



State of New Jersey
GOVERNMENT RECORDS COUNCIL
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

June 28, 2011 Government Records Council Meeting

Mark Bond
Complainant

Complaint No. 2009-324

v.

Borough of Washington (Warren)
Custodian of Record

At the June 28, 2011 public meeting, the Government Records Council (“Council”) considered the June 21, 2011 *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 because the Complainant’s Counsel has failed to establish in his motion for reconsideration of the Council’s March 29, 2011 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 disposing of the complaint, and failed to submit any evidence to refute the Council’s Final Decision, said motion for reconsideration is denied. 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 28th Day of June, 2011



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: July 12, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***Reconsideration*
Supplemental Findings and Recommendations of the Executive Director
June 28, 2011 Council Meeting**

**Mark Bond¹
Complainant**

GRC Complaint No. 2009-324

v.

**Borough of Washington (Warren)²
Custodian of Records**

Records Relevant to Complaint: Copies of all proposals submitted for the position of Borough of Washington (“Borough”) attorney.

Request Made: December 11, 2009³

Response Made: December 14, 2009

Custodian: Kristine Blanchard

GRC Complaint Filed: December 15, 2009⁴

Background

March 29, 2011

Government Records Council’s (“Council”) Interim Order. At its March 29, 2011 public meeting, the Council considered the March 22, 2011 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. Although the Custodian responded in writing to the OPRA request within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i., the Custodian’s response is insufficient because she failed to provide a specific lawful basis for denying access to the requested proposals submitted for the position of Borough attorney 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).
2. The Custodian lawfully denied access to the requested proposals because same were exempt from disclosure at the time of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-1.1. because they contain information that

¹ Represented by Walter M. Luers, Esq., of the Law Offices of Walter M. Luers, LLC (Clinton, NJ).

² Represented by Richard Cushing, Esq., of Gebhardt & Kiefer, P.C. (Clinton, NJ).

³ Although the Complainant’s OPRA request was dated December 11, 2009, the evidence of record indicates that the Complainant forwarded his request to the Custodian on Saturday, December 12, 2009.

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

“would give an advantage to competitors or bidders.” See Renna v. County of Union, GRC Complaint No. 2003-100 (February 2004).

3. Although the Custodian violated N.J.S.A. 47:1A-5.g. by failing to provide a specific lawful basis for denying access to the requested proposals, resulting in an insufficient response to the Complainant’s OPRA request, the Custodian lawfully denied access to the requested proposals pursuant to N.J.S.A. 47:1A-1.1. and Renna, *supra*, because said proposals contain information that “would give an advantage to competitors or bidders.” Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, 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.

April 1, 2011

Council’s Final Decision distributed to the parties.

April 14, 2011

Complainant’s request for reconsideration with the following attachments:

- Stephen J. Novak “Washington receives eight proposals for forensic audit,” *The Express-Times* dated May 6, 2010.
- Stephen J. Novak “Familiar firms bid for forensic audit work in Washington Borough,” *The Express-Times* dated March 21, 2011.

The Complainant’s Counsel, on behalf of the Complainant, requests that the GRC reconsider its March 29, 2011 Final Decision pursuant to *N.J.A.C. 5:105-2.10* based on a mistake and new evidence.

Counsel requests that the GRC reverse its decision and asserts that by preventing access to bids that have already been opened at a public meeting, openness and transparency in government is decreased. Counsel further argues that the Borough of Washington (“Borough”) also failed to abide by its supposed procedures by providing substantial pricing information to local newspapers regarding its search for an auditing firm to conduct a forensic audit of the Borough’s finances.⁵

Counsel states that *N.J.A.C. 5:105-2.10* governs requests for reconsideration; however, the regulation does not describe the standard applicable to a successful request for reconsideration. Counsel states that the GRC and case law have set forth that “[a] party should not seek reconsideration merely based upon dissatisfaction with a decision.” White v. William Patterson University, GRC Complaint No. 2008-216 (August 2009)(quoting D’Atria v. D’Atria, 242 N.J. Super. 392 (Ch. Div. 1990)). Counsel states that a request for reconsideration “... should be utilized only for those cases which fall

⁵ The Complainant’s Counsel used the Borough’s release of information to a local newspaper in another bid process to argue that the Borough’s procedures are inconsistent with their denial of access to the records at issue in this complaint. Forensic audit bids are not at issue herein.

into that narrow corridor in which either 1) the Court has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the Court either did not consider, or failed to appreciate the significance of probative, competent evidence..." Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996)(quoting D'Atria v. D'Atria, 242 N.J. Super. at 401)(internal quotation marks omitted). Counsel argues that the instant complaint falls within the "narrow corridor" described in Cummings, *supra*.

Counsel argues that the Council's holding appears to err on the side of secrecy. Counsel states that OPRA provides that "... any limitations on the right of access accorded by [OPRA], shall be construed in favor of the public's right of access..." N.J.S.A. 47:1A-1. Counsel states that the court has previously noted that "[t]he purpose of OPRA 'is to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process.'" Times of Trenton Publ'g Corp v. Lafayette Yard Cmty. Dev. Corp., 183 N.J. 519, 535 (2005)(quoting Asbury Park Press v. Ocean County Prosecutor's Office, 374 N.J. Super. 312, 329, 864 A.2d 446 (Law Div.2004)).

Counsel argues that in this complaint, the Council held that bids are "information" that, if disclosed, would give an advantage to bidders or competitors. Counsel argues that the notion that disclosure of public bids after they have already been publicly opened but before a contract is finalized is erroneous. Counsel argues that the bids are opened in public and the material terms read; thus, nothing prevents any member of the public or representatives of the competitors from attending the bid opening and recording the information. Counsel argues that to the contrary, the Council's holding poses a disadvantage to those members of the public or competitors who may not be able to attend the bid opening or hire someone to go in their stead.

