



**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**

**June 24, 2014 Government Records Council Meeting**

Mark Lagerkvist  
Complainant

Complaint No. 2011-110

v.

New Jersey Department of Treasury,  
Division of Pensions & Benefits  
Custodian of Record

At the June 24, 2014 public meeting, the Government Records Council (“Council”) considered the June 17, 2014 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 adopt the Honorable Linda M. Kassekert’s, Administrative Law Judge, May 19, 2014 Initial Decision in which the Judge approved the Settlement Agreement signed by the parties or their representatives ordering the parties to comply with the settlement terms and further determining that these proceedings be concluded.

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 24<sup>th</sup> Day of June, 2014

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: June 26, 2014**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
June 24, 2014 Council Meeting**

**Mark Lagerkvist<sup>1</sup>  
Complainant**

**GRC Complaint No. 2011-110**

v.

**New Jersey Department of Treasury,  
Division of Pensions & Benefits<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Inspection of:

1. All available records concerning an investigation into the pension eligibility of Mr. Michael J. Donovan (“Mr. Donovan”) conducted in 2010-2011.
2. Any e-mails or correspondence re: Mr. Donovan’s pension between the Division of Pensions & Benefits (“DPB”) and the Office of the Governor or Lieutenant (“Lt.”) Governor from 2010 to present.

**Custodian of Record:** Florence Sheppard  
**Request Received by Custodian:** March 14, 2011  
**Response Made by Custodian:** April 1, 2011  
**GRC Complaint Received:** April 11, 2011

**Background**

**December 18, 2012 Council Meeting:**

At its December 18, 2012 public meeting, the Council considered the December 11, 2012 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

[B]ecause of significant procedural issues contemplated and for administrative efficacy, this complaint should be referred to the Office of Administrative Law for completion of the *in camera* review and determination as to whether the Custodian unlawfully denied access to any records. Additionally, for administrative ease, the OAL should determine whether the Custodian knowingly and willfully violated OPRA within the totality of the circumstances and

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<sup>1</sup> Represented by Donald M. Doherty, Esq., of Friedman, Doherty, LLC (West Berlin, NJ).

<sup>2</sup> Represented by DAG Danielle P. Schimmel, on behalf of the NJ Attorney General.

determine whether the Complainant is entitled to an award of reasonable attorney's fees.

Id. at 5.

Procedural History:

On December 19, 2012, the Council distributed its Interim Order to all parties. On May 6, 2013, the complaint was transmitted to the Office of Administrative Law ("OAL"). On May 19, 2014, the Honorable Linda M. Kassekert, Administrative Law Judge ("ALJ") issued an Initial Decision as follows:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or the signatures of their representatives.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

Therefore, the ALJ ". . . **CONCLUDE[D]** that the agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the terms of the settlement, and it is **FURTHER ORDERED** that the proceedings in this matter be concluded."

**Analysis**

No analysis required.

**Conclusions and Recommendations**

The Executive Director respectfully recommends that the Council adopt the Honorable Linda M. Kassekert's, Administrative Law Judge, May 19, 2014 Initial Decision in which the Judge approved the Settlement Agreement signed by the parties or their representatives ordering the parties to comply with the settlement terms and further determining that these proceedings be concluded.

Prepared By: Frank F. Caruso  
Senior Case Manager

Approved By: Dawn R. SanFilippo, Esq.  
Acting Executive Director

June 17, 2014



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

**INTERIM ORDER**

**December 18, 2012 Government Records Council Meeting**

Mark Lagerkvist  
Complainant

Complaint No. 2011-110

v.

New Jersey Department of Treasury,  
Division of Pensions & Benefits  
Custodian of Record

At the December 18, 2012 public meeting, the Government Records Council (“Council”) considered the December 11, 2012 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the amended findings and recommendations. The Council, therefore, finds that because of significant procedural issues contemplated and for administrative efficacy, this complaint should be referred to the Office of Administrative Law for completion of the *in camera* review and determination as to whether the Custodian unlawfully denied access to any records. Additionally, for administrative ease, the OAL should determine whether the Custodian knowingly and willfully violated OPRA within the totality of the circumstances and determine whether the Complainant is entitled to an award of reasonable attorney’s fees.

Interim Order Rendered by the  
Government Records Council  
On The 18<sup>th</sup> Day of December, 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: December 19, 2012**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
December 18, 2012 Council Meeting**

**Mark Lagerkvist<sup>1</sup>  
Complainant**

**GRC Complaint No. 2011-110**

v.

**New Jersey Department of Treasury,  
Division of Pensions & Benefits<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Inspection of:

1. All available records concerning an investigation into the pension eligibility of Mr. Michael J. Donovan (“Mr. Donovan”) conducted in 2010-2011.
2. Any e-mails or correspondence re: Mr. Donovan’s pension between the Division of Pensions & Benefits (“DPB”) and the Office of the Governor or Lieutenant (“Lt.”) Governor from 2010 to present.

**Request Made:** March 13, 2011

**Response Made:** April 1, 2011

**Custodian:** Florence Sheppard

**GRC Complaint Filed:** April 11, 2011<sup>3</sup>

**Background**

**September 25, 2012**

Government Records Council’s (“Council”) Interim Order. At its September 25, 2012 public meeting, the Council considered the September 18, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Division of Pensions & Benefits’ request for a stay of the Council’s July 31, 2012 Interim Order is denied because the Custodian and Custodian’s Counsel failed to include the required analysis pursuant to *N.J.A.C. 5:105-2.12(f)* as part of the request for stay.

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<sup>1</sup> Represented by Donald M. Doherty, Esq., of Friedman, Doherty, LLC (West Berlin, NJ).

<sup>2</sup> Represented by DAG Danielle P. Schimmel, on behalf of the NJ Attorney General.

