



State of New Jersey
GOVERNMENT RECORDS COUNCIL
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TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

May 24, 2011 Government Records Council Meeting

Janne Darata
Complainant

Complaint No. 2009-312

v.

Monmouth County Board of Chosen Freeholders
Custodian of Record

At the May 24, 2011 public meeting, the Government Records Council (“Council”) considered the April 20, 2011 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Custodian provided the requested records to the Complainant as required by the Council’s Interim Order, and because the Custodian provided certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4 to the Executive Director within the five (5) business days required by the Council’s Interim Order, the Custodian has complied with the Council’s February 24, 2011 Interim Order.
2. Although the original Custodian provided an insufficient response to the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g. by failing to provide a specific lawful basis for his denial of access, violated N.J.S.A. 47:1A-5.e. by failing to respond immediately to the Complainant’s OPRA request for invoices and vouchers and unlawfully denied access to the thirteen (13) invoices responsive to the Complainant’s OPRA request, the current Custodian complied with the Council’s February 24, 2011 Interim Order by providing all records responsive to the Complainant’s request. Additionally, the evidence of record does not indicate that the original Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the original Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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



Final Decision Rendered by the
Government Records Council
On The 24th Day of May, 2011

Robin Berg Tabakin, Chair
Government Records Council

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

Charles A. Richman, Secretary
Government Records Council

Decision Distribution Date: June 3, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

Janne Darata¹
Complainant

GRC Complaint No. 2009-312

v.

Monmouth County Board of Chosen Freeholders²
Custodian of Records

Records Relevant to Complaint: Copies of all cost records, invoices and payment vouchers showing the breakdown and total cost to date of the lawsuit against Monmouth County Parks Department on hunting in a designated no-hunting zone in Wall Township.

Request Made: June 9, 2009

Response Made: June 12, 2009

Custodian: Marion Masnick³

GRC Complaint Filed: November 24, 2009⁴

Background

February 24, 2011

Government Records Council's ("Council") Interim Order. At its February 24, 2011 public meeting, the Council considered the February 15, 2011 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. Because the Complainant's OPRA request identified specific types of government records sought (*i.e.*, invoices and vouchers) and because the OPRA request contained enough qualifiers for the Custodian's Counsel to identify the litigation for which the Complainant sought records and for the original Custodian to identify thirteen (13) invoices responsive to the Complainant's OPRA request, the Complainant's request seeking "... all cost records, invoices and payment vouchers showing the breakdown and total cost to date of the lawsuit against Monmouth County Parks Department on hunting in a designated no-hunting zone in Wall Township" is not overly broad under OPRA. *See Burnett v. County of Gloucester*, 415 N.J. Super. 506 (App. Div. 2010). The original Custodian's search is not open-ended, nor does it require

¹ No legal representation listed on record.

² Represented by Steven W. Kleinman, Esq. (Freehold, NJ).

³ The original Custodian of Records was James S. Gray.

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

research, but rather requires the original Custodian to provide the invoices from the date the litigation against Monmouth County Parks Department was initiated through the date of the OPRA request.

2. Although the original Custodian responded in writing to the Complainant's June 9, 2009 OPRA request within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i., the original Custodian's response was legally insufficient because he failed to provide a specific lawful basis for said denial of access. Therefore, the original Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5.g. and DeAppolonio, Esq. v. Borough of Deal (Monmouth), GRC Complaint No. 2008-62 (September 2009). The GRC notes that pending litigation is not a lawful basis for denial of access to records requested under OPRA. OPRA provides a statutory right of access to government records which is not in any way supplanted by pending or ongoing litigation.
3. Because the original Custodian failed to immediately grant or deny access to the requested invoice and vouchers, request additional time to respond or request clarification of the request, the original Custodian has violated N.J.S.A. 47:1A-5.e. pursuant to Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 28, 2007). *See also* Ghana v. New Jersey Department of Corrections, GRC Complaint No. 2008-154 (June 2009).
4. The original Custodian has failed to bear his burden of proving a lawful denial of access to the thirteen (13) invoices responsive to the Complainant's OPRA request. N.J.S.A. 47:1A-6. **The Custodian shall disclose the thirteen (13) invoices identified by the Complainant in the Statement of Information as responsive to the Complainant's OPRA request.**
5. **The Custodian shall comply with Item No. 4 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4⁵, to the Executive Director.⁶**
6. The Council defers analysis of whether the original Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

⁵ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁶ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

February 28, 2011

Council's Interim Order distributed to the parties.

