



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

October 29, 2013 Government Records Council Meeting

William Gettler
Complainant

Complaint Nos. 2009-73 and 2009-74

v.

Township of Wantage (Sussex)
Custodian of Record

At the October 29, 2013 public meeting, the Government Records Council (“Council”) considered the October 22, 2013 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 the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian’s conduct. Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). Additionally, no factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 76 (2008). Specifically, the Office of Administrative Law ruled in favor of the Custodian, holding that the Custodian lawfully denied access to the redacted e-mail addresses and the Complainant did not achieve the desired result of disclosure of said addresses. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney’s fee. See N.J.S.A. 47:1A-6; Teeters, 387 N.J. Super. at 432; Mason, 196 N.J. at 76.

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 October, 2013

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: November 1, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
October 29, 2013 Council Meeting**

**William Gettler¹
Complainant**

GRC Complaint Nos. 2009-73 and 2009-74²

v.

**Township of Wantage (Sussex)³
Custodial Agency**

Records Relevant to Complaint:

January 21, 2009 OPRA request:⁴ Copies of every item of correspondence sent or received by any official and/or any employee of the Township of Wantage (“Township”) from December 1, 2008 to January 22, 2009 that relates to the New Jersey Department of Community Affairs’ (“DCA”) Report: “Fiscal Aspects of Consolidating Sussex Borough and Wantage Township” dated November 2008 or that relates to the Complainant.⁵

February 6, 2009 OPRA request:⁶ Copies of all communications (electronic or paper and including any attachments) between Parker Space (“Mayor Space”), Mayor; Clara Nuss (“Deputy Mayor Nuss”), Deputy Mayor; Bill DeBoer (“Committeeman DeBoer”), Committeeman; the Custodian and/or Michelle La Starza (“CFO La Starza”), Chief Financial Officer, regarding the budget, proposed budget or proposed bonds between the dates of January 21, 2009 to February 6, 2009.

Custodian of Record: James Doherty

Request Received by Custodian: January 21, 2009 and February 6, 2009

Response Made by Custodian: January 26, 2009 and February 9, 2009

GRC Complaint Received: March 3, 2009

Background

June 25, 2013 Council Meeting:

At its June 25, 2013 public meeting, the Council considered the June 18, 2013

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

² The Government Records Council has consolidated these matters for adjudication due to the commonality of the parties.

³ Represented by Michael Garofalo, Esq., of Laddey, Clark & Ryan Law Offices, LLC (Sparta, NJ).

⁴ This request is the subject of GRC Complaint No. 2009-73.

⁵ The Complainant states that he is not requesting a copy of the report.

⁶ This request is the subject of GRC Complaint No. 2009-74.

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, found that "... the Council should accept the Administrative Law Judge's May 28, 2013 Initial Decision ordering:

[T]hat an Initial Decision be entered in favor of [the Custodian]. I further **ORDER** that for those redacted e-mail addresses ... where no name is displayed, that [the Custodian] provide the name of the individual "sender" or recipient," respectively, to [the Complainant].

Procedural History:

On June 27, 2013, the Council distributed its Final Decision to all parties. On July 25, 2013, the Complainant's Counsel filed a fee application in accordance with N.J.A.C. 5:105.2.13(b).⁷ Counsel states that the GRC adopted the OAL's Initial Decision holding that the Custodian did not unlawfully redact personal e-mail addresses, but ordering the Custodian to disclose names of e-mail senders and recipients "where only redacted e-mail address[es] are present ..." Counsel asserts that the issue of under what circumstances e-mail addresses should be disclosed is a novel one that the GRC answered by requiring the disclosure of the names of senders or recipients if their names were not disclosed by way of redacted e-mail addresses. Counsel notes that the Custodian provided the Complainant with eight (8) names on July 11, 2012.

On July 30, 2013, the Custodian's Counsel objected to Complainant's Counsel fee application arguing that (1) the Complainant is not a prevailing party; (2) there was no change in the Custodian's conduct (voluntary or otherwise) as a result of the filing of these complaints; and (3) the relief obtained was not the relief sought. Counsel requests that the GRC not treat the fee application as a request for reconsideration and that Complainant Counsel's only option is to file an appeal with the Appellate Division.

Analysis

Prevailing Party Attorney's Fees

OPRA provides that:

⁷N.J.A.C. 5:105-2.13(b) sets forth the requirements of a fee application, providing in relevant part: (b) ... [t]he [fee] application must include a certification from the attorney(s) representing the complainant that includes: 1. The Council's complaint reference name and number; 2. Law firm affiliation; 3. A statement of client representation; 4. The hourly rates of all attorneys and support staff involved in the complaint; 5. Copies of weekly time sheets for each professional involved in the complaint, which includes detailed descriptions of all activities attributable to the project in 0.1 hour (six-minute) increments; 6. Evidence that the rates charged are in accordance with prevailing market rates in the relevant community. Such evidence shall include: (i) Years of related or similar experience; (ii) Skill level; and (iii) Reputation; and 7. A detailed listing of any expense reimbursements with supporting documentation for such costs.

A person who is denied access to a government record by the custodian of the record, at the option of the requestor, may: institute a proceeding to challenge the custodian's decision by filing an action in Superior Court ...; or in lieu of filing an action in Superior Court, file a complaint with the Government Records Council ... A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.

N.J.S.A. 47:1A-6.

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Court held that a complainant is a “prevailing party” if he achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct. Id. at 432. Additionally, the Court held that attorney’s fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. Id.

Additionally, the New Jersey Supreme Court has ruled on the issue of “prevailing party” attorney’s fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the Supreme Court discussed the catalyst theory, “which posits that a plaintiff is a ‘prevailing party’ if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant’s conduct.” Mason, 196 N.J. at 71, (quoting Buckhannon Bd. & Care Home v. West Virginia Dep’t of Health & Human Res., 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court stated that the phrase “prevailing party” is a legal term of art that refers to a “party in whose favor a judgment is rendered.” (quoting Black’s Law Dictionary 1145 (7th ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because “[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties,” Id. at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863, but also over concern that the catalyst theory would spawn extra litigation over attorney's fees. Id. at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

However, the Court noted in Mason, 196 N.J. at 72, that Buckhannon is binding only when counsel fee provisions under federal statutes are at issue. *Citing* Teeters, 387 N.J. Super. at 429; *see, e.g.*, Baer v. Klagholz, 346 N.J. Super. 79 (App. Div. 2001)(applying Buckhannon to the federal Individuals with Disabilities Education Act), *certif. denied*, 174 N.J. 193 (2002). “But in interpreting New Jersey law, we look to state law precedent and the specific state statute before us. When appropriate, we depart from the reasoning of federal cases that interpret comparable federal statutes.” 196 N.J. at 73 (citations omitted).

The Mason Court accepted the application of the catalyst theory within the context of OPRA, stating that:

OPRA itself contains broader language on attorney's fees than the former RTKL did. OPRA provides that “[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.” N.J.S.A. 47:1A-6. Under the prior RTKL, “[a] plaintiff in whose favor such an order [requiring access to public records]

issues ... may be awarded a reasonable attorney's fee not to exceed \$500.00.” N.J.S.A. 47:1A-4 (repealed 2002). The Legislature's revisions therefore: (1) mandate, rather than permit, an award of attorney's fees to a prevailing party; and (2) eliminate the \$500 cap on fees and permit a reasonable, and quite likely higher, fee award. Those changes expand counsel fee awards under OPRA.

Mason at 73-76 (2008).

The Court in Mason, further held that:

[R]equestors are entitled to attorney’s fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) ‘a factual causal nexus between plaintiff’s litigation and the relief ultimately achieved’; and (2) ‘that the relief ultimately secured by plaintiffs had a basis in law.’ Singer v. State, 95 N.J. 487, 495, *cert denied* (1984).

Id. at 76.

Here, the Complainant’s requested relief was “... that the GRC order the Custodian to provide ... copies of the records responsive without redactions for e-mail addresses.” Gettler v. Township of Wantage (Sussex), GRC Complaint Nos. 2009-73 and 2009-74 (Interim Order dated August 24, 2010) at 6. The GRC subsequently forwarded these complaints to the Office of Administrative Law for a determination as to the disclosability of the e-mail addresses. Gettler, GRC 2007-73 and 2007-74 (Interim Order dated January 31, 2012) at 33. The Administrative Law Judge (“ALJ”) issued an Initial Decision on May 28, 2013 in favor of the Custodian, holding that the Custodian did not unlawfully deny access to the redacted e-mails; a decision the Council adopted on June 25, 2013.

The Custodian’s Counsel submitted a fee application on the grounds that the ALJ made a minor concession by requiring the Custodian to inform the Complainant of eight (8) names for redacted e-mail addresses containing no information as to the sender or recipient. However, the evidence indicates that the Complainant was not a prevailing party because the ALJ issued a determination in favor of the Custodian and because the disclosure of several names thereafter does not represent a change warranting an award of reasonable attorney’s fees. Specifically, under the catalyst theory, the relief provided did not meet the Complainant’s requested relief of receiving unredacted e-mail addresses.

Therefore, the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian’s conduct. Teeters, 387 N.J. Super. at 432. Additionally, no factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. at 76. Specifically, the OAL determined that the Custodian lawfully denied access to the redacted e-mail addresses and the Complainant did not achieve the desired result of disclosure of said addresses. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney’s fee. *See* N.J.S.A. 47:1A-6; Teeters, 387 N.J. Super. at 432; Mason, 196 N.J. at 76.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). Additionally, no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 76 (2008). Specifically, the Office of Administrative Law ruled in favor of the Custodian, holding that the Custodian lawfully denied access to the redacted e-mail addresses and the Complainant did not achieve the desired result of disclosure of said addresses. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6; Teeters, 387 N.J. Super. at 432; Mason, 196 N.J. at 76.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Brandon D. Minde, Esq.
Executive Director

October 22, 2013



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

June 25, 2013 Government Records Council Meeting

William Gettler
Complainant

Complaint No. 2009-73 and 2009-74

v.

Township of Wantage (Sussex)
Custodian of Record

At the June 25, 2013 public meeting, the Government Records Council (“Council”) considered the June 18, 2013 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 the Council should accept the Administrative Law Judge’s May 28, 2013 Initial Decision ordering:

[T]hat an Initial Decision be entered in favor of [the Custodian]. I further **ORDER** that for those redacted e-mail addresses ... where no name is displayed, that [the Custodian] provide the name of the individual “sender” or “recipient,” respectively, to [the Complainant].

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 25th Day of June, 2013

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

Steven Ritardi, Esq., Acting Chair
Government Records Council

Decision Distribution Date: June 27, 2013





State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. GRC 06728-12

AGENCY DKT. NO. 2009-73 & 2009-74

RECEIVED
NJ GOV RECORDS COURT
2013 MAY 29 P 7:37

WILLIAM GETTLER,

Petitioner,

v.

TOWNSHIP OF WANTAGE (SUSSEX),

Respondent.

Walter M. Luers, Esq., for the petitioner (Law Offices of Walter M. Luers,
attorneys

Richard A. Stein, Esq., for the respondent (Laddy, Clark & Ryan, attorneys)

Record Closed: February 27, 2013

Decided: May 28, 2013

BEFORE **LELAND S. McGEE, ALJ:**

STATEMENT OF THE CASE

Under the Open Public Records Act (OPRA), on January 21, 2009, William Gettler (petitioner) requested copies of correspondence sent or received by any official and/or any employee of the Township of Wantage (Township) from December 1, 2008, to January 22, 2009, that relates to the New Jersey Department of Community Affairs' (DCA) Report: "Fiscal Aspects of Consolidating Sussex Borough and Wantage

Township" dated November 2008 or that relates to the Complainant. On January 26, 2009, the custodian of records (custodian) responded that the request is vague as to the types of records being requested and, as such, does not meet the requirements of a valid OPRA request for specific government records. The custodian further stated that, although the request is overly broad, he has chosen to provide access to all records located within the time frame and pertaining to key words provided by the complainant. Private e-mail addresses were redacted in the records provided.

Under OPRA, on February 6, 2009, petitioner requested copies of all communications (electronic or paper and including any attachments) between Parker Space, mayor (mayor); Clara Nuss, deputy mayor (Nuss); Bill DeBoer, committeeman (DeBoer); the custodian; and/or Michelle La Starza, chief financial officer (La Starza), regarding the budget, proposed budget, or proposed bonds between the dates of January 21, 2009, and February 6, 2009. On February 9, 2009, the custodian responded that access to a number of the records requested was being granted with redactions because portions of the responsive records are ACD material not subject to disclosure pursuant to OPRA. Further, the custodian denied access to sixteen specified email correspondences in whole because he determined that the records constitute ACD material not subject to disclosure pursuant to OPRA. In addition, private e-mail addresses were redacted in the records provided.

On February 26, 2009, petitioner filed two Complaints with the Government Records Council (GRC). In transmitting the matters to the OAL, the GRC asked that a determination be made as to whether the personal e-mail addresses of government officials are subject to disclosure under OPRA. The GRC further requests that the OAL "combine compliance with the GRC's Interim Order with compliance with the Initial Decision, if any." The GRC also asked for a determination as to whether the custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances. Finally, if the custodian is found to have knowingly and willfully violated OPRA, and unreasonably denied access under the totality of the circumstances, a civil penalty may be assessed in accordance with N.J.S.A. 47:1A-11(a), and appropriate proceedings may be initiated against a custodian against whom

a penalty has been imposed. While the GRC did not specifically request a determination as to whether a civil penalty should be imposed or whether appropriate disciplinary proceedings should be initiated if a penalty is imposed, the GRC noted that due process requires a fact-finding hearing before the penalty may be assessed. This matter was referred to the OAL to conduct such a fact-finding hearing—presumably so that the GRC may determine if a penalty should be assessed and disciplinary proceedings initiated against the custodian.

PROCEDURAL HISTORY

On February 26, 2009, petitioner filed two Denial of Access Complaints with the GRC, which contained, among other things, Government Records Request Forms dated January 21, 2009, and February 6, 2009, respectively. On August 24, 2010, and January 31, 2012, respectively, the GRC issued Interim Orders, stating, among other things, that it was unable to determine certain facts related to the OPRA requests. The matters were transmitted jointly by the GRC to the Office of Administrative Law (OAL), pursuant to N.J.S.A. 47:1A-7(e), as a single contested matter. A hearing was held on January 29, 2013. Final submissions were due on February 26, 2013, at which time the record closed. An Order of Extension was issued on April 12, 2013, extending the time for filing the Initial Decision until May 28, 2013.

FINIDINGS OF FACT

The following facts are not in dispute and I **FIND** them to be **FACTS** of this case.

Under the Open Public Records Act (OPRA), on January 21, 2009, William Gettler (petitioner) requested copies of correspondence sent or received by any official and/or any employee of the Township of Wantage (Township) from December 1, 2008, to January 22, 2009, that relates to the New Jersey Department of Community Affairs' (DCA) Report: "Fiscal Aspects of Consolidating Sussex Borough and Wantage Township" dated November 2008, or that relates to the complainant.

On January 26, 2009, the custodian of records (custodian) responded that the request is vague as to the types of records being requested and, as such, does not meet the requirements of a valid OPRA request for specific government records. The custodian further stated that, although the request is overly broad, he has chosen to provide access to all records located within the time frame and pertaining to key words provided by the complainant. Private e-mail addresses were redacted in the records provided.

Under OPRA, on February 6, 2009, Petitioner requested copies of all communications (electronic or paper and including any attachments) between Parker Space, mayor (mayor); Clara Nuss, deputy mayor (Nuss); Bill DeBoer, committeeman (DeBoer); the custodian; and/or Michelle La Starza, chief financial officer (La Starza), regarding the budget, proposed budget or proposed bonds between the dates of January 21, 2009, and February 6, 2009.

On February 9, 2009, the custodian responded that access to a number of the records requested was being granted with redactions because portions of the responsive records are ACD material not subject to disclosure pursuant to OPRA. Further, the custodian denied access to sixteen specified email correspondences in whole because he determined that the records constitute ACD material not subject to disclosure pursuant to OPRA. In addition, some "private" e-mail addresses were redacted in the records provided although the names of the recipients were not.

Summary of Testimony¹

William Gettler

William Gettler is the petitioner in this proceeding. He testified that the custodian of records did not redact the email address of every Wantage Township Committee (Committee) person every time that it appeared in the OPRA response. (T1 19:1-6; T1

¹ References to "T1" are references to the January 29, 2013, transcript of these proceedings.

19:20 to T1 20:4; T1 28:15-23; T1 28:15 to T1 29:17.) There were also Commission² members whose email addresses were not redacted in the OPRA response. (T1 23:11 to T1 24:20; T1 26:15-24.)

Petitioner testified that Wantage Township assigned official Township email addresses to each Committee member. (T1 29:18-25.) The members receive communication about Township business at their personal email addresses because they get the correspondences immediately; in some instances, on their cell phones. (T1 30:1-12.) Petitioner referred to some email addresses as "personal business" email addresses because people such as Committee members Space and DeBoer, used the respective company email addresses to receive personal information. (T1 33:12 to T1 34:12.)

Petitioner testified that the Township business that was the subject of the OPRA requests was the Township's budget and municipal consolidation. (T1 30:13 to T1 31:14.) Petitioner wanted the email addresses because, in some of the emails that were sent, there were only email addresses in the "from" and "to" sections of the emails. As such, anyone reading the email would not know who sent it or to whom it was sent. He felt that information was important. (T1 32:3-11.)

James Doherty

James Doherty (Doherty) is the municipal clerk and municipal administrator and has been so since May 2000. (T1 54:14-16.) In that capacity he accepts OPRA requests, reviews them for appropriateness and validity under the law and then provides responses. (T1 36:12-24.)

Doherty testified that he redacted email addresses in the responses to petitioner's OPRA requests that were known to him to be personal private email addresses, or which he believed were personal private email addresses. (T1 38:1-8; T1

² "Commission" refers to the statutorily authorized group of citizens selected to study consolidation between Wantage and Sussex Borough. They were not "government officials" but were recipients of correspondences that form the basis of the within OPRA request.

42:15-23.) He concluded that the email address was a personal private email address if it had an address such as "hotmail.com" or "yahoo.com" or "one of the familiar common free email programs available." (T1 38:9-16.) He concluded that if the email address was known to him to be "in the public domain such as a business email address that is on a business card or is on a website," then he assumed that it was not a personal private email address. (T1 38:16-24.)

At the time that Doherty responded to the OPRA requests, he knew that Committeeman Space had a business called Space Farm Zoo and Museum and his personal private email address was in the public domain. (T1 56:18 to T1 57:4.) He stated that Committeeman DeBoer was a used-car salesman and used his personal private email address for business purposes. (T1 57:5-18.) With respect to Committeewoman Nuss, Doherty testified that he had spoken with her at or about the time that she took office regarding her email address. Committeewoman Nuss told him that she preferred that her email address not be made public. As such, he redacted her personal email address in the OPRA responses. Sometime after providing the responses he discovered that she was using that email address for business purposes and that members of the public contacted her directly at that email address. T1 58:1-21 Finally, Doherty testified that "all governing body members inform me not to use their personal email addresses, as disclosing them to the public, but the email addresses I was using for Mr. DeBoer and Mr. Space were not their personal email addresses, they were business email addresses." They never said that they wanted the email addresses to remain confidential. (T1 61:8-16.)

Doherty testified that the only inquiry that he made with any individuals regarding the disclosure of email addresses in the first OPRA request response was what he did

with every elected official of the Wantage Township Committee that starts their term in which I inquire, '[d]o you wish your personal private email address to be utilized on public records or not?' and that would determine whether or not, from that point forward, I release those email addresses. If they had indicated to me at that time, 'Yes, it's fine with me to use my personal private email address as a business email address,' then I would not have redacted it.

Other than that, no I did not make inquiries into any of the others.

[T1 39:1-16.]

He made no additional inquiry for his response to the second OPRA request. (T1 42:15 to T1 43:12.)

Doherty stated that as of January 26, 2009, the date that he responded to petitioner's first OPRA request, it was the Township's practice to communicate with Committee members³ via their personal email addresses even though they had official Township email addresses. (T1 40:11-25.) When he communicated with committee members in the normal course of business via email, Doherty selected a "group" such as "governing body." By typing in that group name, the email addresses of all of the members would automatically be included as recipients of the email. The group name included both the official email addresses of the members and their personal email addresses. (T1 41:9-25.)

Doherty testified that, prior to petitioner's OPRA requests, he had received legal advice as to whether personal private email addresses should be disclosed. He sought that advice from the municipal attorney who advised against disclosure, and relied upon that advice when responding to petitioner's OPRA requests. (T1 50:3-25.) The reason for concern about disclosing these email addresses is the

harvesting of personal private email address for use by others that may lead to identity fraud, that may lead to nuisance emails that may lead to invasions of privacy, that the person who provided the personal private email address to the government agency had never intended to happen at the time that they were providing the email address.

[T1 52:3-12.]

Doherty testified that at the time that he provided the response to the OPRA requests, he did not provide an index. It was not his normal practice to provide an

³ In January and February 2009, the fully constituted Township Committee was comprised of three elected members, Parker Space, William DeBoer, and Clara Nuss. (T1 55:9-23.)

index until "recent years" when the Government Records Counsel devised a Custodian's Handbook. The Handbook "recommends" that an index be prepared when a complaint or an objection has been filed regarding an OPRA request. (T1 62:14 to T1 63:7.)

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

OPRA is contained in N.J.S.A. 47:1A-1 to 18. As the Legislature declared in the first section of the act, the public policy in New Jersey is that government records shall be readily accessible for inspection, copying or examination, with certain exceptions for the protection of the public. N.J.S.A. 47:1A-1. In other words, "OPRA calls for the prompt disclosure of government records." Mason v. Hoboken, 196 N.J. 51, 65 (2007).

Toward this end, custodians of government records must grant access to them or deny a request for them as soon as possible but no later than seven business days after receiving the request, provided that the records are available and not in storage or archived. N.J.S.A. 47:1A-5(i). Failure to respond shall be deemed a denial. Ibid. If the records are in storage or archived, then the custodian must advise, within those seven days, when they will be made available. Ibid. Failure to make them available by that time shall also be deemed a denial. Ibid. Consequently, a person who is denied access may file a complaint with the GRC. N.J.S.A. 47:1A-6.

A custodian who is found to have knowingly and willfully violated the act, 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 knowing and willful violation, however, requires actual knowledge that the actions were wrongful. Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609, 619 (App. Div. 2008) (citing Fielder v. Stinak, 141 N.J. 101, 124 (1995); Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)).

Discussion

I. The Personal Email Addresses Should Not Be Disclosed Because OPRA's Dual Aims of Public Access and Protection of Personal Information Weigh in Favor of Redacting Those Email Addresses

The Open Public Records Act (OPRA) provides that "government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for protection of the public interest[.]" N.J.S.A. 47:1A-1. However, at the same time, "a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy[.]" Ibid.

OPRA broadly 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 in the course of his or its official business by any officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof, 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.

[Ibid.]

In addition to defining a government record, N.J.S.A. 47:1A-1.1 also states that such record shall not include "that portion of any document which discloses the social security number, credit card number, unlisted telephone number or driver license number of any person" except in limited specified circumstances. Ibid. N.J.S.A. 47:1A-5 adds that "[p]rior to allowing access to any government record, the custodian thereof shall redact from that record any information which discloses the social security number, credit card number, unlisted telephone number, or driver license number of

any person” except in limited circumstances. When access is denied, the public agency has the burden of proving that the denial was authorized by law. N.J.S.A. 47:1A-6.

Although N.J.S.A. 47:1A-5’s mandate for the redaction of the “social security number, credit card number, unlisted telephone number, or driver license number of any person” does not include email addresses, N.J.S.A. 47:1A-1’s directive that “a public agency has a responsibility and an obligation to safeguard from public access a citizen’s personal information with which it has been entrusted when disclosure thereof would violate the citizen’s reasonable expectation of privacy” may extend to email addresses. The New Jersey Supreme Court had explained that N.J.S.A. 47:1A-1’s safeguard against disclosure of personal information is substantive and requires “a balancing test that weighs both the public’s strong interest in disclosure with the need to safeguard from public access personal information that would violate a reasonable expectation of privacy.” Burnett v. County of Bergen, 198 N.J. 408, 422-23, 427 (2009).

When “balanc[ing] OPRA’s interests in privacy and access” courts consider the following factors:

(1) the type of record requested; (2) the information it does or might contain; (3) the potential for harm in any subsequent nonconsensual disclosure; (4) the injury from disclosure to the relationship in which the record was generated; (5) the adequacy of safeguards to prevent unauthorized disclosure; (6) the degree of need for access; and (7) whether there is an express statutory mandate, articulated public policy, or other recognized public interest militating toward access.

[Id. at 427 (quoting Doe v. Poritz, 142 N.J. 1, 88 (1995).]

A. Courts Have Required that Certain Personal Information Be Redacted From Records Released In Response to an OPRA Request Where OPRA’s Interest in Privacy Outweighs the Interest in Access

In Burnett, a commercial business requested approximately eight million pages of land title records extending over a twenty-two year period; the records contained

names, addresses, social security numbers, and signatures of numerous individuals. Burnett, supra, 198 N.J. at 418. After balancing the seven factors, the Court “[fou]nd that the twin aims of public access and protection of personal information weigh in favor of redacting [social security numbers] from the requested records before releasing them” because “[i]n that way, disclosure would not violate the reasonable expectation of privacy citizens have in their personal information.” Id. at 437. The Court emphasized that the “balance [wa]s heavily influenced by concerns about the bulk sale and disclosure of a large amount of social security numbers—which [the commercial business] admittedly does not need, and which are not an essential part of the records sought.” Id. at 414. Moreover, “the requested records [we]re not related to OPRA’s core concern of transparency in government.” Ibid.

