2<sup>nd</sup>) exception:

The Complainant next excepts to the ALJ's holding that his two (2) requests are invalid because they fail to identify specific government records. The Complainant notes that the Custodian provided a (1) page conceptual drawing to the Complainant in a July 8, 2008 meeting. The Complainant states that in Burnett v. County of Gloucester, 415 N.J. Super. 506 (App. Div. 2010), the Appellate Division recently provided the GRC with additional guidance on the principles of an invalid OPRA request as defined in MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005). The Complainant states that in Burnett, *supra*, the Court held that a request submitted for a class of government records without identifying a particular document sought does not render the request overly broad, nor does it necessarily require "research." The Complainant states that the plaintiff in Burnett, *supra*, sought all settlement agreements entered into by the County within a specified time frame. The Complainant states that the Court firmly rejected the County's argument that the plaintiff's request was invalid because it lacked specificity: "... it is the documents, themselves, that have been requested, and their retrieval requires a search, not research." *Id.* at 15.

The Complainant argues that here, he sought specific government records, specifically, those documents submitted to the Planning Board from the PHA to raze Elmwood Gardens at the July 10, 2008 meeting. The Complainant contends that MAG, *supra*, and Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005) do not apply here because the PHA submitted the responsive records to the Planning Board during a public meeting.

Complainant's third (3<sup>rd</sup>) exception:

The Complainant next excepts to the ALJ's handling of the proceedings. The Complainant asserts that on October 6, 2011, the ALJ stated that the Custodian's two (2) briefs were lost and thus "... we're starting over." The Complainant contends that the loss of the briefs at OAL only benefited the Custodian and PHA by hiding their violations. *N.J.A.C. 1:1-6.1. and N.J.A.C. 1:1-7.1.* The Complainant argues that the OAL failed in its fiduciary duty to protect the submitted briefs in its custody. *See State v. Kennedy*, 419 N.J. Super. 475 (App. Div. 2011) ("... tampering with physical evidence ... inherently involves dishonesty." *Citing Altobello v. Borden Confectionary Prods., Inc.*, 872 F.2d 215, 217 (7<sup>th</sup> Cir. 1989)). The Complainant further asserts that the PHA refused to serve the Complainant with pleadings, which were due to the OAL on January 21, 2011.

The Complainant asserts that proper notice is essential in contested cases. The Complainant contends that the OAL erred by not notifying him of any and all substantive changes in the original directive of January 11, 2011 in advance of the October 6, 2011 hearing. The Complainant contends that the OAL allowed the Custodian to unlawfully violate the notice and service requirement set forth in *N.J.A.C. 1:1-6.1. and N.J.A.C. 1:1-7.1.*, thus circumventing these complaints. The Complainant argues that according to Superior Court guidelines discussed in Carteret Properties v. Variety Donuts, Inc., 49 N.J. 116, 123-125 (1967), proper notice is essential to the Court's jurisdiction and said notice shall be specific.<sup>7</sup>

The Complainant further contends that the PHA called him as a witness on October 6, 2011 although he received no proper notice of being included on the witness list. The Complainant contends that he was repeatedly subjected to inappropriate, irrelevant and disparaging comments for nearly 2 ½ hours. The Complainant asserts that this bombardment equated to the PHA accusing the Complainant of entering into a fact-finding hearing in bad faith. The Complainant notes that the Appellate Division previously addressed repetitious and persistent lines of questioning in Romano v. Stubbs, 2010 N.J. Super. Unpub. LEXIS 3015 (App. Div. 2010) (“... repetition is relevant to the prejudicial impact of improper argument. When an attorney directed to avoid a prejudicial line of argument persists, we have held that repetition is important to an evaluation of the prejudice from the argument and required a new trial. *See, e.g., Haid v. Loderstedt*, 45 N.J. Super. 547, 554 (App. Div. 1957).”)

The Complainant argues that the ALJ denied him the opportunity to cross-examine Mr. Hurd, the Custodian, Custodian's Counsel and others in regard to their trustworthiness and reliability at hearings on October 6, 2011, October 20, 2011 and November 25, 2011. The Complainant contends that this is in violation of R. 2:10-2 (providing that “any error or omission shall be disregarded by the appellate court unless it ... [is] clearly capable of producing an unjust result...”). The Complainant further contends that the ALJ improperly sustained objections to questions regarding the Custodian and Mr. Hurd's affidavits and questions regarding credibility. The Complainant asserts that the ALJ also restricted the Complainant from examining the credibility of Mr. Hurd, the Custodian, Custodian's Counsel and so on. The Complainant contends that these restrictions were a violation of the Complainant's Sixth Amendment rights. *See Davis v. Alaska*, 4156 U.S. 308, 94 S. Ct. 1105 (1974).