March 7, 2011

E-mail from the Custodian's Counsel to the GRC attaching the following:

- Custodian's response to the Council's Interim Order dated March 7, 2011.
- Copies of the thirteen (13) invoices responsive to the Complainant's OPRA request (with redactions).

Counsel states that attached is the Custodian's response to the Council's February 24, 2011 Interim Order. Counsel notes that the Complainant has been copied on this e-mail.

The Custodian certifies that she is in receipt of the Council's February 24, 2011 Interim Order. The Custodian certifies that in the SOI, the Monmouth County Board of Chosen Freeholders ("Board") identified thirteen (13) invoices from the law firm of Lindabury, McCormick, Estabrook and Cooper, P.C., as responsive to the Complainant's OPRA request:

1. Invoice No. 140085 dated September 30, 2008 (5 pages).
2. Invoice No. 140098 dated October 31, 2008 (5 pages).
3. Invoice No. 140110 dated November 30, 2008 (2 pages).
4. Invoice No. 14012666 dated December 31, 2008 (3 pages).
5. Invoice No. 140140 dated January 31, 2009 (2 pages).
6. Invoice No. 140151 dated February 28, 2009 (2 pages).
7. Invoice No. 140166 dated March 31, 2009 (2 pages).
8. Invoice No. 140182 dated April 30, 2009 (2 pages).
9. Invoice No. 2203005 dated May 31, 2009 (2 pages).
10. Invoice No. 2203315 dated June 30, 2009 (2 pages).
11. Invoice No. 2205307 dated July 31, 2009 (2 pages).
12. Invoice No. 2206364 dated August 31, 2009 (1 page).
13. Invoice No. 2207295 dated September 30, 2009 (2 pages).

The Custodian certifies that attached are copies of the thirteen (13) invoices ordered to be disclosed to the Complainant in the Council's Interim Order. The Custodian certifies that redactions have been made pursuant to N.J.S.A. 47:1A-1.1, which exempts "attorney-client privileged material" from disclosure and specifically provides that:

"[t]his paragraph shall not be construed as exempting from access attorney or consultant bills or invoices except that such bills or invoices may be redacted to remove any information protected by the attorney-client privilege ..." N.J.S.A. 47:1A-1.1.

The Custodian certifies that the Board has redacted (1) all references to specific topics of legal research or analysis conducted by the County's legal counsel and (2) the names of participants in any discussion or correspondence involving the County's legal counsel.

The Custodian certifies that this information has been redacted because it could reveal attorney work product and legal strategies. The Custodian certifies that the GRC previously deemed these types of redactions to be lawful. *See Renna v. Union County Improvement Authority*, GRC Complaint No. 2008-86; *Keddie v. Rutgers*, 148 N.J. 36, 54 (1997). The Custodian certifies that the remaining portions are unredacted.

March 15, 2011

E-mail from the GRC to the Complainant. The GRC requests that the Complainant confirm whether she received the records ordered to be provided pursuant to the Council's February 24, 2011 Interim Order. The GRC requests that the Complainant also confirm whether she is satisfied with the Custodian's response.

March 16, 2011

E-mail from the Complainant to the GRC. The Complainant confirms that she has received the records ordered to be provided in the Council's Interim Order.

Analysis

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

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

"... [t]he Custodian shall disclose the thirteen (13) invoices identified by the Complainant in the Statement of Information as responsive to the Complainant's OPRA request ... within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director."

The Custodian's response to the Council's Interim Order was due by close of business on March 7, 2010. The Custodian certified that the requested records were sent to the Complainant on March 7, 2011. The Custodian further certified that some redactions were made pursuant to N.J.S.A. 47:1A-1.1. and Renna, *supra*.

In order to comply with the Council's Interim Order in the instant complaint, the Custodian was required to provide to the Complainant with the thirteen (13) e-mails identified as responsive to the Complainant's OPRA request within five (5) business days of receipt of the Council's Interim Order.

The evidence of record indicates that the Custodian responded in a timely manner providing to the Complainant the responsive invoices. Additionally, the Custodian certified that she redacted (1) all references to specific topics of legal research or analysis conducted by the County's legal counsel and (2) the names of participants in any discussion or correspondence involving the County's legal counsel pursuant to N.J.S.A.