Similarly, the Appellate Division has concluded that the identity of an individual who attempted suicide by jumping off a bridge should not be disclosed in an OPRA request seeking police and fire department reports about the incident under Burnett. Alfano v. Margate City, A-3797-11 (App. Div. September 25, 2012) (slip op. at 1-2, 8-10), <http://njlaw.rutgers.edu/collections/courts/>. The court noted that

[t]he trial judge correctly applied [the Burnett] factors in concluding that disclosure of the bicyclist’s identity could have severe consequences for him and his family because of the “traumatic event” that was the subject of the report. The disclosure of the names of bicyclist’s family members would also serve to reveal his identity. Thus, we believe that the judge correctly held that there was “no overarching need for a citizen to obtain this individual and his family’s names.”

[Id. at 8.]

However, the court rejected the trial judge’s decision to “to bar access to the entire report rather than provide [the requester] with a redacted copy that would have deleted all personal identifying information” and remanded the matter for redaction of the report to remove any identifying information. Id. at 8-10.

Additionally, the Government Records Council has repeatedly concluded that OPRA requests for the names and addresses of individuals falling within certain

categories should not be permitted because of the risk of unsolicited contact and/or intrusion following the release of such information. See e.g., Bernstein v. Borough of Allendale, Complaint No. 2004-195, Final Decision, Gov't Records Council (July 14, 2005), <<http://www.state.nj.us/grc/decisions/2004-195.html>> (concluding that the names and addresses of dog-license owners should not be disclosed because of the potential harm of unsolicited contact or intrusion); Faulkner v. Rutgers University, Complaint No. 2007-149, Final Decision, Gov't Records Council (May 28, 2008), <<http://www.state.nj.us/grc/decisions/pdf/2007-149.pdf>> (concluding that the names and addresses of Rutgers football season-ticket holders should not be disclosed because of the risk of unsolicited contact); Avin v. Borough of Oradell, Complaint No. 2004-176, Final Decision, Gov't Records Council (March 10, 2005), <<http://www.state.nj.us/grc/decisions/2004-176.html>> (concluding that the names and addresses of homeowners who applied for a fire or burglar alarm permit within a three-year period should not be disclosed because of the risk of unsolicited contact and safety concerns surrounding the identification of those homes which are, and conversely those which are not, secured with such devices).

B. *Courts Have Not Required Redaction of Certain Personal Information From Records Released In Response to an OPRA Request Where OPRA's Interest in Access Outweighs the Interest in Privacy*

In contrast, the Appellate Division has affirmed a trial court's determination that the identity of a person who called 911 complaining about illegal parking blocking his driveway should not be redacted when the owner of the car filed an OPRA request seeking a copy of the 911 call under Burnett. Ponce v. Town of W. New York, A-3475-10 (App. Div. February 27, 2013) (slip op. at 3-4, 10), <http://njlaw.rutgers.edu/collections/courts/>. The trial judge explained that

[t]he type of information requested by [the car owner] is not particularly sensitive or confidential. When the caller made a complaint [to] the police department that someone was blocking his or her driveway he or she could reasonably expect that his name may be revealed in connection with the complaint. There has not been evidence presented to suggest that revealing the caller's identity or the call itself would result in any serious harm or confrontation between

the caller and the - - [sic] and the [car owner]. It may in fact be helpful for the [car owner] to know the information in order to challenge his parking violation.

[Id. at 7-8.]

The Appellate Division emphasized that the city's arguments against disclosure of the caller's identity were "predicated on the notion that if [the car owner] learns the identity of his accuser he will retaliate in some fashion, thus discouraging the average person from reporting incidents to the police via the 911 emergency system." Id. at 9. However, the city "ha[d] not presented any evidence of past hostility between these two individuals" and the court emphasized that "[a]bsent compelling reasons, which are conspicuously absent in this record, few can argue that in a free society an accused is not entitled to know the identity of his accuser." Id. at 9-10. Therefore, the court concluded that "[n]one of the concerns in favor of confidentiality articulated by the Court in Burnett, supra, 198 N.J. at 427, [we]re applicable" and affirmed the trial court's decision ordering disclosure of the caller's identity. Ponce, supra, A-3475-10 at 10.

Similarly, the Appellate Division has concluded that addresses should not be redacted from a mailing list of self-identified "senior citizens" compiled by a county to contact those individuals through a newsletter. Renna v. County of Union, A-1811-10 (App. Div. February 17, 2012) (slip op. at 1, 11-12), <http://njlaw.rutgers.edu/collections/courts/>. A website operator filed an OPRA request seeking access to that mailing list so that he could disseminate information in furtherance of non-profit activities related to monitoring county government. Id. at 2. The court applied the Burnett factors. Id. at 11. The first two factors weighed in favor of disclosure, because "the intent and spirit of OPRA are to maximize public awareness of governmental matters" and "the interest in the dissemination of information, even that unrelated to senior matters, outweighs a perceived notion of expectation of privacy." Id. at 12.

The third factor did not expressly dictate confidentiality of the addresses because "[t]he trial court found that the real potential for harm in this case was unsolicited contact via door-to-door canvassing, mailing, or other contact by plaintiff's organization

or any other organization to which the list might be subsequently disclosed.” Id. at 12-13. The county “argue[d] that the trial court did not consider the possibility of potential victimization of seniors if the names and addresses of senior citizens were released.” Id. at 13. The court distinguished the risk of potential victimization present in Burnett, because in that case, “the presence of social security numbers along with other personal identifiers, such as home addresses and names, elevated the privacy concerns at stake.” Id. at 14. No similar personal identifier linked to the names and addresses existed in the mailing list sought. Id. at 14-16.

The fourth factor did not expressly dictate confidentiality because the harm was minimal where “the potential injury would be door-to-door canvassing or mailing from [the website operator]’s group or other groups that subsequently received the list” and the list was originally created “to notify seniors of available services,” and “[t]he list members signed up to receive information about governmental services.” Id. at 16-17. In considering the fifth factor, the court emphasized that “the trial court found there were no safeguards to prevent disclosure of the names and addresses on the list” but “[t]he ‘senior citizen’ designation does not reveal any personal information about the individuals on the list, not even their ages.” Id. at 18.

The sixth factor weighed in favor of disclosure because the website operator sought the list to further civic activities of his group, and that group “[wa]s specifically aimed at furthering the stated goals of OPRA.” Id. at 18. The group sought to “inform citizens of government activities in Union County” which was “consistent with OPRA’s objective to ‘maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process.’” Id. at 18-19 (quoting Times of Trenton Publ’g Corp. v. Lafayette Yard Cmty. Dev. Corp., 183 N.J. 519, 535 (2005)).

Under the seventh factor, “the trial court noted that plaintiff has a First Amendment free speech right to contact citizens and discuss the Watchdog’s activities” but the county “argue[d] that [the website operator]’s First Amendment right is not compromised if she does not receive the addresses, rather she is free to contact

anyone she desires, but that contact should not be limited to a particular class of vulnerable citizens.” Renna, supra, A-11811-10 at 19. However, the county

“failed to demonstrate that the list is comprised of names belonging only to senior citizens; nor has it shown that the fact that [the website operator] can contact as many people as she desires has adverse policy consequences such that it weighs against disclosure of the addresses on this particular list.

[Id. at 19-20.]

Therefore, the court concluded that the trial judge properly applied the Burnett factors and ordered release of the addresses. Id. at 20-21.

Other lists of names and addresses of individuals falling within certain categories compiled by government entities have also been deemed subject to disclosure under Burnett. See, e.g., Atl. County SPCA v. City of Absecon, A-3047-07 (App. Div. June 5, 2009) (slip op. at 1-2, 20-21), <http://njlaw.rutgers.edu/collections/courts/> (applying the Burnett factors and concluding that the names and addresses of licensed dog owners in Atlantic County should have been disclosed in response to an OPRA request seeking that information); Bolkin v. Kwasniewski, No. L-6547-12 (Law Div. December 5, 2012) (slip op. at 1-3, 30) (applying the Burnett factors and concluding that the names and addresses of pet owners in Fair Lawn should have been disclosed in response to an OPRA request seeking that information).

C. *Application of the Burnett Factors to Balance OPRA’s Interests in Privacy and Access in the Present Matter Dictates that the Redacted Email Addresses Contained in the Emails Not Be Disclosed*

The present matter requires application of the Burnett factors to balance OPRA’s dual interests in privacy and access as applied to the release of personal email addresses contained in a government record. Notably, both the Government Records Council and the Superior Court Law Division have considered whether the release of individuals’ email addresses is appropriate in response to an OPRA request under the Burnett analysis. See Mayer v. Borough of Tinton Falls, Gov’t Records Council Complaint No. 2008-245, Findings and Recommendations of the Executive Dir., Gov’t

Records Council (April 1, 2010), <<http://www.nj.gov/grc/decisions/pdf/2008-245.pdf>>; Mayer v. Borough of Tinton Falls, Gov't Records Council Complaint No. 2008-245, Interim Order, Gov't Records Council (April 13, 2010), <<http://www.nj.gov/grc/decisions/pdf/2008-245.pdf>>; Geier v. Twp. of Plumsted, No. L-3718-09 (Law Div. March 19, 2010) (letter op. on motion on reconsideration).⁴

In Mayer, the complainant, a candidate for and subsequent member of a borough's town council, alleged that another councilman used email addresses that he obtained from the town's website to disseminate campaign materials in an email newsletter. Mayer, supra, GRC Complaint No. 2008-245, Findings and Recommendations of the Executive Dir. at 23. The complainant asserted that he needed access to the list of email addresses "to see who had received what he deemed to be opinionated and biased newsletters and to enable the [town council] to provide a fair and balanced view of [town council] news and events." Ibid.

The Government Records Council's Executive Director weighed the Burnett factors and explained that "there is sufficient concern here to limit access to individuals' home e-mail addresses, particularly when the information is combined with other personal identifying information" but "in the narrowly construed window of political activity" the recognized public interest swings the analysis toward disclosure. Ibid. Therefore she concluded that "because the e-mail addresses collected through the [town]'s website are a government record, and because said addresses were used by [the town councilman] for political campaigning purposes, and because voter registration information may be disclosed to members of the public pursuant to N.J.S.A. 19:31-18.1(a), the e-mail addresses collected through the [town]'s website are subject to disclosure under OPRA." Mayer, supra, GRC Complaint 2008-245, Findings and

⁴ Geier is an unpublished decision from the Law Division and not available on Lexis or the Rutgers website. Mayer indicates that the parties had provided the Government Records Council with a copy of the October 2009 Geier decision. However, a copy of that October 2009 decision is not readily available. However, the New Jersey State League of Municipalities subsequently entered that litigation as an intervenor, and the township moved for reconsideration of the trial court's October 2009 Order directing that an email list used and maintained to distribute township alert emails be released. The trial court then issued a letter, dated March 19, 2010, concluding that its earlier decision was not based upon "a palpably incorrect or irrational basis" or "failed to consider or overlooked competent evidence." Geier, supra, No. L-3718-09 (motion on reconsideration at 6). That March 2010 letter decision is available from the New Jersey State League of Municipalities website at <<http://www.njslom.org/documents/geier-decision.pdf>>.

Recommendations of the Executive Dir. at 23. The Government Records Council adopted the Executive Directors recommendations. Mayer, supra, GRC Complaint No. 2008-245, Interim Order at 1-2.

Although the facts in Mayer are not directly analogous to the present situation, the analysis regarding particular Burnett factors is informative when applying those factors in the present case, as discussed below. See Mayer, supra, GRC Complaint No. 2008-245, Findings and Recommendations of the Executive Dir. at 23.

i. Burnett Factors One and Two

The first and second Burnett factors require consideration of the records requested, and the type of information contained therein, respectively. Petitioner asserts that these two factors weigh in favor of disclosure because the emails are public records and “because we know what type of information is being sought; there is no possibility of information being accidentally disclosed.” (Pet’r’s Letter Br. at 12 (February 26, 2013).) Respondent emphasizes that the email addresses sought are private email addresses. (Resp’t’s Letter Br. at 12 (February 25, 2013).) Notably, petitioner requested email communications and was granted access to those emails. The parties do not dispute that the emails themselves constitute government records subject to disclosure. However, certain personal email addresses contained in those emails constitute the information relevant to the current matter. Since the emails themselves were disclosed, disclosure of the redacted email address is not warranted under these two factors.

ii. Burnett Factors Three and Four

The third and fourth Burnett factors address the potential for harm in subsequent nonconsensual disclosure of the email addresses, and the injury from disclosure to the relationship in which the record was generated, respectively. Petitioner asserts that “there is no realistic possibility for any harm” and, “unlike a social security number or bank account number, [a person’s email address] is simply not very useful in stealing a

person's identity." (Pet'r's Letter Br. at 12.) Respondent disagrees and notes that these factors were examined in Mayer. (Resp't's Letter Br. at 12.)

Contrary to petitioner's assertion, a significant risk of harm exists when releasing email addresses; that potential harm was thoroughly examined in Mayer, where it was explained that

[a] person's e-mail address is a unique personal identifier. Communication via the internet is possible only because an e-mail address distinctly identifies a person or entity. Due to its uniqueness, e-mail addresses may be likened to unlisted telephone numbers. "Electronic mail shares some features with telephonic communication, which generally is not stored in any form and is generally regarded as private" Upon Pet. of Bd. of County Comm'rs, 95 P.3d 593 (Colo. D.C. 2003). As unlisted telephone numbers are exempt from disclosure under OPRA, e-mail addresses, similarly, should be accorded a higher level of protection from disclosure under OPRA.

Although OPRA does not specifically name personal e-mail addresses among the list of personal identifiers exempt from disclosure, the statute should not be interpreted rigidly. The Court in Burnett, supra, found:

"[w]e likewise doubt the Legislature envisioned plaintiff's actual request when it adopted OPRA. We recognize that '[i]t is frequently difficult for a draftsman of legislation to anticipate all situations and to measure his words against them. Hence cases inevitably arise in which a literal application of the language used would lead to results incompatible with the legislative design.'" Burnett, supra, 198 N.J. at 425 (quoting New Capitol Bar & Grill Corp. v. Div. of Employment Sec., 25 N.J. 155, 160 (1957)).

Moreover, since OPRA's inception in 2002, advancements in computer technology facilitating disclosure of personal identifying information have been linked to an increase in instances of identity theft. The Burnett Court stated its "alarming" concern over the statistics of identity theft—nearly ten million Americans, or five percent of the country's population, have been victimized by identity theft. Burnett, supra, 198 N.J. at 432.

There is also a privacy interest in non-disclosure of an individual's e-mail address because e-mail addresses

maintain an individual's anonymity. Anonymity could be compromised if e-mail addresses are released to the public, especially when an e-mail address is contemporaneously coupled with or later used to obtain other personal identifying information such as a name and home address. It is precisely this concern for the grouping of personal identifying information that "elevates the privacy concern at stake," and led the Doe and Burnett Courts to rule in favor of confidentiality. Doe, *supra*, 142 N.J. at 83; Burnett, 198 N.J. at 436. The Doe and Burnett decisions are consistent with the spirit of the federal CANSPAM Act of 2003, 15 U.S.C.S. § 7701. The United States Congress enacted this legislation to combat the abuses with commercial distribution of e-mail addresses. The Act underscores the importance of e-mail, and recognizes the heightened privacy interest in non-disclosure of e-mail addresses. A post-enactment review of the law determined, in pertinent part, that "[i]ndividuals maintain a higher expectation of privacy with regard to e-mail addresses due to the nonexistence of an e-mail address directory similar to a phone book. E-mail addresses maintain anonymity, and certainly are not a matter of public record." Erin Elizabeth Marks, Spammers Clog In-Boxes Everywhere: Will the CANSPAM Act of 2003 Halt the Invasion?, 54 Case W. Res. L. Rev. 943 (Spring 2004). Email addresses would lose their anonymity if disclosed, thus making an individual more vulnerable to an invasion of privacy.

Furthermore, disclosure of e-mail addresses can create a heightened risk of identity theft. In determining whether an individual's social security number should be disclosed, the Burnett Court, as noted above, expressed particular concern for the risk of identity theft given the alarming statistics for this cybercrime in one year. Burnett, 198 N.J. 432. Similarly here, disclosure of e-mail addresses leaves individuals more exposed to spamming, phishing, and other direct "cyberassaults." Phishing is "a scam by which an e-mail user is duped into revealing personal or confidential information which the scammer can use illicitly." <http://www.merriam-webster.com/dictionary/phishing>. Phishing is most concerning because it is carried out through e-mail, and an unscrupulous person or organization only needs an unknowing victim's e-mail address to "phish" for an individual's financial and other personal information. The problem is one of control. If public disclosure of the e-mail addresses is made, then the addresses may be accessed by any person or entity for any purpose.

[Mayer, supra, GRC Complaint No. 2008-245, Findings and Recommendations of the Executive Dir. at 18-20.]

Similar, significant concerns about the potential harm of subsequent nonconsensual disclosure of the email addresses exist here, and weigh against the release of the email addresses.

iii. *Burnett Factor Five*

The fifth Burnett factor requires consideration of the adequacy of safeguards to prevent unauthorized disclosure of the email addresses. Petitioner suggests that “[t]he fifth factor is neutral, as the [custodian] did not discuss safeguards to keep e-mail addresses private.” (Pet’r’s Letter Br. at 13.) Respondent again disagrees, and notes that this factor was examined in Mayer. In Mayer, it was explained that

[i]f the e-mail addresses were to be disclosed, there are no reasonable safeguards in place to protect against unauthorized dissemination of such addresses. Thus, there is nothing to prevent a bulk distribution of the e-mail addresses to other entities, which exposes individuals further to phishing, spamming and other forms of cyber security breaches.

[Mayer, supra, GRC Complaint No. 2008-245, Findings and Recommendations of the Executive Dir. at 20.]

Again, identical concerns about the lack of any safeguards to prevent unauthorized disclosure following release of the email addresses exist here, and weigh against the release of the email addresses.

iv. *Burnett Factor Six*

The sixth Burnett factor addresses the degree of need for access to the email addresses. Petitioner argues that this factor weighs in favor of access, because “[m]embers of the public have a high degree of need for the information.” (Pet’r’s Letter Br. at 13.) When asked what his interest in the email addresses was, petitioner testified that

[i]n a number of the emails that were sent out, the only information contained in the 'from' and the 'to' was an email address and it was redacted. Because of that you have no idea who originated the email, or in some cases, who it was sent to. And I think that information is important to know.

However, petitioner proffered a different reason for his need for access to the email addresses in his brief, and stated that

[t]he sixth factor weighs in favor of access. Members of the public have a high degree of need for the information. With respect to Township Committee members, the unequivocal testimony showed that Wantage Township Committee members checked their personal Township email faster, because they could access them through their phones, rather than their official Wantage email addresses, where apparently e-mails languished unread.⁵ With respect to the Consolidation Commission members, there was no evidence that they even had public e-mail addresses, therefore the *only* way to communicate with them via e-mail regarding Commission business was to send them e-mails to the personal email addresses they were using for public business.

[Pet'r's Letter Br. at 13.]

Respondent addressed the asserted need for the email addresses that petitioner testified about;⁶ respondent argued that that petitioner's

sole reason for requesting the private e-mail addresses of the Consolidation Study Commission Members and the Township Committee Members was that [sic] needed to know who was sending and who was receiving an e-mail. However, [petitioner] did not testify to a single instance . . . , where a redacted e-mail address prevented him from having that information.

[Resp't's Letter Br. at 15.]

⁵ Petitioner's assertion that emails sent to individuals' official Wantage email addresses "languished unread" is not supported by the record.

⁶ Due to the date of the briefs, it is unlikely that respondent was aware that petitioner was asserting a different need for the email addresses than the need that he proffered during his testimony.

Petitioner's explanation as to why he needs access to the redacted email addresses, either during the hearing or as presented in his brief, is not compelling. Notably, in most instances where an email address was redacted, the name of the owner of that email address is prominently displayed next to the redaction—of the approximately sixty-nine relevant redactions in P-1, the identity of the owner of the redacted email address was readily apparent in fifty-one instances. Of the approximately twenty-seven relevant redactions in P-2, the owner of the redacted email address was readily apparent in all but a single instance.

Notably, petitioner's need for access, to the extent that he wants to be able to contact Committee or Commission members via email, is not similar to the need for access in Mayer. Nor is the need for information similar to Renna, where the website operator sought access to a county's email list of self-identified "senior citizens" to further the activities of a group "specifically aimed at furthering the stated goals of OPRA" by "inform[ing] citizens of government activities in Union County[.]" Renna, supra, A-1811-10 (slip op. at 18-19).

Petitioner has not provided a clear explanation regarding how he intends to utilize the email addresses, if disclosed. Moreover, inconsistency exists between his claimed need for the information while testifying and subsequently presented in his brief. His testimony suggested that his need for access to the email addresses related to his desire to know who originated and received the emails. However, his brief suggested that his need for the email addresses was because he wanted to be able to communicate with Committee members in a "faster" manner than would be possible than if he were to utilize their official Wantage email addresses and wanted to communicate with Commission members who might not have public email addresses. Petitioner has not presented a compelling argument for why he needs to contact these individuals through their personal email addresses. However, to the extent that the identity of the owner of some of the redacted email addresses is not readily apparent, petitioner has presented a compelling need to know the name of those individuals participating in the released email communications.

v. Burnett Factor Seven

The seventh Burnett factor requires consideration as to whether an express statutory mandate, articulated public policy, or other recognized public interest militating toward access to email addresses exists. Petitioner suggests that “there is an express statutory mandate militating toward access, which is the [State’s Division of Archives and Records Management] circular . . . that requires public emails to be classified and retained.” (Pet’r’s Letter Br. at 13.) Petitioner asserts that the Division of Archives and Records Management Circular Letter No. 03-10-ST “sets forth standards governing the use, deletion and retention of e-mail” and “[a]ccess to the name of a public official’s e-mail account becomes important because once it is used for public business, it becomes the repository of public records.” (Id. at 11.) He emphasizes that “[t]his information is important for those members of the public who are seeking copies of public records that may not have been retained on official servers or in circumstances where public business is being conducted completely on private domain servers.” (Ibid.)

However, that Circular Letter does not suggest that a public interest militating toward public access to personal email addresses exists, as suggested by petitioner. The Circular Letter was issued “to provide and explain requirements, guidelines and best practices for electronic mail (e-mail) messages that meet the criteria for public records as defined by the [Destruction of Public Records Law (1953), N.J.S.A. 47:3-16 to -32]”. Circular Letter No. 03-10-ST at 1, Division of Archives and Records Management, effective July 11, 2002 <<http://www.nj.gov/state/darm/pdf/circular-letter-03-10-st.pdf>>. The Circular Letter notes that emails could be public records under the then-recently enacted OPRA, and public records must be retained under the Destruction of Public Records Law. Id. at 4. However, there is no dispute that the emails in question here constitute public records, even when a personal email account is utilized rather than individuals’ official Wantage email addresses. In fact, such emails have been disclosed in the present matter, with personal email addresses redacted.

In contrast, respondent emphasizes that pending legislation is “well along in the process of removing e-mail addresses as a government record discloseable under OPRA.” (Resp’t’s Letter Br. at 16.) The State Assembly passed a bill that would amend the language of N.J.S.A. 47:1A-1.1 to exclude “email address[es]” from being considered part of a government record by a vote of seventy-four (74) to zero (0) on December 3, 2012; Assembly Bill No. A-1280 amends the language of N.J.S.A. 47:1A-1.1 such that a government record shall not include “that portion of any document which discloses the social security number, credit card number, unlisted telephone number, **e-mail address**, or driver license number of any person[.]” An identical bill was introduced in the State Senate on January 28, 2013, Senate Bill No. S-2487, but has not been voted upon at this time. See New Jersey Legislature Bills 2012-2013, <<http://www.njleg.state.nj.us/bills/BillsByNumber.asp>>.

Although the legislation has not been enacted into law at this time, it suggests the existence of a public policy in favor of the confidentiality of email addresses, rather than militating toward access to email addresses. Further support for such a public policy was identified in Mayer, where it was noted that “the federal government emphasized the strong public policy for confidentiality of e-mail addresses in enacting the CAN-SPAM Act of 2003.” Mayer, *supra*, GRC Complaint No. 2008-245, Findings and Recommendations of the Executive Dir. at 23. Therefore, contrary to petitioner’s assertion, no express statutory mandate, articulated public policy, or other recognized public interest militating toward access to email addresses exists.

vi. *Balancing of the Burnett Factors*

On balancing the Burnett factors, OPRA’s dual object to provide both public access and protection of personal information, weigh in favor of redacting the personal email addresses from the disclosed emails. Most notably, the potential for harm in subsequent nonconsensual disclosure of the email addresses and the lack of any adequate safeguards that would prevent unauthorized disclosure of the email addresses outweigh the degree of need for access to the email addresses proffered by petitioner. There is no dispute that the emails themselves constitute public records,

and those emails have already been disclosed. Disclosure of the emails with redaction of the email addresses does not violate the reasonable expectation of privacy these individuals have in their personal information. However, where the identity of the owner of the redacted email address is not readily apparent—particularly where the name of the owner is not prominently listed next to the redacted email address—the custodian should provide the name of the owner of those redacted email addresses, because petitioner has presented a compelling need for the identity of those individuals.

II. Although Legislation Is Not Usually Applied Retroactively, Retroactive Application of the Legislation Recently Passed by the State Assembly Amending OPRA By Excluding Email Addresses from Government Records May Be Appropriate If Enacted into Law, Because the Nature of that Amendment is Curative

As noted above, the State Assembly recently passed Assembly Bill No. A-1280 on December 3, 2012, and it would amend the language of N.J.S.A. 47:1A-1.1 to exclude email addresses from being considered part of a government record in the same way that a social security number, credit card number, unlisted telephone number, or driver license number are already expressly excluded; an identical bill was introduced in the State Senate on January 28, 2013, Senate Bill No. S-2487, but has not been voted upon at this time. See New Jersey Legislature Bills 2012-2013, <<http://www.njleg.state.nj.us/bills/BillsByNumber.asp>>. Additionally, both bills indicate that “[t]his act shall take effect immediately.” Ibid. The corresponding Statements to both bills and Assembly State Government Committee Statement each explains that

[t]his bill revises the definitions section of what is commonly known as the Open Public Records Act (OPRA), P.L. 1963, c. 73 (C.47:1A-1 et seq.) as amended and supplemented by P.L. 2001, c. 404 (C.47:1A-5 et seq.), to include e-mail addresses on the list of confidential items that must be redacted from any public record disclosed under the provisions of the act.