#### **April 13, 2012**

Letter from the Complainant to the GRC with the following attachments:

- PHA document (untitled and undated) and receipt of records dated July 8, 2008.
- Planning Board special meeting agenda dated July 10, 2008.
- Planning Board special meeting minutes dated July 10, 2008.
- Courier News article “120 Units May Be Razed” dated July 17, 2008.

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<sup>7</sup> The GRC notes that the issue in Carteret is whether a property owner provided sufficient notice of termination to a tenant. The Court discussed what constituted sufficient notice and defined the term “specify” as it relates to a notice of termination. The Complainant also cited to Kroll Realty, Inc. v. Fuentes, 163 N.J. Super. 23, 26 (App. Div. 1978), which also involves a tenant/landlord issue. Robert F. Edwards v. Housing Authority of Plainfield (Union), 2008-183 & 2009-259 – Supplemental Findings and 10 Recommendations of the Executive Director

- Memorandum from Mr. Hurd to the Complainant dated July 22, 2008.
- E-mail from Ms. Fran Snyder (“Ms. Snyder”), previous GRC Mediator, to the Complainant dated January 7, 2009.
- The Custodian’s Affidavit dated January 13, 2009.
- Mr. Hurd’s Affidavit dated September 30, 2009.
- Complainant’s OPRA request to the Planning Board dated February 28, 2012.
- Letter from Mr. Nierstedt to the Complainant dated March 2, 2012 attaching a list of Planning Board members from 1998 to 2002.

The Complainant recapitulates his arguments from the exceptions filed on February 19, 2012. The Complainant notes that Mr. Hurd served on the Planning Board from 1998 to 2001. The Complainant provides no additional new information or evidence that is relevant to the instant complaint.

### Analysis

#### **Whether the GRC should adopt, modify or reject the ALJ’s Initial Decision dated February 6, 2012?**

##### Complainant’s first (1<sup>st</sup>) exceptions:

The Complainant first excepted to the ALJ’s Initial Decision in its entirety and argued that the ALJ did not consider the significance of probative, competent evidence and acted arbitrarily and capriciously. The Complainant argued that the ALJ ignored contradictory evidence and the Custodian’s failure to submit an SOI in GRC Complaint No. 2008-183. The Complainant further argued that the ALJ ignored the Council’s holdings that the Custodian violated OPRA by failing to respond properly to the July 22, 2008 OPRA request and failing to respond at all the August 20, 2009 OPRA request.

The GRC rejects the Complainant’s exception. The ALJ stated in the Initial Decision that “based on the credible evidence ... the [PHA] maintained documents concerning Elmwood Gardens.” *Id.* at pg. 12. This is consistent with the evidence provided as part of GRC Complaint No. 2009-259 that the GRC took judicial notice of in GRC Complaint No. 2008-183. However, the ALJ specifically noted that “[w]hether those documents, taken together, meet the definition of a plan or proposal remains dubious.” *Id.* at pg. 13.

Moreover, the ALJ noted in the Facts section of the Initial Decision that the GRC requested an SOI from the Custodian on three (3) occasions. *Id.* at pg. 2. The ALJ further referred to the fact that the Custodian’s failure to respond to the Complainant’s August 20, 2009 OPRA request in GRC Complaint No. 2009-259 resulted in a deemed denial. *Id.* at pg. 14. Thus, the Initial Decision indicates that the ALJ took into account all of the facts that the Complainant argued the ALJ failed to consider.

##### Complainant’s second (2<sup>nd</sup>) exception:



The Complainant next excepted to the ALJ's holding that the Complainant's two (2) OPRA requests were overly broad. The Complainant argued that the GRC should follow the Court's holding in Burnett v. County of Gloucester, 415 N.J. Super. 506 (App. Div. 2010), which provided additional guidance on its holding in MAG. The Complainant argued that 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, 37 (App. Div. 2005) do not apply in these matters because the Complainant specifically sought the records submitted to the Planning Board.

The GRC rejects this exception. In Burnett, *supra*, the plaintiff appealed from an order of summary judgment entered against him in his suit to compel production by the County of Gloucester of documents requested pursuant to OPRA, consisting of “[a]ny and all *settlements, releases or similar documents* entered into, approved or accepted from 1/1/2006 to present.” *Id.* at 508. (Emphasis added). The Appellate Division determined that the request sought a specific type of document, although it did not specify a particular case to which such document pertained, and was therefore not overly broad. *Id.* at 515-16.