Counsel further argues that knowledge of the bids prior to an award of contract would not deter competition. Counsel asserts that once bids are opened, they cannot be changed; therefore, knowledge of the contents of the bids after they have been opened has no value. Counsel argues that the law recognizes this fact by setting a deadline for bid submissions and by having a public opening of bids at the same time. Counsel asserts that the process guarantees a fair and open process.

Additionally, Counsel asserts that disclosure of bid information does not harm a public agency. Counsel asserts that legal work for public agencies is highly coveted because public agencies rarely default on their obligations. Counsel asserts that in the unlikely event that a public agency is dissatisfied with the bids received or subsequent negotiations, nothing prevents that agency from withdrawing the RFP and issuing a new one. Counsel argues that in this respect, nondisclosure of the publically opened bids prejudices the public because they would forever lose the opportunity to provide meaningful insight, analysis and criticism of the public contracting process.

Moreover, Counsel contends that to the extent that the Council has identified a conflict between OPRA and The New Jersey Local Public Contracts Law, the Council should err on the side of transparency. Counsel asserts that in other complaints, the Council has held that where other laws required public disclosure of information, that information must be disclosed under OPRA. Counsel states that in Walsh v. Township of

Middletown (Monmouth), GRC Complaint No. 2008-266 (March 2011), the Council held that home addresses of public officials that were contained in financial disclosure statements could not be redacted because N.J.S.A. 40A:9-22.6(b) “specifically requires that a public official divulge such information,” and because N.J.S.A. 40A:9-22.6(c) states that “all financial disclosure statements filed are public records.”

Counsel argues that reasoning employed by the Council in Walsh, supra, applies to the instant complaint in that public bid and contracting laws require the public opening of bids. Counsel asserts that the Legislature has already determined that bids should be opened to the public, same must be public records subject to disclosure under OPRA: just as financial disclosure statements were determined to be public records in Walsh, supra. Counsel asserts that the only distinction between the instant complaint and Walsh, supra, is that the bids at issue in this complaint are required to be publically opened, while the documents in Walsh, supra, were designated as “public records.” Counsel contends that this is a distinction without a difference and that in both cases the Legislature intended that the records at issue become public whether through a designation or through a public opening of the records.

Further, Counsel asserts that the Council’s decision imposed a standard of non-disclosure on the Borough to which it did not adhere. Counsel states that the attached newspaper articles show that the Borough disclosed the prices set forth in bids by auditors to conduct a forensic audit of the Borough’s finances.

Counsel requests that, for the foregoing reasons, the Council reverse its March 29, 2011 Final Decision and hold that the public bids should have been disclosed to the Complainant.

Analysis

Whether the Complainant has met the required standard for reconsideration of the Council’s March 29, 2011 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’s Council filed the motion for reconsideration of the Council’s Final Decision dated March 29, 2011 on April 14, 2011, nine (9) days from the issuance of the Council’s Order.

Applicable case law holds that:

“[a] party should not seek reconsideration merely based upon dissatisfaction with a decision.” D’Atria v. D’Atria, 242 N.J. Super. 392,

401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D'Atria, 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 motion for reconsideration, the Complainant's Counsel argued that the Council's Final Decision that disclosure of public bids after they have been publically opened and prior to awarding a contract is in error. Counsel argued that nothing prevents a competitor or member of the public from attending the bid opening or sending a representative in their stead. Counsel argued that to the contrary, the Council's holding is a disadvantage to members of the public or competitors who are unable to attending the bid opening.

Counsel asserted that contrary to the Council's holding that disclosure of the bids would be an advantage to competitors, once bids have been opened, they cannot be altered. Counsel argued that the purpose of deadlines for submissions and a public bid opening promotes a fair and open process. Counsel argued that henceforth the bids are of no value once opened publically.

Counsel asserted that disclosure of bid information does not harm a public agency; rather, the public is prejudiced in the rare instance that public agencies withdraw an RFP and issue a new one. Counsel argued that nondisclosure of publicly opened bids would prejudice the public because they would lose forever the opportunity to provide meaningful insight, analysis and criticism of the public contracting process.

Moreover, Counsel contended that to the extent that a conflict exists between OPRA and The New Jersey Local Public Contracts Law, the Council should err on the side of transparency. Counsel contended that in Walsh, supra, the GRC recognized that N.J.S.A. 40A:9-22.6(c) required that "all financial disclosure statements filed are public records." Counsel contended that the reasoning employed in Walsh, supra, applies to the instant complaint. Specifically, Counsel argued that like N.J.S.A. 40A:9-22.6(c), contracting laws require bids to be publically opened; thus, same must be public records. Counsel notes that the only distinction between Walsh, supra, and this complaint is that N.J.S.A. 40A:9-22.6(c) designates financial disclosure forms as public records while the New Jersey Local Public Contracts Law requires bids to be opened publically. Counsel contended that this is merely a distinction without a difference.

Counsel finally argued that the Council's decision imposed a standard with which not even the Borough has conformed. Counsel notes that the Borough has shared prices set forth in bids accepted from auditors with a local newspaper that has in turn published same in newspaper articles.

The crux of Counsel's motion for reconsideration in the instant complaint is that because the New Jersey Public Contracts Law requires public opening of received bids prior to successfully negotiating a contract, the bids should have been disclosed to the Complainant and the Council's March 29, 2011 Final Decision was erroneous. This argument is essentially the same argument originally posed by the Complainant in his Denial of Access Complaint. The Council's decision in the instant complaint was based on Renna v. County of Union, GRC Complaint No. 2003-100 (February 2004) and O'Neill Elec. Co., Inc. v. Board of Chosen Freeholders of County of Warren, 297 N.J. Super. 473 (App. Div. 1997). Counsel has failed to provide any argument or case law to refute either authority, instead opting to argue that the Council's reasoning in Walsh, *supra*, should be applied to this complaint.