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

2. The Custodian's request for reconsideration be denied because the Custodian has failed to establish in her request for reconsideration of the Council's July 31, 2012 Interim Order that 1) the Council'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 Council acted arbitrarily, capriciously or unreasonably in determining that the Custodian's response was untimely and ordering an *in camera* review of the responsive records. D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990); Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996); 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). **Thus, the Custodian is required to comply with the Council's July 31, 2012 Interim Order.**
3. **The Custodian must deliver<sup>4</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 2 above), a document or redaction index<sup>5</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,<sup>6</sup> 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.**
4. 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.

### **September 26, 2012**

Council's Interim Order ("Order") distributed to the parties.

### **October 3, 2012**

Custodian's request for stay. The Custodian's Counsel submits a letter brief requesting that the GRC grant a stay of the Council's September 25, 2012 and July 31, 2012 Orders in accordance with *N.J.A.C. 5:105-2.12* to permit an appeal to the Appellate Division under NJ Court Rule 2:5-6.<sup>7</sup> Counsel recapitulates the facts of the complaint and includes the required analysis pursuant to *N.J.A.C. 5:105-2.12(f)* challenging the Council's decision to conduct an *in camera* review of the responsive records.

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<sup>4</sup> The *in camera* records 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.

<sup>5</sup> The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

<sup>6</sup> "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."

<sup>7</sup> R. 2:5-6 permits an agency 20 days from an order to appeal an agency decision. Counsel notes that she will file an appeal within that time frame.

### **October 11, 2012**

Letter from the GRC to the Custodian's Counsel. The GRC states that *N.J.A.C.* 5:105-2.12(d) allows a party to submit a request for stay of an interim order prior to the last day on which a party is required to take action. The GRC further states that *R.* 2:5-6 provides that "[t]he filing of a motion for leave to appeal shall not stay the proceedings in the ... agency except on motion made to the court or agency which entered the order or if denied by it, to the appellate court."

The GRC states that because it has not received any motion made to the Appellate Division, this matter cannot be delayed and the request for stay is denied. The GRC states that the Custodian must comply with the Council's Order by close of business on October 18, 2012.

### **October 15, 2012**

Custodian's motion for leave to appeal.

### **October 17, 2012**

Custodian's request for stay. The Custodian's Counsel resubmits a request for stay in light of the DPB's recent motion for leave to appeal the Council's Order.

### **October 17, 2012**

Letter from the GRC to the Custodian's Counsel. The GRC grants Counsel's request for stay.

### **November 7, 2012**

Superior Court of New Jersey, Appellate Division, denies DPB's motion for leave to appeal, without prejudice to either party seeking appellate review after the GRC's *in camera* review of the records is completed.

## **Analysis**

### **Whether the Custodian unlawfully denied access to the requested records?**

OPRA provides that:

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

Additionally, OPRA defines a government record as:

"... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ... The terms shall not include *inter-agency or intra-agency*



*advisory, consultative, or deliberative material.*” (Emphasis added.)  
N.J.S.A. 47:1A-1.1.

OPRA provides that:

“... where it shall appear that the record or records which are sought to be inspected, copied, or examined *shall pertain to an investigation in progress* by any public agency, the right of access provided for in [OPRA] *may be denied* if the inspection, copying or examination of such record or records *shall be inimical to the public interest; provided, however, that this provision shall not be construed to allow any public agency to prohibit access to a record of that agency that was open for public inspection, examination, or copying before the investigation commenced.*” (Emphasis added.) N.J.S.A. 47:1A-3.a.

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 further provides that:

“... the *personnel or pension records of any individual* in the possession of a public agency, including but not limited to records relating to any grievance filed by or against an individual, *shall not be considered a government record* and shall not be made available for public access, except that: an individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefor, and the amount and type of any pension received shall be a government record; personnel or pension records of any individual shall be accessible when required to be disclosed by another law, when disclosure is essential to the performance of official duties of a person duly authorized by this State or the United States, or when authorized by an individual in interest ...”  
N.J.S.A. 47:1A-10.

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.

In this instant matter, the Council has ordered an *in camera* review of the 26 responsive records identified by the Custodian in the Statement of Information (“SOI”). These records pertain to a Chapter 204 review of Mr. Donovan’s pension eligibility. For this reason, the GRC will refer this complaint to the Office of Administrative Law (“OAL”) to complete the ordered *in camera* review and determine whether the Custodian

unlawfully denied access to any of the responsive records. *See Gill v. New Jersey Department of Banking & Insurance*, GRC Complaint No. 2007-189 (Interim Order dated June 11, 2009).

Therefore, because of significant procedural issues contemplated and for administrative efficacy, this complaint should be referred to the OAL for completion of the *in camera* review and determination as to whether the Custodian unlawfully denied access to any records. Additionally, for administrative ease, the OAL should determine whether the Custodian knowingly and willfully violated OPRA within the totality of the circumstances and determine whether the Complainant is entitled to an award of reasonable attorney's fees.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that because of significant procedural issues contemplated and for administrative efficacy, this complaint should be referred to the Office of Administrative Law for completion of the *in camera* review and determination as to whether the Custodian unlawfully denied access to any records. Additionally, for administrative ease, the OAL should determine whether the Custodian knowingly and willfully violated OPRA within the totality of the circumstances and determine whether the Complainant is entitled to an award of reasonable attorney's fees.

Prepared By: Frank F. Caruso  
Senior Case Manager

Approved By: Karyn Gordon, Esq.  
Acting Executive Director

December 11, 2012



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET  
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CHRIS CHRISTIE  
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RICHARD E. CONSTABLE, III  
Commissioner

INTERIM ORDER

September 25, 2012 Government Records Council Meeting

Mark Lagerkvist  
Complainant

Complaint No. 2011-110

v.