[Assembly Bill No. A-1280, Statement, (passed January 10, 2013); Senate Bill No. S-2486, Statement, (introduced January 28, 2013); Assembly State Gov’t Comm., Statement to A-1280, (November 19, 2012).]

New Jersey courts “have long followed a general rule of statutory construction that favors prospective application of statutes.” Cruz v. Central Jersey Landscaping, 195 N.J. 33, 45 (2008) (quoting Gibbons v. Gibbons, 86 N.J. 515, 521 (1981)). “A statute will be given retroactive effect only (1) where the Legislature has declared such an intent, either explicitly or implicitly, (2) when an amendment is curative, or (3) ‘when the expectations of the parties so warrant.’” Botis v. Estate of Kudrick, 421 N.J. Super. 107, 116 (App. Div. 2011) (quoting Cruz, *supra*, 195 N.J. at 45).

Although the pending legislation indicates that the “act shall take effect immediately[,]” courts have explained that identical “language provides ‘no clear indication’ as to whether the Legislature intended the amendment ‘to apply to claims that were pending on the date of its enactment.’” See Botis, *supra*, 421 N.J. Super. at 116 (quoting Bunk v. Port Auth., 144 N.J. 176, 194 (1996)). Regardless, the proposed amendment to N.J.S.A. 47:1A-1.1 merely revises that statute to add email addresses to the specified personal information excluded from being considered part of a government record consistent with the four categories of information already excluded. I am not persuaded by respondent’s argument that, because the legislation is “well along in the process,” the email addresses should be disclosed. (Resp’t’s Letter Br. at 16.) It has not been enacted as of the date of this Initial Decision and therefore has no probative value other than to illustrate the public policy intent of one House of the New Jersey legislature as described herein.

For the foregoing reasons, I **CONCLUDE** that, OPRA’s dual aims of public access and protection of personal information weigh in favor of redacting the personal email addresses from the disclosed emails in the present case. I **CONCLUDE** that the potential for harm in subsequent nonconsensual disclosure of the email addresses and the lack of any adequate safeguards that would prevent unauthorized disclosure of the email addresses outweigh the degree of need for access to these email addresses. I further **CONCLUDE** that the public interest in knowing to whom public records are sent dictates in favor of disclosure of the names of the email “senders” and “recipients” where only the redacted email address is present on the subject emails.

I further **CONCLUDE** that respondent did not knowingly and willfully deny petitioner access to the records requested. Finally, I **CONCLUDE** that respondent did not unreasonably deny petitioner's access to the record.

ORDER

Based upon my **FINDINGS OF FACT** and **CONCLUSIONS OF LAW**, I **ORDER** that an Initial Decision be entered in favor of respondent. I further **ORDER** that for those redacted email addresses in Exhibit P-1 and in Exhibit P-2, where no name is displayed, that respondent provide the name of the individual "sender" or "recipient," respectively, to petitioner.

I hereby **FILE** my Initial Decision with the **GOVERNMENT RECORDS COUNCIL** for consideration.

This recommended decision may be adopted, modified or rejected by the **GOVERNMENT RECORDS COUNCIL**, who by law is authorized to make a final decision in this matter. If the Government Records Council does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **EXECUTIVE DIRECTOR OF THE GOVERNMENT RECORDS COUNCIL, 101 South Broad Street, P.O. Box 819, Trenton, New Jersey 08625-0819**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.



May 28, 2013

DATE

LELAND S. McGEE, ALJ

Date Received at Agency:

May 28, 2013

Date Mailed to Parties:

LSM/lr

APPENDIX

Witnesses

For Petitioner:

William Gettler
James Doherty

For Respondent:

None

Exhibits

For Petitioner:

P-1 Response to OPRA request dated January 26, 2009
P-2 Response to OPRA request dated February 9, 2009

For Respondent:

None



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. GRC 06728-12

AGENCY DKT. NO. 2009-73 & 2009-74

RECEIVED
NJ GOV RECORDS COURT
2013 MAY 29 P 7:37

WILLIAM GETTLER,

Petitioner,

v.

TOWNSHIP OF WANTAGE (SUSSEX),

Respondent.

Walter M. Luers, Esq., for the petitioner (Law Offices of Walter M. Luers,
attorneys

Richard A. Stein, Esq., for the respondent (Laddy, Clark & Ryan, attorneys)

Record Closed: February 27, 2013

Decided: May 28, 2013

BEFORE **LELAND S. McGEE, ALJ:**

STATEMENT OF THE CASE

Under the Open Public Records Act (OPRA), on January 21, 2009, William Gettler (petitioner) requested copies of correspondence sent or received by any official and/or any employee of the Township of Wantage (Township) from December 1, 2008, to January 22, 2009, that relates to the New Jersey Department of Community Affairs' (DCA) Report: "Fiscal Aspects of Consolidating Sussex Borough and Wantage

Township" dated November 2008 or that relates to the Complainant. On January 26, 2009, the custodian of records (custodian) responded that the request is vague as to the types of records being requested and, as such, does not meet the requirements of a valid OPRA request for specific government records. The custodian further stated that, although the request is overly broad, he has chosen to provide access to all records located within the time frame and pertaining to key words provided by the complainant. Private e-mail addresses were redacted in the records provided.

Under OPRA, on February 6, 2009, petitioner requested copies of all communications (electronic or paper and including any attachments) between Parker Space, mayor (mayor); Clara Nuss, deputy mayor (Nuss); Bill DeBoer, committeeman (DeBoer); the custodian; and/or Michelle La Starza, chief financial officer (La Starza), regarding the budget, proposed budget, or proposed bonds between the dates of January 21, 2009, and February 6, 2009. On February 9, 2009, the custodian responded that access to a number of the records requested was being granted with redactions because portions of the responsive records are ACD material not subject to disclosure pursuant to OPRA. Further, the custodian denied access to sixteen specified email correspondences in whole because he determined that the records constitute ACD material not subject to disclosure pursuant to OPRA. In addition, private e-mail addresses were redacted in the records provided.

On February 26, 2009, petitioner filed two Complaints with the Government Records Council (GRC). In transmitting the matters to the OAL, the GRC asked that a determination be made as to whether the personal e-mail addresses of government officials are subject to disclosure under OPRA. The GRC further requests that the OAL "combine compliance with the GRC's Interim Order with compliance with the Initial Decision, if any." The GRC also asked for a determination as to whether the custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances. Finally, if the custodian is found to have knowingly and willfully violated OPRA, and unreasonably denied access under the totality of the circumstances, a civil penalty may be assessed in accordance with N.J.S.A. 47:1A-11(a), and appropriate proceedings may be initiated against a custodian against whom

a penalty has been imposed. While the GRC did not specifically request a determination as to whether a civil penalty should be imposed or whether appropriate disciplinary proceedings should be initiated if a penalty is imposed, the GRC noted that due process requires a fact-finding hearing before the penalty may be assessed. This matter was referred to the OAL to conduct such a fact-finding hearing—presumably so that the GRC may determine if a penalty should be assessed and disciplinary proceedings initiated against the custodian.

PROCEDURAL HISTORY

On February 26, 2009, petitioner filed two Denial of Access Complaints with the GRC, which contained, among other things, Government Records Request Forms dated January 21, 2009, and February 6, 2009, respectively. On August 24, 2010, and January 31, 2012, respectively, the GRC issued Interim Orders, stating, among other things, that it was unable to determine certain facts related to the OPRA requests. The matters were transmitted jointly by the GRC to the Office of Administrative Law (OAL), pursuant to N.J.S.A. 47:1A-7(e), as a single contested matter. A hearing was held on January 29, 2013. Final submissions were due on February 26, 2013, at which time the record closed. An Order of Extension was issued on April 12, 2013, extending the time for filing the Initial Decision until May 28, 2013.

FINIDINGS OF FACT

The following facts are not in dispute and I **FIND** them to be **FACTS** of this case.

Under the Open Public Records Act (OPRA), on January 21, 2009, William Gettler (petitioner) requested copies of correspondence sent or received by any official and/or any employee of the Township of Wantage (Township) from December 1, 2008, to January 22, 2009, that relates to the New Jersey Department of Community Affairs' (DCA) Report: "Fiscal Aspects of Consolidating Sussex Borough and Wantage Township" dated November 2008, or that relates to the complainant.

On January 26, 2009, the custodian of records (custodian) responded that the request is vague as to the types of records being requested and, as such, does not meet the requirements of a valid OPRA request for specific government records. The custodian further stated that, although the request is overly broad, he has chosen to provide access to all records located within the time frame and pertaining to key words provided by the complainant. Private e-mail addresses were redacted in the records provided.

Under OPRA, on February 6, 2009, Petitioner requested copies of all communications (electronic or paper and including any attachments) between Parker Space, mayor (mayor); Clara Nuss, deputy mayor (Nuss); Bill DeBoer, committeeman (DeBoer); the custodian; and/or Michelle La Starza, chief financial officer (La Starza), regarding the budget, proposed budget or proposed bonds between the dates of January 21, 2009, and February 6, 2009.

On February 9, 2009, the custodian responded that access to a number of the records requested was being granted with redactions because portions of the responsive records are ACD material not subject to disclosure pursuant to OPRA. Further, the custodian denied access to sixteen specified email correspondences in whole because he determined that the records constitute ACD material not subject to disclosure pursuant to OPRA. In addition, some "private" e-mail addresses were redacted in the records provided although the names of the recipients were not.

Summary of Testimony¹

William Gettler

William Gettler is the petitioner in this proceeding. He testified that the custodian of records did not redact the email address of every Wantage Township Committee (Committee) person every time that it appeared in the OPRA response. (T1 19:1-6; T1

¹ References to "T1" are references to the January 29, 2013, transcript of these proceedings.

19:20 to T1 20:4; T1 28:15-23; T1 28:15 to T1 29:17.) There were also Commission² members whose email addresses were not redacted in the OPRA response. (T1 23:11 to T1 24:20; T1 26:15-24.)

Petitioner testified that Wantage Township assigned official Township email addresses to each Committee member. (T1 29:18-25.) The members receive communication about Township business at their personal email addresses because they get the correspondences immediately; in some instances, on their cell phones. (T1 30:1-12.) Petitioner referred to some email addresses as "personal business" email addresses because people such as Committee members Space and DeBoer, used the respective company email addresses to receive personal information. (T1 33:12 to T1 34:12.)

Petitioner testified that the Township business that was the subject of the OPRA requests was the Township's budget and municipal consolidation. (T1 30:13 to T1 31:14.) Petitioner wanted the email addresses because, in some of the emails that were sent, there were only email addresses in the "from" and "to" sections of the emails. As such, anyone reading the email would not know who sent it or to whom it was sent. He felt that information was important. (T1 32:3-11.)

James Doherty

James Doherty (Doherty) is the municipal clerk and municipal administrator and has been so since May 2000. (T1 54:14-16.) In that capacity he accepts OPRA requests, reviews them for appropriateness and validity under the law and then provides responses. (T1 36:12-24.)

Doherty testified that he redacted email addresses in the responses to petitioner's OPRA requests that were known to him to be personal private email addresses, or which he believed were personal private email addresses. (T1 38:1-8; T1

² "Commission" refers to the statutorily authorized group of citizens selected to study consolidation between Wantage and Sussex Borough. They were not "government officials" but were recipients of correspondences that form the basis of the within OPRA request.

42:15-23.) He concluded that the email address was a personal private email address if it had an address such as "hotmail.com" or "yahoo.com" or "one of the familiar common free email programs available." (T1 38:9-16.) He concluded that if the email address was known to him to be "in the public domain such as a business email address that is on a business card or is on a website," then he assumed that it was not a personal private email address. (T1 38:16-24.)

At the time that Doherty responded to the OPRA requests, he knew that Committeeman Space had a business called Space Farm Zoo and Museum and his personal private email address was in the public domain. (T1 56:18 to T1 57:4.) He stated that Committeeman DeBoer was a used-car salesman and used his personal private email address for business purposes. (T1 57:5-18.) With respect to Committeewoman Nuss, Doherty testified that he had spoken with her at or about the time that she took office regarding her email address. Committeewoman Nuss told him that she preferred that her email address not be made public. As such, he redacted her personal email address in the OPRA responses. Sometime after providing the responses he discovered that she was using that email address for business purposes and that members of the public contacted her directly at that email address. T1 58:1-21 Finally, Doherty testified that "all governing body members inform me not to use their personal email addresses, as disclosing them to the public, but the email addresses I was using for Mr. DeBoer and Mr. Space were not their personal email addresses, they were business email addresses." They never said that they wanted the email addresses to remain confidential. (T1 61:8-16.)

Doherty testified that the only inquiry that he made with any individuals regarding the disclosure of email addresses in the first OPRA request response was what he did

with every elected official of the Wantage Township Committee that starts their term in which I inquire, '[d]o you wish your personal private email address to be utilized on public records or not?' and that would determine whether or not, from that point forward, I release those email addresses. If they had indicated to me at that time, 'Yes, it's fine with me to use my personal private email address as a business email address,' then I would not have redacted it.

Other than that, no I did not make inquiries into any of the others.

[T1 39:1-16.]

He made no additional inquiry for his response to the second OPRA request. (T1 42:15 to T1 43:12.)

Doherty stated that as of January 26, 2009, the date that he responded to petitioner's first OPRA request, it was the Township's practice to communicate with Committee members³ via their personal email addresses even though they had official Township email addresses. (T1 40:11-25.) When he communicated with committee members in the normal course of business via email, Doherty selected a "group" such as "governing body." By typing in that group name, the email addresses of all of the members would automatically be included as recipients of the email. The group name included both the official email addresses of the members and their personal email addresses. (T1 41:9-25.)

Doherty testified that, prior to petitioner's OPRA requests, he had received legal advice as to whether personal private email addresses should be disclosed. He sought that advice from the municipal attorney who advised against disclosure, and relied upon that advice when responding to petitioner's OPRA requests. (T1 50:3-25.) The reason for concern about disclosing these email addresses is the

harvesting of personal private email address for use by others that may lead to identity fraud, that may lead to nuisance emails that may lead to invasions of privacy, that the person who provided the personal private email address to the government agency had never intended to happen at the time that they were providing the email address.

[T1 52:3-12.]

Doherty testified that at the time that he provided the response to the OPRA requests, he did not provide an index. It was not his normal practice to provide an

³ In January and February 2009, the fully constituted Township Committee was comprised of three elected members, Parker Space, William DeBoer, and Clara Nuss. (T1 55:9-23.)

index until "recent years" when the Government Records Counsel devised a Custodian's Handbook. The Handbook "recommends" that an index be prepared when a complaint or an objection has been filed regarding an OPRA request. (T1 62:14 to T1 63:7.)

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

OPRA is contained in N.J.S.A. 47:1A-1 to 18. As the Legislature declared in the first section of the act, the public policy in New Jersey is that government records shall be readily accessible for inspection, copying or examination, with certain exceptions for the protection of the public. N.J.S.A. 47:1A-1. In other words, "OPRA calls for the prompt disclosure of government records." Mason v. Hoboken, 196 N.J. 51, 65 (2007).

Toward this end, custodians of government records must grant access to them or deny a request for them as soon as possible but no later than seven business days after receiving the request, provided that the records are available and not in storage or archived. N.J.S.A. 47:1A-5(i). Failure to respond shall be deemed a denial. Ibid. If the records are in storage or archived, then the custodian must advise, within those seven days, when they will be made available. Ibid. Failure to make them available by that time shall also be deemed a denial. Ibid. Consequently, a person who is denied access may file a complaint with the GRC. N.J.S.A. 47:1A-6.

A custodian who is found to have knowingly and willfully violated the act, 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 knowing and willful violation, however, requires actual knowledge that the actions were wrongful. Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609, 619 (App. Div. 2008) (citing Fielder v. Stinak, 141 N.J. 101, 124 (1995); Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)).

Discussion

I. The Personal Email Addresses Should Not Be Disclosed Because OPRA's Dual Aims of Public Access and Protection of Personal Information Weigh in Favor of Redacting Those Email Addresses

The Open Public Records Act (OPRA) provides that "government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for protection of the public interest[.]" N.J.S.A. 47:1A-1. However, at the same time, "a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy[.]" Ibid.

OPRA broadly 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 in the course of his or its official business by any officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof, 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.

[Ibid.]

In addition to defining a government record, N.J.S.A. 47:1A-1.1 also states that such record shall not include "that portion of any document which discloses the social security number, credit card number, unlisted telephone number or driver license number of any person" except in limited specified circumstances. Ibid. N.J.S.A. 47:1A-5 adds that "[p]rior to allowing access to any government record, the custodian thereof shall redact from that record any information which discloses the social security number, credit card number, unlisted telephone number, or driver license number of

any person” except in limited circumstances. When access is denied, the public agency has the burden of proving that the denial was authorized by law. N.J.S.A. 47:1A-6.

Although N.J.S.A. 47:1A-5’s mandate for the redaction of the “social security number, credit card number, unlisted telephone number, or driver license number of any person” does not include email addresses, N.J.S.A. 47:1A-1’s directive that “a public agency has a responsibility and an obligation to safeguard from public access a citizen’s personal information with which it has been entrusted when disclosure thereof would violate the citizen’s reasonable expectation of privacy” may extend to email addresses. The New Jersey Supreme Court had explained that N.J.S.A. 47:1A-1’s safeguard against disclosure of personal information is substantive and requires “a balancing test that weighs both the public’s strong interest in disclosure with the need to safeguard from public access personal information that would violate a reasonable expectation of privacy.” Burnett v. County of Bergen, 198 N.J. 408, 422-23, 427 (2009).

When “balanc[ing] OPRA’s interests in privacy and access” courts consider the following factors:

(1) the type of record requested; (2) the information it does or might contain; (3) the potential for harm in any subsequent nonconsensual disclosure; (4) the injury from disclosure to the relationship in which the record was generated; (5) the adequacy of safeguards to prevent unauthorized disclosure; (6) the degree of need for access; and (7) whether there is an express statutory mandate, articulated public policy, or other recognized public interest militating toward access.

[Id. at 427 (quoting Doe v. Poritz, 142 N.J. 1, 88 (1995).]

A. Courts Have Required that Certain Personal Information Be Redacted From Records Released In Response to an OPRA Request Where OPRA’s Interest in Privacy Outweighs the Interest in Access

In Burnett, a commercial business requested approximately eight million pages of land title records extending over a twenty-two year period; the records contained

names, addresses, social security numbers, and signatures of numerous individuals. Burnett, supra, 198 N.J. at 418. After balancing the seven factors, the Court “[fou]nd that the twin aims of public access and protection of personal information weigh in favor of redacting [social security numbers] from the requested records before releasing them” because “[i]n that way, disclosure would not violate the reasonable expectation of privacy citizens have in their personal information.” Id. at 437. The Court emphasized that the “balance [wa]s heavily influenced by concerns about the bulk sale and disclosure of a large amount of social security numbers—which [the commercial business] admittedly does not need, and which are not an essential part of the records sought.” Id. at 414. Moreover, “the requested records [we]re not related to OPRA’s core concern of transparency in government.” Ibid.

Similarly, the Appellate Division has concluded that the identity of an individual who attempted suicide by jumping off a bridge should not be disclosed in an OPRA request seeking police and fire department reports about the incident under Burnett. Alfano v. Margate City, A-3797-11 (App. Div. September 25, 2012) (slip op. at 1-2, 8-10), <http://njlaw.rutgers.edu/collections/courts/>. The court noted that

[t]he trial judge correctly applied [the Burnett] factors in concluding that disclosure of the bicyclist’s identity could have severe consequences for him and his family because of the “traumatic event” that was the subject of the report. The disclosure of the names of bicyclist’s family members would also serve to reveal his identity. Thus, we believe that the judge correctly held that there was “no overarching need for a citizen to obtain this individual and his family’s names.”

[Id. at 8.]

However, the court rejected the trial judge’s decision to “to bar access to the entire report rather than provide [the requester] with a redacted copy that would have deleted all personal identifying information” and remanded the matter for redaction of the report to remove any identifying information. Id. at 8-10.

Additionally, the Government Records Council has repeatedly concluded that OPRA requests for the names and addresses of individuals falling within certain

categories should not be permitted because of the risk of unsolicited contact and/or intrusion following the release of such information. See e.g., Bernstein v. Borough of Allendale, Complaint No. 2004-195, Final Decision, Gov't Records Council (July 14, 2005), <<http://www.state.nj.us/grc/decisions/2004-195.html>> (concluding that the names and addresses of dog-license owners should not be disclosed because of the potential harm of unsolicited contact or intrusion); Faulkner v. Rutgers University, Complaint No. 2007-149, Final Decision, Gov't Records Council (May 28, 2008), <<http://www.state.nj.us/grc/decisions/pdf/2007-149.pdf>> (concluding that the names and addresses of Rutgers football season-ticket holders should not be disclosed because of the risk of unsolicited contact); Avin v. Borough of Oradell, Complaint No. 2004-176, Final Decision, Gov't Records Council (March 10, 2005), <<http://www.state.nj.us/grc/decisions/2004-176.html>> (concluding that the names and addresses of homeowners who applied for a fire or burglar alarm permit within a three-year period should not be disclosed because of the risk of unsolicited contact and safety concerns surrounding the identification of those homes which are, and conversely those which are not, secured with such devices).

B. *Courts Have Not Required Redaction of Certain Personal Information From Records Released In Response to an OPRA Request Where OPRA's Interest in Access Outweighs the Interest in Privacy*

In contrast, the Appellate Division has affirmed a trial court's determination that the identity of a person who called 911 complaining about illegal parking blocking his driveway should not be redacted when the owner of the car filed an OPRA request seeking a copy of the 911 call under Burnett. Ponce v. Town of W. New York, A-3475-10 (App. Div. February 27, 2013) (slip op. at 3-4, 10), <http://njlaw.rutgers.edu/collections/courts/>. The trial judge explained that

[t]he type of information requested by [the car owner] is not particularly sensitive or confidential. When the caller made a complaint [to] the police department that someone was blocking his or her driveway he or she could reasonably expect that his name may be revealed in connection with the complaint. There has not been evidence presented to suggest that revealing the caller's identity or the call itself would result in any serious harm or confrontation between

the caller and the - - [sic] and the [car owner]. It may in fact be helpful for the [car owner] to know the information in order to challenge his parking violation.

[Id. at 7-8.]

The Appellate Division emphasized that the city's arguments against disclosure of the caller's identity were "predicated on the notion that if [the car owner] learns the identity of his accuser he will retaliate in some fashion, thus discouraging the average person from reporting incidents to the police via the 911 emergency system." Id. at 9. However, the city "ha[d] not presented any evidence of past hostility between these two individuals" and the court emphasized that "[a]bsent compelling reasons, which are conspicuously absent in this record, few can argue that in a free society an accused is not entitled to know the identity of his accuser." Id. at 9-10. Therefore, the court concluded that "[n]one of the concerns in favor of confidentiality articulated by the Court in Burnett, supra, 198 N.J. at 427, [we]re applicable" and affirmed the trial court's decision ordering disclosure of the caller's identity. Ponce, supra, A-3475-10 at 10.

Similarly, the Appellate Division has concluded that addresses should not be redacted from a mailing list of self-identified "senior citizens" compiled by a county to contact those individuals through a newsletter. Renna v. County of Union, A-1811-10 (App. Div. February 17, 2012) (slip op. at 1, 11-12), <http://njlaw.rutgers.edu/collections/courts/>. A website operator filed an OPRA request seeking access to that mailing list so that he could disseminate information in furtherance of non-profit activities related to monitoring county government. Id. at 2. The court applied the Burnett factors. Id. at 11. The first two factors weighed in favor of disclosure, because "the intent and spirit of OPRA are to maximize public awareness of governmental matters" and "the interest in the dissemination of information, even that unrelated to senior matters, outweighs a perceived notion of expectation of privacy." Id. at 12.

The third factor did not expressly dictate confidentiality of the addresses because "[t]he trial court found that the real potential for harm in this case was unsolicited contact via door-to-door canvassing, mailing, or other contact by plaintiff's organization

or any other organization to which the list might be subsequently disclosed.” Id. at 12-13. The county “argue[d] that the trial court did not consider the possibility of potential victimization of seniors if the names and addresses of senior citizens were released.” Id. at 13. The court distinguished the risk of potential victimization present in Burnett, because in that case, “the presence of social security numbers along with other personal identifiers, such as home addresses and names, elevated the privacy concerns at stake.” Id. at 14. No similar personal identifier linked to the names and addresses existed in the mailing list sought. Id. at 14-16.

The fourth factor did not expressly dictate confidentiality because the harm was minimal where “the potential injury would be door-to-door canvassing or mailing from [the website operator]’s group or other groups that subsequently received the list” and the list was originally created “to notify seniors of available services,” and “[t]he list members signed up to receive information about governmental services.” Id. at 16-17. In considering the fifth factor, the court emphasized that “the trial court found there were no safeguards to prevent disclosure of the names and addresses on the list” but “[t]he ‘senior citizen’ designation does not reveal any personal information about the individuals on the list, not even their ages.” Id. at 18.

The sixth factor weighed in favor of disclosure because the website operator sought the list to further civic activities of his group, and that group “[wa]s specifically aimed at furthering the stated goals of OPRA.” Id. at 18. The group sought to “inform citizens of government activities in Union County” which was “consistent with OPRA’s objective to ‘maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process.’” Id. at 18-19 (quoting Times of Trenton Publ’g Corp. v. Lafayette Yard Cmty. Dev. Corp., 183 N.J. 519, 535 (2005)).

Under the seventh factor, “the trial court noted that plaintiff has a First Amendment free speech right to contact citizens and discuss the Watchdog’s activities” but the county “argue[d] that [the website operator]’s First Amendment right is not compromised if she does not receive the addresses, rather she is free to contact

anyone she desires, but that contact should not be limited to a particular class of vulnerable citizens.” Renna, supra, A-11811-10 at 19. However, the county

“failed to demonstrate that the list is comprised of names belonging only to senior citizens; nor has it shown that the fact that [the website operator] can contact as many people as she desires has adverse policy consequences such that it weighs against disclosure of the addresses on this particular list.