Counsel contended the GRC reasoned in Walsh, *supra*, that N.J.S.A. 40A:9-22.6(c) provides that financial disclosure forms for local government agencies are "public records" is a distinction without a difference to the end that contracting laws require bids to be publicly opened. This comparison is erroneous for the simple fact that although bids are required to be opened publicly, there is no statutory provision that states that the bids are henceforth public records subject to disclosure. Additionally, OPRA contains a specific exemption to disclosure for "information which, if disclosed, would give an advantage to competitors or bidders." N.J.S.A. 47:1A-1.1. Thus, the Council's holding in Walsh, *supra*, is inapposite to the instant complaint.

Further, Counsel fails to cite to specific portions of the New Jersey Public Contracts Law that specifically state that bids cannot be altered after being opened publically. Even if this were the case, disclosure would not necessarily nullify the advantage to competitors exemption afforded under OPRA. Without a contract being awarded, any in-depth analysis of a bid could give a competitor an advantage in the negotiation process.

Counsel argued that if a public agency withdraws an RFP and issues a new one, only members of the citizenry would be harmed by nondisclosure of the bids submitted in response to the withdrawn RFP. However, this argument ignores the fact that once an RFP has been withdrawn, the bids submitted for such RFP are no longer under consideration. Thus, there can be no harm done to the citizenry if they are not allowed to gain access to bids that are no longer under consideration.

As the moving party, the Complainant's Counsel 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*. Counsel failed to do so. Counsel has also failed to show that the GRC acted arbitrarily, capriciously or unreasonably in disposing of the complaint. See D'Atria, *supra*. Notably, Counsel failed to provide any opposing case law to refute the Council's Final Decision. Counsel further

failed to provide any competent, credible evidence that the Council acted unreasonably in deciding that the requested bids were exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

Therefore, because the Complainant's Counsel has failed to establish in his motion for reconsideration of the Council's March 29, 2011 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 disposing of the complaint, and failed to submit any evidence to refute the Council's Final Decision, said motion for reconsideration is denied. 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).

Finally, the GRC notes that Counsel argued that the Borough has in the past released bid figures to a local newspaper on two (2) occasions. In support of this argument, Counsel attached to the motion for reconsideration two (2) newspaper articles, one dated May 6, 2010 and another dated March 21, 2011. The GRC has no jurisdiction over the manner in which a public agency releases information to the press unless the author of the article has requested records under OPRA and subsequently filed a Denial of Access Complaint. N.J.S.A. 47:1A-7.b. Additionally, the article does not state whether the author obtained the information at the public opening of the bids or by some other means and only identifies a price range within which each bidder is estimating for services. Thus, such articles do not rise to the level of competent, credible evidence sufficient to support a reversal of the Council's March 29, 2011 decision.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because the Complainant's Counsel has failed to establish in his motion for reconsideration of the Council's March 29, 2011 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 disposing of the complaint, and failed to submit any evidence to refute the Council's Final Decision, said motion for reconsideration is denied. 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: Catherine Starghill, Esq.
Executive Director

June 21, 2011



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

CHRIS CHRISTIE
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FINAL DECISION

March 29, 2011 Government Records Council Meeting

Mark Bond
Complainant

Complaint No. 2009-324

v.

Borough of Washington (Warren)
Custodian of Record

At the March 29, 2011 public meeting, the Government Records Council (“Council”) considered the March 22, 2011 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Although the Custodian responded in writing to the OPRA request within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i., the Custodian’s response is insufficient because she failed to provide a specific lawful basis for denying access to the requested proposals submitted for the position of Borough attorney 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).
2. The Custodian lawfully denied access to the requested proposals because same were exempt from disclosure at the time of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-1.1. because they contain information that “would give an advantage to competitors or bidders.” See Renna v. County of Union, GRC Complaint No. 2003-100 (February 2004).
3. Although the Custodian violated N.J.S.A. 47:1A-5.g. by failing to provide a specific lawful basis for denying access to the requested proposals, resulting in an insufficient response to the Complainant’s OPRA request, the Custodian lawfully denied access to the requested proposals pursuant to N.J.S.A. 47:1A-1.1. and Renna v. County of Union, GRC Complaint No. 2003-100 (February 2004), because said proposals contain information that “would give an advantage to competitors or bidders.” Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, 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.



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 29th Day of March, 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: April 1, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
March 29, 2011 Council Meeting**

Mark Bond¹
Complainant

GRC Complaint No. 2009-324

v.

Borough of Washington (Warren)²
Custodian of Records

Records Relevant to Complaint: Copies of all proposals submitted for the position of Borough of Washington (“Borough”) attorney.

Request Made: December 11, 2009³

Response Made: December 14, 2009

Custodian: Kristine Blanchard

GRC Complaint Filed: December 15, 2009⁴

Background

December 11, 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.

December 14, 2009

Custodian’s response to the OPRA request. The Custodian received the Complainant’s OPRA request on December 14, 2009. The Custodian responds in writing to the Complainant’s OPRA request on the same day as receipt of such request. The Custodian states that the following firms submitted proposals:

- Courter, Kobert & Cohen, P.C.
- Gebhardt & Kiefer, P.C.
- Mason, Griffin & Pierson, P.C.

The Custodian states that she is unable to disclose specifics of each proposal because the Borough is still involved in interviewing and negotiating the terms of any contract.

¹ No legal representation listed on record.

² Represented by Richard Cushing, Esq., of Gebhardt & Kiefer, P.C. (Clinton, NJ).

³ Although the Complainant’s OPRA request was dated December 11, 2009, the evidence of record indicates that the Complainant forwarded his request to the Custodian on Saturday, December 12, 2009.

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

December 14, 2009

E-mail from the Complainant to the Custodian. The Complainant requests that the Custodian note the reasons for denying access to the requested records directly on the Complainant's OPRA request form. The Complainant further states that the requested proposals are in fact government records subject to disclosure and that the Complainant is not seeking any information regarding negotiations.

December 15, 2009

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

- Complainant's OPRA request dated December 11, 2009.
- E-mail from the Custodian to the Complainant dated December 14, 2009.
- E-mail from the Complainant to the Custodian dated December 14, 2009.