New Jersey Department of Treasury,  
Division of Pensions & Benefits  
Custodian of Record

At the September 25, 2012 public meeting, the Government Records Council (“Council”) considered the September 18, 2012 *Reconsideration* Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Division of Pensions & Benefits’ request for a stay of the Council’s July 31, 2012 Interim Order is denied because the Custodian and Custodian’s Counsel failed to include the required analysis pursuant to *N.J.A.C. 5:105-2.12(f)* as part of the request for stay.
2. The Custodian’s request for reconsideration be denied because the Custodian has failed to establish in her request for reconsideration of the Council’s July 31, 2012 Interim Order that 1) the Council’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 Council acted arbitrarily, capriciously or unreasonably in determining that the Custodian’s response was untimely and ordering an *in camera* review of the responsive records. *D’Atria v. D’Atria*, 242 N.J. Super. 392, 401 (Ch. Div. 1990); *Cummings v. Bahr*, 295 N.J. Super. 374, 384 (App. Div. 1996); *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). **Thus, the Custodian is required to comply with the Council’s July 31, 2012 Interim Order.**
3. **The Custodian must deliver<sup>1</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 2 above), a document or redaction**

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<sup>1</sup> The *in camera* records 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.

**index<sup>2</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,<sup>3</sup> 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.**

4. 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 25<sup>th</sup> Day of September, 2012

Robin Berg Tabakin, Chair  
Government Records Council

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

Denise Parkinson Vetti, Secretary  
Government Records Council

**Decision Distribution Date: September 26, 2012**

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

<sup>3</sup> "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**

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

**Mark Lagerkvist<sup>1</sup>**  
**Complainant**

**GRC Complaint No. 2011-110**

v.

**New Jersey Department of Treasury,**  
**Division of Pensions & Benefits<sup>2</sup>**  
**Custodian of Records**

**Records Relevant to Complaint:** Inspection of:

1. All available records concerning an investigation into the pension eligibility of Mr. Michael J. Donovan (“Mr. Donovan”) conducted in 2010-2011.
2. Any e-mails or correspondence re: Mr. Donovan’s pension between the Division of Pensions & Benefits (“DPB”) and the Office of the Governor or Lieutenant (“Lt.”) Governor from 2010 to present.

**Request Made:** March 13, 2011

**Response Made:** April 1, 2011

**Custodian:** Florence Sheppard

**GRC Complaint Filed:** April 11, 2011<sup>3</sup>

**Background**

**July 31, 2012**

Government Records Council’s (“Council”) Interim Order. At its July 31, 2012 public meeting, the Council considered the July 24, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian did not timely respond to the Complainant’s OPRA request. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA

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

<sup>2</sup> Represented by DAG Kellie Pushko, on behalf of the NJ Attorney General.

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

request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

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 following requested records to determine the validity of the Custodian's assertion that the record constitutes inter-agency or intra-agency advisory, consultative, or deliberative material and contains pension information which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. and N.J.S.A. 47:1A-10:

- Statutory Requirements, Police Training Act dated July 1, 2002.
- Monmouth County Sheriff's Office, Rules and Regulations revised February 11, 2004.
- Monmouth County Sheriff's Office, General Order 98-20 (job description) revised March 15, 2007.
- Oath of office dated September 17, 2007 and February 19, 2008.
- Monmouth County Sheriff's Office, General Order 98-20 (job description) revised September 16, 2008.
- Executive session minutes (with redactions) dated September 11, 2008.
- Monmouth County Sheriff's Office chart dated July 21, 2008.
- Monmouth County Sheriff's Office chart dated September 22, 2008.
- Interoffice Memorandum from Sergeant ("Sgt") David Finck to Sheriff Kim Guadagno, Monmouth County Sheriff's Office, dated August 25, 2008.
- Letter from Mr. Robert Melson, Division of Criminal Justice, to Sheriff Kim Guadagno dated December 3, 2009.
- Letter from Mr. Anthony F. Wieners, President of the New Jersey State Policemen's Benevolent Association, Inc., to Mr. Fred Beaver, Director, dated February 18, 2010.
- Employment verification form dated April 29, 2010.
- Letter from Mr. Michael Czyzyk to Mr. Craig Marshall, Monmouth County, dated April 29, 2010.
- Complaint dated May 12, 2010.
- Letter from Mr. Michael Czyzyk to Mr. Craig Marshall, Monmouth County, dated June 2, 2010.
- Member and employer screen prints.
- Job specifications No. 07595, No. 03696 and No. 05851 dated June 9, 2010.
- E-mail from Mr. David Finck to Mr. Donovan dated June 9, 2010.
- Letter from Mr. Craig Marshall to Mr. Michael Czyzyk dated June 14, 2010.
- Letter from Mr. Craig Marshall to Mr. Michael Czyzyk dated June 15, 2010.

- Letter from Mr. Shaun Golden, Acting Sheriff of the Monmouth County Sheriff's Office, to Ms. Andrea Bazer, County Counsel of the County of Monmouth, dated June 15, 2010.
- Memorandum regarding Hiring and Removal Procedures dated June 15, 2010.
- E-mail from Mr. Michael Czyzyk to the Custodian dated July 8, 2010 (with attachment memorandum).
- Memorandum from Mr. Michael Czyzyk dated September 27, 2010.
- Letter from Mr. Anthony F. Wieners to the Custodian dated December 14, 2010.
- Letter from Mr. Anthony F. Wieners to the Custodian dated January 7, 2011.

The Custodian must also certify to whether a Chapter 204 review is defined as an investigation for purposes of N.J.S.A. 47:1A-3. The Custodian must further certify to why disclosure of the responsive records would be inimical to the public interest.

3. **The Custodian must deliver<sup>4</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 2 above), a document or redaction index<sup>5</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,<sup>6</sup> 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.**
4. Ms. O'Hare responded to the Complainant's OPRA request Item No. 2 stating that no records responsive exist. Moreover, the Custodian certified in the Statement of Information that no records responsive exist and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. Thus, the Custodian did not unlawfully deny access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
5. 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 2, 2012**

Council's Interim Order ("Order") distributed to the parties.

<sup>4</sup> The *in camera* records 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.

<sup>5</sup> The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

<sup>6</sup> "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."