Regarding GRC Complaint No. 2008-183, the Complainant's July 22, 2008 OPRA request sought a proposal, which the ALJ determined was a non-specific type of record. The ALJ reasoned that the records provided to the Planning Board by the PHA consisted of several identifiable documents provided to the Planning Board over time and not as one package: “a site plan, two photographs of the existing complex, an exterior rendering of potential townhouses, a first-floor plan of the existing complex, a brief description of the existing structure, zoning, potential townhouses and a zoning map.” *Id.* at pg. 13. The ALJ noted that it is doubtful that these records as a collection constituted a proposal. The ALJ clearly determined the term “proposal” was open to interpretation as to exactly what a “proposal” constituted.

The ALJ further likened the Complainant's request to OPRA request Item No. 1 at issue in Morgano v. Essex County Prosecutor's Office, GRC Complaint No. 2007-156 (February 2008), which sought case files for two (2) indictment numbers. In that complaint, the Council noted that the case files composed of twenty (20) and twenty-one (21) separate records respectively. This is different from plaintiff's request in Burnett, *supra*, which sought settlements, releases and records similar to the former over a defined period of time.

Regarding GRC Complaint No. 2009-259, the ALJ clearly articulated the reasons why he believed the Complainant's August 22, 2009 OPRA request is overly broad and unclear. The ALJ stated that the Complainant's request essentially sought “all records that may have been related to the potential demolition of Elmwood Gardens.” *Id.* at pg. 14. The ALJ further noted that the inclusion of the Courier News article did not “... cure the deficiency ... which erroneously suggested that [Mr.] Hurd presented a package to the [Planning] Board at the meeting.” ALJ's Initial Decision dated February 6, 2012. Again, his request is certainly more similar to the request at issue in Morgano, *supra*, than in Burnett, *supra*.

The GRC notes that the Council similarly cited to Morgano in determining that the Complainant's August 22, 2009 OPRA request was broad and unclear. See Edwards v. Plainfield Housing Authority (Union), GRC Complaint No. 2009-259 (Final Decision dated November 18, 2009). In fact, the Complainant filed an appeal on December 18, 2009 in part challenging the Council's holding. Edwards v. Plainfield Housing Authority (Union), GRC Complaint No. 2009-259 (Interim Order dated December 21, 2010).

Complainant's third (3<sup>rd</sup>) exception:

Finally, the Complainant excepted to the ALJ's handling of the proceedings. The Complainant argued that the OAL lost briefs and failed to notify the Complainant of changes in advance of the October 6, 2011 hearing. The Complainant further contended that the ALJ allowed the PHA to call him as a witness with no proper notice and allowed the PHA to bombard him with what he characterized as irrelevant and disparaging comments. The Complainant also contended that the ALJ did not allow him to fully cross-examine the PHA's witnesses concerning trustworthiness and reliability and imposed restrictions on the Complainant's ability to examine the credibility of the PHA witnesses; the Complainant also asserted that the ALJ sustained objections to the Complainant's questions regarding the Custodian's actions.

The GRC rejects this exception because the Complainant already brought these arguments before the ALJ who considered and denied Complainant's arguments, having placed those reasons on the record. See ALJ's Initial Decision at pg. 12. Moreover, a review of the ALJ's Initial Decision indicates that the Complainant was not denied due process in the OAL proceedings.

An administrative agency has the duty of ensuring that the administrative law judge's decision was based on a preponderance of the credible evidence. In re Polk License Revocation, 90 N.J. 550, 560 (1982); Dore v. Bedminster Tp. Bd. of Ed., 185 N.J. Super. 447, 453 (App.Div.1982). The agency's decision need only "demonstrate that the agency gave attentive consideration to the ALJ's recommendation as part of the record and [to] address itself to key items of evidence which were crucial to its decision." Public Advocate Dep't v. Public Utilities Bd., 189 N.J. Super. 491, 506. See also St. Vincent's Hospital v. Finley, 154 N.J. Super. 24, 29-33 (App.Div.1977).

The ultimate determination of the agency and the ALJ's recommendations must therefore be accompanied by basic findings of fact sufficient to support them. State, Dep't of Health v. Tegnazian, 194 N.J. Super. 435, 442-43 (App. Div. 1984). The purpose of such findings "is to enable a reviewing court to conduct an intelligent review of the administrative decision and determine if the facts upon which the order is grounded afford a reasonable basis therefor." *Id.* at 443. Additionally, the sufficiency of evidence "must take into account whatever in the record fairly detracts from its weight"; the test is not for the courts to read only one side of the case and, if they find any evidence there, the action is to be sustained and the record to the contrary is to be ignored (citation omitted). St. Vincent's Hospital v. Finley, 154 N.J. Super. 24, 31 (App. Div. 1977).