The Complainant states that on December 9, 2009, the Express-Times, a local newspaper, identified three (3) law firms that submitted proposals for the professional services contract for the position of Borough attorney. The Complainant further states that he submitted an OPRA request dated December 11, 2009 to the Borough on December 12, 2009 seeking copies of the proposals for all three (3) firms.

The Complainant states that the Custodian responded to the OPRA request in writing on December 14, 2009 identifying by name the three (3) firms that provided proposals but denying access to the actual proposals because the Borough was still interviewing and negotiating the terms of any contract. The Complainant states that he replied to the Custodian requesting that the Custodian note the reason for denying access to the requested records on the OPRA request form. The Complainant states that he further informed the Custodian that the records should have been provided because they are public records and the Complainant was not seeking any records pertaining to deliberations or negotiations.

The Complainant states that in a subsequent telephone conversation with the Custodian, the Custodian informed him that based on advice given by the Custodian's Counsel the denial of access would not be altered; such Counsel was a member of one of the three (3) law firms that submitted proposals to the Borough. The Complainant states that he advised the Custodian that he would file a Denial of Access Complaint with the GRC.

The Complainant states that the Custodian's Counsel has been re-appointed annually for nearly 25 years. The Complainant states that this year marked the first year in recent history that the Borough accepted proposals for the position of Borough attorney. The Complainant states that earlier in the year, the Comptroller's Office found a wide range of contracting issues and violations of State bond law by the Borough. The Complainant argues that as a Borough taxpayer, he is interested in seeing a change in the appointment of Borough attorney. The Complainant asserts that disclosure of the requested proposals would allow him the opportunity to discuss his concerns with the Borough Mayor and Council in an educated manner.

The Complainant argues that the records requested are proposals that provide the fees each firm would charge the Borough. Moreover, the Complainant contends that although he questions the propriety of interviews conducted by the Borough, the Complainant is not seeking records pertaining to negotiations or interviews. The Complainant contends that the advice of Counsel was given in his own best interest and not the interest of the Complainant, which is a violation of OPRA.

The Complainant does not agree to mediate this complaint.

January 2, 2010

E-mail from the Complainant to the GRC attaching a copy of *N.J.A.C. 5:34-4.3(b)* of the Local Public Contracts Law.

The Complainant requests that the GRC accept the attached statute as part of the Denial of Access Complaint. The Complainant states that the attached statute concerns opening and evaluating proposals and awarding competitive contracts. The Complainant states that *N.J.A.C. 5:34-4.3(b)* provides that “at the time and place proposals are due, the names of all vendors and the price of their respective proposals shall be announced in public.” *Id.* The Complainant states that he believes that the requested records are public based on this statute.

January 5, 2010

E-mail from the Complainant to the GRC attaching a copy of the “Guide to New Jersey Local Unit Pay-to-Play Law,” page 9.

The Complainant requests that the GRC accept the attached document as part of the Denial of Access Complaint. The Complainant states that the attached document was published by the Division of Local Government Services (“LGS”), Department of Community Affairs (“DCA”) and is available online. The Complainant states that he provided the attached document to the Borough noting that the requested records were solicited by the Borough under the “Fair and Open Process.”

The Complainant states that the “Guide to New Jersey Local Unit Pay-to-Play Law” provides that “[l]ike formal bids, fair and open proposals must be publicly opened, and the name of each vendor, their price proposal(s), and other pertinent information read aloud.” *Id.* at page 9, section 6, second bullet point. The Complainant reiterates that he believes the requested records are public based on this guide.

The Complainant states that because the Borough used the “Fair and Open Process,” the due date for submissions passed and the proposals were opened prior to his OPRA request, access should have been granted to the requested proposals. The Complainant notes that he believes that the pricing of one of the proposals was altered a day after the official interviews and deliberations; therefore, the Complainant requests that the GRC order disclosure of both the initial proposals and subsequently altered proposals.

January 6, 2010

Letter from Mr. Richard D. Phelan (“Mr. Phelan”), Borough Manager, to the Complainant.

Mr. Phelan notes that the Complainant filed a Denial of Access Complaint because the Custodian denied access to records that the Complainant believes should be disclosed under OPRA.

Mr. Phelan states that the Borough denied access to the requested records for two (2) reasons. First, Mr. Phelan states that the definition of a government record excludes “inter-agency or intra-agency, advisory, consultative or deliberative materials.” N.J.S.A. 47:1A-1.1. Second, Mr. Phelan states that the Borough is not required to disclose “information which, if disclosed, would give an advantage to competitors or bidders.” *Id.* Mr. Phelan states that the Borough has indicated to the Complainant that complete copies of each proposal will be provided when the Mayor and Council have made a decision with respect to the selection of a candidate and contract terms.

Mr. Phelan states that in an effort to assure that the Borough’s denial was lawful, he contacted the GRC and received an informal opinion agreeing with the Borough’s denial. Mr. Phelan also states that defending an appeal before the GRC will cost the Borough a considerable amount of money in attorney’s fees. Mr. Phelan requests that based on the foregoing, the Complainant review OPRA, contact the GRC and consider withdrawing this complaint.

January 7, 2010

E-mail from the Complainant to the GRC attaching a letter from Mr. Phelan to the Complainant dated January 6, 2010.

The Complainant states that the Borough has requested that the Complainant withdraw this complaint. The Complainant states that he still believes that the Custodian violated OPRA by denying access to the requested proposals even after the requested proposals were opened and publicly read on the submission date as required by law. The Complainant states that he feels that the Borough has thwarted the Complainant’s attempt to provide himself and the public with an opportunity to better lobby the Mayor and Council prior to the awarding of a lucrative contract which could have changed the Borough’s decision and resulted in substantial savings to the Borough’s taxpayers.

The Complainant states that he is not willing to withdraw this complaint and will await the GRC’s decision on this matter.

January 15, 2010

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

January 22, 2010

E-mail from the Custodian to the Complainant. The Custodian states that the requested proposals are now available for disclosure and pickup for a copying cost of \$16.00. The Custodian requests that the Complainant advise as to whether he is still interested in obtaining the proposals.