### **August 8, 2012**

E-mail from the Custodian's Counsel to the GRC. Counsel states that she is in receipt of the Council's Order, but was on vacation at the time that her office received the Order. Counsel states that she understands that the deadline to comply with the Council's Order is August 9, 2012. Counsel thus requests an extension of five (5) business days, or until August 16, 2012, to comply with the Council's Order.

### **August 8, 2012**

E-mail from the GRC to the Custodian's Counsel. The GRC grants Counsel an extension of time until August 16, 2012 to submit compliance of the Council's Order.

### **August 15, 2012**

Custodian's request for stay and reconsideration<sup>7</sup> of the Council's Order with the following attachments:

- Letter from Ms. Barbara O'Hare ("Ms. O'Hare"), Manager of the Government Records Access Unit ("GRAU"), to the Complainant dated March 22, 2011.
- E-mail receipt dated March 22, 2011.
- Letter from Ms. O'Hare to the Complainant dated March 23, 2011.
- E-mail receipt dated March 23, 2011.
- E-mail from Ms. O'Hare to the Complainant dated March 30, 2011.

The Custodian requests that the Council reconsider its July 31, 2012 Order based on a mistake and new evidence.

The Custodian certifies that the Department of Treasury ("DOT") received the Complainant's OPRA request on March 13, 2011. The Custodian certifies that although the Council's Order states that the Custodian did not timely respond to the Complainant's OPRA request, Ms. O'Hare requested three (3) extensions and responded within the third (3<sup>rd</sup>) extended time frame. The Custodian certifies that proof of these extensions was inadvertently omitted; however, the Custodian requests that the GRC supplement the record with these documents.

The Custodian further states that the Council ordered the Custodian to provide 26 records for an *in camera* review so that the Council may determine whether said records were exempt as inter-agency or intra-agency advisory, consultative or deliberative ("ACD") material. The Custodian certifies that she is thus requesting reconsideration of the Council's Order because the records at issue are part of Mr. Donovan's pension file and were thus denied as confidential records pursuant to N.J.S.A. 47:1A-10 and N.J.A.C. 17:1-1.2. The Custodian asserts that the Council provided no analysis as to the application of N.J.S.A. 47:1A-10 to the 26 records in its Order. The Custodian certifies that she is thus requesting reconsideration of the DPB's position that the records are pension records not subject to disclosure under OPRA. The Custodian certifies that all of the records ordered for an *in camera* review are part of Mr. Donovan's individual pension file and pertain to a post-retirement review of his file.

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<sup>7</sup> The Custodian's Counsel submitted a corrected filing of the request for stay and reconsideration on August 16, 2012.



The Custodian certifies that pension files are kept at the DPB regarding individual members for the purpose of administering benefits owed to those members. The Custodian certifies that the proper administration of the pension system requires that the DPB obtain records and other information from employers and other government agencies regarding its members. The Custodian certifies that once the DPB obtains these records, they become part of the individual member's pension file. The Custodian certifies that the confidentiality of these records exchanged between the DPB and other government agencies is essential in maintaining the proper functioning of the Retirement systems. The Custodian certifies that the absence of this confidentiality could have a chilling effect on other government agencies providing records to the DPB.

The Custodian certifies that at times, the DPB is called upon to review an individual member's pension account. The Custodian certifies that if a review of an individual account reveals some modification or question as to the individual's eligibility or participation in the system, the DPB may make recommendations for a correction or adjustment. The Custodian certifies that any dispute over an individual member's account may be brought before that Pension system's Board to issue a final determination. The Custodian certifies that that Board's final determination is public information and would be subject to disclosure.

The Custodian certifies that in this case, a post-retirement review of Mr. Donovan's account triggered a Chapter 204 title investigation and review of the eligibility of the title Mr. Donovan was holding for inclusion into the Police and Firemen's Retirement System ("PFRS"). The Custodian certifies that the Chapter 204 title review is another function of the DPB different from the review of individual accounts.

The Custodian certifies that upon receipt of the Complainant's OPRA request, she determined that the DPB maintained records responsive to request Item No. 1. The Custodian certifies that after reviewing the records, she determined first and foremost that the records were individual pension records contained in Mr. Donovan's individual pension file and were thus exempt from access pursuant to N.J.S.A. 47:1A-10.

The Custodian certifies that she further determined that some of the records were also part of the record in the Chapter 204 title review and were thus pre-decisional or ACD material exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 and N.J.S.A. 47:1A-3. The Custodian certifies that these records were reviewed by the PFRS Board at its May 2, 2011 meeting in conjunction with the Chapter 204 title review of Chief Warrant Officer. The Custodian certifies that of the records reviewed by the PFRS Board, only the Job specifications No. 05851 and No. 07595 were also contained in Mr. Donovan's pension file.

The Custodian's Counsel submits a letter brief in support of the Custodian's request for stay and reconsideration. Counsel recapitulates the facts of this complaint. Counsel states that a stay has been requested to allow the Council to reconsider the matter on the basis of the pension exemption afforded for in OPRA. N.J.S.A. 47:1A-10. Counsel asserts that the Council's Interim Order failed to address this issue and that a reconsideration of same will likely make an *in camera* review unnecessary nor

appropriate. Counsel notes that a stay is required in order for the Council to reconsider and address this issue.

### **Records requested for *in camera* review are exempt under OPRA**

Counsel contends that the Council's Order fails to address the Custodian's argument that the responsive records are part of the individual pension file of Mr. Donovan and are confidential under N.J.S.A. 47:1A-10. Counsel contends that the GRC instead ordered an *in camera* review of the records to determine the applicability of the ACD exemption. Counsel asserts that although the GRC makes a cursory reference to N.J.S.A. 47:1A-10 in its Order, there is no discussion regarding the nature of the pension files and why the records sought would be anything other than confidential. Counsel asserts that the Custodian properly denied access to the responsive records based on a clear exemption. Counsel further asserts that the Custodian's certified statements in this submission clearly shows that the records are maintained as part of Mr. Donovan's pension file, a fact that is undisputed. Counsel contends that the Council should reconsider and reverse its Order because the responsive records are unquestionably confidential under settled law.