[Id. at 19-20.]

Therefore, the court concluded that the trial judge properly applied the Burnett factors and ordered release of the addresses. Id. at 20-21.

Other lists of names and addresses of individuals falling within certain categories compiled by government entities have also been deemed subject to disclosure under Burnett. See, e.g., Atl. County SPCA v. City of Absecon, A-3047-07 (App. Div. June 5, 2009) (slip op. at 1-2, 20-21), <http://njlaw.rutgers.edu/collections/courts/> (applying the Burnett factors and concluding that the names and addresses of licensed dog owners in Atlantic County should have been disclosed in response to an OPRA request seeking that information); Bolkin v. Kwasniewski, No. L-6547-12 (Law Div. December 5, 2012) (slip op. at 1-3, 30) (applying the Burnett factors and concluding that the names and addresses of pet owners in Fair Lawn should have been disclosed in response to an OPRA request seeking that information).

C. *Application of the Burnett Factors to Balance OPRA’s Interests in Privacy and Access in the Present Matter Dictates that the Redacted Email Addresses Contained in the Emails Not Be Disclosed*

The present matter requires application of the Burnett factors to balance OPRA’s dual interests in privacy and access as applied to the release of personal email addresses contained in a government record. Notably, both the Government Records Council and the Superior Court Law Division have considered whether the release of individuals’ email addresses is appropriate in response to an OPRA request under the Burnett analysis. See Mayer v. Borough of Tinton Falls, Gov’t Records Council Complaint No. 2008-245, Findings and Recommendations of the Executive Dir., Gov’t

Records Council (April 1, 2010), <<http://www.nj.gov/grc/decisions/pdf/2008-245.pdf>>; Mayer v. Borough of Tinton Falls, Gov't Records Council Complaint No. 2008-245, Interim Order, Gov't Records Council (April 13, 2010), <<http://www.nj.gov/grc/decisions/pdf/2008-245.pdf>>; Geier v. Twp. of Plumsted, No. L-3718-09 (Law Div. March 19, 2010) (letter op. on motion on reconsideration).⁴

In Mayer, the complainant, a candidate for and subsequent member of a borough's town council, alleged that another councilman used email addresses that he obtained from the town's website to disseminate campaign materials in an email newsletter. Mayer, supra, GRC Complaint No. 2008-245, Findings and Recommendations of the Executive Dir. at 23. The complainant asserted that he needed access to the list of email addresses "to see who had received what he deemed to be opinionated and biased newsletters and to enable the [town council] to provide a fair and balanced view of [town council] news and events." Ibid.

The Government Records Council's Executive Director weighed the Burnett factors and explained that "there is sufficient concern here to limit access to individuals' home e-mail addresses, particularly when the information is combined with other personal identifying information" but "in the narrowly construed window of political activity" the recognized public interest swings the analysis toward disclosure. Ibid. Therefore she concluded that "because the e-mail addresses collected through the [town]'s website are a government record, and because said addresses were used by [the town councilman] for political campaigning purposes, and because voter registration information may be disclosed to members of the public pursuant to N.J.S.A. 19:31-18.1(a), the e-mail addresses collected through the [town]'s website are subject to disclosure under OPRA." Mayer, supra, GRC Complaint 2008-245, Findings and

⁴ Geier is an unpublished decision from the Law Division and not available on Lexis or the Rutgers website. Mayer indicates that the parties had provided the Government Records Council with a copy of the October 2009 Geier decision. However, a copy of that October 2009 decision is not readily available. However, the New Jersey State League of Municipalities subsequently entered that litigation as an intervenor, and the township moved for reconsideration of the trial court's October 2009 Order directing that an email list used and maintained to distribute township alert emails be released. The trial court then issued a letter, dated March 19, 2010, concluding that its earlier decision was not based upon "a palpably incorrect or irrational basis" or "failed to consider or overlooked competent evidence." Geier, supra, No. L-3718-09 (motion on reconsideration at 6). That March 2010 letter decision is available from the New Jersey State League of Municipalities website at <<http://www.njslom.org/documents/geier-decision.pdf>>.

Recommendations of the Executive Dir. at 23. The Government Records Council adopted the Executive Directors recommendations. Mayer, supra, GRC Complaint No. 2008-245, Interim Order at 1-2.

Although the facts in Mayer are not directly analogous to the present situation, the analysis regarding particular Burnett factors is informative when applying those factors in the present case, as discussed below. See Mayer, supra, GRC Complaint No. 2008-245, Findings and Recommendations of the Executive Dir. at 23.

i. Burnett Factors One and Two

The first and second Burnett factors require consideration of the records requested, and the type of information contained therein, respectively. Petitioner asserts that these two factors weigh in favor of disclosure because the emails are public records and “because we know what type of information is being sought; there is no possibility of information being accidentally disclosed.” (Pet’r’s Letter Br. at 12 (February 26, 2013).) Respondent emphasizes that the email addresses sought are private email addresses. (Resp’t’s Letter Br. at 12 (February 25, 2013).) Notably, petitioner requested email communications and was granted access to those emails. The parties do not dispute that the emails themselves constitute government records subject to disclosure. However, certain personal email addresses contained in those emails constitute the information relevant to the current matter. Since the emails themselves were disclosed, disclosure of the redacted email address is not warranted under these two factors.

ii. Burnett Factors Three and Four

The third and fourth Burnett factors address the potential for harm in subsequent nonconsensual disclosure of the email addresses, and the injury from disclosure to the relationship in which the record was generated, respectively. Petitioner asserts that “there is no realistic possibility for any harm” and, “unlike a social security number or bank account number, [a person’s email address] is simply not very useful in stealing a

person's identity." (Pet'r's Letter Br. at 12.) Respondent disagrees and notes that these factors were examined in Mayer. (Resp't's Letter Br. at 12.)

Contrary to petitioner's assertion, a significant risk of harm exists when releasing email addresses; that potential harm was thoroughly examined in Mayer, where it was explained that

[a] person's e-mail address is a unique personal identifier. Communication via the internet is possible only because an e-mail address distinctly identifies a person or entity. Due to its uniqueness, e-mail addresses may be likened to unlisted telephone numbers. "Electronic mail shares some features with telephonic communication, which generally is not stored in any form and is generally regarded as private" Upon Pet. of Bd. of County Comm'rs, 95 P.3d 593 (Colo. D.C. 2003). As unlisted telephone numbers are exempt from disclosure under OPRA, e-mail addresses, similarly, should be accorded a higher level of protection from disclosure under OPRA.

Although OPRA does not specifically name personal e-mail addresses among the list of personal identifiers exempt from disclosure, the statute should not be interpreted rigidly. The Court in Burnett, supra, found:

"[w]e likewise doubt the Legislature envisioned plaintiff's actual request when it adopted OPRA. We recognize that '[i]t is frequently difficult for a draftsman of legislation to anticipate all situations and to measure his words against them. Hence cases inevitably arise in which a literal application of the language used would lead to results incompatible with the legislative design.'" Burnett, supra, 198 N.J. at 425 (quoting New Capitol Bar & Grill Corp. v. Div. of Employment Sec., 25 N.J. 155, 160 (1957)).

Moreover, since OPRA's inception in 2002, advancements in computer technology facilitating disclosure of personal identifying information have been linked to an increase in instances of identity theft. The Burnett Court stated its "alarming" concern over the statistics of identity theft—nearly ten million Americans, or five percent of the country's population, have been victimized by identity theft. Burnett, supra, 198 N.J. at 432.

There is also a privacy interest in non-disclosure of an individual's e-mail address because e-mail addresses

maintain an individual's anonymity. Anonymity could be compromised if e-mail addresses are released to the public, especially when an e-mail address is contemporaneously coupled with or later used to obtain other personal identifying information such as a name and home address. It is precisely this concern for the grouping of personal identifying information that "elevates the privacy concern at stake," and led the Doe and Burnett Courts to rule in favor of confidentiality. Doe, supra, 142 N.J. at 83; Burnett, 198 N.J. at 436. The Doe and Burnett decisions are consistent with the spirit of the federal CANSPAM Act of 2003, 15 U.S.C.S. § 7701. The United States Congress enacted this legislation to combat the abuses with commercial distribution of e-mail addresses. The Act underscores the importance of e-mail, and recognizes the heightened privacy interest in non-disclosure of e-mail addresses. A post-enactment review of the law determined, in pertinent part, that "[i]ndividuals maintain a higher expectation of privacy with regard to e-mail addresses due to the nonexistence of an e-mail address directory similar to a phone book. E-mail addresses maintain anonymity, and certainly are not a matter of public record." Erin Elizabeth Marks, Spammers Clog In-Boxes Everywhere: Will the CANSPAM Act of 2003 Halt the Invasion?, 54 Case W. Res. L. Rev. 943 (Spring 2004). Email addresses would lose their anonymity if disclosed, thus making an individual more vulnerable to an invasion of privacy.

Furthermore, disclosure of e-mail addresses can create a heightened risk of identity theft. In determining whether an individual's social security number should be disclosed, the Burnett Court, as noted above, expressed particular concern for the risk of identity theft given the alarming statistics for this cybercrime in one year. Burnett, 198 N.J. 432. Similarly here, disclosure of e-mail addresses leaves individuals more exposed to spamming, phishing, and other direct "cyberassaults." Phishing is "a scam by which an e-mail user is duped into revealing personal or confidential information which the scammer can use illicitly." <http://www.merriam-webster.com/dictionary/phishing>. Phishing is most concerning because it is carried out through e-mail, and an unscrupulous person or organization only needs an unknowing victim's e-mail address to "phish" for an individual's financial and other personal information. The problem is one of control. If public disclosure of the e-mail addresses is made, then the addresses may be accessed by any person or entity for any purpose.

[Mayer, supra, GRC Complaint No. 2008-245, Findings and Recommendations of the Executive Dir. at 18-20.]

Similar, significant concerns about the potential harm of subsequent nonconsensual disclosure of the email addresses exist here, and weigh against the release of the email addresses.

iii. Burnett Factor Five

The fifth Burnett factor requires consideration of the adequacy of safeguards to prevent unauthorized disclosure of the email addresses. Petitioner suggests that “[t]he fifth factor is neutral, as the [custodian] did not discuss safeguards to keep e-mail addresses private.” (Pet’r’s Letter Br. at 13.) Respondent again disagrees, and notes that this factor was examined in Mayer. In Mayer, it was explained that

[i]f the e-mail addresses were to be disclosed, there are no reasonable safeguards in place to protect against unauthorized dissemination of such addresses. Thus, there is nothing to prevent a bulk distribution of the e-mail addresses to other entities, which exposes individuals further to phishing, spamming and other forms of cyber security breaches.

[Mayer, supra, GRC Complaint No. 2008-245, Findings and Recommendations of the Executive Dir. at 20.]

Again, identical concerns about the lack of any safeguards to prevent unauthorized disclosure following release of the email addresses exist here, and weigh against the release of the email addresses.

iv. Burnett Factor Six

The sixth Burnett factor addresses the degree of need for access to the email addresses. Petitioner argues that this factor weighs in favor of access, because “[m]embers of the public have a high degree of need for the information.” (Pet’r’s Letter Br. at 13.) When asked what his interest in the email addresses was, petitioner testified that

[i]n a number of the emails that were sent out, the only information contained in the 'from' and the 'to' was an email address and it was redacted. Because of that you have no idea who originated the email, or in some cases, who it was sent to. And I think that information is important to know.

However, petitioner proffered a different reason for his need for access to the email addresses in his brief, and stated that

[t]he sixth factor weighs in favor of access. Members of the public have a high degree of need for the information. With respect to Township Committee members, the unequivocal testimony showed that Wantage Township Committee members checked their personal Township email faster, because they could access them through their phones, rather than their official Wantage email addresses, where apparently e-mails languished unread.⁵ With respect to the Consolidation Commission members, there was no evidence that they even had public e-mail addresses, therefore the *only* way to communicate with them via e-mail regarding Commission business was to send them e-mails to the personal email addresses they were using for public business.

[Pet'r's Letter Br. at 13.]

Respondent addressed the asserted need for the email addresses that petitioner testified about;⁶ respondent argued that that petitioner's

sole reason for requesting the private e-mail addresses of the Consolidation Study Commission Members and the Township Committee Members was that [sic] needed to know who was sending and who was receiving an e-mail. However, [petitioner] did not testify to a single instance . . . , where a redacted e-mail address prevented him from having that information.

[Resp't's Letter Br. at 15.]

⁵ Petitioner's assertion that emails sent to individuals' official Wantage email addresses "languished unread" is not supported by the record.

⁶ Due to the date of the briefs, it is unlikely that respondent was aware that petitioner was asserting a different need for the email addresses than the need that he proffered during his testimony.

Petitioner's explanation as to why he needs access to the redacted email addresses, either during the hearing or as presented in his brief, is not compelling. Notably, in most instances where an email address was redacted, the name of the owner of that email address is prominently displayed next to the redaction—of the approximately sixty-nine relevant redactions in P-1, the identity of the owner of the redacted email address was readily apparent in fifty-one instances. Of the approximately twenty-seven relevant redactions in P-2, the owner of the redacted email address was readily apparent in all but a single instance.

Notably, petitioner's need for access, to the extent that he wants to be able to contact Committee or Commission members via email, is not similar to the need for access in Mayer. Nor is the need for information similar to Renna, where the website operator sought access to a county's email list of self-identified "senior citizens" to further the activities of a group "specifically aimed at furthering the stated goals of OPRA" by "inform[ing] citizens of government activities in Union County[.]" Renna, supra, A-1811-10 (slip op. at 18-19).

Petitioner has not provided a clear explanation regarding how he intends to utilize the email addresses, if disclosed. Moreover, inconsistency exists between his claimed need for the information while testifying and subsequently presented in his brief. His testimony suggested that his need for access to the email addresses related to his desire to know who originated and received the emails. However, his brief suggested that his need for the email addresses was because he wanted to be able to communicate with Committee members in a "faster" manner than would be possible than if he were to utilize their official Wantage email addresses and wanted to communicate with Commission members who might not have public email addresses. Petitioner has not presented a compelling argument for why he needs to contact these individuals through their personal email addresses. However, to the extent that the identity of the owner of some of the redacted email addresses is not readily apparent, petitioner has presented a compelling need to know the name of those individuals participating in the released email communications.

v. Burnett Factor Seven

The seventh Burnett factor requires consideration as to whether an express statutory mandate, articulated public policy, or other recognized public interest militating toward access to email addresses exists. Petitioner suggests that “there is an express statutory mandate militating toward access, which is the [State’s Division of Archives and Records Management] circular . . . that requires public emails to be classified and retained.” (Pet’r’s Letter Br. at 13.) Petitioner asserts that the Division of Archives and Records Management Circular Letter No. 03-10-ST “sets forth standards governing the use, deletion and retention of e-mail” and “[a]ccess to the name of a public official’s e-mail account becomes important because once it is used for public business, it becomes the repository of public records.” (Id. at 11.) He emphasizes that “[t]his information is important for those members of the public who are seeking copies of public records that may not have been retained on official servers or in circumstances where public business is being conducted completely on private domain servers.” (Ibid.)

However, that Circular Letter does not suggest that a public interest militating toward public access to personal email addresses exists, as suggested by petitioner. The Circular Letter was issued “to provide and explain requirements, guidelines and best practices for electronic mail (e-mail) messages that meet the criteria for public records as defined by the [Destruction of Public Records Law (1953), N.J.S.A. 47:3-16 to -32]”. Circular Letter No. 03-10-ST at 1, Division of Archives and Records Management, effective July 11, 2002 <<http://www.nj.gov/state/darm/pdf/circular-letter-03-10-st.pdf>>. The Circular Letter notes that emails could be public records under the then-recently enacted OPRA, and public records must be retained under the Destruction of Public Records Law. Id. at 4. However, there is no dispute that the emails in question here constitute public records, even when a personal email account is utilized rather than individuals’ official Wantage email addresses. In fact, such emails have been disclosed in the present matter, with personal email addresses redacted.

In contrast, respondent emphasizes that pending legislation is “well along in the process of removing e-mail addresses as a government record discloseable under OPRA.” (Resp’t’s Letter Br. at 16.) The State Assembly passed a bill that would amend the language of N.J.S.A. 47:1A-1.1 to exclude “email address[es]” from being considered part of a government record by a vote of seventy-four (74) to zero (0) on December 3, 2012; Assembly Bill No. A-1280 amends the language of N.J.S.A. 47:1A-1.1 such that a government record shall not include “that portion of any document which discloses the social security number, credit card number, unlisted telephone number, **e-mail address**, or driver license number of any person[.]” An identical bill was introduced in the State Senate on January 28, 2013, Senate Bill No. S-2487, but has not been voted upon at this time. See New Jersey Legislature Bills 2012-2013, <<http://www.njleg.state.nj.us/bills/BillsByNumber.asp>>.

Although the legislation has not been enacted into law at this time, it suggests the existence of a public policy in favor of the confidentiality of email addresses, rather than militating toward access to email addresses. Further support for such a public policy was identified in Mayer, where it was noted that “the federal government emphasized the strong public policy for confidentiality of e-mail addresses in enacting the CAN-SPAM Act of 2003.” Mayer, *supra*, GRC Complaint No. 2008-245, Findings and Recommendations of the Executive Dir. at 23. Therefore, contrary to petitioner’s assertion, no express statutory mandate, articulated public policy, or other recognized public interest militating toward access to email addresses exists.

vi. *Balancing of the Burnett Factors*

On balancing the Burnett factors, OPRA’s dual object to provide both public access and protection of personal information, weigh in favor of redacting the personal email addresses from the disclosed emails. Most notably, the potential for harm in subsequent nonconsensual disclosure of the email addresses and the lack of any adequate safeguards that would prevent unauthorized disclosure of the email addresses outweigh the degree of need for access to the email addresses proffered by petitioner. There is no dispute that the emails themselves constitute public records,

and those emails have already been disclosed. Disclosure of the emails with redaction of the email addresses does not violate the reasonable expectation of privacy these individuals have in their personal information. However, where the identity of the owner of the redacted email address is not readily apparent—particularly where the name of the owner is not prominently listed next to the redacted email address—the custodian should provide the name of the owner of those redacted email addresses, because petitioner has presented a compelling need for the identity of those individuals.

II. Although Legislation Is Not Usually Applied Retroactively, Retroactive Application of the Legislation Recently Passed by the State Assembly Amending OPRA By Excluding Email Addresses from Government Records May Be Appropriate If Enacted into Law, Because the Nature of that Amendment is Curative

As noted above, the State Assembly recently passed Assembly Bill No. A-1280 on December 3, 2012, and it would amend the language of N.J.S.A. 47:1A-1.1 to exclude email addresses from being considered part of a government record in the same way that a social security number, credit card number, unlisted telephone number, or driver license number are already expressly excluded; an identical bill was introduced in the State Senate on January 28, 2013, Senate Bill No. S-2487, but has not been voted upon at this time. See New Jersey Legislature Bills 2012-2013, <<http://www.njleg.state.nj.us/bills/BillsByNumber.asp>>. Additionally, both bills indicate that “[t]his act shall take effect immediately.” Ibid. The corresponding Statements to both bills and Assembly State Government Committee Statement each explains that

[t]his bill revises the definitions section of what is commonly known as the Open Public Records Act (OPRA), P.L. 1963, c. 73 (C.47:1A-1 et seq.) as amended and supplemented by P.L. 2001, c. 404 (C.47:1A-5 et seq.), to include e-mail addresses on the list of confidential items that must be redacted from any public record disclosed under the provisions of the act.

[Assembly Bill No. A-1280, Statement, (passed January 10, 2013); Senate Bill No. S-2486, Statement, (introduced January 28, 2013); Assembly State Gov’t Comm., Statement to A-1280, (November 19, 2012).]

New Jersey courts “have long followed a general rule of statutory construction that favors prospective application of statutes.” Cruz v. Central Jersey Landscaping, 195 N.J. 33, 45 (2008) (quoting Gibbons v. Gibbons, 86 N.J. 515, 521 (1981)). “A statute will be given retroactive effect only (1) where the Legislature has declared such an intent, either explicitly or implicitly, (2) when an amendment is curative, or (3) ‘when the expectations of the parties so warrant.’” Botis v. Estate of Kudrick, 421 N.J. Super. 107, 116 (App. Div. 2011) (quoting Cruz, *supra*, 195 N.J. at 45).

Although the pending legislation indicates that the “act shall take effect immediately[,]” courts have explained that identical “language provides ‘no clear indication’ as to whether the Legislature intended the amendment ‘to apply to claims that were pending on the date of its enactment.’” See Botis, *supra*, 421 N.J. Super. at 116 (quoting Bunk v. Port Auth., 144 N.J. 176, 194 (1996)). Regardless, the proposed amendment to N.J.S.A. 47:1A-1.1 merely revises that statute to add email addresses to the specified personal information excluded from being considered part of a government record consistent with the four categories of information already excluded. I am not persuaded by respondent’s argument that, because the legislation is “well along in the process,” the email addresses should be disclosed. (Resp’t’s Letter Br. at 16.) It has not been enacted as of the date of this Initial Decision and therefore has no probative value other than to illustrate the public policy intent of one House of the New Jersey legislature as described herein.

For the foregoing reasons, I **CONCLUDE** that, OPRA’s dual aims of public access and protection of personal information weigh in favor of redacting the personal email addresses from the disclosed emails in the present case. I **CONCLUDE** that the potential for harm in subsequent nonconsensual disclosure of the email addresses and the lack of any adequate safeguards that would prevent unauthorized disclosure of the email addresses outweigh the degree of need for access to these email addresses. I further **CONCLUDE** that the public interest in knowing to whom public records are sent dictates in favor of disclosure of the names of the email “senders” and “recipients” where only the redacted email address is present on the subject emails.

I further **CONCLUDE** that respondent did not knowingly and willfully deny petitioner access to the records requested. Finally, I **CONCLUDE** that respondent did not unreasonably deny petitioner's access to the record.

ORDER

Based upon my **FINDINGS OF FACT** and **CONCLUSIONS OF LAW**, I **ORDER** that an Initial Decision be entered in favor of respondent. I further **ORDER** that for those redacted email addresses in Exhibit P-1 and in Exhibit P-2, where no name is displayed, that respondent provide the name of the individual "sender" or "recipient," respectively, to petitioner.

I hereby **FILE** my Initial Decision with the **GOVERNMENT RECORDS COUNCIL** for consideration.

This recommended decision may be adopted, modified or rejected by the **GOVERNMENT RECORDS COUNCIL**, who by law is authorized to make a final decision in this matter. If the Government Records Council does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **EXECUTIVE DIRECTOR OF THE GOVERNMENT RECORDS COUNCIL, 101 South Broad Street, P.O. Box 819, Trenton, New Jersey 08625-0819**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.



May 28, 2013

DATE

LELAND S. McGEE, ALJ

Date Received at Agency:

May 28, 2013

Date Mailed to Parties:

LSM/lr

APPENDIX

Witnesses

For Petitioner:

William Gettler
James Doherty

For Respondent:

None

Exhibits

For Petitioner:

P-1 Response to OPRA request dated January 26, 2009
P-2 Response to OPRA request dated February 9, 2009

For Respondent:

None



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Acting Commissioner

INTERIM ORDER

January 31, 2012 Government Records Council Meeting

William Gettler
Complainant

Complaint No. 2009-73 & 2009-74

v.

Township of Wantage (Sussex)
Custodian of Record

At the January 31, 2012 public meeting, the Government Records Council (“Council”) considered the January 24, 2012 Supplemental and *In Camera* Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. By a majority vote, the Council adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Complainant has failed to establish in his request for reconsideration of the Council’s August 24, 2010 Final Decision and Order 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 determining this complaint, and failed to submit any evidence to establish that the Complainant’s January 21, 2009 request was not overly broad and therefore invalid under OPRA, 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).
2. Because the Custodian provided the GRC with a legal certification, the unredacted records requested for the *in camera* inspection and a document index on September 1, 2010, the Custodian timely complied with the Council’s August 24, 2010 Interim Order.
3. The Custodian has unlawfully denied access to portions of the e-mail dated February 2, 2009 at 13:14:22 from the Custodian to Ms. Nuss re: Re: seniority list. Therefore, the Custodian must disclose to the Complainant those portions of Item No. 20 of the *in camera* table as indicated.
4. The method of “whiting out” the portions of the final four (4) e-mails provided did not allow the Complainant to clearly identify the specific location of redacted



material. Therefore, the Custodian's method of "whiting out" the requested e-mails is not "a visually obvious method that shows ... the specific location of any redacted material in the record" and is thus not appropriate under OPRA. N.J.S.A. 47:1A-5.g.

5. Because of the conflicting evidence on this point, it is necessary to refer this matter to the Office of Administrative Law to resolve the facts. In so doing, the Administrative Law Judge should determine the disclosability of these e-mail addresses. Further, the GRC requests that the Administrative Law Judge combine compliance of this Interim Order with compliance of the Administrative Law Judge's initial decision, if any. Finally, the Administrative Law Judge should determine whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Interim Order Rendered by the
Government Records Council
On The 31st Day of January, 2012

Robin Berg Tabakin, Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: February 3, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental and *In Camera* Findings and Recommendations
of the Executive Director
January 31, 2012 Council Meeting**

**William Gettler¹
Complainant**

GRC Complaint No. 2009-73 & 2009-74³

v.

**Township of Wantage (Sussex)²
Custodian of Records**

Records Relevant to Complaint:

January 21, 2009 OPRA request:⁴

Copies of every item of correspondence sent or received by any official and/or any employee of the Township of Wantage (“Township”) from December 1, 2008 to January 22, 2009 that relates to the New Jersey Department of Community Affairs’ (“DCA”) Report: “Fiscal Aspects of Consolidating Sussex Borough and Wantage Township” dated November 2008 or that relates to the Complainant.⁵

February 6, 2009 OPRA request:⁶

Copies of all communications (electronic or paper and including any attachments) between Parker Space (“Mayor Space”), Mayor; Clara Nuss (“Deputy Mayor Nuss”), Deputy Mayor; Bill DeBoer (“Committeeman DeBoer”), Committeeman; the Custodian and/or Michelle La Starza (“CFO La Starza”), Chief Financial Officer, regarding the budget, proposed budget or proposed bonds between the dates of January 21, 2009 to February 6, 2009.