January 22, 2010

E-mail from the Complainant to the Custodian. The Complainant advises that he still wishes to obtain the requested records. The Complainant states that he is forwarding payment to the Borough.

The Complainant requests that the Custodian confirm whether the proposed cost of \$16.00 is consistent with the fees enumerated on the OPRA request form (*See N.J.S.A. 47:1A-5.b.*)⁵ The Complainant also asks whether the records will include a copy of the e-mail discussed during the Council's reorganization meeting that preceded the Council's interview meeting, after which the initial proposal of Gebhardt and Kiefer, P.C., was altered.⁶

January 25, 2010

E-mail from the Custodian to the Complainant. The Custodian confirms that the Borough relied on the fees enumerated on the Borough's OPRA request form in calculating the proposed copying charge. The Custodian states that the e-mail in question is included in the records being provided. Moreover, the Custodian states that the records will be made available to the Complainant on January 26, 2010.⁷

January 25, 2010

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated December 11, 2009.
- Letter from the Custodian to the Complainant dated December 14, 2009.
- Letter from the Complainant to the Custodian dated December 14, 2009.
- Complainant's OPRA request dated December 11, 2009 with the Custodian's notes thereon.
- E-mail from the Complainant to the GRC dated January 2, 2010 attaching a copy of *N.J.A.C. 5:34-4.3(b)* of the Local Public Contracts Law.
- E-mail from the Complainant to the GRC dated January 5, 2010 attaching a copy of the "Guide to New Jersey Local Unit Pay-to-Play Law," page 9.
- Letter from Mr. Phelan to the Complainant dated January 6, 2010.
- E-mail from the Complainant to the GRC dated January 7, 2010 attaching a letter from Mr. Phelan to the Complainant dated January 6, 2010.
- E-mail from the Custodian to the Complainant dated January 22, 2010.
- E-mail from the Complainant to the Custodian dated January 22, 2010.
- Public Notice of Solicitation of Proposals for Professional Services undated.
- Copies of the three (3) proposals requested by the Complainant.

The Custodian certifies that no extensive search was needed because the Complainant requested specific records which were easily identifiable.

⁵ This portion of the statute was recently amended to provide new statutory copy fees of \$.05 for letter sized paper and \$.07 for legal sized paper. The amendment went into effect on November 9, 2010.

⁶ The Complainant notes that the Custodian has an obligation to forward the SOI to the GRC and Complainant simultaneously and also to copy the Complainant on any correspondence sent to the GRC. The Complainant notes that he has not received a copy of the SOI to date.

⁷ The Custodian acknowledges that the SOI is being forwarded to the GRC via e-mail and regular mail and confirms that the Complainant will receive a copy.

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

The Custodian certifies that she received the Complainant’s OPRA request on December 14, 2009. The Custodian certifies that she responded in writing on the same day as receipt of the Complainant’s OPRA request denying access to the requested proposals because the Borough was still involved in interviewing candidates and negotiating the terms of any contract. The Custodian certifies that at the request of the Complainant, the Custodian noted her response on the request form. The Custodian certifies that the Complainant subsequently made telephone calls to her and Mr. Phelan. The Custodian certifies that the Complainant was again informed that the records could not be provided until after the governing body appointed the Borough Attorney. The Custodian certifies that Mr. Phelan reiterated the Borough’s denial of access to the requested records in a letter to the Complainant dated January 6, 2010.

The Custodian states that the records at issue in this complaint were submitted to the Borough in response to a Notice of Solicitation of Proposals for Professional Services. The Custodian states that all proposals were due on December 4, 2009. The Custodian states that the proposals were solicited in accordance with the “Fair and Open” process established by N.J.S.A. 19:44A-20.4 et seq. The Custodian states that the proposal solicitation was not intended to comply with N.J.S.A. 40A:11-4.1 et seq., which addresses competitive contracting in lieu of public bidding. The Custodian states that the proposals were opened publicly on December 4, 2009 and the amount of each proposal was announced. The Custodian notes that no members of the public attended the opening of the bid proposals.

The Custodian states that following her denial of access to the requested proposals, the Complainant (a former member of the Borough governing body) pursued the matter through a series of telephone calls in which both the Custodian and Mr. Phelan reiterated the Borough’s reasons for denying access to the request records. The Custodian states that the Borough subsequently negotiated and awarded a contract for professional services as an exception to the Local Public Contracts Law. N.J.S.A. 40A:11-5. The Custodian states that the contract was awarded on January 5, 2010 at a public meeting.

The Custodian contends that the Borough lawfully denied access to the requested records pursuant to N.J.S.A. 47:1A-1.1., which exempts access to “information which, if disclosed, would give an advantage to competitors or bidders.” *Id.* The Custodian argues that the records at issue here represent an ample example of the need for this exemption. The Custodian speculates that if the proposals were deemed to be government records subject to disclosure at the time of submission, a potential bidder might try to obtain copies of already submitted bids prior to the awarding of a contract and attempt to tailor their own bid accordingly. Moreover, the Custodian argues that even if the proposals were made available in the period between the final submission deadline and awarding of the contract, the release of this information could adversely affect the leverage a public agency has in negotiating the terms of a contract.

The Custodian asserts that the release of the bid proposals would have set a floor for negotiations which would not have existed if the information remained confidential. The Custodian asserts that the process involved herein was not an award of a bid based on a contract included with bid documents but was instead a negotiation of a contract for professional services by the governing body as authorized by N.J.S.A. 40A:11-5. The Custodian argues that just as negotiations may be conducted outside of the public's purview pursuant to N.J.S.A. 10:4-12(b)(7) of the Open Public Meetings Act ("OPMA"), so too must the basis for negotiations be kept confidential under OPRA until a contract is awarded.