### **Pension Records are confidential and exempt under OPRA**

Counsel states that OPRA was enacted "to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process." (*Citation omitted.*) Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Counsel states that OPRA promotes this process by making government records readily accessible to the public. N.J.S.A. 47:1A-1.1. Counsel states that although OPRA broadly defines a government record, the Supreme Court noted that "... the public's right of access [is] not absolute ..." because the statute excludes numerous categories of records and information from disclosure. Education Law Center v. New Jersey Department of Education, 198 N.J. 274, 284 (2009).

Counsel states that one such exemption is set forth in N.J.S.A. 47:1A-10, which provides that "...personnel or pension records of any individual in the possession of a public agency ... shall not be considered a government record and shall not be made available for public access ..." N.J.S.A. 47:1A-10. Counsel states that according to the Supreme Court, "personnel records are, by definition, not classified as government records at all; any document that qualifies as a personnel record is therefore not subject to being disclosed notwithstanding the other provisions of the statute." Kovalcik v. Somerset County Prosecutor's Office, 206 N.J. 581, 592 (2011). Counsel states that pension records are likewise exempt from access under OPRA: the personnel and pension provision "... begins with a presumption of non-disclosure ..." *Id.* at 594. Counsel states that based on this presumption, "... courts have tended to favor protection of employee confidentiality." McGee v. Twp of East Amwell, 416 N.J. Super. 602, 615 (App. Div. 2010).

Counsel states that the confidentiality afforded to personnel and pension records is based on the policy that such records "... are often sensitive, and understandably

personal, in nature.” Kovalchik, supra, at 595 (requiring public agencies to “... safeguard from public access a citizen’s personal information ... when disclosure thereof would violate the citizen’s reasonable expectation of privacy ...”). Counsel states that the Appellate Division has similarly indicated that OPRA recognizes that personnel matters in the public sector “... implicate privacy concerns.” McGee, supra, at 616. *See also North Jersey Media Group, Inc. v. Bergen County Prosecutor’s Office*, 405 N.J. Super. 386 (App. Div. 2009)(citing to Kovalchik, supra, at 592); Trenton Times Corp. v. Bd. Of Ed. Of Trenton, 138 N.J. Super. 357, 363 (App. Div. 1976)(enforcing privacy of personnel records under the old Right to Know Law, which OPRA replaced in 2002).

Counsel contends that the Complainant’s OPRA request plainly sought records that were Mr. Donovan’s pension records. Counsel states that the request identified Mr. Donovan by name and sought records related to an investigation of his pension. Counsel asserts that the fact that the DPB and PFRS Board engaged in additional investigations and a Chapter 204 title review does not alter the facts that the records are pension records. Counsel notes that many of the records are personnel records received by the DPB from Mr. Donovan’s employer or are other records related to Mr. Donovan’s position and pension enrollment: these records are clearly pension records. Counsel thus argues that the Custodian lawfully denied access to same pursuant to N.J.S.A. 47:1A-10.

Counsel next argues that the plain language of N.J.S.A. 47:1A-10 indicates that the Legislature expressly intended to ensure the privacy of an individual’s personnel and pension information, with certain exceptions, regardless of which agency is in possession of that information or whether the individual is employee by that agency. Counsel contends that this intent was confirmed in North Jersey Media Group, Inc. v. NJ Department of Personnel, 389 N.J. Super. 527 (Law Division 2006). Counsel states that in that case, plaintiff filed an OPRA request for law enforcement test applications submitted to defendant by an employee of the City of Passaic. Counsel states that plaintiff sought information showing whether the employee had the minimum educational qualifications for employment as a police officer. *Id.* at 530. Counsel states that although the employee was not employed by defendant, plaintiff relied on N.J.S.A. 47:1A-10 in support of disclosure. *Id.* at 532. Counsel states that the Court held that the records were exempt as personnel records pursuant to N.J.S.A. 47:1A-10. *Id.* at 534.

Counsel argues that similarly here, records obtained, compiled and maintained by the DPB in an individual’s pension file are confidential even if provided to the DPB by the individual’s employer or from other sources. Counsel contends that the Legislative purpose to protect the privacy of this information is clearly expressed in the plain language of N.J.S.A. 47:1A-10.

### **In camera review is unnecessary because all records are exempt**

Counsel states that the Council’s Order requires the records to be provided for an *in camera* review despite the fact that these records are exempt from access under OPRA. Counsel asserts that the Council ordered an *in camera* based on the premise that the records are ACD material and not the pension exemption contained in N.J.S.A. 47:1A-10. Counsel contends that an *in camera* review is neither necessary nor appropriate for the reasons previously discussed. Counsel thus contends that the Custodian’s secondary basis

for denying access to the responsive records need not be reached at all. Counsel asserts that although the Council may exercise its discretion to conduct an *in camera* review, it should reconsider and reverse its decision to conduct same here because a review is unnecessary. See Loigman v. Kimmelman, 102 N.J. 98, 109 (1986); Wilson v. Brown, 404 N.J. Super. 557, 578 (App. Div. 2009), *certif. den.* 198 N.J. 473 (2009); Paff v. New Jersey Department of Labor, Board of Review, 379 N.J. Super. 346, 355 (App. Div. 2005)(holding that in OPRA cases before the GRC, the Council may conduct an *in camera* review “when necessary”). Counsel asserts that the Appellate Division as emphasized that an *in camera* review is not required where the case involved a document that is *per se* exempt from access. *Id.* Counsel contends that this is exactly the case herein, where the responsive records are exempt as pension records pursuant to N.J.S.A. 47:1A-10. Counsel thus contends that the Council does not need to inspect the records in order to determine the validity of the Custodian’s asserted exemptions.