47:1A-1.1. and Renna, *supra*. Moreover, the Complainant confirmed receipt of same in an e-mail to the GRC on March 16, 2011.

Therefore, because the Custodian provided the responsive records to the Complainant as required by the Council's Interim Order, and because the Custodian provided certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4 to the Executive Director within the five (5) business days required by the Council's Interim Order, the Custodian has complied with the Council's February 24, 2011 Interim Order.

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

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 original Custodian provided an insufficient response to the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g. by failing to provide a specific lawful basis for his denial of access, violated N.J.S.A. 47:1A-5.e. by failing to respond immediately to the Complainant's OPRA request for invoices and vouchers and

unlawfully denied access to the thirteen (13) invoices responsive to the Complainant's OPRA request, the current Custodian complied with the Council's February 24, 2011 Interim Order by providing all records responsive to the Complainant's request. Additionally, the evidence of record does not indicate that the original Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the original Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian provided the requested records to the Complainant as required by the Council's Interim Order, and because the Custodian provided certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4 to the Executive Director within the five (5) business days required by the Council's Interim Order, the Custodian has complied with the Council's February 24, 2011 Interim Order.
2. Although the original Custodian provided an insufficient response to the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g. by failing to provide a specific lawful basis for his denial of access, violated N.J.S.A. 47:1A-5.e. by failing to respond immediately to the Complainant's OPRA request for invoices and vouchers and unlawfully denied access to the thirteen (13) invoices responsive to the Complainant's OPRA request, the current Custodian complied with the Council's February 24, 2011 Interim Order by providing all records responsive to the Complainant's request. Additionally, the evidence of record does not indicate that the original Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the original Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

April 20, 2011



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

INTERIM ORDER

February 24, 2011 Government Records Council Meeting

Janne Darata
Complainant

Complaint No. 2009-312

v.

Monmouth County Board of Chosen Freeholders
Custodian of Record

At the February 24, 2011 public meeting, the Government Records Council (“Council”) considered the February 15, 2011 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Complainant’s OPRA request identified specific types of government records sought (*i.e.*, invoices and vouchers) and because the OPRA request contained enough qualifiers for the Custodian’s Counsel to identify the litigation for which the Complainant sought records and for the original Custodian to identify thirteen (13) invoices responsive to the Complainant’s OPRA request, the Complainant’s request seeking “... all cost records, invoices and payment vouchers showing the breakdown and total cost to date of the lawsuit against Monmouth County Parks Department on hunting in a designated no-hunting zone in Wall Township” is not overly broad under OPRA. *See* Burnett v. County of Gloucester, 415 N.J. Super. 506 (App. Div. 2010). The original Custodian’s search is not open-ended, nor does it require research, but rather requires the original Custodian to provide the invoices from the date the litigation against Monmouth County Parks Department was initiated through the date of the OPRA request.
2. Although the original Custodian responded in writing to the Complainant’s June 9, 2009 OPRA request within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i., the original Custodian’s response was legally insufficient because he failed to provide a specific lawful basis for said denial of access. Therefore, the original Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5.g. and DeAppolonio, Esq. v. Borough of Deal (Monmouth), GRC Complaint No. 2008-62 (September 2009). The GRC notes that pending litigation is not a lawful basis for denial of access to records requested under OPRA. OPRA provides a statutory right of access to government records which is not in any way supplanted by pending or ongoing litigation.



3. Because the original Custodian failed to immediately grant or deny access to the requested invoice and vouchers, request additional time to respond or request clarification of the request, the original Custodian has violated N.J.S.A. 47:1A-5.e. pursuant to Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 28, 2007). *See also* Ghana v. New Jersey Department of Corrections, GRC Complaint No. 2008-154 (June 2009).
4. The original Custodian has failed to bear his burden of proving a lawful denial of access to the thirteen (13) invoices responsive to the Complainant's OPRA request. N.J.S.A. 47:1A-6. **The Custodian shall disclose the thirteen (13) invoices identified by the Complainant in the Statement of Information as responsive to the Complainant's OPRA request.**
5. **The Custodian shall comply with Item No. 4 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4¹, to the Executive Director.²**
6. The Council defers analysis of whether the original Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 24th Day of February, 2011

Robin Berg Tabakin, Chair
Government Records Council

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

Charles A. Richman, Secretary
Government Records Council

Decision Distribution Date: February 28, 2011

¹ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

² Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Janne Darata¹
Complainant**

GRC Complaint No. 2009-312

v.