The Custodian states that in Fisher v. Lakewood Board of Education (Ocean), GRC Complaint No. 2006-193 (April 2008), the Council was tasked with deciding whether the custodian unlawfully denied access to a copy of a proposal that was incorporated into a contract with the Lakewood Board of Education. The Custodian states that the Council held that:

"[b]ecause the requested proposal was incorporated as part of the contract between the Lakewood BOE and Catapult Learning for Title I services which was approved by the Board on September 28, 2006 (prior to the Complainant's OPRA requests), the requested proposal is a government record pursuant to N.J.S.A. 47:1A-1.1 and is subject to immediate public access as part of the approved contract." *Id.* at pg. 1 (Final Decision dated April 30, 2008).

The Custodian notes that contrary to the facts in Fisher, the Complainant's request herein was submitted to the Borough before the award of a contract.

The Custodian asserts that although the Complainant was informed that the proposals would be subject to disclosure after a contract was awarded to one of the participating law firms, the Complainant did not renew his OPRA request. The Custodian certifies that the Custodian informed the Complainant that the requested proposals were available for disclosure on January 22, 2010.

The Custodian states that the Complainant supplemented his Denial of Access Complaint with a copy of N.J.A.C. 5:34-4.3 and a page from the "Guide to New Jersey Local Unit Pay-to-Play Law" prepared by LGS. The Custodian argues that neither authority supports the disclosure of the requested records. The Custodian avers that N.J.A.C. 5:34-4.3 applies to competitive contracting used in lieu of public bidding pursuant to N.J.S.A. 40A:11-4.2. The Custodian contends that because the Borough did not seek to fill the Borough Attorney position through competitive contracting, the provisions of N.J.A.C. 5:34-4.3 do not apply. The Custodian further asserts that although the Borough did follow a fair and open process pursuant to N.J.S.A. 19:44A-20.4 et seq., neither that statute nor the "Guide to New Jersey Local Unit Pay-to-Play Law" mandates the release of proposals. The Custodian avers that the page provided by the Complainant states that bids must be publicly opened with the name of the vendor and the price proposal read aloud: a requirement with which the Borough complied. The Custodian asserts that the "Guide to New Jersey Local Unit Pay-to-Play Law" does not indicate that

the proposals themselves must be made available as public records following the public review session.

The Custodian asserts based on the foregoing, the Borough properly denied access to the requested proposals and respectfully requests that the GRC rule in favor of the Borough.

January 25, 2010

The Complainant's response to the Custodian's SOI. The Complainant acknowledges receipt of the Custodian's SOI.⁸ The Complainant states that he wishes to submit additional information regarding this complaint. The Complainant asserts that a review of the proposals provided as part of the SOI clearly shows that no information could have provided an advantage to any bidder or competitor simply because the submission date had passed. The Complainant asserts that because the Borough advertised the proposals under the "Fair and Open Process," the proposals should have been made public at the time of each proposal's public reading per the "Guide to New Jersey Local Unit Pay-to-Play Law."

The Complainant contends that although the Borough argues in the SOI that "[t]he proposal solicitation was not intended to comply with N.J.S.A. 40A:11-4.1 et seq.," it appears as though the Borough was simultaneously negotiating a contract pursuant to N.J.S.A. 40A:11-5 and receiving proposals under N.J.S.A. 19:44A-20.4 et seq. The Complainant asserts that two (2) of the three (3) candidates were interviewed at a Council meeting on December 17, 2009 and the third (3rd) and subsequent choice of the Borough was not even present at the meeting. The Complainant asserts that there is no evidence to suggest that the Borough ever entered into a negotiation process. The Complainant asserts that in the absence of such evidence, one would infer that proposals under the "Fair and Open Process" should be handled similarly to other proposals and consequently subject to the following requirements:

"Each interested vendor shall submit a proposal which shall include all the information required by the request for proposals. Failure to meet the requirements of the request for proposals may result in the contracting unit disqualifying the vendor from further consideration. Under no circumstances shall the provisions of a proposal be subject to negotiation by the contacting unit." N.J.S.A. 40A:11-4.5(b).

"At the option of the contracting unit, the request for proposals document may, after proposals are received and opened, but prior to completing the evaluation of the proposals, provide the opportunity for vendors to provide clarification regarding their submission. The presentation shall address only those matters specified by the contracting unit. The presentation shall not be used for negotiation of a contract contrary to law." N.J.S.A. 5:34-4.3(c)(3).

⁸ The Complainant notes that Counsel is one of the three (3) attorneys who supplied a proposal to the Borough, provided legal guidance to the Custodian regarding the records at issue in this complaint and was reappointed as the Municipal Solicitor even though his firm's bid was not the lowest proposal.
Mark Bond v. Borough of Washington (Warren), 2009-324 – Findings and Recommendations of the Executive Director

The Complainant reiterates his position that the Borough unlawfully denied access to the records requested and that disclosure of same would have enabled the public to be better informed of a process by which it appears the Borough has steered a lucrative contract to a more expensive candidate.

January 26, 2010

E-mail from the Complainant to the Custodian. The Complainant states that on January 25, 2010, the Custodian advised that the requested proposals would be available for pickup. The Complainant requests that he be allowed to collect the records in the afternoon while the Complainant was at the Borough attending to other business. The Complainant also requests that the Custodian confirm that payment for the records was received.

January 26, 2010

E-mail from the Custodian to the Complainant. The Custodian confirms that the Complainant's payment was received and that the records are ready for pickup.⁹

January 27, 2010

E-mail from the Complainant to the GRC attaching an e-mail from the Custodian's Counsel to Mr. Phelan dated December 18, 2009. The Complainant states that the attached e-mail, which was provided as part of the records received from the Borough in response to the Complainant's OPRA request but which was not part of the SOI, may provide a motive for the Borough's denial of access to the requested records.¹⁰ The Complainant argues that this e-mail from the Custodian's Counsel offering to amend his proposal was composed two (2) weeks after the proposal deadline date on December 4, 2009.

January 28, 2010

E-mail from the Custodian's Counsel to the GRC. Counsel states that he is in receipt of the Complainant's January 25, 2010 submission. Counsel states that the Borough is aware that the GRC's regulations at *N.J.A.C. 5:105-2.4(f)* provides that the GRC will not accept additional submissions from a custodian after the SOI is provided without the approval of the Executive Director. Counsel asserts that although the Borough believes the Complainant's submission is faulty, said submission does not raise any new issues.