Moreover, due process demands only that a litigant in a contested administrative adjudication receive a full and fair hearing conducted at the agency level. See Matter of

Kallen, 92 N.J. 14 (1983). As the New Jersey Supreme Court emphasized in In re Polk License Revocation, *supra*, a "due process violation will be found only when a combination of functions is such as to render an independent judgment impossible." *Id.*, 90 N.J. at 577. See Withrow v. Larkin, 421 U.S. 35, 55-58, 95 S.Ct. 1456, 1468-69, 43 L.Ed.2d 712, 728-730 (1975). "[T]he bare assertion of improper conduct falls short of proof of actual bias, prejudice or violation of due process in a hearing required by our case law." See Matter of Cole, 194 N.J. Super. 237, 246 (App.Div.1984); In re Blum, 109 N.J. Super. 125, 129 (App. Div.1970).

In DeVitis v. NJ Racing Comm'n, 202 N.J. Super. 404 (App. Div. 1985), the Superior Court of New Jersey, Appellate Division, determined that no denial of due process occurred in an administrative hearing wherein the appellant claimed that the administrative law judge violated his right to due process by permitting certain witnesses to testify who had previously acted in a quasi-judicial capacity by ruling in the first instance on his suspension. The Court noted that:

"Generally, the rules of the Office of Administrative Law provide that '[e]xcept as otherwise provided by law or by administrative rule establishing a privilege ... [e]very person is qualified to be a witness' at an administrative hearing. N.J.A.C. 1:1-15.2(e). See N.J.A.C. 1:1-15.6. Two exceptions are contained within New Jersey's Administrative Procedure Act, which states that the 'administrative law judge may in his discretion exclude any evidence if he finds that its probative value is substantially outweighed by the risk that its admission will either (i) necessitate undue consumption of time or (ii) create substantial danger of undue prejudice or confusion.'" N.J.S.A. 52:14B-10(a)." DeVitis, *supra*, at 497.

The Court held that "...the administrative law judge's decision to allow [the testimony of individuals who previously ruled on DeVitis' suspension] ... in no way 'affronted current notions of due process of law' nor in any way necessitated an undue consumption of time or created a substantial danger of undue prejudice or confusion." DeVitis, *supra*, at 498. The Court held that because the proceedings afforded DeVitis a full and fair opportunity to present witnesses and evidence in his own behalf, to cross-examine witnesses against him and to rebut their testimony, and to present defenses on his own behalf, all before an objective factfinder in the Office of Administrative Law, the OAL proceedings fully complied with all due process requirements. *Id.* at 500.

In the matter before the Council, a review of the ALJ's Initial Decision reveals that the ALJ provided the Complainant with ample opportunity to present witnesses and evidence on his own behalf, including the submission of documentary evidence after the Complainant's testimony, and even permitted an adjournment of the hearing to allow the Complainant an opportunity to obtain legal advice and to amend his witness list. Initial Decision at pg. 11. The ALJ specifically rejected the Complainant's objections to the proceedings before the OAL, including his claims that he was unfairly subjected to opposing counsel's badgering and disparaging comments and remarks, as being "without merit." Initial Decision at pg. 12. Additionally, the Complainant admitted in his exceptions that the ALJ permitted the Complainant the opportunity to cross-examine

PHA's witnesses, but objected to the restrictions on cross-examination, which the ALJ imposed.

The Council notes that N.J.S.A. 52:14B-10(a) controls the administration of evidence in contested cases at OAL:

“[t]he parties shall not be bound by rules of evidence whether statutory, common law, or adopted formally by the Rules of Court. All relevant evidence is admissible, except as otherwise provided herein. *The administrative law judge may in his discretion exclude any evidence* if he finds that its probative value is substantially outweighed by the risk that its admission will either (i) necessitate undue consumption of time or (ii) create substantial danger of undue prejudice or confusion. The administrative law judge shall give effect to the rules of privilege recognized by law. *Any party in a contested case may present his case or defense by oral and documentary evidence, submit rebuttal evidence and conduct such cross-examination as may be required, in the discretion of the administrative law judge, for a full and true disclosure of the facts.*” (Emphasis added). N.J.S.A. 52:14B-10(a).

Thus, the ALJ had the discretion under the statute to control the submission of evidence at the hearing, including placing limitations upon the Complainant's ability to cross-examine witnesses. The Council therefore rejects the Complainant's exception in this regard.