Requests Made: January 21, 2009 and February 6, 2009

Responses Made: January 26, 2009 and February 9, 2009

Custodian: James Doherty

GRC Complaint Filed: March 3, 2009⁷

Records Submitted for *In Camera* Examination: Seventeen (17) unredacted e-mails requested for the *in camera*.⁸

¹ No legal representation listed on record.

² Represented by Michael Garofalo, Esq., of Laddey, Clark & Ryan Law Offices, LLC (Sparta, NJ).

³ The Government Records Council has consolidated these matters for adjudication due to the commonality of the parties.

⁴ This request is the subject of GRC Complaint No. 2009-73.

⁵ The Complainant states that he is not requesting a copy of the report.

⁶ This request is the subject of GRC Complaint No. 2009-74.

⁷ The GRC received the Denial of Access Complaint on said date.

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Background

August 24, 2010

Government Records Council's ("Council") Interim Order. At its August 24, 2010 public meeting, the Council considered the August 20, 2010 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. Therefore, because the Complainant's January 21, 2009 request fails to specify identifiable government records and would require the Custodian to conduct research to identify and locate government records which may be responsive to the request, the Complainant's request is overly broad and is therefore invalid under OPRA. MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005), and New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007). Therefore, the Custodian has not unlawfully denied access to the requested records. *See also* Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).
2. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the sixteen (16) e-mails to determine the validity of the Custodian's assertion that the records constitute advisory, consultative or deliberative material which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
3. Because the Custodian has raised the issue that disclosure of private e-mail addresses implicates privacy concerns under OPRA, the Complainant and the Custodian must complete a balancing test chart. The GRC is therefore sending this to the parties contemporaneously with the Council's decision. **The parties must complete this questionnaire and return it to the GRC within five (5) business days of receipt thereof.**
4. The GRC must also conduct an *in camera* review of all records responsive to the Complainant's February 6, 2009 OPRA request containing redactions of e-mail addresses to determine if the asserted privacy interests apply to the redacted e-mail addresses. The Custodian must also provide a **comprehensive document index** for all records responsive to the Complainant in response to his February 6, 2009 OPRA request.
5. **The Custodian must deliver⁹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see Item No. 2 and No. 4**

⁸ The GRC originally ordered sixteen (16) e-mails to be provided for an *in camera* review. The Custodian subsequently submitted four (4) additional e-mails for an *in camera* review at the request of the GRC. Three (3) of the twenty (20) e-mails are duplicates.

⁹ The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

above), the requested comprehensive document or redaction index,¹⁰ as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,¹¹ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.

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

August 26, 2010

Council's Interim Order distributed to the parties.

September 1, 2010

Certification of the Custodian in response to the Council's Interim Order with the following attachments:

- Sixteen (16) unredacted e-mails.
- General document index.
- Comprehensive document index attached to each e-mail describing the record content, the potential harm in any subsequent non-consensual disclosure, the injury from disclosure, and the adequacy of safeguards to prevent unauthorized disclosure.

The Custodian certifies that the enclosed records are the records requested by the GRC for an *in camera* inspection. The Custodian also certifies that he is the Municipal Administrator/Clerk of the Township and the Records Custodian of same. Additionally, the Custodian certifies that he treated the personal e-mail addresses of the Mayor and Township Committee members as private, unlisted telephone numbers under OPRA. Further, the Custodian asserts that disclosure of personal, private e-mail addresses would constitute an invasion of privacy, subject the individuals to the possibility of identity theft, and open up the possibility of receiving malicious and undesirable electronic communications, commonly referred to as viruses, malware and spam.

The Custodian certifies that the Mayor and all Township Committee members have a Township-issued e-mail address which is disclosed to the public. The Custodian also certifies that all communications to and from the elected officials utilize this official e-mail address. The Custodian certifies that the secondary inclusion of the personal, private and unlisted e-mail addresses of those individuals represents an ancillary preference of the elected officials for purpose of their own convenience and not for public dissemination. Further, the Custodian certifies that the private e-mail addresses are not

¹⁰ The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

¹¹ "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."

an integral or relevant part of the records requested. The Custodian certifies that the disclosure of same is not necessary in order for the Complainant to have full knowledge and understanding of the contents of the requested e-mails, nor is it necessary in order to contact his elected representatives since the official e-mail address is included in every record created involving communications to or from the elected officials.

The Custodian states that his responses to the balancing test chart required to be completed pursuant to the Council’s August 24, 2010 Interim Order are as follows:

Factors for Consideration in Balancing Test	Custodian’s Response
1. The type of records requested.	The Custodian certifies that the type of records requested are e-mails containing advice on topics related to official Township business.
2. The information the requested records do or might contain.	The Custodian certifies that aside from the material that he believes to be exempt as advisory, consultative or deliberative (“ACD”) material, private e-mail addresses are contained in the e-mails in question.
3. The potential harm in any subsequent non-consensual disclosure of the requested records.	The Custodian argues that release of personal and private e-mail addresses would circumvent the spirit and intent of the Custodian’s “obligation to safeguard from public access a citizen’s personal information.”
4. The injury from disclosure to the relationship in which the requested record was generated.	The Custodian argues that invasion of privacy, possible identity theft and undesired malicious e-mail messages (such as spam, viruses and malware) could result if personal e-mail addresses are disclosed.
5. The adequacy of safeguards to prevent unauthorized disclosure.	The Custodian certifies that he reviews all records prior to disclosing them to a requestor in accordance with the requirements of OPRA.
6. Whether there is an express statutory mandate, articulated public policy or other recognized public interest militating toward access.	The Custodian certifies that there is no express statutory mandate, articulated public policy or other recognized public interest militating toward access.

September 6, 2010

Letter from the Complainant to the GRC. The Complainant states that pursuant to a telephone conversation with the GRC, the Complainant requests a stay of the Council's August 24, 2010 Interim Order. The Complainant further requests an extension of time until September 20, 2010 to submit a request for reconsideration and the requested balancing test.

September 13, 2010

Letter from the GRC to the Complainant. The GRC states that it is in receipt of the Complainant's letter dated September 6, 2010. Additionally, the GRC states that pursuant to *N.J.A.C. 5:105-2.10*, a request for reconsideration is due within ten (10) business days from receipt of the Council's Interim Order, or September 14, 2010.

Thus, the GRC grants the Complainant an extension of time until September 22, 2010 to submit the request for reconsideration and balancing test.

September 19, 2010

Complainant's request for reconsideration¹² and completed balancing test questionnaire. The Complainant requests that the GRC reconsider conclusion No. 1 of the Council's August 24, 2010 Interim Order (holding that the Complainant's January 21, 2009 request is overly broad) based on a mistake. The Complainant asserts that he believes the GRC's analysis and determination that the Complainant's January 21, 2009 request was overly broad is in error.

The Complainant states that his January 21, 2009 request sought a "... true and complete copy of every item of correspondence (letters, memos, faxes, e-mails, web site, etc.)..." The Complainant states that in its August 24, 2010 Interim Order, the Council held that:

"the Complainant's [January 21, 2009] request for 'every item of correspondence sent or received ...' would require the Custodian to review all correspondence received or sent by any official and/or any employees of the Township *over more than a year's time period* to determine which records may be responsive to the Complainant's request..." (Emphasis added.) *Id.* at pg. 15.

The Complainant contends that the Township is a small municipality and that his request was very specific in that the Complainant sought records over a two (2) month period (December 2008 to January 22, 2009), not over a year's time as stated in the Council's Interim Order, and concerning one (1) specific report. The Complainant asserts that every record requested was a current record requiring no research on the part of the Custodian.

The Complainant states that in the Custodian's initial response dated January 26, 2009, the Custodian never claimed that the request would require research; rather, the

¹² The Complainant submitted his request for reconsideration on the GRC's request for reconsideration form.
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Custodian provided some records and denied access to other records responsive to the Complainant’s request within the time frame which were identified based on key words. The Complainant argues that the Custodian attempted to employ semantics when initially responding to the Complainant’s request by stating that same was vague “as [the Complainant] used the word ‘etc.’” The Complainant contends that if the Custodian really believed the request was invalid, he would not have undertaken the task of locating records.

The Complainant states that the Council further held that “the Custodian has not unlawfully denied access to the requested records.” Council’s August 24, 2009 Interim Order. The Complainant contends that he does not agree with this statement and questions whether it was based on the Custodian’s initial response in which he objected to the use of the word “etc.”

The Complainant states that the Custodian denied access to three (3) e-mails responsive to his January 21, 2009 request.¹³ The Complainant questions why the GRC has not ordered disclosure of these three (3) e-mails, which were one of the primary reasons the instant complaints were filed. Moreover, the Complainant states that the Custodian also provided a total of forty-two (42) pages of records responsive to the January 21, 2009 request of which nine (9) pages contained one or more redactions for e-mail addresses; however, the GRC has not ordered an *in camera* review of any of these records.

The Complainant notes that to date, the Custodian has failed to comply with the GRC’s regulations by not providing the Complainant with a signed certification and *in camera* document index. *N.J.A.C. 5:105-2.8(c)2*.

The Complainant disputes the Custodian’s failure to supply a comprehensive document index to the GRC. The Complainant notes several inconsistencies with those indexes provided as part of the Statement of Information (“SOI”) and subsequent submissions at the request of the GRC.¹⁴

Additionally, the Complainant states that he received an extension of time until September 22, 2010 to submit the requested balancing test chart. The Complainant states that his responses to the balancing test chart are as follows:

Need for Access Questions	Complainant’s Response
1. Why does the Complainant need the requested records or information?	The Complainant states that he needs the requested e-mails for open government. The Complainant asserts that the Township is deliberating via e-mail in order to circumvent OPRA (and OPMA). The Complainant notes that he

¹³ The Custodian eventually disclosed copies of these three (3) e-mails to the Complainant on July 27, 2011 and advised the Complainant that the circumstances making the e-mails ACD in nature no longer applied.

¹⁴ The Complainant further provides extensive discussion regarding his dealings with the Township and argues that the Custodian and Township Council are using e-mail to circumvent the Open Public Meetings Act (“OPMA”). The GRC notes that it has no authority to adjudicate complaints regarding OPMA.

	<p>previously received records pursuant to OPRA requests that aided in the discovery of an error in the Township's 2008 budget and believes that situation proves why access is needed in this complaint.</p> <p>The Complainant states that prior to his January 21, 2009 OPRA request, the Complainant read a newspaper article about the "Fiscal Aspects of Consolidating Sussex Borough and Wantage Township" report dated November 2008. The Complainant states that he reviewed the report and found what he believed to be several problems. The Complainant states that he released to the public a copy of the report with his comments on or about December 2008. The Complainant asserts that shortly after, several people told him that e-mails being sent by the Custodian and others contained disparaging remarks about the Complainant and rebuttals to the Complainant's comments on the report. The Complainant states that based on this, he submitted his first OPRA request on January 21, 2009.</p> <p>The Complainant states that regarding the Custodian's redaction of e-mail addresses, OPRA provides that the definition of a government record includes references to "... information stored or maintained electronically ..." and "e-mail"¹⁵ but the Legislature included no exemption for private e-mail addresses. The Complainant argues that in many of the e-mails provided by the Custodian, only e-mail addresses were present (i.e. <123@abc.com> instead of <Name><123@abc.com>). The Complainant argues that if the e-mail addresses were redacted, the Complainant had no knowledge of who sent or received the e-mail. The Complainant questions why a personal e-mail address should be given the same status as an unlisted telephone number when an individual who accepts a government position knowingly chooses to use a personal e-mail address for official business. The Complainant also notes the Mercer County Superior Court¹⁶ ruled that private e-mail addresses are not to be redacted.</p>
2. How important are the	The Complainant states that access to the records are

¹⁵ OPRA uses the term "e-mail" twice. First, OPRA specifically exempts from disclosure information received by a member of the Legislature from a constituent or information held by a member of the Legislature concerning a constituent, including but not limited to information in written form or contained in any e-mail ..." N.J.S.A. 47:1A-1.1. OPRA also allows the GRC to "... utilize ... e-mail ..." to perform its statutory duties. N.J.S.A. 47:1A-7.b.

¹⁶ NJFOG v. GRC, Docket No. MER-L-1177-09 (Decided July 17, 2009). The GRC notes that in NJFOG, no ruling actually occurred because the case was settled prior to adjudication; however, the GRC did release the e-mail addresses at issue based on the GRC's status as a quasi-judicial agency.

requested records or information to the Complainant?	extremely important. The Complainant reiterates that he believes the Custodian and Township Council are using e-mails to circumvent the intent of OPRA.
3. Does the Complainant plan to redistribute the requested records or information?	The Complainant states that redistribution of the records or information depends on what information is contained within the records. The Complainant states that if the records provide no new information, then there would be no need to redistribute it. The Complainant states that if new information is present such as why the Township has made a decision, who initiated it, how much it would cost, etc., then this information should be made public.
4. Will the Complainant use the requested records or information for unsolicited contact of the individuals named in the government records?	The Complainant states that because he actively follows local, county, state and federal government, it could be argued that he already makes “unsolicited contact” with various officials and employees of the government. The Complainant states that if the GRC is asking if the Complainant will make unsolicited contact with a member of the Consolidation Study Commission who happened to receive a copy of an e-mail, then the answer is no.

September 23, 2010

Letter from the Custodian’s Counsel to the GRC. Counsel states that he is in receipt of the Complainant’s request for reconsideration. Counsel requests that the Complainant’s request for reconsideration be denied because it fails to address any grounds for relief.

Counsel states that the Complainant indicates that the reason for his request for reconsideration is a mistake. Counsel states that in the context of a request for reconsideration, “mistake” is defined in law as a situation to which the parties could not have protected themselves during the litigation. *See DEG, LLC. V. Township of Fairfield*, 198 N.J. 242 (2009). Counsel asserts that the GRC’s review and conclusion based on the law does not constitute a mistake. *Wausau Ins. v. Prudential Prop. Ins.*, 312 N.J. Super. 516 (App. Div. 1998). Counsel argues that a request for reconsideration is not a substitute for an appeal.

Counsel asserts that the request for reconsideration is simply a rehashing of the issues originally presented to the GRC. Counsel argues that the Complainant’s request for reconsideration merely questions the GRC’s conclusion. Counsel argues that the Complainant’s disagreement with the GRC’s conclusion does not sufficiently support a request for reconsideration.

October 30, 2010

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

- E-mail from the Custodian to Committeewoman Nuss and copied to Committeeman Deboer and Mayor Space dated February 2, 2009 (with redactions).
- Screenshot of ERA Best Choice Realtors Sales Staff dated October 30, 2010.
- Screenshot of “The Dam Truth” Wantage Township Contact Information dated October 30, 2010.

The Complainant states that he is in receipt of Custodian Counsel’s letter dated September 23, 2010 in which Counsel requests that the Complainant’s request for reconsideration be denied. The Complainant disputes that the Council’s determination that the Complainant’s January 21, 2009 request was invalid because the determination has no basis in fact or law.

The Complainant argues that the Custodian never denied the January 21, 2009 request on the basis that it was invalid. Moreover, the Complainant argues that among the forty-two (42) pages of records the Custodian provided on January 26, 2009 were a copy of a Civil Action complaint and minutes from a Township meeting. The Complainant argues that these types of records are encompassed within the “etc.” portion of his request.

The Complainant asserts that because the Custodian chose to accept and respond to the Complainant’s January 21, 2009 request, the Complainant requests that the GRC order disclosure of unredacted copies of the three (3) e-mails for which access was denied and the nine (9) pages of information previously redacted for e-mail addresses and provided on January 26, 2009. The Complainant requests that if the GRC will not order disclosure of the above records, then the GRC should amend its August 24, 2010 Interim Order to include an *in camera* review for the three (3) e-mails and nine (9) redacted pages of records responsive to the January 21, 2009 request.

Further, the Complainant contends that after reviewing the document index submitted with the *in camera* records, he believes the Custodian has again failed to provide a sufficient comprehensive document index and thus has not complied with the Council’s Order. The Complainant notes that aside from those redacted records responsive to the January 21, 2009 request, the Custodian provided twenty-three (23) of thirty-nine (39) pages of records responsive to the February 6, 2009 OPRA request with one or more redactions. The Complainant notes that six (6) of those pages contain redactions for ACD material and/or e-mail addresses. The Complainant states that the remaining seventeen (17) pages contain redactions only of e-mail addresses. The Custodian requests that the GRC expand its *in camera* review to encompass these additional records.

The Complainant reiterates that the Custodian erred by redacting personal e-mail addresses because OPRA does not expressly exempt e-mail addresses from disclosure. The Complainant reiterates his balancing test response that the Mercer County Court has affirmed that private e-mail addresses are subject to disclosure in NJFOG v. GRC, Docket No. MER-L-1177-09 (Decided July 17, 2009). The Complainant asserts that the Custodian cannot deny knowledge of this order because the Complainant provided a copy

of said Order signed by Mercer County Superior Court Judge Douglas H. Hurd to the Custodian and Township Committee in August 2009.

The Complainant states that the Custodian certified in his September 1, 2010 legal certification attached to the *in camera* records that the Mayor and all Township Committee members have a Township issued e-mail account that is disclosed to the public. The Complainant states that the Custodian further certified that all communications to and from elected officials utilize “this official e-mail address.” The Complainant states that the Custodian further certified that the Mayor and Township Committee members’ personal e-mail addresses are “...not necessary ... in order to contact [the Complainant’s] elected representatives, since the official e-mail address is included in every record created involving communications to or from the elected official(s).” The Complainant states that attached is an e-mail dated February 2, 2009 that was sent by the Custodian to then-Committeewoman Nuss and copied to Committeeman Deboer and Mayor Space. The Complainant states that no official e-mail address for each Committee member is included in said e-mail. The Complainant states that he also attached website screenshots from two websites posting personal e-mail addresses for Committeewoman Nuss, Committeeman Deboer and another Township Committee member.¹⁷

November 3, 2010

Letter from the Custodian to the GRC. The Custodian states that he has received the Complainant’s October 30, 2010 letter. The Custodian requests that the GRC ignore the Complainant’s continued attempts to induce the GRC to determine the validity of the Custodian’s certifications. The Custodian reiterates his previous certification that he has fully complied with the GRC’s Interim Order.¹⁸

November 5, 2010

Letter from the Custodian to the GRC attaching a screenshot of the Township’s website. The Custodian states that in the Complainant’s letter to the GRC dated October 30, 2010, the Complainant accuses the Custodian of having provided a false certification to the GRC and offers examples of e-mails which do not include the individual Township e-mail addresses of the Mayor and Township Committee members.

The Custodian disputes the Complainant’s contention that the evidence contradicts the Custodian’s certification dated September 1, 2010. The Custodian states that the official e-mail address of the Township is administrator@wantagetwp-nj.org, which is listed as the official Township e-mail account on the Township’s official website, the New Jersey League of Municipalities directory, the Sussex County Official directory, the Township’s municipal calendar and Township newsletters. The Custodian states that each year, hundreds of Township residents communicate with their elected officials through this e-mail address.

¹⁷ The GRC’s review of these websites reveals that neither is affiliated with the Township.

¹⁸ The Custodian made additional arguments regarding the Complainant’s perceived attack on the Custodian’s character.

The Custodian contends that it is clear that said e-mail address is listed on every Township e-mail released to the general public. The Custodian contends that his September 1, 2010 certification is therefore correct and truthful.

November 17, 2010

Letter from the Complainant to the GRC.¹⁹ The Complainant states that he is in receipt of the Custodian's two (2) letters to the GRC dated November 3, 2010 and November 5, 2010. The Complainant argues that he believes the Custodian has failed to provide the GRC with a comprehensive document index as was requested by the GRC on multiple occasions throughout the course of this complaint.

Additionally, the Complainant argues that in the Custodian's letter to the GRC dated November 6, 2010, the Custodian amended a portion his own September 1, 2010 legal certification in order to support an erroneous argument. The Complainant states that the Custodian's certification states the following:

“[a]ll members of the Mayor and Committee of the Township ... have a Township-issued e-mail account which is disclosed to the public. All communications to and from the elected officials utilize *this* official e-mail address, and the secondary inclusion of the personal, private and unlisted e-mail addresses of those individuals represents an ancillary preference of the elected officials for purposes of their own convenience and quick access, not intended for public dissemination.” (Emphasis added.) Custodian's certification dated September 1, 2010 at pg. 2.

The Complainant argues that in the Custodian's letter to the GRC dated November 5, 2010, the Custodian chose to change “this” to “the” in an attempt to make the GRC believe he was always referring to Township's official e-mail address. The Complainant contends that this is further evidence that the Custodian knowingly and willfully provided false information to the GRC and is attempting to cover up his falsified legal certification.²⁰

The Complainant asserts that he anticipates that the GRC will hold that the Custodian unlawfully denied access to the sixteen (16) e-mails and that the Custodian unlawfully redacted information from a number of other records. The Custodian further asserts that he believes the GRC must order disclosure of the sixteen (16) e-mails, including copies of all attachments, and to provide previously redacted copies of all records without redactions.

May 13, 2011

Letter from the GRC to the Custodian. The GRC states that in a letter from the Complainant to the GRC dated October 30, 2010, the Complainant asserts that additional records containing redactions may be at issue. The GRC states that the Complainant

¹⁹ The Complainant attached a business card for Committeewoman Nuss showing a private e-mail address; however, the business card is for ERA Best Choice Realtors.

²⁰ The Complainant notes that the Custodian also refused the Complainant's attempts to obtain responsive records through common law, which the GRC has no authority to address. The Complainant further reiterates the arguments presented to the GRC in his request for reconsideration. William Gettler v. Township of Wantage (Sussex), 2009-73 & 2009-74 – Supplemental and *In Camera* Findings and Recommendations of the Executive Director 11

noted that the Custodian provided twenty-three (23) of thirty-nine (39) pages of records responsive to the February 6, 2009 OPRA request with one or more redactions. Further the Complainant noted that six (6) of those pages contain redactions for ACD material.

The GRC states that based on the foregoing and because the GRC had no prior knowledge of these six (6) pages of records, the GRC requests that the Custodian submit same for an *in camera* review. The GRC states that as previously stated in the Council's August 24, 2010 Interim Order, the Custodian "must deliver²¹ to the Council in a sealed envelope nine (9) copies of the six (6) unredacted records, a comprehensive document index,²² as well as a legal certification, in accordance with N.J. Court Rule 1:4-4,²³ that the records provided are the records requested by the Council for the *in camera* inspection." The GRC requests that the Custodian provide the requested records and document index to the GRC by close of business on May 18, 2011.

May 16, 2011

E-mail from the Custodian to the GRC. The Custodian states that on this date, the Complainant agreed to provide the Custodian with the partially redacted records referenced in the Complainant's letter dated October 30, 2010. The Custodian states that the Complainant has agreed to provide said records by May 17, 2010. The Custodian states that assuming he receives the documents required for an *in camera* review on May 17, 2011, the Custodian will comply with the GRC's order in a timely manner.

May 17, 2011

Letter from the Custodian to the GRC attaching the following:

- Six (6) pages of partially redacted records referenced in the Complainant's letter dated October 30, 2011.²⁴
- Six (6) pages of the same records in unredacted form.
- Redaction index.
- Balancing Test.

The Custodian certifies that he is producing the following records for an *in camera* review pursuant to the GRC's request of May 13, 2011.²⁵

July 27, 2011

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

- E-mail from the Custodian to the Township governing body dated December 4, 2008 regarding "NJDCR Report."

²¹ The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

²² The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

²³ "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."

²⁴ The six (6) pages of records encompass four (4) individual e-mails.

²⁵ Additional correspondence was submitted by the Complainant on May 26, 2011 and July 25, 2011. However, said correspondence restates the facts/assertions already presented to the GRC.

- E-mail from Chuck McKay to the Custodian dated January 11, 2009 regarding “Re: Analysis of State Fiscal Report.” (with one (1) redaction of an e-mail address).
- E-mail from the Custodian to Chuck McKay dated January 12, 2009 regarding “Re: Analysis of State Fiscal Report.” (with one (1) redaction of an e-mail address).

The Custodian states that in a recent correspondence to the GRC dated July 25, 2011, the Complainant referenced his desire to obtain unredacted copies of the three (3) e-mails responsive to his January 21, 2009 OPRA request. The Custodian states that the Complainant has yet to receive the three (3) e-mails because he initially declined to mediate this complaint and because he failed to resubmit a new OPRA request for same.

The Custodian states that regardless of the pending complaint, the Custodian will interpret the Complainant’s correspondence as a request for the records at issue. The Custodian states that because the circumstances that existed at the time of the Complainant’s OPRA request which rendered the requested e-mails exempt from disclosure, *i.e.*, the Consolidation Committee no longer exists, no longer apply, attached are the three (3) e-mails for which access was initially denied.²⁶

August 14, 2011

Letter from the Complainant to the GRC with the following attachments:²⁷

- Letter from the Custodian to the Complainant dated July 27, 2011 attaching:
 - E-mail from the Custodian to the Township governing body dated December 4, 2008 regarding “NJDCR Report.”
 - E-mail from Chuck McKay to the Custodian dated January 11, 2009 regarding “Re: Analysis of State Fiscal Report.” (with one (1) redaction of an e-mail address).
 - E-mail from the Custodian to Chuck McKay dated January 12, 2009 regarding “Re: Analysis of State Fiscal Report.” (with one (1) redaction of an e-mail address).

The Complainant recapitulates the facts of the instant complaints. The Complainant argues that the Custodian’s disclosure of the three (3) e-mails responsive to his January 21, 2009 OPRA request after two and a half years is an attempt to avoid liability under the law.

The Complainant states that the first (1st) e-mail is dated December 4, 2008. The Complainant states that none of the recipients of the e-mail were part of the Consolidation Study Commission; thus, none of the individuals were going to be involved in the deliberations concerning the proposed consolidation. The Complainant argues that this e-mail also included other persons not involved in the Township’s

²⁶ The Custodian also submitted a letter to the GRC on July 27, 2011 in which he reiterates that the Township was willing to mediate this complaint. The Custodian also noted that he denied the Complainant’s allegations of a knowing and willful violation of OPRA.