**Monmouth County Board of Chosen Freeholders²
Custodian of Records**

Records Relevant to Complaint: Copies of all cost records, invoices and payment vouchers showing the breakdown and total cost to date of the lawsuit against Monmouth County Parks Department on hunting in a designated no-hunting zone in Wall Township.

Request Made: June 9, 2009

Response Made: June 12, 2009

Custodian: Marion Masnick³

GRC Complaint Filed: November 24, 2009⁴

Background

June 9, 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.

June 12, 2009

The Custodian Counsel's response to the OPRA request. On behalf of the Custodian, Counsel responds in writing to the Complainant's OPRA request on the third (3rd) business day following receipt of such request. Counsel states that he is in receipt of the Complainant's OPRA request in which the Complainant sought information concerning the litigation by a Wall Township resident seeking a temporary injunction to stop hunting in Shark River Park.

Counsel states that the County made a motion for summary judgment to dismiss the lawsuit which was granted by the Judge. Counsel states that the Plaintiff appealed the dismissal to the Appellate Division and said appeal was dismissed as well. Counsel states that Plaintiff filed an appeal of the original decision granting summary judgment and that the action is currently pending before the Appellate Division.

¹ No legal representation listed on record.

² Represented by Steven W. Kleinman, Esq. (Freehold, NJ).

³ The original Custodian of Records was James S. Gray.

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

Counsel states that based on the foregoing, no information will be provided to the Complainant until such time as the litigation has concluded.

November 24, 2009

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

- Complainant’s OPRA request dated June 9, 2009.
- Letter from the Custodian to the Complainant dated June 12, 2009.

The Complainant states that she submitted an OPRA request to the Custodian on June 9, 2009. The Complainant states that Counsel responded on June 12, 2009 denying access to the requested records.

The Complainant states that OPRA provides that “... government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest ...” N.J.S.A. 47:1A-1. The Complainant argues that legal costs are not specifically exempt from access; to the contrary, the definition of attorney-client privilege exemption states that:

“[t]his paragraph *shall not* be construed as exempting from access attorney or consultant bills or invoices except that such bills or invoices may be redacted to remove any information protected by the attorney-client privilege;” (Emphasis added.) N.J.S.A. 47:1A-1.1.

The Complainant believes she is entitled to access the requested information as a citizen concerned with the amount of taxpayer money being spent to date by the Monmouth County Board of Chosen Freeholders (“Board”) to litigate a lawsuit. The Complainant requests that the GRC order disclosure of the requested information.

The Complainant does not agree to mediate this complaint.

December 17, 2009

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

December 23, 2009

E-mail from the Custodian’s Counsel to the GRC. Counsel requests an extension of time until December 30, 2009 to submit the requested SOI.

December 24, 2009

E-mail from the GRC to the Custodian’s Counsel. The GRC grants an extension of time until December 30, 2009 to submit the requested SOI.

December 29, 2009

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated June 9, 2009.

- Letter from the Custodian to the Complainant dated June 12, 2009.

The Custodian certifies that no records responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management (“DARM”).⁵

The Custodian certifies that he received the Complainant’s OPRA request on June 9, 2009. The Custodian states that Mr. Carton responded in writing on June 12, 2009 denying access to the requested record because the Board was still engaged in litigation.

The Custodian identifies the following invoices from Lindabury, McCormick, Estabrook & Cooper, P.C., as responsive to the Complainant’s OPRA request:

1. Invoice No. 140085 dated September 30, 2008 (5 pages).
2. Invoice No. 140098 dated October 31, 2008 (5 pages).
3. Invoice No. 140110 dated November 30, 2008 (2 pages).
4. Invoice No. 14012666 dated December 31, 2008 (3 pages).
5. Invoice No. 140140 dated January 31, 2009 (2 pages).
6. Invoice No. 140151 dated February 28, 2009 (2 pages).
7. Invoice No. 140166 dated March 31, 2009 (2 pages).
8. Invoice No. 140182 dated April 30, 2009 (2 pages).
9. Invoice No. 2203005 dated May 31, 2009 (2 pages).
10. Invoice No. 2203315 dated June 30, 2009 (2 pages).
11. Invoice No. 2205307 dated July 31, 2009 (2 pages).
12. Invoice No. 2206364 dated August 31, 2009 (1 page).
13. Invoice No. 2207295 dated September 30, 2009 (2 pages).