### **The Order erroneously focused on the ACD exemption**

Counsel contends that the Council’s Order confused the DPB’s reasons for denial and mistakenly focused on the ACD exemption. Counsel asserts that the Complainant’s OPRA request specifically seeks pension records. Counsel asserts that although the DPB considered the records as part of its Chapter 204 title review, the Complainant’s OPRA request was limited to the records pertaining to Mr. Donovan’s pension. Counsel thus argues that although the ACD exemption applies to the Chapter 204 title review pending before the PFRS Board, the Custodian mainly denied access to the records pursuant to N.J.S.A. 47:1A-10. Counsel thus contends that the Council should reconsider its Order to include a detailed analysis of the exemption afforded for in N.J.S.A. 47:1A-10.

### **The Custodian’s response was timely**

Counsel states that N.J.S.A. 47:1A-5 requires that a custodian respond in writing within the statutorily mandated seven (7) business days granting access, denying access, seeking clarification or requesting an extension of time. Counsel states that in the Statement of Information (“SOI”), the Custodian asserted that she timely responded; however, the Council found that the Custodian’s response was untimely because the Custodian failed to submit proof of her requests for extensions of time. Counsel contends that the Council should reconsider and reverse its holding that the Custodian failed to respond in a timely manner based on additional evidence provided by the Custodian.

Counsel states that the DPB received the Complainant’s OPRA request on March 13, 2011; thus, a response in writing was due by March 22, 2011. Counsel states that Ms. O’Hare responded in writing on March 22, 2011 seeking an extension of time until March 23, 2011. Counsel states that Ms. O’Hare responded in writing on March 23, 2011 seeking a second (2<sup>nd</sup>) extension of time until March 30, 2011. Counsel states that on March 30, 2011, Ms. O’Hare sought a third (3<sup>rd</sup>) extension of time until April 1, 2011. Counsel states that Ms. O’Hare formally responded in writing on April 1, 2011, within the third (3<sup>rd</sup>) extended deadline to respond.

Counsel states that because the Custodian responded in a timely manner (through Ms. O’Hare) but inadvertently failed to submit supporting documentation as part of the

SOI, Counsel requests that the Council reverse its holding that the Custodian failed to respond in a timely manner.

**August 16, 2012**

E-mail from the Complainant to the GRC. The Complainant requests that the GRC confirm that he has ten (10) business days, or until August 29, 2012, to submit objections to the Custodian's request for stay and reconsideration of the Council's Order.

**August 16, 2012**

E-mail from the GRC to the Complainant. The GRC states that pursuant to its regulations at *N.J.A.C. 5:105-2.12(d)2* and *N.J.A.C. 5:105-2.10(d)*, the Complainant's deadline to submit objections to the request for stay and reconsideration is August 29, 2012.

**August 17, 2012**

E-mail from the Custodian's Counsel to the GRC. Counsel states that because her office filed the corrected brief on August 16, 2012, the Complainant should have until August 30, 2012 to respond.

**August 17, 2012**

E-mail from the GRC to all parties. The GRC states that it will amend the deadline date for the Complainant to submit his objections accordingly.

**August 29, 2012**

Complainant's objections to the request for stay and reconsideration. The Complainant states that on August 16, 2012, the Custodian submitted a request for stay and reconsideration of the Council's Order. The Complainant argues that said requests are meritless and should be denied because of the facts of the complaint and the Council's well-reasoned Order.

**Request for stay lacks required analysis**

The Complainant states that *N.J.A.C. 5:105-2.12(f)* provides that:

"A request for a stay of interim orders or final decisions must be in writing and include a detailed analysis of the issue(s), which includes an analysis of the following factors that the Council will include in its decision-making process:

1. The clear likelihood of success on the merits of the claim;
2. The danger of irreparable harm in the absence of a stay;
3. The harm to others if a stay is not granted; and
4. The public interest." *Id.*

The Complainant asserts that the request for stay must be denied because the Custodian failed to address these four factors. The Complainant contends that the Custodian failed to provide any reason why an *in camera* review of the responsive records would pose any "danger of irreparable harm in the absence of a stay" or "harm to others if a stay is not

granted.” The Complainant further contends that the Custodian failed to argue how compliance of the Council’s Order could be inimical to the “public interest.” The Complainant finally argues that the Custodian failed to provide any argument regarding the clear likelihood “of success on the merits of the claim.” The Complainant notes that the Council informed the parties of this requirement in its August 2, 2012 letter to the parties.

The Complainant argues that absent this required analysis, the Council should order the Custodian to submit the records without further delay.

### **Custodian’s certification does not offer “new evidence”**

The Complainant states that the Custodian’s request for reconsideration indicates that same is warranted on the basis of “new evidence.” The Complainant states that on its reconsideration form, the Council explicitly defines new evidence as “... evidence that *could not* have been provided prior to the Council’s Decision because the evidence did not exist at the time.” (Emphasis in original).

The Complainant states that in the Custodian’s certification, she certified that proof of three (3) extensions of time were inadvertently omitted; however, this proof does not constitute new evidence. The Complainant asserts that the Custodian’s failure to timely submit evidence in her possession prior to the Council’s adjudication of the complaint does not constitute a valid basis for reconsideration on the basis of new evidence. The Complainant asserts that the extension letters were clearly in the possession of the Custodian before she submitted the SOI and before the Council’s Order. The Complainant thus argues that under well-established law, the Custodian’s new evidence argument should be rejected because the Custodian failed to submit any new evidence.

### **Council did not make a “mistake” by not considering pension exemption**

The Complainant states that the Custodian’s request for reconsideration also indicates that same is warranted on the basis of “mistake” because the Council did not address whether the responsive records were exempt pursuant to N.J.S.A. 47:1A-10. The Complainant contends that this argument is without merit.

The Complainant states that the Custodian’s Counsel argues that the Council only made a cursory reference to N.J.S.A. 47:1A-10. The Complainant assert that the Findings & Recommendations of the Executive Director (“FR”), which the Council’s Order was based on, offers a more thorough analysis. The Complainant asserts that the FR cited to N.J.S.A. 47:1A-10 at least ten (10) times. The Complainant asserts that this provision was inarguably considered, along with case law and other relevant statutes.