²⁷ The Complainant attached additional records which were previously provided to the GRC.

government or consolidation process. The Complainant argues that by copying these parties on this e-mail, the Custodian waived any claim that the e-mail is exempt from disclosure because it constituted ACD material. Further, the Complainant alleges that this e-mail was clearly meant to distribute the consolidation report to individuals who were not on the Consolidation Study Commission. The Complainant further states that the consolidation report was a public record the moment it was released by DCA.

The Complainant states that the second (2nd) e-mail is dated January 11, 2009. The Complainant states that the sender was a member of the Consolidation Study Commission; however, the sender represented Sussex Borough and not the Township. The Complainant states that the contents of this e-mail concern the representative complaining to the Custodian about opposition by the Complainant and others to the consolidation. The Complainant asserts that this e-mail contains no ACD material and should have been disclosed. The Complainant asserts that a review of the e-mail reveals that it does not contain certain comments which he was led to believe it contained. The Complainant asserts that it is possible that either another e-mail of the same date exists or the one provided was altered. The Complainant asserts that alteration is possible because this e-mail is different in format from all other e-mails provided. The Complainant asks whether the GRC has the authority to independently search the Township's e-mail system in an attempt to determine whether the Custodian altered any of the records provided.

The Complainant states that the third (3rd) e-mail is dated January 12, 2009. The Complainant states that this e-mail was the Custodian's reply to the January 11, 2009 e-mail. The Complainant asserts that this e-mail appears to be nothing more than a conversation between the Custodian and a member of the consolidation committee and does not constitute ACD material.

The Complainant asserts that persons not part of the consolidation process were copied on the last two e-mails and thus the e-mails should not constitute ACD material.²⁸ The Complainant further argues that a person's embarrassment in the content of a particular record is not a lawful basis for denying access to records.

The Complainant asserts that the Custodian signed the SOI legally certifying to the truthfulness of same. The Complainant argues that the Custodian cannot prove that the document indexes filed are in fact truthful; thus, the Custodian has knowingly and willfully violated OPRA.²⁹

²⁸ The name of the e-mail account showed as "Chuck & Carol." It is not possible to determine whether the joint e-mail account could have compromised any privileged conversations.

²⁹ The remainder of the Complainant's correspondence restates the facts/assertions already presented to the GRC.

Analysis

Whether the Complainant has met the required standard for reconsideration of the Council's August 24, 2010 Interim Order conclusions that the Complainant's January 21, 2009 request was overly broad and therefore invalid under OPRA?³⁰

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, on September 6, 2010, or the ninth (9th) business day after the issuance of the Council's August 24, 2010 Interim Order, the Complainant requested an extension of time to submit a request for reconsideration. On September 13, 2010, the GRC granted the Complainant an extension until September 22, 2010 to submit a request for reconsideration. On September 19, 2010, the Complainant filed his request for reconsideration of the Council's Order. Thus, the GRC will consider the Complainant's request for reconsideration as timely filed.

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 the request for reconsideration, the Complainant asserted that the Council's Interim Order erroneously concluded that the Complainant's January 21, 2009 request was invalid under OPRA because it failed to specify identifiable government records and would require the Custodian to conduct research to identify and locate government

³⁰ This request pertains to *Gettler v. Township of Wantage (Sussex)*, GRC Complaint No. 2009-73. *William Gettler v. Township of Wantage (Sussex)*, 2009-73 & 2009-74 – Supplemental and *In Camera* Findings and Recommendations of the Executive Director 15

records which may be responsive to the request. The Complainant argued that the Township is a small municipality and the Complainant's request was very specific that the Complainant sought records over a two (2) month period (December 2008 to January 22, 2009), not over a year's time as stated in the Council's Interim Order, and concerning one (1) specific report. The Complainant also disputed the Council's conclusion that because said request is invalid under OPRA, the Custodian did not unlawfully deny access to the requested records.

In opposition to the Complainant's request for reconsideration, the Custodian's Counsel argued that the reconsideration should be denied because the Complainant failed to establish sufficient grounds for relief. Counsel stated that in the context of a request for reconsideration, "mistake" is defined in law as a situation to which the parties could not have protected themselves during the litigation. *See DEG, LLC. V. Township of Fairfield*, 198 N.J. 242 (2009). Counsel asserted that the GRC's review and conclusion based on the law does not constitute a mistake. *Wausau Ins. v. Prudential Prop. Ins.*, 312 N.J. Super. 516 (App. Div. 1998). Counsel asserted that the Complainant's request for reconsideration is simply a rehashing of the issues originally presented to the GRC and that the Complainant merely questions the GRC's conclusion. Counsel argued that the Complainant's disagreement with the GRC's conclusion does not amount to a mistake.

In response to the Custodian Counsel's assertions, the Complainant contended that the Custodian never denied the January 21, 2009 request on the basis that it was invalid.

A review of the Complainant's January 21, 2009 request for records shows that the Complainant sought:

"Copies of every item of correspondence (*letters, memos, faxes, e-mails, web site, etc.*) sent or received by any official and/or any employee of the Township of Wantage from December 1, 2008 to January 22, 2009 that relates to the [DCA's] Report: "Fiscal Aspects of Consolidating Sussex Borough and Wantage Township" dated November 2008 or that relates to the Complainant[.]" (Emphasis added.)

Although the Complainant's records request seeks a particular type of government record, *i.e.*, correspondence, the Complainant's records request fails to specify the particular individuals whose correspondence is sought. The request would therefore require the Custodian to perform research among all of the correspondence sent or received by anyone employed by the Township of Wantage between the pertinent dates to determine what specific items related to either the NJDCA report dated November 2008 or the Complainant. As such, the Complainant's request is overly broad and is therefore invalid under OPRA.

"[U]nder OPRA, agencies are required to disclose only 'identifiable' government records not otherwise exempt." *MAG Entertainment v. Div. of ABC*, 375 N.J. Super. 534, 549 (App. Div. 2005). A request that does not identify the particular records sought by name, date, type of record or some other specific identifying characteristic may be found to be invalid.

In MAG, the Division of Alcoholic Beverage Control sought to revoke MAG's liquor license for various violations. Trying to establish a defense of selective prosecution, MAG filed an OPRA request with the Division, seeking "**all documents or records ...** that the ABC sought, obtained or ordered revocation of a liquor license for the charge of selling alcoholic beverages to an intoxicated person [who], after leaving the licensed premises, was involved in a fatal auto accident," and "**all documents or records** evidencing that the ABC sought, obtained or ordered suspension of a liquor license exceeding 45 days for charges of lewd or immoral activity." *Id.* at 539-40 (Emphasis added). MAG's request did not identify any specific case by name, date, docket number or any other citation, but instead demanded that:

"the documents or records should set forth the persons and/or parties involved, the name and citation of each such case, including unreported cases, the dates of filing, hearing and decision, the tribunals or courts involved, the substance of the allegations made, the docket numbers, the outcome of each matter, the names and addresses of all persons involved, including all witnesses and counsel, and copies of all pleadings, interrogatory answers, case documents, expert reports, transcripts, findings, opinions, orders, case resolutions, published or unpublished case decisions, statutes, rules and regulations." *Id.* at 540.

The Court found that this was an invalid OPRA request with which the Custodian was not obligated to comply. *Id.* at 553. The Court found it very significant that MAG "failed to identify with any specificity or particularity the governmental records sought. MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past." *Id.* at 549. Because MAG failed to identify any particular documents by name, type of document, date range, or any other identifying characteristic, the custodian would have been required:

"to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense....Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted." *Id.*

The Court therefore found that "MAG's request was not a proper one for specific documents within OPRA's reach, but rather a broad-based demand for research and analysis, decidedly outside the statutory ambit." *Id.* at 550. *See also* New Jersey Builder's Ass'n v. N.J. Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007)(holding that a five-page document listing thirty-eight separate requests all of which included a request for "any and all data" failed to specifically identify the documents sought as required by N.J.S.A. 47:1A-5.f; OPRA did not, therefore, require the custodian to produce the records within seven business days); Bent v. Township of Stafford, 381 N.J. Super. 30 (App. Div. 2005)(finding that a five-part request for the "entire file" of his criminal investigation and "'the factual basis underlying documented action and advice to third parties" is not a proper request for public records under OPRA, and the information it seeks is beyond the statutory reach of OPRA); Reda v. Township of West Milford, William Gettler v. Township of Wantage (Sussex), 2009-73 & 2009-74 – Supplemental and *In Camera* Findings and Recommendations of the Executive Director 17

GRC Complaint No. 2002-58 (January 17, 2003)(dismissing request for annual costs of liability settlements by the Township for each of five years, including costs for “legal defense of said items[.]” because the requestor failed to identify any specific record in the custodian’s possession and holding that OPRA does not require records custodians to conduct research among its records for a requestor and correlate data from various government records).

Therefore, a request for records must identify particular records within the custodian’s possession by name, date, docket number, type of record, or some other specific identifying characteristic in order to be valid under OPRA. Because the Complainant’s records request failed to specify the particular individuals whose correspondence was sought, the request required the Custodian to conduct research to fulfill and is therefore overly broad; thus, the request is invalid under OPRA.

Because the request is overly broad and invalid under OPRA, the Custodian was not obligated to comply with such request. *See New Jersey Builder’s Ass’n, supra*. The Council therefore declined to order an *in camera* review of any redacted records the Custodian may have produced in response to this request.

However, a review of the Complainant’s records request discloses that such request seeks government records generated over a fifty-three (53) day period from December 1, 2008 to January 22, 2009, rather than the one-year period noted in the Council’s August 24, 2010 Interim Order.

As the moving party, the Complainant was required to establish either of the necessary criteria set forth above; namely 1) that the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence. *See Cummings, supra*.

With regard to the Complainant’s allegation that the Council erroneously stated that the Complainant’s records request encompassed records generated over a one-year period, the Complainant has established that his records request encompassed records generated over a fifty-three (53) day period. However, this statement was not part of the Council’s conclusions and recommendations in the August 24, 2010 Interim Order. Moreover, the Council’s error was not material, as it does not change the overly broad nature of the records sought by the Complainant. The Council therefore declines to amend its August 24, 2010 Interim Order.

The Complainant failed to establish that his January 21, 2009 records request was not overly broad and therefore valid under OPRA. The Complainant has also failed to show that the GRC acted arbitrarily, capriciously or unreasonably in disposing of the complaint. *See D’Atria, supra*. Notably, the Complainant failed to submit any evidence to establish that the Complainant’s January 21, 2009 request was not overly broad and therefore invalid under OPRA.

Therefore, because the Complainant has failed to establish in his request for reconsideration of the Council’s August 24, 2010 Final Decision and Order 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 determining this complaint, and failed to submit any evidence to establish that the Complainant's January 21, 2009 request was not overly broad and therefore invalid under OPRA, 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).

The Council's August 24, 2010 Interim Order therefore remains unchanged.

Whether the Custodian complied with the Council's August 24, 2010 Interim Order by timely providing the records responsive to the Complainant's February 6, 2009 OPRA request for an *in camera* inspection?

At its August 24, 2010 public meeting, the Council found that because the Custodian asserted that he lawfully denied access to sixteen (16) e-mails responsive to the Complainant's February 6, 2009 OPRA request as ACD material pursuant to N.J.S.A. 47:1A-1.1., the Council must determine whether the legal conclusion asserted by the Custodian is properly applied to the records at issue pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005). Therefore, the Council ordered an *in camera* review of the responsive e-mails to determine the validity of the Custodian's assertion that access to the e-mails was properly denied.

The Council further ordered the Custodian to deliver to the Council in a sealed envelope nine (9) copies of the requested unredacted records, a document index, and a legal certification from the Custodian, that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery was to be received by the GRC within five (5) business days from receipt of the Council's Interim Order or on September 3, 2010.

Therefore, because the Custodian provided the GRC with a legal certification, the unredacted records requested for the *in camera* inspection and a document index on September 1, 2010, the Custodian timely complied with the Council's August 24, 2010 Interim Order.

Whether the Custodian unlawfully denied access to the seventeen (17) e-mails responsive to the Complainant's February 6, 2009 OPRA request as ACD material pursuant to N.J.S.A. 47:1A-1.1.?

The Custodian initially asserted that he lawfully denied the Complainant access to the requested records because the sixteen (16) e-mails are exempt from disclosure as ACD material pursuant to N.J.S.A. 47:1A-1.1. The Complainant disputed the Custodian's denial of access.

Moreover, the Complainant asserted in his letter to the GRC dated October 30, 2010 that the Custodian provided six (6) pages of additional e-mails containing redactions for information the Custodian deemed to be ACD material. Subsequently, the GRC requested on May 13, 2011 that the Custodian submit the six (6) pages of e-mails to the GRC for an *in camera* review. On May 17, 2011, the GRC received the six (6) redacted and unredacted pages of records, which comprised a total of four (4) e-mails, to conduct an *in camera* review.

Further review of the records provided for an *in camera* review revealed that of the twenty (20) e-mails provided to the GRC, three (3) were duplicates. Therefore, seventeen (17) total e-mails responsive to the February 6, 2009 OPRA request are at issue in the instant complaint.

OPRA provides that “if the custodian of a government record asserts that part of a particular record is exempt from public access ..., the custodian shall delete or 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.

OPRA excludes from the definition of a government record “inter-agency or intra-agency advisory, consultative or deliberative material.” N.J.S.A. 47:1A-1.1. It is evident that this phrase is intended to exclude from the definition of a government record the types of documents that are the subject of the “deliberative process privilege.”

In O’Shea v. West Milford Board of Education, GRC Complaint No. 2004-93 (April 2006), the Council stated that “neither the statute nor the courts have defined the terms... ‘advisory, consultative, or deliberative’ in the context of the public records law. The Council looks to an analogous concept, the deliberative process privilege, for guidance in the implementation of OPRA’s ACD exemption. Both the ACD exemption and the deliberative process privilege enable a governmental entity to shield from disclosure material that is pre-decisional and deliberative in nature. Deliberative material contains opinions, recommendations, or advice about agency policies. In Re the Liquidation of Integrity Insurance Company, 165 N.J. 75, 88 (2000); In re Readoption With Amendments of Death Penalty Regulations, 182 N.J. 149 (App. Div. 2004).

The deliberative process privilege is a doctrine that permits government agencies to withhold documents that reflect advisory opinions, recommendations and deliberations submitted as part of a process by which governmental decisions and policies are formulated. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150, 95 S. Ct. 1504, 1516, 44 L. Ed.2d 29, 47 (1975). Specifically, the New Jersey Supreme Court has ruled that a record that contains or involves factual components is entitled to deliberative-process protection under the exemption in OPRA when it was used in decision-making process *and* its disclosure would reveal deliberations that occurred during that process. Education Law Center v. NJ Department of Education, 198 N.J. 274, 966 A.2d 1054, 1069 (2009). This long-recognized privilege is rooted in the concept that the sovereign has an interest in protecting the integrity of its deliberations. The earliest federal case adopting the privilege is Kaiser Alum. & Chem. Corp. v. United States, 157 F. Supp. 939 (1958). The privilege and its rationale were subsequently adopted by the federal district courts and circuit courts of appeal. United States v. Farley, 11 F.3d 1385, 1389 (7th Cir.1993).

The deliberative process privilege was discussed at length in In Re Liquidation of Integrity Insurance Co., 165 N.J. 75 (2000). There, the Court addressed the question of whether the Commissioner of Insurance, acting in the capacity of Liquidator of a regulated entity, could protect certain records from disclosure which she claimed contained opinions, recommendations or advice regarding agency policy. *Id.* at 81. The Court adopted a qualified deliberative process privilege based upon the holding of McClain v. College Hospital, 99 N.J. 346 (1985), Liquidation of Integrity, *supra*, 165 N.J. at 88. In doing so, the Court noted that:

“[a] document must meet two requirements for the deliberative process privilege to apply. First, it must have been generated before the adoption of an agency's policy or decision. In other words, it must be pre-decisional. ... Second, the document must be deliberative in nature, containing opinions, recommendations, or advice about agency policies. ... Purely factual material that does not reflect deliberative processes is not protected. ... Once the government demonstrates that the subject materials meet those threshold requirements, the privilege comes into play. In such circumstances, the government's interest in candor is the "preponderating policy" and, prior to considering specific questions of application, the balance is said to have been struck in favor of non-disclosure.” (Citations omitted.) *Id.* at 84-85.

The Court further set out procedural guidelines based upon those discussed in McClain:

“[t]he initial burden falls on the state agency to show that the documents it seeks to shield are pre-decisional and deliberative in nature (containing opinions, recommendations, or advice about agency policies). Once the deliberative nature of the documents is established, there is a presumption against disclosure. The burden then falls on the party seeking discovery to show that his or her compelling or substantial need for the materials overrides the government's interest in non-disclosure. Among the considerations are the importance of the evidence to the movant, its availability from other sources, and the effect of disclosure on frank and independent discussion of contemplated government policies.” In Re Liquidation of Integrity, *supra*, 165 N.J. at 88, *citing McClain*, *supra*, 99 N.J. at 361-62.

In In Re Liquidation of Integrity, *supra*, 165 N.J. at 84-5, the judiciary set forth the legal standard for applying the deliberative process privilege as follows:

- (1) The initial burden falls on the government agency to establish that matters are both *pre-decisional* and *deliberative*.
 - a. Pre-decisional means that the records were generated before an agency adopted or reached its decision or policy.

- b. Deliberative means that the record contains opinions, recommendations, or advice about agency policies or decisions.
 - i. Deliberative materials do not include purely factual materials.
 - ii. Where factual information is contained in a record that is deliberative, such information must be produced so long as the factual material can be separated from its deliberative context.
 - c. The exemption covers recommendations, draft documents, proposals, suggestions, and other subjective documents *which reflect the personal opinions of the writer rather than the policy of the agency*.
 - d. Documents which are protected by the privilege are those which *would inaccurately reflect or prematurely disclose the views of the agency, suggesting as agency position that which is only a personal position*.
 - e. To test whether disclosure of a document is likely to adversely affect the purposes of the privilege, courts ask themselves *whether the document is so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communications within the agency*.
- (2) Once it has been determined that a record is deliberative, there is a presumption against disclosure and the party seeking the document has the burden of establishing his or her compelling or substantial need for the record.
- a. That burden can be met by a showing of:
 - i. the importance of the information to the requesting party,
 - ii. its availability from other sources **and**
 - iii. the effect of disclosure on frank and independent discussion of contemplated government policies.

The GRC conducted an *in camera* examination on the submitted record. The results of this examination are set forth in the following table:

Record Number	Record Name/Date	Description of Record or Redaction	Custodian's Explanation/ Citation for Non-disclosure or Redactions	Findings of the <i>In Camera</i> Examination
1.	E-mail dated January 23, 2009 from Jim Doherty to governing body	Advice given by Administrator to Mayor regarding representations made to	<u>N.J.S.A. 47:1A-1.1</u> permits the redaction of e-mail addresses and denial of	The discussion in this e-mail involves Township officials advising and

	re: Budget.	employees; thoughts the Mayor shared with Administrators regarding same and proposed strategy for addressing negotiable items with employee unions.	records considered to be ACD material.	deliberating on various scenarios in the preparation of the municipal budget. These discussions are therefore ACD in nature. Thus, this discussion is exempt from disclosure as ACD pursuant to <u>N.J.S.A. 47:1A-1.1</u> .
2.	E-mail dated January 23, 2009 from Parker Space to Jim Doherty re: Health Coverage.	Inquiry made by Mayor to Administrator regarding a topic of negotiation being deliberated between the Township and employee unions.	<u>N.J.S.A. 47:1A-1.1</u> permits the redaction of e-mail addresses and denial of records considered to be ACD material.	The discussion in this e-mail involves Township officials advising and deliberating on various scenarios in the preparation of the municipal budget. These discussions are therefore ACD in nature. Thus, this discussion is exempt from disclosure as ACD pursuant to <u>N.J.S.A. 47:1A-1.1</u> .
3.	E-mail dated January 23, 2009 from Jim Doherty to Parker Space re: Health Coverage.	Response and advice offered by Administrator to Mayor regarding a topic of negotiation being deliberated between the Township and employee unions.	<u>N.J.S.A. 47:1A-1.1</u> permits the redaction of e-mail addresses and denial of records considered to be ACD material.	The discussion in this e-mail involves Township officials advising and deliberating on various scenarios in the preparation of the municipal budget. These discussions are therefore ACD in nature. Thus, this discussion is exempt from

				disclosure as ACD pursuant to <u>N.J.S.A. 47:1A-1.1.</u>
4.	E-mail dated January 30, 2009 from Jim Doherty to governing body and Township Attorney re: Possible Budget Savings through personnel changes – Administration and Finance.	Advice offered by Administrator to governing body to explain the likely benefits versus drawbacks of various potential layoffs and job reductions being deliberated.	<u>N.J.S.A. 47:1A-1.1</u> permits the redaction of e-mail addresses and denial of records considered to be ACD material.	The discussion in this e-mail involves Township officials advising and deliberating on various scenarios in the preparation of the municipal budget. These discussions are therefore ACD in nature. Thus, this discussion is exempt from disclosure as ACD pursuant to <u>N.J.S.A. 47:1A-1.1.</u>
5.	E-mail dated January 30, 2009 at 9:51:36 from Jim Doherty to governing body re: Impact of Personnel Changes.	Advice offered by Administrator to governing body to explain the likely benefits versus drawbacks of various potential layoffs and job reductions being deliberated.	<u>N.J.S.A. 47:1A-1.1</u> permits the redaction of e-mail addresses and denial of records considered to be ACD material.	The discussion in this e-mail involves Township officials advising and deliberating on various scenarios in the preparation of the municipal budget. These discussions are therefore ACD in nature. Thus, this discussion is exempt from disclosure as ACD pursuant to <u>N.J.S.A. 47:1A-1.1.</u>
6.	E-mail dated January 30, 2009 at 11:40:37 from Jim Doherty to governing body re: Impact of	Advice offered by Administrator to governing body to explain the likely benefits versus drawbacks of	<u>N.J.S.A. 47:1A-1.1</u> permits the redaction of e-mail addresses and denial of records	The discussion in this e-mail involves Township officials advising and deliberating on

	Personnel Changes – Message 2.	various potential layoffs and job reductions being deliberated.	considered to be ACD material.	various scenarios in the preparation of the municipal budget. These discussions are therefore ACD in nature. Thus, this discussion is exempt from disclosure as ACD pursuant to <u>N.J.S.A. 47:1A-1.1.</u>
7.	E-mail dated January 30, 2009 at 13:49:47 from Jim Doherty to Parker Space re: Impact of Personnel Changes – Message 3.	Advice offered by Administrator to governing body to explain the likely benefits versus drawbacks of various potential layoffs and job reductions being deliberated.	<u>N.J.S.A. 47:1A-1.1</u> permits the redaction of e-mail addresses and denial of records considered to be ACD material.	The discussion in this e-mail involves Township officials advising and deliberating on various scenarios in the preparation of the municipal budget. These discussions are therefore ACD in nature. Thus, this discussion is exempt from disclosure as ACD pursuant to <u>N.J.S.A. 47:1A-1.1.</u>
8.	E-mail dated January 30, 2009 at 14:51:14 from Jim Doherty to Parker Space re: Impact of Personnel Changes – Message 3.	Mayor’s advice regarding position on problem areas of municipal budget; Administrator’s response explaining that other members of governing body have expressed a request for scenarios involving other departments.	<u>N.J.S.A. 47:1A-1.1</u> permits the redaction of e-mail addresses and denial of records considered to be ACD material.	The discussion in this e-mail involves Township officials advising and deliberating on various scenarios in the preparation of the municipal budget. These discussions are therefore ACD in nature. Thus, this discussion is exempt from disclosure as ACD

				pursuant to <u>N.J.S.A. 47:1A-1.1.</u>
9.	E-mail dated January 30, 2009 at 16:08:04 from Jim Doherty to governing body re: Impact of Personnel Changes – Message 2.	Advice offered by Administrator to governing body to explain the likely benefits versus drawbacks of various potential layoffs and job reductions being deliberated.	<u>N.J.S.A. 47:1A-1.1</u> permits the redaction of e-mail addresses and denial of records considered to be ACD material.	The discussion in this e-mail involves Township officials advising and deliberating on various scenarios in the preparation of the municipal budget. These discussions are therefore ACD in nature. Thus, this discussion is exempt from disclosure as ACD pursuant to <u>N.J.S.A. 47:1A-1.1.</u>
10.	E-mail dated February 2, 2009 from Jim Doherty to governing body and Township Attorney re: Impact of Personnel Changes.	Advice offered by Administrator to governing body to explain the likely benefits versus drawbacks of various potential layoffs and job reductions being deliberated.	<u>N.J.S.A. 47:1A-1.1</u> permits the redaction of e-mail addresses and denial of records considered to be ACD material.	The discussion in this e-mail involves Township officials advising and deliberating on various scenarios in the preparation of the municipal budget. These discussions are therefore ACD in nature. Thus, this discussion is exempt from disclosure as ACD pursuant to <u>N.J.S.A. 47:1A-1.1.</u>
11.	DUPLICATE OF RECORD #10 ABOVE	DUPLICATE OF RECORD #10 ABOVE	DUPLICATE OF RECORD #10 ABOVE	DUPLICATE OF RECORD #10 ABOVE
12.	E-mail dated February 5, 2009 from Jim Doherty to	Advice offered by Administrator to Mayor to explain the strategy for a	<u>N.J.S.A. 47:1A-1.1</u> permits the redaction of e-mail addresses	The discussion in this e-mail involves Township officials