Henceforth, the Initial Decision reflects that the ALJ clearly articulated the credible evidence he considered to be important to his decision. The ALJ then made a determination based on the preponderance of the credible evidence in the record. The ALJ further indicated that the circumstances in this matter revealed an ongoing contentious relationship between the parties.

Because the preponderance of the credible evidence adduced during the hearing at the OAL outweighs the parties' exceptions, and because the Complainant failed to provide any legal basis for the GRC to reject the ALJ's findings, the Council adopts the ALJ's Initial Decision dated February 6, 2012, which finds:

“**I CONCLUDE** that the [PHA] and its custodian did not unlawfully deny [the Complainant] access to the records, because [the Complainant's] requests were invalid under OPRA.

I further **CONCLUDE** that [the Complainant] failed to meet the standard for a proper OPRA request, where the request sought documents that were not readily identifiable, and was of the nature of a blanket request for a class of various documents.

Although [the Custodian] failed to respond to [the Complainant's] second OPRA request, which is “deemed” a denial of that request, I **CONCLUDE** that imposition of a civil penalty is inappropriate, because

neither the [C]ustodian nor any other official knowingly and willfully violated OPRA or unreasonably denied access under the totality of the circumstances.” (Emphasis in original).

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that because the credible evidence adduced during the hearing at the Office of Administrative Law outweighs the parties’ exceptions, and because the Complainant failed to provide any legal basis for the GRC to reject the Administrative Law Judge’s findings, the Council adopts the Administrative Law Judge’s Initial Decision dated February 6, 2012:

“I **CONCLUDE** that the [PHA] and its custodian did not unlawfully deny [the Complainant] access to the records, because [the Complainant’s] requests were invalid under OPRA.

I further **CONCLUDE** that [the Complainant] failed to meet the standard for a proper OPRA request, where the request sought documents that were not readily identifiable, and was of the nature of a blanket request for a class of various documents.

Although [the Custodian] failed to respond to [the Complainant’s] second OPRA request, which is “deemed” a denial of that request, I **CONCLUDE** that imposition of a civil penalty is inappropriate, because neither the [C]ustodian nor any other official knowingly and willfully violated OPRA or unreasonably denied access under the totality of the circumstances.” (Emphasis in original).

Prepared By: Frank F. Caruso  
Senior Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

April 18, 2012



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

JON S. CORZINE  
Governor

CHARLES A. RICHMAN  
Acting Commissioner

**FINAL DECISION**

**November 18, 2009 Government Records Council Meeting**

Robert Edwards  
Complainant

Complaint No. 2009-259

v.

Housing Authority of Plainfield (Union)  
Custodian of Record

At the November 18, 2009 public meeting, the Government Records Council (“Council”) considered the November 10, 2009 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’s Counsel has alleged that the Custodian did not receive the Complainant’s August 20, 2009 OPRA request, there is no evidence in the record to support this assertion. Therefore, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. The Complainant’s request is invalid under OPRA because it fails to identify specific government records sought. MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), Morgano v. Essex County Prosecutor’s Office, GRC Complaint No. 2007-156 (February 2008), Feiler-Jampel v. Somerset County Prosecutor’s Office, GRC Complaint No. 2007-190 (March 2008). Accordingly, the Custodian has not unlawfully denied the Complainant access to the records requested.
3. Although the Custodian’s failure to provide a written response to the Complainant’s OPRA request within the statutorily mandated seven (7) business



days resulted in a “deemed” denial, because the Complainant’s OPRA request was invalid under OPRA as broad and unclear according to the prior Court and GRC decisions, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian’s unlawful “deemed” denial of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

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 18<sup>th</sup> Day of November, 2009

Robin Berg Tabakin, Chair  
Government Records Council

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

Harlynn A. Lack, Secretary  
Government Records Council

**Decision Distribution Date: November 23, 2009**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
November 18, 2009 Council Meeting**

**Robert Edwards<sup>1</sup>  
Complainant**

**GRC Complaint No. 2009-259**

v.

**Housing Authority of Plainfield (Union)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** “For the purposes of this request, the term ‘documents’ includes, but is not limited to: correspondence, memos, reports, concept papers, maps, plans, site plans, layouts, sketches, photographs and/or any other materials in any format.