### **Available evidence contradicts pension records exemption**

The Complainant states that the Custodian asserts that all records ordered to be provided for an *in camera* review are indisputably pension records exempt from

disclosure pursuant to N.J.S.A. 47:1A-10. The Complainant states that the Custodian thus concluded that no *in camera* review was necessary, nor appropriate.

The Complainant argues that the facts of this complaint indicate that the Custodian's assertions are overly broad and would not survive the scrutiny of an *in camera* review. The Complainant argues that his original OPRA request did not seek pension records for Mr. Donovan: he sought "all available records of 2010-2011 investigation into pension eligibility" also known as the Chapter 204 title review. The Complainant argues that although the Custodian's certification should be rejected, if the Council allows same to stand, it should be noted that the Custodian certified that a Chapter 204 review is another function of the DPB different from the review of individual accounts.

The Complainant states that in the SOI, the Custodian identified 25 records<sup>8</sup> responsive to the Complainant's OPRA request. The Complainant further contends that the Custodian's document index was deficient under the legal standard set forth by the Court in Paff v. New Jersey Department of Labor, 392 N.J. Super. 334 (App. Div. 2007)(holding that "[t]he index is essentially a 'privilege log' that must provide sufficient information 'respecting the basis of the privilege-confidentiality-exception claim of the privilege-confidentiality-exception claim vis a vis each document.' Hartz Mountain Indus., Inc. v. N.J. Sports & Exposition Auth., 369 N.J. Super. 175, 185, 848 A.2d 793 (App. Div.), *certif. denied*, 182 N.J. 147, 862 A.2d 56 (2004). An accurate index is necessary for substantive review by the requesting party as well as the reviewing court." *Id.* at 341). The Complainant contends that the Custodian failed to adhere to the Paff standard and thus waived any possible remedy. The Complainant requests that the Council order the Custodian to produce a more descriptive privilege log that provides "the basis of the privilege-confidentiality-exception claim of the privilege-confidentiality-exception claim vis a vis each document ... for substantive review by the requesting party as well as the reviewing court." *Id.*

The Complainant moreover contends that based on the information contained in the deficient document index submitted as part of the SOI, the records in question could be divided into three (3) categories for purposes of further analysis.

The Complainant asserts that the first (1<sup>st</sup>) category is non-pension records predating Mr. Donovan's hiring by the Monmouth County Sheriff's Office ("MCSO"). The Complainant contends that the following records could not conceivably contain any information exempt from disclosure under N.J.S.A. 47:1A-10:

- Statutory Requirements, Police Training Act dated July 1, 2002.
- Monmouth County Sheriff's Office, Rules and Regulations revised February 11, 2004.
- Monmouth County Sheriff's Office, General Order 98-20 (job description) revised March 15, 2007.

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<sup>8</sup> The Custodian actually listed 26 records in the SOI; however, the Complainant does not identify the Complaint dated May 12, 2010. The GRC notes that this record was also ordered to be delivered for an *in camera* review.

- Oath of office dated September 17, 2007 and February 19, 2008.
- Monmouth County Sheriff's Office chart dated July 21, 2008.

The Complainant asserts that the second (2<sup>nd</sup>) category of records is non-pension records that did not originate from either the DPB or Mr. Donovan's employer. The Complainant contends that the following records are unlikely to contain any information exempt from disclosure under N.J.S.A. 47:1A-10:

- Letter from Mr. Robert Melson, Division of Criminal Justice, to Sheriff Kim Guadagno dated December 3, 2009.
- Letter from Mr. Anthony F. Wieners, President of the New Jersey State Policemen's Benevolent Association, Inc., to Mr. Fred Beaver, Director, dated February 18, 2010.
- Letter from Mr. Anthony F. Wieners to the Custodian dated December 14, 2010.
- Letter from Mr. Anthony F. Wieners to the Custodian dated January 7, 2011.

The Complainant contends that the Council has a duty to conduct a substantive *in camera* review of the first two (2) categories of records to determine if the records contain any exempt information. The Complainant contends that the Council should then accordingly order disclosure with redactions, if necessary.

The Complainant contends that the third (3<sup>rd</sup>) category of records is those records originated by the DPB or MCSO during Mr. Donovan's employment. The Complainant contends that the following records must be reviewed *in camera* to determine whether they contain any information exempt from disclosure under N.J.S.A. 47:1A-10:

- Monmouth County Sheriff's Office, General Order 98-20 (job description) revised September 16, 2008.
- Executive session minutes (with redactions) dated September 11, 2008.
- Monmouth County Sheriff's Office chart dated September 22, 2008.
- Interoffice Memorandum from Sergeant ("Sgt") David Finck to Sheriff Kim Guadagno, Monmouth County Sheriff's Office, dated August 25, 2008.
- Employment verification form dated April 29, 2010.
- Letter from Mr. Michael Czyzyk to Mr. Craig Marshall, Monmouth County, dated April 29, 2010.
- Letter from Mr. Michael Czyzyk to Mr. Craig Marshall, Monmouth County, dated June 2, 2010.
- Member and employer screen prints.
- Job specifications No. 07595, No. 03696 and No. 05851 dated June 9, 2010.
- E-mail from Mr. David Finck to Mr. Donovan dated June 9, 2010.
- Letter from Mr. Craig Marshall to Mr. Michael Czyzyk dated June 14, 2010.
- Letter from Mr. Craig Marshall to Mr. Michael Czyzyk dated June 15, 2010.
- Letter from Mr. Shaun Golden, Acting Sheriff of the Monmouth County Sheriff's Office, to Ms. Andrea Bazer, County Counsel of the County of Monmouth, dated June 15, 2010.
- Memorandum regarding Hiring and Removal Procedures dated June 15, 2010.