Counsel avers that based on the foregoing and unless the GRC believes that a response from the Borough would be productive, the Borough stands by the SOI and all documents submitted therein.

February 1, 2010

E-mail from the Custodian's Counsel to the GRC. Counsel states that he is in receipt of the Complainant's January 27, 2010 correspondence. Counsel states that he

⁹ The Complainant responded via e-mail confirming that he would be in to pick up the requested records later in the day.

¹⁰ In said e-mail the Custodian's Counsel advises Mr. Phelan that, assuming that the Borough's delay in selecting an attorney is based on the price of services, Gebhardt & Kiefer, P.C. is willing to lower the proposed price. Counsel provides several reasons for his willingness to agree to a lesser retainer.

thought he had attached the December 18, 2009 e-mail as part of the SOI but apparently had not, which oversight was corrected by the Complainant.

Counsel states that although the GRC is aware of its scope of review, it is worth noting that the only issue in this complaint is whether the Custodian unlawfully denied access to the requested proposals. Counsel asserts that although the Borough is confident that the process followed to solicit, negotiate and award a contract for the professional services of the Borough attorney conformed with all applicable statutory and regulatory requirements, whether it meets those standards is not relevant to the GRC's review.

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 ... The terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material ... [a] government record shall not include the following ... information which, if disclosed, would give an advantage to competitors or bidders ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA also provides that:

“[i]f the *custodian is unable to comply* with a request for access, the custodian *shall indicate the specific basis therefor* on the request form and promptly return it to the requestor...” (Emphasis added.) N.J.S.A. 47:1A-5.g.

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

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

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public

access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

The GRC will first address whether the Custodian’s response to the Complainant’s OPRA request was sufficient.

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.

The Complainant submitted an OPRA request to the Borough via e-mail on December 12, 2009. The Custodian responded in writing on the same day as receipt of the Complainant’s OPRA request denying access to the requested proposals because the Borough was still involved in interviewing and negotiating the terms of any contract. The Custodian subsequently noted her response on the Complainant’s OPRA request form at the request of the Complainant.

Although the Custodian responded in a timely manner pursuant to N.J.S.A. 47:1A-5.i., the Custodian failed to cite to any portion of OPRA, another statute or Executive Order at the time of her denial as it required by N.J.S.A. 47:1A-5.g.

Therefore, although the Custodian responded in writing within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i., the Custodian’s response is

insufficient under OPRA because she failed to provide a specific lawful basis for denying access to the requested proposals submitted for the position of Borough attorney pursuant to N.J.S.A. 47:1A-5.g. and DeAppolonio, *supra*.

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

Following the filing of the instant Denial of Access Complaint, Mr. Phelan advised the Complainant in a letter dated January 6, 2010 that access to the requested proposals was denied pursuant to N.J.S.A. 47:1A-1.1. Specifically, Mr. Phelan stated that the definition of a government record excludes “inter-agency or intra-agency, advisory, consultative or deliberative materials.” N.J.S.A. 47:1A-1.1. Second, Mr. Phelan stated that the Borough is not required to disclose “information which, if disclosed, would give an advantage to competitors or bidders.” *Id.* Mr. Phelan further advised that the requested proposals would be provided once the Borough selected an attorney.

On January 22, 2010, the Custodian notified the Complainant that the requested records were now available for disclosure. The Complainant retrieved the requested proposals from the Borough on January 26, 2010.

At issue in this complaint is whether a proposal submitted to a public agency is considered a government record after being opened for inspection during a public session meeting in accordance with Local Public Contracts Law but prior to the awarding of a contract by a public agency. As cited by the Custodian in SOI, the GRC has previously decided on a issue similar in Fisher v. Lakewood Board of Education (Ocean), GRC Complaint No. 2006-193 (April 2008).

In Fisher, *supra*, the complainant submitted two (2) OPRA requests to the Board seeking “Catapult Learning’s revised, detailed proposal, as reviewed by the Board of Education on September 28, 2006 (only the pages detailing the budget)” on October 5, 2006 and October 24, 2006 respectively. The custodian responded in writing to the first (1st) OPRA request denying access and stating that the Board was in the process of working to clarify the initial proposal and negotiating on various aspects of the revised proposal. The custodian subsequently denied access to the same record in response to the second (2nd) OPRA request stating that the proposal was a work in progress.

In the SOI, the custodian contended that the requested proposal was exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1., which exempts from disclosure information that “would give an advantage to competitors or bidders.” The custodian also asserted that the proposal contained deliberative materials.

The complainant subsequently argued that there could be no advantage to competitors or bidders because a contract was awarded to Catapult Learning on September 28, 2006, prior to the complainant submitting his first OPRA request. The complainant also noted that the custodian previously provided the complainant with a similar record provided to the Board by a competing bidder.

The custodian subsequently certified that the requested proposal was used to negotiate an agreement between the Board and Catapult Learning. Based on the facts presented in Fisher, supra, the GRC held that:

“[b]ecause the requested proposal was incorporated as part of the contract between the Lakewood BOE and Catapult Learning for Title I Services which was approved by the Board on September 28, 2006 (prior to the Complainant’s OPRA requests), the requested proposal is a government record pursuant to N.J.S.A. 47:1A-1.1. and is subject to immediate public access as part of the approved contract. Thus, the Custodian’s assertion that the requested proposal is exempt as deliberative material or information which, if disclosed, would give an advantage to bidders pursuant to N.J.S.A. 47:1A-1.1, is invalid. As such, the Custodian has not borne his burden of proving a lawful denial of access to the requested proposal pursuant to N.J.S.A. 47:1A-6.” *Id.* on pg. 7.