	Parker Space re: Adjustment to budget from removal of paid lunch hour.	course of action which would represent the most beneficial result in light of then-existing negotiations with employee unions.	and denial of records considered to be ACD material.	advising and deliberating on various scenarios in the preparation of the municipal budget. These discussions are therefore ACD in nature. Thus, this discussion is exempt from disclosure as ACD pursuant to <u>N.J.S.A. 47:1A-1.1</u> .
13.	E-mail dated February 5, 2009 at 11:36:29 from Jim Doherty to governing body re: Adjustment to budget from removal of paid lunch hour.	Advice offered by Administrator to Mayor to explain the likely impact of layoffs under given scenarios.	<u>N.J.S.A. 47:1A-1.1</u> permits the redaction of e-mail addresses and denial of records considered to be ACD material.	The discussion in this e-mail involves Township officials advising and deliberating on various scenarios in the preparation of the municipal budget. These discussions are therefore ACD in nature. Thus, this discussion is exempt from disclosure as ACD pursuant to <u>N.J.S.A. 47:1A-1.1</u> .
14.	E-mail dated February 5, 2009 at 11:36:29 from Parker Space to Jim Doherty re: Adjustment to budget from removal of paid lunch hour.	Advice offered by Administrator to Mayor to explain the likely impact of layoffs under given scenarios, and matters involving negotiations with employee unions.	<u>N.J.S.A. 47:1A-1.1</u> permits the redaction of e-mail addresses and denial of records considered to be ACD material.	The discussion in this e-mail involves Township officials advising and deliberating on various scenarios in the preparation of the municipal budget. These discussions are therefore ACD in nature. Thus, this discussion is

				exempt from disclosure as ACD pursuant to <u>N.J.S.A. 47:1A-1.1.</u>
15.	E-mail dated February 5, 2009 at 17:47:14 from Parker Space to Jim Doherty re: Adjustment to budget from removal of paid lunch hour.	Mayor's Acknowledgement of Advice offered by Administrator to Mayor to explain the strategy for a course of action which would represent the most beneficial result in light of then-existing negotiations with employee unions.	<u>N.J.S.A. 47:1A-1.1</u> permits the redaction of e-mail addresses and denial of records considered to be ACD material.	The discussion in this e-mail involves Township officials advising and deliberating on various scenarios in the preparation of the municipal budget. These discussions are therefore ACD in nature. Thus, this discussion is exempt from disclosure as ACD pursuant to <u>N.J.S.A. 47:1A-1.1.</u>
16.	DUPLICATE OF RECORD #15 ABOVE	DUPLICATE OF RECORD #15 ABOVE	DUPLICATE OF RECORD #15 ABOVE	DUPLICATE OF RECORD #15 ABOVE
17.	E-mail dated January 23, 2009 at 10:56:57 from Jim Doherty to Governing body re: follow up items from Budget Workshop No. 2.	Redactions made to delete discussion of strategy involving contract negotiations with employees	<u>N.J.S.A. 10:4-12</u> allows government bodies to exclude the public from discussions of matters involving negotiations. <u>N.J.S.A. 47:1A-1.1</u> permits the redaction of e-mail addresses and denial of records considered to be ACD material.	The discussion in the redacted portion of this e-mail involves Township officials advising and deliberating on various scenarios in the preparation of the municipal budget. These discussions are therefore ACD in nature. Thus, this discussion is exempt from disclosure as ACD pursuant to <u>N.J.S.A. 47:1A-1.1.</u>

18.	E-mail dated January 23, 2009 at 13:49:07 from Parker Space to Jim Doherty re: Budget.	Redactions were made to delete discussion of strategy involving contract negotiations with employees	<u>N.J.S.A. 10:4-12</u> allows government bodies to exclude the public from discussions of matters involving negotiations. <u>N.J.S.A. 47:1A-1.1</u> permits the redaction of e-mail addresses and denial of records considered to be ACD material.	The discussion in the redacted portion of this e-mail involves Township officials advising and deliberating on various scenarios in the preparation of the municipal budget. These discussions are therefore ACD in nature. Thus, this discussion is exempt from disclosure as ACD pursuant to <u>N.J.S.A. 47:1A-1.1</u> .
19.	DUPLICATE OF RECORD #18 ABOVE	DUPLICATE OF RECORD #18 ABOVE	DUPLICATE OF RECORD #18 ABOVE	DUPLICATE OF RECORD #18 ABOVE
20.	E-mail dated February 2, 2009 at 13:14:22 from Jim Doherty to Cara Nuss re: Re: seniority list.	Redactions were made to delete discussion of the terms and conditions of employment of specific employees and strategy regarding potential layoffs involving said employees.	<u>N.J.S.A. 10:4-12</u> allows government bodies to exclude the public from discussions of matters involving negotiations. <u>N.J.S.A. 47:1A-1.1</u> permits the redaction of e-mail addresses and denial of records considered to be ACD material.	Paragraph No. 1 and No. 2 are disclosable as these two (2) paragraphs contain which are not exempt from disclosure. The Custodian must disclose the unlawfully redacted information. First sentence of the paragraph No. 3 Redact from the first comma after “certifications” to the end of the paragraph. The Custodian must disclose the unlawfully redacted

				<p>information from “Some” to “certifications.”</p> <p>The remainder of paragraph No. 3 contains discussion of Township officials advising and deliberating on various scenarios in the preparation of the municipal budget. These discussions are therefore ACD in nature. Thus, this discussion is exempt from disclosure as ACD pursuant to <u>N.J.S.A. 47:1A-1.1</u>.</p> <p>First sentence in <u>Constable</u>: Redact from “Negele” to “because” and the second sentence. These discussions are ACD in nature and are exempt from disclosure as ACD pursuant to <u>N.J.S.A. 47:1A-1.1</u>.</p> <p>The Custodian must disclose the unlawfully redacted information from “state” to “constables.”³¹</p>
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³¹ **Unless expressly identified for redaction, everything in the record shall be disclosed.** For purposes of identifying redactions, unless otherwise noted a paragraph/new paragraph begins whenever there is an indentation and/or a skipped space(s). The paragraphs are to be counted starting with the first whole William Gettler v. Township of Wantage (Sussex), 2009-73 & 2009-74 – Supplemental and *In Camera* Findings and Recommendations of the Executive Director 30

Based on the *in camera* review, it is determined that the discussions contained in the seventeen (17) e-mails at issue³² involve Township officials advising and deliberating on various scenarios in the preparation of the municipal budget. These discussions are therefore ACD in nature. Thus, these discussions are exempt from disclosure as ACD material pursuant to N.J.S.A. 47:1A-1.1.

However, the Custodian has unlawfully denied access to portions of the e-mail dated February 2, 2009 at 13:14:22 from the Custodian to Ms. Nuss re: Re: seniority list. Therefore, the Custodian must disclose to the Complainant those portions of Item No. 20 of the *in camera* table as indicated.

The GRC further notes that some of the redactions made by the Custodian were not done in a visually obvious manner. Specifically, the last four (4) e-mails submitted to the GRC on May 17, 2011 for an *in camera* review contained large whited out areas with the label “Redacted – Administrative and Consultative Material” in the center of the white area. The GRC previously discussed what constitutes an appropriate redaction in Wolosky v. Andover Regional School District (Sussex), GRC Complaint No. 2009-94 (April 2010). In that complaint, the custodian provided access to executive session minutes containing the statement “[t]his matter remains confidential due to [ACD] materials not subject to public disclosure,” under the headings for individual subject matters discussed in executive session. The GRC found that it appeared that the custodian made electronic redactions to the meeting minutes responsive prior to disclosing such minutes to the complainant. The GRC explained that:

“[i]f a record contains material that must be redacted, such as a social security number or unlisted phone number, *redaction must be accomplished by using a visually obvious method that shows the requestor the specific location of any redacted material in the record.* For example, if redacting a social security number or similar type of small-scale redaction, custodians should:

Make a paper copy of the original record and manually ‘black out’ the information on the copy with a dark colored marker. Then provide a copy of the blacked-out record to the requestor.’ (Emphasis added.) [Handbook for Records Custodians] at page 14.

It appears that the Custodian ‘electronically’ redacted the meeting minutes by deleting this material and inserting the phrase ‘[t]his matter

paragraph in each record and continuing sequentially through the end of the record. If a record is subdivided with topic headings, renumbering of paragraphs will commence under each new topic heading. Sentences are to be counted in sequential order throughout each paragraph in each record. Each new paragraph will begin with a new sentence number. If only a portion of a sentence is to be redacted, the word in the sentence which the redaction follows or precedes, as the case may be, will be identified and set off in quotation marks. If there is any question as to the location and/or extent of the redaction, the GRC should be contacted for clarification before the record is redacted. The GRC recommends the redactor make a paper copy of the original record and manually “black out” the information on the copy with a dark colored marker, then provide a copy of the blacked-out record to the requester.

³² Because three (3) of the twenty (20) e-mails identified by the Custodian are duplicates, the GRC will reference only seventeen (17) e-mails as the records responsive to the request.

remains confidential due to [ACD] materials not subject to public disclosure,' as opposed to redacting the information using a 'visually obvious method that shows the specific location of any redacted material...' This method does not show the requestor the specific location of the redacted material or the volume of material redacted. Although the Custodian eventually did release the requested records, the specific location of the redactions made was not visually obvious." *Id.* at page 12-13.

In this complaint, the Custodian redacted the four (4) e-mails provided to the GRC on May 17, 2011 in a manner that would not show a requestor the specific location of the redacted material or the volume of material redacted; thus, the specific location of the material underlying the redactions made was not visually obvious to the Complainant.

Thus, the method of "whiting out" the portions of the four (4) e-mails provided to the GRC on May 17, 2011 did not allow the Complainant to clearly identify the specific location of redacted material. Therefore, the Custodian's method of redacting the requested e-mails is not "a visually obvious method that shows ... the specific location of any redacted material in the record" and is thus not appropriate under OPRA. N.J.S.A. 47:1A-5.g.

Whether personal e-mail addresses of government officials are subject to disclosure under OPRA?

OPRA provides that:

"...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...* a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy" (Emphasis added.) N.J.S.A. 47:1A-1.

Moreover, OPRA requires that:

"[p]rior to allowing access to any government record, the custodian thereof shall redact from that record any information which discloses the social security number, credit card number, unlisted telephone number, or driver license number of any person; except [in certain limited circumstances.]" N.J.S.A. 47:1A-5.a.

The issue herein presented by the Complainant, why a personal e-mail address should be given the same status as an unlisted telephone number when an individual who accepts a government position knowingly chooses to use a personal e-mail address for official business, is a case of first impression. The Custodian contended in his responses to the Complainant and the SOI that such redactions are authorized under OPRA pursuant to the provision of N.J.S.A. 47:1A-1.1. regarding a citizen's reasonable expectation of privacy.

At issue are the three (3) partially redacted e-mails submitted for an *in camera* review and responsive to the Complainant's February 6, 2009 OPRA request, in addition to another seventeen (17) pages of records that contain redactions for only e-mail addresses. The GRC requested that both parties submit balancing tests to determine whether the Complainant's need for access outweighed the Township's right of confidentiality.

However, there are three factors infringing on the GRC's ability to decide this issue.

First, the Custodian failed to provide a document index as part of the SOI that accurately detailed all records that were provided, provided with redactions or for which access was wholly denied. Moreover, the GRC requested that the Custodian resubmit the document index in order to paint a clearer picture of the records at issue herein. On both occasions, the Custodian failed to provide an intelligible document index, thus providing unwarranted confusion in this complaint.

Second, in a letter to the GRC dated October 30, 2010, the Complainant argued that the Custodian's September 1, 2010 certification was erroneous because some of the e-mails did not include both the Mayor and Township Committee members' official and personal e-mail addresses. On November 5, 2010, the Custodian argued that the official e-mail address referred to in his certification was actually administrator@wantagetwp-nj.org. The Custodian further noted that this address was present in every e-mail. The Complainant subsequently contended that the Custodian misquoted himself in order to mislead the GRC into believing that administrator@wantagetwp-nj.org was indeed the e-mail address to which the Custodian referred in his September 1, 2010 certification. It is unclear whether the Custodian's certification actually referred to only administrator@wantagetwp-nj.org or to each individual Township assigned e-mail address in his September 1, 2010 certification.

Third, the GRC found a number of inconsistencies in redaction of personal e-mail addresses that the Custodian chose to redact in at least the last four (4) e-mails provided. Specifically, one of the Township Committee member's personal e-mail addresses is not redacted once. Another personal e-mail address is redacted in one e-mail and not another.

Therefore, because of the conflicting evidence on this point, it is necessary to refer this matter to the Office of Administrative Law ("OAL") to resolve the facts. In so doing, the Administrative Law Judge ("ALJ") should determine the disclosability of these e-mail addresses. Further, the GRC requests that the ALJ combine compliance with this Interim Order with compliance with the ALJ's initial decision, if any. Finally, the ALJ should determine whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Complainant has failed to establish in his request for reconsideration of the Council's August 24, 2010 Final Decision and Order 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 determining this complaint, and failed to submit any evidence to establish that the Complainant's January 21, 2009 request was not overly broad and therefore invalid under OPRA, 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).
2. Because the Custodian provided the GRC with a legal certification, the unredacted records requested for the *in camera* inspection and a document index on September 1, 2010, the Custodian timely complied with the Council's August 24, 2010 Interim Order.
3. The Custodian has unlawfully denied access to portions of the e-mail dated February 2, 2009 at 13:14:22 from the Custodian to Ms. Nuss re: Re: seniority list. Therefore, the Custodian must disclose to the Complainant those portions of Item No. 20 of the *in camera* table as indicated.
4. The method of "whiting out" the portions of the final four (4) e-mails provided did not allow the Complainant to clearly identify the specific location of redacted material. Therefore, the Custodian's method of "whiting out" the requested e-mails is not "a visually obvious method that shows ... the specific location of any redacted material in the record" and is thus not appropriate under OPRA. N.J.S.A. 47:1A-5.g.
5. Because of the conflicting evidence on this point, it is necessary to refer this matter to the Office of Administrative Law to resolve the facts. In so doing, the Administrative Law Judge should determine the disclosability of these e-mail addresses. Further, the GRC requests that the Administrative Law Judge combine compliance of this Interim Order with compliance of the Administrative Law Judge's initial decision, if any. Finally, the Administrative Law Judge should determine whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

January 24, 2012



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

August 24, 2010 Government Records Council Meeting

William Gettler
Complainant

Complaint Nos. 2009-73 & 2009-74

v.

Township of Wantage (Sussex)
Custodian of Record

At the August 24, 2010 public meeting, the Government Records Council (“Council”) considered the August 20, 2010 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 January 21, 2009 request fails to specify identifiable government records and would require the Custodian to conduct research to identify and locate government records which may be responsive to the request, the Complainant’s request is overly broad and is therefore invalid under OPRA. MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005), and New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007). Therefore, the Custodian has not unlawfully denied access to the requested records. *See also* Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).
2. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the sixteen (16) e-mails to determine the validity of the Custodian’s assertion that the records constitute advisory, consultative or deliberative material which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
3. Because the Custodian has raised the issue that disclosure of private e-mail addresses implicates privacy concerns under OPRA, the Complainant and the Custodian must complete a balancing test chart. The GRC is therefore sending this to the parties contemporaneously with the Council’s decision. **The parties must complete this questionnaire and return it to the GRC within five (5) business days of receipt thereof.**



4. The GRC must also conduct an *in camera* review of all records responsive to the Complainant's February 6, 2009 OPRA request containing redactions of e-mail addresses to determine if the asserted privacy interests apply to the redacted e-mail addresses. The Custodian must also provide a ***comprehensive document index*** for all records responsive to the Complainant in response to his February 6, 2009 OPRA request.
5. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see Item No. 2 and No. 4 above), the requested comprehensive document or redaction index,² as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,³ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 24th Day of August, 2010

Robin Berg Tabakin, Chair
Government Records Council

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

Stacy Spera, Secretary
Government Records Council

Decision Distribution Date: August 26, 2010

¹ The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

² The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

³ "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."

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
August 24, 2010 Council Meeting**

**William Gettler¹
Complainant**

GRC Complaint No. 2009-73 & 2009-74²

v.

**Township of Wantage (Sussex)³
Custodian of Records**

Records Relevant to Complaint:

January 21, 2009 OPRA request:

Copies of every item of correspondence sent or received by any official and/or any employee of the Township of Wantage from December 1, 2008 to January 22, 2009 that relates to the New Jersey Department of Community Affairs' ("NJDCA") Report: "Fiscal Aspects of Consolidating Sussex Borough and Wantage Township" dated November 2008 or that relates to the Complainant.⁴

February 6, 2009 OPRA request:

Copies of all communications (electronic or paper and including any attachments) between Parker Space ("Mayor Space"), Mayor of the Township of Wantage, Clara Nuss ("Deputy Mayor Nuss"), Deputy Mayor of the Township of Wantage, Bill DeBoer ("Committeeman DeBoer"), Committeeman for Township of Wantage, the Custodian and/or Michelle La Starza ("CFO La Starza"), Chief Financial Officer for the Township of Wantage, regarding the budget, proposed budget or proposed bonds between the dates of January 21, 2009 to February 6, 2009.

Requests Made: January 21, 2009 and February 6, 2009

Responses Made: January 26, 2009 and February 9, 2009

Custodian: James Doherty

GRC Complaint Filed: March 3, 2009⁵

¹ No legal representation listed on record.

² The Government Records Council has consolidated these matters for adjudication due to the commonality of the parties.

³ Represented by Michael Garofalo, Esq., of Laddey, Clark & Ryan Law Offices, LLC (Sparta, NJ).

⁴ The Complainant states that he is not requesting a copy of the report as he already has a copy.

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

Background

January 21, 2009

Complainant's first (1st) Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

January 26, 2009

Custodian's response to the first (1st) OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the third (3rd) business day following receipt of such request. The Custodian states that the Complainant's request is vague as to the types of records being requested and, as such, does not meet the requirements of a valid OPRA request for specific government records. The Custodian states that although the request is overly broad, he has chosen to provide access to all records located within the time frame and pertaining to key words provided by the Complainant.

The Custodian states that the Township of Wantage ("Township") treats private e-mail addresses as unlisted telephone numbers, which are recognized as one of the accepted exemptions from public disclosure under OPRA. The Custodian states that as such, private e-mail addresses have been redacted in the records provided.

Further, the Custodian states that records or information considered to be inter-agency or intra-agency advisory consultative or deliberative ("ACD") material is exempt from disclosure pursuant to OPRA. The Custodian states that he has determined that the following records are ACD material not subject to disclosure:

1. E-mail from the Custodian to the Township governing body dated December 4, 2008 regarding "NJDCA Report."
2. E-mail from Chuck McKay to the Custodian dated January 11, 2009 regarding "Re: Analysis of State Fiscal Report."
3. E-mail from the Custodian to Chuck McKay dated January 12, 2009 regarding "Re: Analysis of State Fiscal Report."

The Custodian states that no charge has been assessed for two (2) pages containing a couple of words and icons which are included for completeness. The Custodian states that the total copy cost is \$17.25.

February 6, 2009

Complainant's second (2nd) Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

February 9, 2009

Custodian's response to the second (2nd) OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the second (2nd) business day following receipt of such request. The Custodian states that access to a number of records is being granted with redactions because portions of the responsive records are ACD material not subject to disclosure pursuant to OPRA.

Additionally, the Custodian states that he has determined that access to the following records is denied in whole because said records constitute ACD material not subject to disclosure pursuant to OPRA:

1. E-mail from the Custodian to the Mayor and Committee dated January 23, 2009 regarding “budget.”
2. E-mail from the Custodian to Mayor and Committee dated January 23, 2009 regarding “health coverage.”
3. E-mail from Mayor Space to the Custodian dated January 23, 2009 regarding “health coverage.”
4. E-mail from the Custodian to Mayor, Committee and Counsel dated January 30, 2009 regarding “possible budget savings through personnel changes – Administration and Finance.”
5. E-mail from the Custodian to Mayor Space dated January 30, 2009 regarding “impact of personnel changes.”
6. E-mail from the Custodian to Mayor and Committee dated January 30, 2009 regarding “impact of personnel changes.”
7. E-mail from the Custodian to Mayor Space dated January 30, 2009 regarding “impact of personnel changes.”
8. E-mail from the Custodian to Mayor and Committee dated January 30, 2009 regarding “impact of personnel changes.”
9. E-mail from the Custodian to Mayor and Committee dated January 30, 2009 regarding “impact of personnel changes.”
10. E-mail from the Custodian to Mayor, Committee and Counsel dated February 2, 2009 regarding “impact of personnel changes.”
11. E-mail from the Custodian to mayor and Committee dated February 2, 2009 regarding “impact of personnel changes.”
12. E-mail from the Custodian to Mayor Space dated February 5, 2009 regarding “adjustment to budget from removal of paid lunch hour.”
13. E-mail from Mayor Space to the Custodian dated February 5, 2009 regarding “adjustment to budget from removal of paid lunch hour.”
14. E-mail from the Custodian to Mayor Space and Committee dated February 5, 2009 regarding “adjustment to budget from removal of paid lunch hour.”
15. E-mail from the Custodian to Mayor Space and Committee dated February 5, 2009 regarding “adjustment to budget from removal of paid lunch hour.”
16. E-mail from the Custodian to Mayor Space dated February 5, 2009 regarding “adjustment to budget from removal of paid lunch hour.”

Further, the Custodian states that the Township treats private e-mail addresses as unlisted telephone numbers, which are recognized as one of the accepted exemptions from public disclosure under OPRA. The Custodian states that as such, private e-mail addresses have been redacted in the records provided.

Finally, the Custodian states the Complainant will not be charged copying costs for several pages included for completeness and accuracy. The Custodian states that the total copying cost for all records provided is \$15.00.

February 18, 2009

Letter from the Complainant to Mayor Space and Deputy Mayor Nuss. The Complainant states that he hand delivered OPRA requests to the Custodian on January 21, 2009 and February 6, 2009.

The Complainant states that on January 26, 2009 the Custodian responded in writing to the Complainant's January 21, 2009 request denying access to three (3) e-mails as ACD material exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. The Complainant states that OPRA provides that "any limitations on the right of access ... shall be construed in favor of the public's right of access." N.J.S.A. 47:1A-1. The Complainant acknowledges that N.J.S.A. 47:1A-1.1. recognizes ACD material as an acceptable exemption, but the Complainant contends that the Custodian is using the exemption as a blanket response for records that are not actually ACD material.

The Complainant states that the court saw the potential for misuse of exemptions found in OPRA and held that:

"[the] court must always maintain a sharp focus on the purpose of OPRA and resist attempts to limit its scope, absent a clear showing that one of its exemptions or exceptions incorporated in its statutes by reference is applicable to the requested disclosure, and salutary goal 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."

The Complainant states that the three (3) e-mails to which access was denied pertain to the report entitled "Fiscal Aspects of Consolidating Sussex Borough and Wantage Township" issued by NJDCA to the Joint Municipal Consolidation Study Commission of Sussex County and Wantage Township for deliberation. The Complainant states that the report was also posted on the Township's website. The Complainant asserts that neither the Custodian nor any members of the Township governing body are members of the Joint Municipal Consolidation Study Commission and would not have been involved in the Commission's deliberations, therefore, the Complainant questions how the Custodian can invoke the ACD exemption in this instance.

Further, the Complainant states that the Custodian responded in writing to the Complainant's February 6, 2009 request on February 9, 2009 again denying access to sixteen (16) e-mails as ACD material exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. The Complainant contends that the Custodian is unlawfully denying access to the requested records in order to cover for errors in the Township's budget.

The Complainant requests that Mayor Space and Deputy Mayor Nuss order the Custodian to provide access to the records denied.

February 22, 2009

Letter from the Complainant to Mayor Space and Deputy Mayor Nuss. The Complainant again asks that Mayor Space and Deputy Mayor Nuss order the Custodian to provide access to the records denied.

March 3, 2009

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

- Complainant’s first (1st) OPRA request dated January 21, 2009.
- Letter from the Custodian to the Complainant dated January 26, 2009.
- Six (6) e-mails responsive to the Complainant’s January 21, 2009 OPRA request with redactions of e-mail addresses.
- Complainant’s second (2nd) OPRA request dated February 6, 2009.
- Letter from the Custodian to the Complainant dated February 9, 2009.
- Letter from the Complainant to Mayor Space and Deputy Mayor Nuss dated February 18, 2009.
- Letter from the Complainant to Mayor Space and Deputy Mayor Nuss dated February 22, 2009.⁶

The Complainant states that he submitted an OPRA request to the Township on January 21, 2009. The Complainant states that the Custodian responded in writing on January 26, 2009 stating that although the Complainant’s request was overly broad because the Complainant used the word “etc.” in his request to identify types of correspondence, the Custodian chose to search for all e-mails that included the key words the Complainant identified in his OPRA request. The Complainant states that the Custodian redacted e-mail addresses under the authority that allows for nondisclosure of unlisted telephone numbers. The Complainant states that the Custodian also stated that three (3) e-mails were exempt from disclosure as ACD material.

The Complainant disputes the Custodian’s characterization of the request as overly broad. The Complainant asserts that his request was very specific: it sought records containing information regarding a report within a limited time period. The Complainant notes that although he identifies some types of correspondence, including letters, faxes, e-mails and so on, the Complainant argues that the use of “etc.” does not make his OPRA request vague. The Complainant contends that there could be many different identifiers for types of correspondence and questions whether a requestor must specifically identify all possible records to avoid a custodian’s omission of records or a response that the request is overly broad.

Further, the Complainant disputes the Custodian’s redaction of e-mail addresses through OPRA’s exemption from disclosure for unlisted telephone numbers. The Complainant questions whether there is any legal basis for treating private e-mail addresses as unlisted telephone numbers. The Complainant contends that some of the e-mail addresses redacted did not include a name, thus making it impossible to identify who the e-mail was sent from or who was receiving the e-mail. The Complainant states that he has attached copies of six (6) e-mails provided by the Custodian that illustrate this argument. The Complainant contends that Mr. Jack Doyle (“Mr. Doyle”) is a consultant

⁶ The Complainant includes in the Denial of Access Complaint two (2) requests made under common law for the records which the Complainant denied access to in his January 26, 2009 and February 9, 2009 response. However, these two (2) requests are irrelevant to the instant complaint because the GRC only has the authority to adjudicate requests made pursuant to OPRA.

contracted by NJDCA; therefore, his e-mail should not be redacted. The Complainant further argues that if a person takes an official position in municipal government, state government or, in this instance, a municipal Consolidation Study Commission, and chooses to use their personal e-mail address for official government correspondence, their private e-mail address should not be exempt from disclosure. The Complainant requests that the GRC order the Custodian to provide the Complainant with copies of the records responsive without redactions for e-mail addresses.