Please provide copies of the following public records:

Documents submitted to the Plainfield Planning Board (“Planning Board”) or any member thereof that were referenced during, pertained to, or were submitted for or as part of or in anticipation of, the presentation about Elmwood Gardens given by the PHA at the Plainfield Planning Board meeting on July 10, 2008. This includes documents that may have been submitted to the Plainfield Planning Board prior to the July 10, 2008 meeting.”<sup>3</sup>

**Request Made:** August 20, 2009

**Response Made:** None

**Custodian:** Randall Wood

**GRC Complaint Filed:** September 16, 2009<sup>4</sup>

**Background**

**August 20, 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.

**September 16, 2009**

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

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<sup>1</sup> Represented by Bobby Conner, Esq., of the American Civil Liberties Union of New Jersey (Newark, NJ).

<sup>2</sup> Represented by Dan Smith, Esq. (Orange, NJ).

<sup>3</sup> This is a verbatim recitation of the Complainant’s records request.

<sup>4</sup> The GRC received the Denial of Access Complaint on said date.



- Plainfield Planning Board Agenda for July 10, 2008;
- Courier News article “120 Units May Be Razed” dated July 17, 2008;
- Custodian’s affidavit dated January 13, 2009;
- Sketch of possible layout for Elmwood Gardens dated June 8, 2009;
- Complainant’s OPRA request dated August 20, 2009;<sup>5</sup>
- Certification of Complainant dated September 15, 2009; and
- Letter brief from the Complainant’s Counsel dated September 15, 2009.

The Complainant certifies that he has submitted three (3) OPRA requests to the Housing Authority for the records relevant to this complaint. The Complainant also certifies that the first request was filed on July 22, 2008. The Complainant further certifies that the Custodian denied his request on July 22, 2008, stating that no records responsive existed. The Complainant further certifies that he has filed a similar OPRA request<sup>6</sup> with the Plainfield Planning Board and received some documents pertaining to the Housing Authority’s plans for Elmwood Gardens.

The Complainant certifies that based on the records received from the Planning Board and the newspaper article published after the Housing Authority’s presentation, he believes that additional records responsive to the request exist. The Complainant certifies that on June 8, 2009 he met with the Custodian, at which time the Custodian provided him with a sketch utilized during the July 10, 2008 Plainfield Planning Board presentation regarding Elmwood Gardens.

In a letter brief accompanying the Denial of Access Complaint, the Complainant’s Counsel states that the Housing Authority discussed various documents, sketches and site plans at the Plainfield Planning Board meeting held on July 10, 2008. The Complainant’s Counsel states that shortly after the meeting, the Courier News published an article about the Housing Authority’s proposal for Elmwood Gardens. The Complainant’s Counsel further states that the article mentioned a packet of information distributed to the Planning Board.

The Complainant’s Counsel states that on August 20, 2009, he submitted an OPRA request on the Complainant’s behalf for the records presented at the Plainfield Planning Board meeting. The Complainant’s Counsel states that the Custodian has not yet responded to the Complainant’s OPRA request. The Complainant’s Counsel also states that the lack of response resulted in an unlawful denial of access. The Complainant’s Counsel argues that in an effort to avoid disclosure of records requested, the Custodian is using semantics or employing an improperly cramped reading of the term “proposal.”

The Complainant’s Counsel also states that the Complainant’s OPRA request clearly identified the records sought because it referenced the Plainfield Planning Board

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<sup>5</sup> The Complainant alleges that he sent the OPRA request to the Custodian by fax and by regular mail. The Complainant attached to his Denial of Access Complaint a fax confirmation sheet showing that the OPRA request, comprising a five (5) page fax, was successfully sent to the Custodian’s fax machine at 13:25 on August 20, 2009.

<sup>6</sup> The Complainant does not indicate the dates of the other OPRA request.

meeting, the subject matter of the Housing Authority's presentation and the newspaper article concerning the same.

The Complainant's Counsel requests that the GRC find that the Custodian knowingly and willful violated OPRA by unlawfully denying the Complainant access to the records requested. N.J.S.A. 47: 1A-11.

The Complainant did not agree to mediate this complaint.

**September 22, 2009**

Request for the Statement of Information ("SOI") sent to the Custodian.

**September 29, 2009<sup>7</sup>**

Custodian's SOI with the following attachments:

- Custodian's affidavit dated January 13, 2009;
- Letter Brief of Custodian's Counsel dated September 29, 2009;
- Custodian's certification dated September 29, 2009;
- Lewis Hurd's (Executive Assistant of the Housing Authority of Plainfield) affidavit dated September 30, 2009; and
- Ricky Williams' (Member of Plainfield Housing Authority) affidavit dated September 30, 2009.

The Custodian certifies that Lewis Hurd of the Plainfield Housing Authority was requested by the Director of Planning for the City of Plainfield to speak to the Plainfield Planning and Zoning Boards regarding the possible demolition or rehabilitation of Elmwood Gardens. The Custodian certifies that no documents were presented at the meeting or provided subsequent to the meeting. The Custodian further certifies that the discussion regarding the process was purely informational.