This complaint differs from Fisher, supra, in that the contract for Borough Solicitor was not awarded at the time the Custodian received the Complainant’s OPRA request. However, the facts of Fisher, supra, are instructive here in that the requested bids, although presented to the public during public session, were still being used in the process of negotiating a contract for the position of Borough solicitor.

Moreover, in Renna v. County of Union, GRC Complaint No. 2003-100 (February 2004), the GRC held that the Custodian had lawfully denied access to a proposal submitted by Xerox to run a print shop, stating that release of the information would give an unfair advantage to competitors. In this case, although the Borough may have complied with the “Fair and Open Process” by opening the requested proposals publically, the proposals necessarily contain sensitive business information in order for the Borough to make the most accurate decision regarding the position of Borough solicitor.

The New Jersey Local Public Contracts Law, N.J.S.A. 40A:11-1 et seq., requires that all advertisements for receipt of bids be published in an official newspaper of the municipality within a set amount of days prior to the date set for receipt of bids. N.J.S.A. 40A:11-23(a). The published “Notice to Bidders” must provide a description of the contract, the manner of obtaining the detailed bid specifications and submitting the bid, and the time and place at which bids will be received and opened. N.J.S.A. 40A:11-23(b).

The bid specifications must also clearly set forth the documents that are required to be submitted either with the bid or post bidding. The statute sets forth specific documents that are required to be submitted with the bid as well as others that may be required pursuant to the details set forth in the specifications themselves. N.J.S.A. 40A:11-23.2.

Further,

“[a]t such time and place the contracting agent of the contracting unit shall publicly receive the bids, and thereupon immediately proceed to unseal them and publicly announce the contents, which announcement shall be

made in the presence of any parties bidding or their agents, ***who are then and there present***, and shall also make proper record of the prices and terms,” (Emphasis added.) N.J.S.A. 40A:11-23(b).

Thus, the New Jersey Local Public Contracts Law requires that information regarding the contents of bids, which will necessarily comprise sensitive business information regarding the bidder and the details of the bid submitted, will be disclosed to the bidders at the time and place set forth in the published Notice to Bidders.

However when the same records are requested under OPRA after the disclosure of the bids at the time and place set forth in the published Notice to Bidders, the result is different. OPRA specifically exempts from the definition of a government record information which, if disclosed, would give an advantage to competitors or bidders. N.J.S.A. 47:1A-1.1. The sensitive business information contained in bids for public contracts would certainly give an advantage to competitors or bidders if such information were widely disclosed and could result in collusion or bid-rigging arrangements.

In a case decided under the Right to Know Law, N.J.S.A. 47:1A-1 to 1A-4, which preceded OPRA, the Appellate Division upheld summary dismissal of a complaint by a contractor who sought the disclosure of a list of contractors who bid on projects for Warren County. O'Neill Elec. Co., Inc. v. Board of Chosen Freeholders of County of Warren, 297 N.J. Super. 473 (App. Div. 1997). In so doing, the court determined that

“access to a bidders list facilitates collusive or bid-rigging arrangements and that withholding disclosure makes this more difficult. The Attorney General persuasively argues that:

‘to the extent that a prospective bidder can ascertain the identity of his competitors or, better yet from the [bidder's perspective], ascertain that he has no competitors, the bidder can adjust his bid so as to obtain the award of the contract at a higher price than would be required if the bidder were faced with uncertainty as to the nature of his competition.’

The potential bidder could thereby ‘adjust’ his bid if aware that there was little or perhaps no competition.” *Id.* at 479.

Thus, the GRC interprets N.J.S.A. 47:1A-1.1 as prohibiting the disclosure of bid information after the unsealing of bids and public announcement of the contents thereof required by N.J.S.A. 40A:11-23(b).

Therefore, the Custodian lawfully denied access to the requested proposals because same were exempt from disclosure at the time of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-1.1. because they contain information that “would give an advantage to competitors or bidders.” See Renna, supra.

Further, the GRC acknowledges that there is a conflict of laws between the Borough's obligation to open the bids up publicly prior to the successful negotiation of a contract and OPRA's exemption from disclosure for information which "would give an advantage to competitors or bidders." N.J.S.A. 47:1A-1.1.

The GRC finally notes that while the Complainant's OPRA request on its face is overly broad and unclear due to the absence of a specific time period within which the Custodian could narrow her search, the facts of this complaint reveal that the Complainant's OPRA request was sufficient for the Custodian to identify the responsive records. Specifically, the Complainant states in the Denial of Access Complaint that the Borough recently accepted proposals for the position of Borough attorney for the first time in many years. Additionally, the Custodian responded to the Complainant's OPRA request identifying three (3) proposals as responsive: the Custodian's response is an indication that she needed no additional information to identify the records responsive to the Complainant's OPRA request.

Whether the Custodian's insufficient response 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 (Felder 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 violated N.J.S.A. 47:1A-5.g. by failing to provide a specific lawful basis for denying access to the requested proposals, resulting in an insufficient response to the Complainant's OPRA request, the Custodian lawfully denied access to the requested proposals pursuant to N.J.S.A. 47:1A-1.1. and Renna, supra, because said proposals contain information that "would give an advantage to competitors or bidders." Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, 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.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Although the Custodian responded in writing to the OPRA request within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i., the Custodian's response is insufficient because she failed to provide a specific lawful basis for denying access to the requested proposals submitted for the position of Borough attorney 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).
2. The Custodian lawfully denied access to the requested proposals because same were exempt from disclosure at the time of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-1.1. because they contain information that "would give an advantage to competitors or bidders." See Renna v. County of Union, GRC Complaint No. 2003-100 (February 2004).
3. Although the Custodian violated N.J.S.A. 47:1A-5.g. by failing to provide a specific lawful basis for denying access to the requested proposals, resulting in an insufficient response to the Complainant's OPRA request, the Custodian lawfully denied access to the requested proposals pursuant to N.J.S.A. 47:1A-1.1. and Renna v. County of Union, GRC Complaint No. 2003-100 (February 2004), because said proposals contain information that "would give an advantage to competitors or bidders." Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, 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.

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Executive Director

March 22, 2011