Moreover, the Complainant disputes the Custodian's denial of access to three (3) e-mails identified in the Custodian's January 26, 2009 response as exempt from disclosure as ACD. The Complainant asserts that he believes that the Legislature intended to make government more transparent by adopting OPRA (2002) and its predecessor, the Right to Know Law (1975). See N.J.S.A. 47:1A-1. The Complainant argues that in Asbury Park Press v. Ocean County Prosecutor's Office, 374 N.J. Super. 312, 864 (App. Div. 2004), the New Jersey courts held that:

“[c]ourt must always maintain a sharp focus on the purpose of [OPRA] and resist attempts to limit its scope, absent a clear showing that one of its exemptions or exceptions incorporated in its statutes by reference is applicable to the requested disclosure, and the salutary goal is to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secular process.”

The Complainant argues that the three (3) e-mails withheld concern the NJDCA report, which was released to the Consolidation Study Commission of Sussex Borough and Wantage Township for deliberations. The Complainant notes that neither the Custodian nor any member of Wantage Township's governing body are members of the Joint Municipal Consolidation Study Commission and therefore will not be involved in the Commission's deliberations. The Complainant questions how the ACD exemption can be invoked when neither party in the e-mails is involved in the deliberations. The Complainant requests that the GRC order that the Custodian provide the three (3) withheld e-mails to the Complainant.

Additionally, the Complainant states that he hand delivered an OPRA request to the Township on February 6, 2009. The Complainant states that the Custodian responded on February 9, 2009, denying access to sixteen (16) e-mails as ACD material pursuant to N.J.S.A. 47:1A-1.1. The Complainant states that he sent two (2) letters to Mayor Space and Deputy Mayor Nuss requesting that they order the Custodian to provide access to said e-mails.

The Complainant contends that the Custodian is unlawfully denying access to the sixteen (16) e-mails in an attempt to cover mistakes in the budget.

The Complainant does not agree to mediate this complaint.

March 12, 2009

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

March 19, 2009

Custodian’s SOI attaching the Complainant’s OPRA request dated February 6, 2009.⁷

The Custodian certifies that his search for the requested records included performing a keyword search on his computer. The Custodian also 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”).

The Custodian certifies that he received the Complainant’s January 21, 2009 OPRA request on the same date. The Custodian certifies that he responded in writing on January 26, 2009 stating that although the Complainant’s request was overly broad because it contained the word “etc.”, the Custodian chose to provide access to all records within the time frame and pertaining to key words from the Complainant’s request. The Custodian further certifies that he provided access to records but advised that some e-mail addresses were redacted similar to how unlisted telephone numbers are permitted to be redacted. The Custodian certifies that he also denied access to three (3) e-mails considered to be exempt under OPRA as ACD material.

The Custodian certifies that he received the Complainant’s February 6, 2009 OPRA request on the same date. The Custodian certifies that he responded in writing on February 9, 2009 providing access to some records with redactions of private e-mail addresses and ACD material. Additionally, the Custodian certifies that he denied access to sixteen (16) e-mails that were considered ACD material pursuant to N.J.S.A. 47:1A-1.1.

The Custodian provides the following in the document index:⁸

List of All Records Responsive to the Complainant’s OPRA request	List of All Records Provided in Entirety or with Redactions	Records Denied in Entirety	Legal Explanation and Statutory Citation for the denial of access or redaction.
E-mail dated January 21, 2009	E-mail dated January 11, 2009 provided with redactions on January 26, 2009	E-mail dated February 5, 2009	<u>N.J.S.A. 47:1A-1.1</u> . permits the redaction of e-mail addresses. Additionally, <u>N.J.S.A. 47:1A-1.1</u> . permits the denial of records considered to be ACD material.
E-mail dated January 29, 2009	E-mail dated January 11, 2009 provided	E-mail dated February 2,	<u>N.J.S.A. 47:1A-1.1</u> . permits the redaction of e-mail addresses.

⁷ The Custodian filed a single SOI including responses to both the instant complaints.

⁸ The document index included is verbatim as provided by the Custodian in the SOI. Further, the document index contains seventeen (17) e-mails to which access was denied; however, the evidence of record shows that the Custodian erroneously identified an extra e-mail dated January 30, 2009. Further, the three (3) e-mails responsive to the Complainant’s January 21, 2009 OPRA request for which access was denied are not included in the document index.

	with redactions on January 26, 2009	2009	Additionally, <u>N.J.S.A. 47:1A-1.1.</u> permits the denial of records considered to be ACD material.
	E-mail dated December 4, 2009 provided with redactions on January 26, 2009	E-mail dated January 30, 2009	<u>N.J.S.A. 47:1A-1.1.</u> permits the redaction of e-mail addresses. Additionally, <u>N.J.S.A. 47:1A-1.1.</u> permits the denial of records considered to be ACD material.
	E-mail dated January 30, 2009 provided with redactions on February 9, 2009	E-mail dated January 30, 2009	<u>N.J.S.A. 47:1A-1.1.</u> permits the redaction of e-mail addresses. Additionally, <u>N.J.S.A. 47:1A-1.1.</u> permits the denial of records considered to be ACD material.
	E-mail dated January 27, 2009 provided with redactions on February 9, 2009	E-mail dated January 23, 2009	<u>N.J.S.A. 47:1A-1.1.</u> permits the redaction of e-mail addresses. Additionally, <u>N.J.S.A. 47:1A-1.1.</u> permits the denial of records considered to be ACD material.
	E-mail dated January 26, 2009 provided with redactions on February 9, 2009	E-mail dated January 23, 2009	<u>N.J.S.A. 47:1A-1.1.</u> permits the redaction of e-mail addresses. Additionally, <u>N.J.S.A. 47:1A-1.1.</u> permits the denial of records considered to be ACD material.
	E-mail dated January 26, 2009 provided with redactions on February 9, 2009	E-mail dated January 23, 2009	<u>N.J.S.A. 47:1A-1.1.</u> permits the redaction of e-mail addresses. Additionally, <u>N.J.S.A. 47:1A-1.1.</u> permits the denial of records considered to be ACD material.
	E-mail dated January 26, 2009 provided with redactions on February 9, 2009	E-mail dated January 23, 2009	<u>N.J.S.A. 47:1A-1.1.</u> permits the redaction of e-mail addresses. Additionally, <u>N.J.S.A. 47:1A-1.1.</u> permits the denial of records considered to be ACD material.
	E-mail dated January 26, 2009 provided with redactions on February 9, 2009	E-mail dated February 2, 2009	<u>N.J.S.A. 47:1A-1.1.</u> permits the redaction of e-mail addresses. Additionally, <u>N.J.S.A. 47:1A-1.1.</u> permits the denial of records considered to be ACD material.
	E-mail dated January 28, 2009 provided with redactions on February 9, 2009	E-mail dated January 30, 2009	<u>N.J.S.A. 47:1A-1.1.</u> permits the redaction of e-mail addresses. Additionally, <u>N.J.S.A. 47:1A-1.1.</u> permits the denial of records considered to be ACD material.
	E-mail dated January 29, 2009 provided with redactions on February 9, 2009	E-mail dated January 30, 2009	<u>N.J.S.A. 47:1A-1.1.</u> permits the redaction of e-mail addresses. Additionally, <u>N.J.S.A. 47:1A-1.1.</u> permits the denial of records

			considered to be ACD material.
	E-mail dated January 26, 2009 provided with redactions on February 9, 2009	E-mail dated January 30, 2009	<u>N.J.S.A.</u> 47:1A-1.1. permits the redaction of e-mail addresses. Additionally, <u>N.J.S.A.</u> 47:1A-1.1. permits the denial of records considered to be ACD material.
	E-mail dated February 3, 2009 provided with redactions on February 9, 2009	E-mail dated February 5, 2009	<u>N.J.S.A.</u> 47:1A-1.1. permits the redaction of e-mail addresses. Additionally, <u>N.J.S.A.</u> 47:1A-1.1. permits the denial of records considered to be ACD material.
	E-mail dated January 29, 2009 provided with redactions on February 9, 2009	E-mail dated February 5, 2009	<u>N.J.S.A.</u> 47:1A-1.1. permits the redaction of e-mail addresses. Additionally, <u>N.J.S.A.</u> 47:1A-1.1. permits the denial of records considered to be ACD material.
	E-mail dated January 29, 2009 provided with redactions on February 9, 2009	E-mail dated February 5, 2009	<u>N.J.S.A.</u> 47:1A-1.1. permits the redaction of e-mail addresses. Additionally, <u>N.J.S.A.</u> 47:1A-1.1. permits the denial of records considered to be ACD material.
	E-mail dated January 23, 2009 provided with redactions on February 9, 2009	E-mail dated February 5, 2009	<u>N.J.S.A.</u> 47:1A-1.1. permits the redaction of e-mail addresses. Additionally, <u>N.J.S.A.</u> 47:1A-1.1. permits the denial of records considered to be ACD material.
	E-mail dated January 23, 2009 provided with redactions on February 9, 2009		<u>N.J.S.A.</u> 47:1A-1.1. permits the redaction of e-mail addresses. Additionally, <u>N.J.S.A.</u> 47:1A-1.1. permits the denial of records considered to be ACD material.
	E-mail dated January 23, 2009 provided with redactions on February 9, 2009		<u>N.J.S.A.</u> 47:1A-1.1. permits the redaction of e-mail addresses. Additionally, <u>N.J.S.A.</u> 47:1A-1.1. permits the denial of records considered to be ACD material.
	E-mail dated January 29, 2009 provided with redactions on February 9, 2009		<u>N.J.S.A.</u> 47:1A-1.1. permits the redaction of e-mail addresses. Additionally, <u>N.J.S.A.</u> 47:1A-1.1. permits the denial of records considered to be ACD material.
	E-mail dated January 29, 2009 provided with redactions on February 9, 2009		<u>N.J.S.A.</u> 47:1A-1.1. permits the redaction of e-mail addresses. Additionally, <u>N.J.S.A.</u> 47:1A-1.1. permits the denial of records considered to be ACD material.
	E-mail dated January		<u>N.J.S.A.</u> 47:1A-1.1. permits the

	29, 2009 provided with redactions on February 9, 2009		redaction of e-mail addresses. Additionally, <u>N.J.S.A.</u> 47:1A-1.1. permits the denial of records considered to be ACD material.
	E-mail dated February 2, 2009 provided with redactions on February 9, 2009		<u>N.J.S.A.</u> 47:1A-1.1. permits the redaction of e-mail addresses. Additionally, <u>N.J.S.A.</u> 47:1A-1.1. permits the denial of records considered to be ACD material.

The Custodian states that N.J.S.A. 47:1A-1.1. provides that government records shall not include:

“inter-agency or intra-agency advisory, consultative, or deliberative material ... and ... that portion of any document which discloses the social security number, credit card number, unlisted telephone number or driver license number of any person...”

The Custodian contends that the portion of N.J.S.A. 47:1A-1.1. regarding a citizen’s reasonable expectation of privacy, though not directly identifying personal e-mail addresses as part of the information not subject to disclosure, should apply. The Custodian argues that government officials have a reasonable expectation that private e-mail addresses, similar to their unlisted telephone numbers, need not be disclosed to the public.

The Custodian finally argues that OPRA further allows for the denial of access to records which contain ACD material in part or in whole.

March 29, 2009

The Complainant’s response to the Custodian’s SOI with the following attachments:

- Letter from the Custodian to the Complainant dated January 26, 2009.
- Letter from the Custodian to the Complainant dated February 9, 2009.⁹

The Complainant takes issue with the Custodian’s SOI. Specifically, the Complainant notes that the Custodian filed a joint SOI for each of the Complainant’s two (2) complaints. The Complainant states that it should be noted that each complaint dealt with two (2) totally separate requests: the January 21, 2009 OPRA request sought copies of government records relating to the NJDCA report and the February 6, 2009 OPRA request sought copies of government records pertaining to the Township’s 2009 budget process. The Complainant contends that the only two (2) similarities between the two (2) complaints is the Custodian’s refusal to provide access to all of the records requested.

⁹ The Complainant also attaches his requests made under common law and the Custodian’s responses to same. As stated in an earlier footnote, the common law requests are irrelevant to the adjudication of the instant complaint.
William Gettler v. Township of Wantage (Sussex), 2009-73 & 2009-74 – Findings and Recommendations of the Executive Director

The Complainant contends that the Custodian failed to properly identify records in the SOI and further failed to provide a general nature description of each record. The Complainant argues that although the Custodian states in the SOI that e-mail addresses were redacted pursuant to N.J.S.A. 47:1A-1.1., the Custodian concedes that no such provision exists:

“[d]espite the fact that private e-mail addresses are not specifically cited, government officials have a reasonable expectation that, like their unlisted telephone numbers, a private, home computer e-mail address need not be disclosed to the public.” *See* Custodian’s SOI, Item 12.

The Complainant again questions whether there is any legal basis for treating private e-mail addresses similarly to unlisted telephone numbers, as asserted by the Custodian. Further, the Complainant asserts that because some of the e-mails redacted do not include the person’s name it is impossible to determine from or to whom the e-mail was sent. The Complainant questions that if Mr. Jack Doyle (“Mr. Doyle”) is a consultant contracted by NJDCA, under what authority could his e-mail address be redacted. Moreover, the Complainant questions that if an official in municipal government, state government or in this instance a Consolidation Study Commission chooses to use their private e-mail address for official government business, what authority permits the exemption from disclosure of e-mail addresses.

The Complainant requests that the GRC order the Custodian to provide access to copies of the requested records without redactions of any e-mail addresses.

Additionally, the Complainant states that the Custodian improperly denied access to records responsive to both requests as ACD material not subject to disclosure under OPRA. The Complainant argues that the Custodian’s denial is too broad in scope, allowing a custodian to justify denying access to records which may be embarrassing to a public agency or that a custodian does not want to provide to a requestor. The Complainant asserts that e-mails are already being used to circumvent the Open Public Meetings Act (“OPMA”) by settling matters through a series of e-mails away from the public’s scrutiny instead of through discussion at a public meeting.

The Complainant states that OPRA requires that a public agency bear the burden of proving a lawful denial of access. N.J.S.A. 47:1A-6. Further, the Complainant states that under OPRA, access to government records “shall be construed in favor of the public’s right of access.” N.J.S.A. 47:1A-1. *See also* Asbury Park Press v. ocean County Prosecutor’s Office, 374 N.J. Super. 312, 864 (App. Div. 2004).

Complainant’s January 21, 2009 OPRA request:

The Complainant states that in response to his OPRA request, the Custodian provided eighteen (18) documents at a total of forty-two (42) pages, including a one (1) page cover letter. The Complainant avers that of the forty-two (42) pages of records, nine (9) pages contained redactions. The Complainant states that the Custodian also denied access to three (3) e-mails.

The Complainant states that a thorough inspection of the SOI reveals that the (3) records denied were not included in the document index. The Complainant also notes that none of the forty-two (42) pages of records provided by the Custodian on January 26, 2009 contains an e-mail dated January 11, 2009. Further, the Complainant states that one (1) e-mail dated December 4, 2008 is identified in the document index as redacted; however, no redactions were made to the record.¹⁰ The Complainant notes that the Custodian also failed to include in the document index any of the records that were provided to the Complainant, even though those records contained redactions.

The Complainant reiterates that the Custodian could not have denied access to the three (3) e-mails responsive to the Complainant's January 21, 2009 OPRA request as ACD material because the municipal government removed themselves from further official participation in the consolidation process by adopting on May 29, 2008 an "Amending Resolution Authorizing Submission of an Application to the local Finance Board of the State of New Jersey for the Creation of a Joint Consolidation Study Commission for the Township of Wantage and the Borough of Sussex, Establishing a Process for a Consolidation Study in Accordance with N.J.S.A. 40A:65-25 et seq." The Complainant requests that the GRC perform an *in camera* review of the three (3) e-mails to which he was denied access as ACD material.

Complainant's February 6, 2009 OPRA request:

The Complainant states that in response to his OPRA request, the Custodian provided twenty-five (25) documents totaling thirty-nine (39) pages, including a two (2) page cover letter. The Complainant avers that of the thirty-nine (39) pages of records, twenty-three (23) contained redactions.

The Complainant points out that although the Custodian originally denied access to sixteen (16) e-mails, the Custodian identifies seventeen (17) e-mails in the document index. Further, the Complainant contends that the Custodian also failed to provide a general nature description of the denied records. The Complainant also asserts that the Custodian failed to include in the document index meeting minutes of three (3) meetings which were provided to the Complainant.

The Complainant requests that the GRC perform an *in camera* review of the records to which he was denied access entirely and those containing redactions.

May 6, 2009

E-mail from the GRC to the Custodian's Counsel. The GRC states that it is in receipt of the SOI. The GRC states that the evidence of record for the instant complaint would be considerably clearer if the SOI corresponding to each complaint was separate. The GRC requests that the Township re-submit a separate SOI for each complaint by May 11, 2009.

¹⁰ It is unclear if the December 4, 2008 e-mail referenced is one (1) of the three (3) e-mails for which access was denied by the Custodian January 26, 2009 or a separate e-mail provided to the Complainant.
William Gettler v. Township of Wantage (Sussex), 2009-73 & 2009-74 – Findings and Recommendations of the Executive Director

May 12, 2009

Custodian's amended SOI attaching the Complainant's OPRA request dated February 6, 2009. The Custodian re-submits the SOI previously provided to the GRC for the January 21, 2009 OPRA request and restates his position regarding the instant complaint.

July 1, 2009

E-mail from the GRC to the Custodian's Counsel. The GRC states that it is in receipt of the Custodian's amended SOI and found that the records listed in the document index were identical to the index previously submitted for the January 21, 2009 OPRA request. The GRC requests that Counsel clarify whether the records identified in the document index reflect all records responsive to the Complainant's two (2) OPRA requests.

July 1, 2009

E-mail from the Custodian's Counsel to the GRC. Counsel states that the Complainant made two (2) requests. Counsel states that the Complainant requested "any and all" communications from December 1, 2009 and January 22, 2009 in GRC Complaint No. 2009-73. Counsel states that the Complainant's request in GRC Complaint No. 2009-74 contains a similar request for "any and all" communications between January 21, 2009 through February 6, 2009.

Counsel avers that the document index created for the SOI covers from December 1, 2008 to February 6, 2009 is arranged chronologically and is responsive to both complaints.

August 2, 2009

Letter from the Complainant to the GRC attaching the following:

- Letter from the Custodian to the Complainant dated January 26, 2009.
- Letter from the Custodian to the Complainant dated February 9, 2009.

The Complainant argues that the Custodian has still failed to provide a complete SOI. The Complainant argues that the GRC's SOI request letter advises that a custodian will only have one (1) opportunity to rectify an SOI deemed to be incomplete; however, Counsel's July 1, 2009 e-mail is in fact a third (3rd) submittal of the facts of the SOI.

The Complainant contends that although Counsel included the correct period of time relevant to each OPRA request, Counsel has failed to acknowledge that the subject of each request is entirely different. The Complainant reiterates that the only similarity between the requests relevant to both complaints is the Custodian's failure to provide access to redacted information and undisclosed records.

The Complainant reiterates his requests that the GRC order the Custodian provide access to copies of all records responsive with no redactions, including those that the Custodian deemed to be exempt from OPRA as ACD material. Further, the Complainant requests that the GRC order the Custodian to cease redacting private e-mail addresses

from public records and provide the Complainant with unredacted copies of the records previously provided by the Custodian.¹¹

Analysis

Whether the Complainant's two (2) OPRA requests are invalid under OPRA?

OPRA provides that:

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

Additionally, OPRA defines a government record as:

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

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

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

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request "with certain exceptions." N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

Complainant's January 21, 2009 OPRA request:

The Complainant's January 21, 2009 request sought "[c]opies of every item of correspondence sent or received by any official and/or any employee of the Township of Wantage from December 1, 2008 to January 22, 2009 that relates to the New Jersey Department of Community Affairs' ("NJDCA") Report: "Fiscal Aspects of Consolidating Sussex Borough and Wantage Township" dated November 2008 or that relates to the Complainant." The Custodian responded in writing on January 26, 2009 stating that the

¹¹ The Complainant sent a letter to the GRC on August 8, 2009 reiterating his position from previous letters, and attaching a news release pertaining to a Mercer County Superior Court ruling ordering the GRC to provide access to complaint acknowledgement notices that the GRC e-mailed to complainants without redactions of the complainants' e-mail addresses.

Complainant's request is vague as to the types of records being requested and, as such, did not meet the requirements of a valid OPRA request.¹²

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),¹³ 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."¹⁴

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

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

In the instant case, the Complainant's request for "every item of correspondence sent or received ..." would require the Custodian to review all correspondence received

¹² The Custodian further stated that he undertook the task of identifying records which may be responsive to the Complainant's request.

¹³ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

¹⁴ As stated in Bent, *supra*.

or sent by any official and/or any employees of the Township over more than a year's time period to determine which records may be responsive to the Complainant's request; however, the Custodian is not required to conduct research in response to an OPRA request. MAG, supra, Bent, supra, and NJ Builders, supra.

Therefore, because the Complainant's January 21, 2009 request fails to specify identifiable government records and would require the Custodian to conduct research to identify and locate government records which may be responsive to the request, the Complainant's request is overly broad and is therefore invalid under OPRA. MAG, supra, Bent, supra, and NJ Builders, supra. Therefore, the Custodian has not unlawfully denied access to the requested records. *See also* Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

Complainant's February 6, 2009 OPRA request:

The Complainant's February 6, 2009 request sought "[c]opies of all communications (electronic or paper and including any attachments) between Parker Space ("Mayor Space"), Mayor of the Township of Wantage, Clara Nuss ("Deputy Mayor Nuss"), Deputy Mayor of the Township of Wantage, Bill DeBoer ("Committeeman DeBoer"), Committeeman for Township of Wantage, the Custodian and/or Michelle La Starza ("CFO La Starza"), Chief Financial Officer for the Township of Wantage, regarding the budget, proposed budget or proposed bonds between the dates of January 21, 2009 to February 6, 2009." The Custodian responded providing access to some records and denying access to sixteen (16) e-mails.

In Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the Complainant appealed a final decision of the GRC¹⁵ in which the GRC dismissed the complaint by accepting the Custodian's legal conclusion for the denial of access without further review. The court stated that:

"OPRA contemplates the GRC's meaningful review of the basis for an agency's decision to withhold government records...When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers."

The court also stated that:

"[t]he statute also contemplates the GRC's *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the 'Open Public Meetings Act,' N.J.S.A. 10:4-6 to -21, it also provides that the GRC 'may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.' N.J.S.A. 47:1A-7f.

¹⁵ Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005). William Gettler v. Township of Wantage (Sussex), 2009-73 & 2009-74 – Findings and Recommendations of the Executive Director

This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.”

Further, the court stated that:

“[w]e hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal...There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC’s obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7f, which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.”

Therefore, pursuant to Paff, supra, the GRC must conduct an *in camera* review of the sixteen (16) e-mails to determine the validity of the Custodian’s assertion that the records constitute ACD material which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

Additionally, the Complainant disputed the redaction of e-mail addresses in the records provided to him in response to the February 6, 2009 OPRA request. The Custodian contended in both his responses to the Complainant and the SOI that such redactions are authorized under OPRA pursuant to the provision of N.J.S.A. 47:1A-1.1 regarding a citizen’s reasonable expectation of privacy. However, the Custodian does note that:

“[d]espite the fact that private e-mail addresses are not specifically cited, government officials have a reasonable expectation that, like their unlisted telephone numbers, a private, home computer e-mail address need not be disclosed to the public.” *See* Custodian’s SOI, Item 12.

OPRA provides that:

“[p]rior to allowing access to any government record, the custodian ... shall redact ... information which discloses the social security number, credit card number, unlisted telephone number, or driver license number of any person[.]”

Although the Custodian acknowledges that private e-mail addresses are not explicitly cited as part of the personal privacy exemption, the evidence of record is not detailed enough to make a determination whether the redactions for private e-mail addresses are lawful under OPRA. Because the Custodian has raised the issue that disclosure of private e-mail addresses implicates privacy concerns under OPRA, the Complainant and the Custodian must complete a balancing test chart. The GRC is therefore sending said chart to the parties contemporaneously with the Council’s decision. The parties must complete this questionnaire and return it to the GRC within five (5) business days of receipt thereof.

Pursuant to Paff, *supra*, the GRC must also conduct an *in camera* review of all records responsive to the Complainant's February 6, 2009 OPRA request containing redactions of e-mail addresses to determine if the asserted privacy interests apply to the redacted e-mail addresses. The Custodian must also provide a ***comprehensive document index*** for all records responsive to the Complainant in response to his February 6, 2009 OPRA request.

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

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Complainant's January 21, 2009 request fails to specify identifiable government records and would require the Custodian to conduct research to identify and locate government records which may be responsive to the request, the Complainant's request is overly broad and is therefore invalid under OPRA. MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005), and New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007). Therefore, the Custodian has not unlawfully denied access to the requested records. *See also* Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).
2. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the sixteen (16) e-mails to determine the validity of the Custodian's assertion that the records constitute advisory, consultative or deliberative material which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
3. Because the Custodian has raised the issue that disclosure of private e-mail addresses implicates privacy concerns under OPRA, the Complainant and the Custodian must complete a balancing test chart. The GRC is therefore sending this to the parties contemporaneously with the Council's decision. **The parties must complete this questionnaire and return it to the GRC within five (5) business days of receipt thereof.**
4. The GRC must also conduct an *in camera* review of all records responsive to the Complainant's February 6, 2009 OPRA request containing redactions of e-mail addresses to determine if the asserted privacy interests apply to the redacted e-mail addresses. The Custodian must also provide a ***comprehensive***

document index for all records responsive to the Complainant in response to his February 6, 2009 OPRA request.

5. **The Custodian must deliver¹⁶ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see Item No. 2 and No. 4 above), the requested comprehensive document or redaction index,¹⁷ as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,¹⁸ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**

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

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

August 20, 2010

¹⁶ The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

¹⁷ The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

¹⁸ "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."