The Custodian contends that access to the requested records was denied because the Complainant failed to identify the lawsuit by name or docket number and further failed to specify an identifiable government record. The Custodian asserts that the Complainant’s OPRA request would have required the Custodian to conduct research for the purposes of identifying the relevant lawsuit and type of records sought by the Complainant. The Custodian asserts that based on the nature of the Complainant’s OPRA request, the Custodian forwarded same to Counsel for review and response.

The Custodian certifies that Counsel responded on June 12, 2009 providing a general account of the litigation status and stating that no information would be provided until the conclusion of litigation.

The Custodian argues that the records responsive are exempt from disclosure as attorney-client privileged material. N.J.S.A. 47:1A-1.1. The Custodian argues that the attorney-client privilege protects communications between a lawyer and the client in the course of that professional relationship and particularly protects that information which, if disclosed, would jeopardize the legal position of the client. N.J.S.A. 2A-84A-20. The Custodian asserts that the litigation has not concluded; therefore, the records remain within the privilege’s purview.

⁵ The Custodian did not certify as to the search undertaken.

The Custodian notes that the Complainant contends in the Denial of Access Complaint that the requested information is the amount of money spent on the lawsuit to date. The Custodian asserts that although the Complainant's OPRA request is invalid because it seeks information, the County is prepared to provide redacted invoices to the Complainant. The Custodian argues that he is not obligated to provide an answer to the Complainant's question of how much money was spent on a lawsuit; however, the Complainant may analyze the redacted invoices for the information she is seeking.

January 12, 2010

The Complainant's response to the Custodian's SOI. The Complainant states that she is in receipt of the Board's SOI. The Complainant avers that she is only requesting the amount of money spent on one litigation matter and has not received this information.

The Complainant notes that the Custodian argues in the SOI that the Complainant failed to specify a lawsuit, docket number or record sought. The Complainant asserts that she clearly identified the lawsuit by content (lawsuit against the Monmouth County Park Service on hunting in a designated no-hunting zone in Wall Township). The Complainant argues that the Custodian's June 12, 2009 response clearly indicates that he knew the litigation to which the Complainant referred. The Complainant argues that in the SOI, the Custodian identified thirteen (13) invoices responsive to the OPRA request yet the Custodian has failed to provide the requested records.

The Complainant further contends that providing access to the requested information will not jeopardize the Board's attorney-client privilege nor will their legal position be exposed.⁶

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 ... A government record shall not include ... any record within the attorney-client privilege. This paragraph shall not be construed as

⁶ Additional correspondence was submitted by the parties. However, said correspondence is either not relevant to this complaint or restates the facts/assertions already presented to the GRC.

exempting from access attorney or consultant bills or invoices except that such bills or invoices may be redacted to remove any information protected by the attorney-client privilege” (Emphasis added.) N.J.S.A. 47:1A-1.1.

Further, OPRA provides that:

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

OPRA 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 GRC will first address whether the Complainant’s request is valid under OPRA.

The Complainant here requested copies of “... all cost records, invoices and payment vouchers showing the breakdown and total cost to date of the lawsuit against Monmouth County Parks Department on hunting in a designated no-hunting zone in Wall Township.” The original Custodian argued in the SOI that the Complainant’s request was overly broad because it failed to identify the lawsuit by name or docket number and further failed to specify an identifiable government record.

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

Further, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),⁷ 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.”⁸

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).”

This matter is, however, similar to the facts presented in Burnett v. County of Gloucester, 415 N.J. Super. 506 (App. Div. 2010). In Burnett, 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.

In this complaint, it is evident that the Complainant did not know the exact name or docket number of the litigation matter sought; thus, the Complainant attempted to identify the parties to such litigation and the issues of such. Although the original Custodian argued that the request was a request for information, the Complainant’s OPRA request specifically identified both invoices and vouchers as records requested, which are classified as immediate access records under OPRA. N.J.S.A. 47:1A-5.e. Moreover, the Custodian’s Counsel identified the litigation for which the Complainant

⁷ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

⁸ As stated in Bent, *supra*.

sought records in his response to the OPRA request. Additionally, the original Custodian identified in the SOI thirteen (13) invoices responsive to the Complainant's OPRA request.