Mr. Hurd certifies that he is the Executive Assistant of the Housing Authority of Plainfield. Mr. Hurd further certifies that he and the Custodian were invited by the Director of Planning to speak at the July 10, 2008 Plainfield Planning Board meeting about the Housing Authority's ideas concerning Elmwood Gardens Apartment complex. Mr. Hurd certifies that the Plainfield Planning Board requested the meeting to discuss ideas which the Housing Authority might have regarding Elmwood Gardens. Mr. Hurd certifies that the discussion was for informational purposes only. Mr. Hurd certifies that he made the representation to the Housing Authority at the meeting because Mr. Wood was not available.

Mr. Hurd certifies that although the City of Plainfield Director of Planning requested Mr. Hurd to provide information to him prior to the meeting so that the Board would know the topic of discussion, Mr. Hurd does not fully remember what materials were provided to the Plainfield Planning Board. However, Mr. Hurd certifies that he remembers providing to the Planning Board a sketch of a possible layout created by an

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<sup>7</sup> Additional materials were submitted by the parties. However, said correspondence is either not relevant to this complaint or restates the facts/assertions already presented to the GRC.

architect. Mr. Hurd also certifies that when the Custodian later asked him what materials were provided at the meeting, he initially indicated that no materials were provided at the meeting. Mr. Hurd certifies that he later remembered that prior to the meeting he provided a summary page, pictures of the current site, and sketches of another site.

Mr. Hurd certifies that the Custodian was on vacation at the time of the presentation to the Planning Board and was therefore unaware of the materials Mr. Hurd provided to the Plainfield Planning Board prior to the July 10, 2008 meeting. Mr. Hurd certifies that no materials were distributed at the July 10, 2008 meeting with the Planning Board.

Mr. Ricky Williams, a Housing Authority member, certifies that he accompanied Mr. Hurd to the July 10, 2008 Plainfield Planning Board meeting where they discussed the demolition or rehabilitation of Elmwood Gardens. Mr. Williams certifies that he recalls the Plainfield Planning Board members asking Mr. Hurd if he knew when the project would begin. Mr. Williams certifies that Mr. Hurd informed the Planning Board that Mr. Hurd was present only to receive information for zoning regulations regarding what structures could be redeveloped in the Elmwood Garden area. Mr. Williams certifies that Mr. Hurd stated there was no specific date or time when the project would take place because it was still in the planning stage. Mr. Williams certifies that he does not recall any documents being distributed at the meeting. Mr. Williams also certifies that he recalls the Plainfield Planning Board reviewing a sketch of possible town house construction. Mr. Williams states that he believes that the sketch was provided to the Plainfield Planning Board prior to the meeting.

In a letter brief accompanying the SOI, the Custodian's Counsel contends that Mr. Hurd was not authorized to provide documents to the Plainfield Planning Board on behalf of the Housing Authority of Plainfield at the July 10, 2008 meeting. The Custodian's Counsel maintains that any records used at the meeting were not required by law to be made, maintained or kept on file by the Custodian. The Custodian's Counsel further contends that the packet of information provided to the Plainfield Planning Board was not intended to be or represented as a government record that the Custodian had a legal obligation to make, maintain or file. MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005).

The Custodian's Counsel states that on June 8, 2009, the Custodian met with the Complainant to discuss the records requested.<sup>8</sup> The Custodian's Counsel contends that at that meeting, the Custodian had no knowledge of the packet of information which the Complainant alleges was presented at the July 10, 2008 Plainfield Planning Board meeting. The Custodian's Counsel states that at their meeting on June 8, 2009, the Custodian gave the Complainant a one (1) page sketch pertaining to the Elmwood Gardens. The Custodian's Counsel states that this sketch was not used in the oral presentation by Mr. Hurd nor was it referred to as a formal proposal to the Plainfield Planning Board. The Custodian's Counsel states that he believes that the Plainfield

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<sup>8</sup> Custodian's Counsel also references a meeting between the Complainant and the Custodian on August 29, 2008; this meeting apparently transpired in regards to a separate OPRA request from the Complainant. Robert Edwards v. Housing Authority of Plainfield (Union), 2009-259 – Findings and Recommendations of the Executive Director 4

Planning Board provided the Complainant with a copy of the packet of information in response to a separate request.