Therefore, because the Complainant's OPRA request identified specific types of government records sought (*i.e.*, invoices and vouchers) and because the OPRA request contained enough qualifiers for the Custodian's Counsel to identify the litigation for which the Complainant sought records and for the Custodian to identify thirteen (13) invoices responsive to the Complainant's OPRA request, the Complainant's request seeking "... all cost records, invoices and payment vouchers showing the breakdown and total cost to date of the lawsuit against Monmouth County Parks Department on hunting in a designated no-hunting zone in Wall Township" is not overly broad under OPRA. *See Burnett v. County of Gloucester*, 415 N.J.Super. 506 (App. Div. 2010). The original Custodian's search is not open-ended, nor does it require research, but rather requires the original Custodian to provide the invoices from the date the litigation against Monmouth County Parks Department was initiated through the date of the OPRA request.

The GRC next turns to whether the original Custodian's response was sufficient pursuant to OPRA and precedential case law. Further, the GRC will address whether the Custodian appropriately responded to the Complainant's request items seeking immediate access records.

In the instant complaint, the Complainant submitted an OPRA request on June 9, 2009. Counsel responded in writing on behalf of the original Custodian on June 12, 2009 stating that no information regarding the litigation by a Wall Township resident seeking a temporary injunction to stop hunting in Shark River Park would be provided until the conclusion of said litigation. In doing so, Counsel failed to provide a specific lawful basis for denying access to the requested records.

OPRA provides that if a "...custodian is unable to comply with a request for access, the custodian *shall indicate the specific basis therefor ...* on the request form and promptly return it to the requestor" (Emphasis added.) N.J.S.A. 47:1A-5.g. In DeAppolonio, Esq. v. Borough of Deal (Monmouth), GRC Complaint No. 2008-62 (September 2009), the complainant argued in the Denial of Access Complaint that although the custodian responded in writing in a timely manner, the custodian failed to provide some of the records responsive and further failed to provide a specific lawful basis for denying access to the missing records. The GRC held that:

"... the Council's decisions have repeatedly supported this statutory mandate by holding that custodians must provide a legally valid reason for any denial of access to records. *See Seabrook v. Cherry Hill Police Department*, GRC Complaint No. 2004-40 (April 2004), Rosenblum v. Borough of Closter, GRC Complaint No. 2005-16 (October 2005) and Paff v. Township of Plainsboro, GRC Complaint No. 2005-29 (October 2005). The Council also held that for a denial of access to be in compliance with OPRA, it must be specific and must be sufficient to prove that a custodian's denial is authorized by OPRA. *See Morris v. Trenton Police Department*, GRC Complaint No. 2007-160 (May 2008).

Here, while the Custodian's response to the Complainant's request was within the time allowed by N.J.S.A. 47:1A-5.i., his response was not in compliance with OPRA because it failed to provide a specific basis for denying the Complainant access to certain records pursuant to N.J.S.A. 47:1A-5.g. and the Council's decisions in Seabrook, supra, Rosenblum, supra, Paff, supra and Morris, supra." *Id.* at pg. 7.

In this complaint, Counsel responded in writing on behalf the original Custodian denying access to the requested records until the conclusion of the litigation for which the Complainant was seeking records. In doing so, Counsel failed to identify a specific citation in either OPRA, another State statute, executive order or regulation at the time of said denial. OPRA provides that a custodian shall comply or indicate the specific basis thereof in the event that a record cannot be disclosed. N.J.S.A. 47:1A-5.g.

Therefore, although the original Custodian responded in writing to the Complainant's June 9, 2009 OPRA request within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i., the original Custodian's response was legally insufficient because he failed to provide a specific lawful basis for said denial of access. Therefore, the original Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5.g. and DeAppolonio, supra. The GRC notes that pending litigation is not a lawful basis for denial of access to records requested under OPRA. OPRA provides a statutory right of access to government records which is not in any way supplanted by pending or ongoing litigation.

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

In this complaint, the Custodian's Counsel responded in writing on behalf of the original Custodian on the third (3rd) business day following receipt of the Complainant's request; however, the Custodian failed to grant or deny access to the requested immediate access records.

Therefore, because the original Custodian failed to immediately grant or deny access to the requested invoice and vouchers, request additional time to respond or request clarification of the request, the original Custodian has violated N.J.S.A. 47:1A-5.e. pursuant to Herron, supra. See also Ghana v. New Jersey Department of Corrections, GRC Complaint No. 2008-154 (June 2009).

The GRC will next address whether the original Custodian unlawfully denied access to the requested records.