The Custodian's Counsel states that the records sought by Complainant are exempt from disclosure under OPRA as advisory, consultative or deliberative material. Additionally, the Custodian's Counsel states that the Custodian does not recall receiving the Complainant's OPRA request in this matter. The Custodian's Counsel states that the Custodian did not knowingly and willfully violate OPRA and unlawfully deny the Complainant access to the records requested. The Custodian's Counsel requests that the GRC dismiss this complaint for the above mentioned reasons.

### **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.

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.

The Complainant's Counsel states that on August 20, 2009, he submitted an OPRA request on behalf of the Complainant for the documents presented at the meeting between the Housing Authority and the Plainfield Planning Board on July 10, 2008. The Complainant's Counsel attached to the Denial of Access Complaint a fax confirmation sheet which allegedly confirms that a five (5) page facsimile was successfully sent to the

Custodian's fax machine on August 20, 2009. The Custodian's Counsel contends in the Statement of Information that the Custodian does not recall receiving the Complainant's August 20, 2009 OPRA request; however, no evidence was submitted to support this assertion.

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian's failure to respond within the required seven (7) business days results in a "deemed" denial. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.<sup>9</sup> Thus, a custodian's failure to respond in writing to a complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

Although the Custodian's Counsel contends that the Custodian did not receive the Complainant's August 20, 2009 OPRA request, there is no evidence in the record to support this assertion. Therefore, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

Although the parties have put forth conflicting accounts of the events in question, the Complainant's August 20, 2009 request is invalid under OPRA because it fails to specify identifiable government records.

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.

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<sup>9</sup> It is the GRC's position that a custodian's written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

Further, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),<sup>10</sup> 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.”<sup>11</sup>

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).”

In Morgano v. Essex County Prosecutor’s Office, GRC Complaint No. 2007-156 (February 2008), the Complainant filed an OPRA request for two entire prosecutor’s office files. The Council relied upon MAG, *supra*, and Bent, *supra*, in determining that the request was overbroad and of the nature of a blanket request for a class of various documents rather than a request for a specific government record. As such, the Council found that the Custodian met her burden of proof in denying the Complainant access to the records.

In Feiler-Jampel v. Somerset County Prosecutor’s Office, GRC Complaint No. 2007-190 (March 2008), the GRC held that because the records requested comprise an entire Somerset County Prosecutor’s Office file, was overbroad and a blanket request for a class of various documents rather than a request for specific government records, the request was invalid.

In the matter currently before the Council, the Complainant’s request seeks “documents” submitted by the Housing Authority to the Plainfield Planning Board in conjunction with a meeting on July 10, 2008. However, the term “documents” does not

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<sup>10</sup> Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

<sup>11</sup> As stated in Bent, *supra*.

identify a specific government record but rather, a class of records. The Complainant stated in his request that “for the purposes of this request, the term ‘documents’ includes, but is not limited to: correspondence, memos, reports, concept papers, maps, plans, site plans, layouts, sketches, photographs and/or any other materials in any format,” thereby broadening his request to essentially a general request for all the records in the Custodian’s possession that may relate to the specified subject matter. Such a request is invalid under OPRA because it is overly broad. Pursuant to Bent, *supra*, 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.

Therefore, the Complainant’s request is invalid under OPRA because it fails to identify specific government records sought. MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), Morgano v. Essex County Prosecutor’s Office, GRC Complaint No. 2007-156 (February 2008), Feiler-Jampel v. Somerset County Prosecutor’s Office, GRC Complaint No. 2007-190 (March 2008). Accordingly, the Custodian has not unlawfully denied the Complainant access to the records requested.

**Whether the Custodian’s deemed denial rises 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).

Although the Custodian's failure to provide a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business days resulted in a "deemed" denial, because the Complainant's OPRA request was invalid under OPRA as broad and unclear according to the prior Court and GRC decisions, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's unlawful "deemed" denial of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Although the Custodian's Counsel has alleged that the Custodian did not receive the Complainant's August 20, 2009 OPRA request, there is no evidence in the record to support this assertion. Therefore, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. The Complainant's request is invalid under OPRA because it fails to identify specific government records sought. MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), Morgano v. Essex County Prosecutor's Office, GRC Complaint No. 2007-156 (February 2008), Feiler-Jampel v. Somerset County Prosecutor's Office, GRC Complaint No. 2007-190 (March 2008). Accordingly, the Custodian has not unlawfully denied the Complainant access to the records requested.
3. Although the Custodian's failure to provide a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business days resulted in a "deemed" denial, because the Complainant's OPRA request was invalid under OPRA as broad and unclear according to the prior Court and GRC decisions, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's unlawful



“deemed” denial of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

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Executive Director

November 10, 2009