Counsel responded in writing on behalf of the original Custodian on the third (3rd) business day after receipt of the Complainant's OPRA request denying access to records regarding the litigation identified in said request until the conclusion of same. In the SOI, the original Custodian argued that the Complainant's OPRA request was an overly broad request for information; however, the original Custodian identified thirteen (13) invoices that are responsive to the Complainant's OPRA request. Moreover, the original Custodian argued that the records responsive are exempt from disclosure as attorney-client privileged material. N.J.S.A. 47:1A-1.1. Specifically, the original Custodian argued that because the litigation had not concluded, the invoices fall within the privilege's purview.

Although OPRA does contain an exemption for "... any record within the attorney-client privilege," this exemption is paired with the following caveat:

"This paragraph shall not be construed as exempting from access attorney or consultant bills or invoices except that such bills or invoices may be redacted to remove any information protected by the attorney-client privilege ..." N.J.S.A. 47:1A-1.1.

Based on the foregoing, the exemption set forth at N.J.S.A. 47:1A-1.1. only applies to any attorney-client privileged information noted on the invoices. Although OPRA may exempt attorney-client privileged information, OPRA explicitly provides that the exemption shall not be construed to exempting in their entirety invoices similar to those identified by the original Custodian as responsive in this complaint. Moreover, OPRA affords the original Custodian the ability to "... excise from a copy of the record that portion which the custodian asserts is exempt from access and shall promptly permit access to the remainder of the record." N.J.S.A. 47:1A-5.g.

Therefore, the original Custodian has failed to bear his burden of proving a lawful denial of access to the thirteen (13) invoices responsive to the Complainant's OPRA request. N.J.S.A. 47:1A-6. The Custodian shall disclose the thirteen (13) invoices identified by the Complainant in the SOI as responsive to the Complainant's OPRA request.

Finally, the GRC notes that the original Custodian correctly stated in the SOI that he is not obligated to provide an answer to the Complainant's question of how much money was spent on a lawsuit. As previously stated, OPRA "*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). Thus, the original Custodian is required under OPRA to provide the thirteen (13) invoices to the Complainant so that she may analyze the invoices for the information she is seeking.

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

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Complainant's OPRA request identified specific types of government records sought (*i.e.*, invoices and vouchers) and because the OPRA request contained enough qualifiers for the Custodian's Counsel to identify the litigation for which the Complainant sought records and for the original Custodian to identify thirteen (13) invoices responsive to the Complainant's OPRA request, the Complainant's request seeking "... all cost records, invoices and payment vouchers showing the breakdown and total cost to date of the lawsuit against Monmouth County Parks Department on hunting in a designated no-hunting zone in Wall Township" is not overly broad under OPRA. *See Burnett v. County of Gloucester*, 415 N.J. Super. 506 (App. Div. 2010). The original Custodian's search is not open-ended, nor does it require research, but rather requires the original Custodian to provide the invoices from the date the litigation against Monmouth County Parks Department was initiated through the date of the OPRA request.
2. Although the original Custodian responded in writing to the Complainant's June 9, 2009 OPRA request within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i., the original Custodian's response was legally insufficient because he failed to provide a specific lawful basis for said denial of access. Therefore, the original Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5.g. and DeAppolonio, Esq. v. Borough of Deal (Monmouth), GRC Complaint No. 2008-62 (September 2009). The GRC notes that pending litigation is not a lawful basis for denial of access to records requested under OPRA. OPRA provides a statutory right of access to government records which is not in any way supplanted by pending or ongoing litigation.
3. Because the original Custodian failed to immediately grant or deny access to the requested invoice and vouchers, request additional time to respond or request clarification of the request, the original Custodian has violated N.J.S.A. 47:1A-5.e. pursuant to Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 28, 2007). *See also Ghana v. New Jersey Department of Corrections*, GRC Complaint No. 2008-154 (June 2009).
4. The original Custodian has failed to bear his burden of proving a lawful denial of access to the thirteen (13) invoices responsive to the Complainant's OPRA

request. N.J.S.A. 47:1A-6. **The Custodian shall disclose the thirteen (13) invoices identified by the Complainant in the Statement of Information as responsive to the Complainant's OPRA request.**

5. **The Custodian shall comply with Item No. 4 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4⁹, to the Executive Director.¹⁰**
6. The Council defers analysis of whether the original Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

February 15, 2011

⁹ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

¹⁰ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.