- E-mail from Mr. Michael Czyzyk to the Custodian dated July 8, 2010 (with attachment memorandum).
- Memorandum from Mr. Michael Czyzyk dated September 27, 2010.

The Complainant contends that absent an *in camera* review and based on the legally deficient document index submitted as part of the SOI, it is unreasonable to assume that these records contain any information exempt from disclosure pursuant to N.J.S.A. 47:1A-10 or any other statute.

### **Complainant’s interest in access outweighs the DPB’s interest in non-disclosure**

The Complainant states that the Custodian’s Counsel relies on North Jersey Media Group, Inc. v. NJ Department of Personnel, 389 N.J. Super. 527 (Law Division 2006)<sup>9</sup> to support the Custodian’s argument that records in the individual’s pension file are confidential even if obtained from the individual’s employer or other sources. The Complainant contends that NJMG, *supra*, actually supports the need for an *in camera* because the NJMG Court ordered disclosure of a redacted law enforcement test application after conducting same. The Complainant notes that this holding was even in the face of the Court’s holding that “... the application is a [New Jersey Department of Personnel] record and part of the employee’s personnel file ...” *Id.* at 536. The Complainant states that the Court reasoned that:

“While the State has an interest in maintaining the secrecy of private information, including but not limited to social security numbers, credit card numbers and unlisted telephone numbers, that interest does not apply to other types of information ... the only legitimate argument to support confidentiality is that the State needs to prevent the widespread dissemination of the private information of State workers. However, in the present case, all concerns regarding the disclosure of Rivera's private information can be resolved by redacting that information from the application.” *Id.* at 539.

The Complainant further argues that in Burnett v. County of Bergen, 198 N.J. 408 (2009), the Supreme Court considered conflicting provisions of State law:

“... when legitimate privacy concerns exist that require a balancing of interests and consideration of the need for access, it is appropriate to ask whether unredacted disclosure will further the core purposes of OPRA: ‘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 435.

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<sup>9</sup> The GRC notes that the Court in NJMG did not expressly indicate that an *in camera* review of the test application was performed; however, the Court ordered disclosure of the record with certain redactions. The GRC further notes that the Court did conduct an *in camera* review of a personnel record in North Jersey Media Group, Inc. v. Bergen County Prosecutor’s Office, 405 N.J. Super. 386 (App. Div. 2009). Mark Lagerkvist v. New Jersey Department of Treasury, Division of Pensions & Benefits, 2011-110 – Supplemental Findings and Recommendations of the Executive Director 13

The Complainant states that the Supreme Court further noted that “[w]ere a similar request made by an investigative reporter or public interest group examining land recording practices of local government, this factor would weigh differently in the balancing test.” *Id.* at 435. The Complainant further states that in NJMG, *supra*, the Court held that a news organization’s “interest in disclosure clearly outweighs the State’s interest in confidentiality.” *Id.* at 539. The Complainant states that the Council may take judicial notice that the Complainant is an investigative reporter as detailed in his certification of December 28, 2010 filed with the Law Division in the matter of Lagerkvist v. NJ Dept. of Environmental Protection, Docket No. L-2185-10. The Complainant states that in Lagerkvist, the Court notes “[p]laintiff manages and operates a news-gathering enterprise called ‘New Jersey Watchdog.’” *Id.* The Complainant thus contends that his profession as an investigative reporter and reason for seeking access to the records are relevant to the balancing of the interest in disclosure.

The Complainant thus requests that the Council must enforce its Order instructing the Custodian to provide the responsive records for an *in camera* review and certify to whether a Chapter 204 title review is defined as an investigation for purposes of N.J.S.A. 47:1A-3 and that disclosure of the responsive records would be inimical to the public interest. The Custodian further requests that the Custodian or Council provide the Complainant with a copy of the document or redaction index that is legally compliant with Paff, *supra*.

### Analysis

#### **Whether the Complainant has met the required standard for reconsideration of the Council’s July 31, 2012 Interim Order?**

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

In the matter before the Council, the Custodian filed a request for stay and reconsideration of the Council’s July 31, 2012 Interim Order on August 15, 2012, one (1) day before the expiration of the extended time frame to comply with said Order.

#### **Custodian’s request for stay**<sup>10</sup>

The GRC’s regulations at *N.J.A.C. 5:105-2.12* provide that parties may file a stay of a final decision or interim order. Regarding interim orders, a request for stay must be

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<sup>10</sup> The GRC notes that it is simultaneously addressing both the request for stay and reconsideration because the Custodian submitted both at the same time. The GRC further notes that its general practice is to address a request for stay of an interim order prior to the submission of a reconsideration; thus, not creating an artificial stay even in the instance that the GRC chooses to not grant same.  
Mark Lagerkvist v. New Jersey Department of Treasury, Division of Pensions & Benefits, 2011-110 – Supplemental Findings 14 and Recommendations of the Executive Director

served made to Council in writing “prior to the last day by which action was to have been taken in accordance with the Council's decision.” *N.J.A.C. 5:105-2.12(d)*. The GRC’s regulations further provide for the filing of objections within 10 days after receipt of a request for a stay. Additionally, *N.J.A.C. 5:105-2.12(f)* provides that:

“A request for a stay of interim orders or final decisions must be in writing and include a detailed analysis of the issue(s), which includes an analysis of the following factors that the Council will include in its decision-making process:

1. The clear likelihood of success on the merits of the claim;
2. The danger of irreparable harm in the absence of a stay;
3. The harm to others if a stay is not granted; and
4. The public interest.” *Id.*

The Custodian’s Counsel timely provided the DPB’s request for a stay on August 15, 2012. However, neither Counsel nor the Custodian included the required analysis. In fact, Counsel stated only that the DPB has requested a stay of the Council’s Order so that the GRC may consider the request for reconsideration. The Complainant timely filed an objection to the request for stay arguing that the GRC should deny same on the basis that the DPB failed to address the required analysis.

The Council agrees that in the absence of the required analysis, it is unclear how denying the DPB’s request for a stay will cause irreparable harm, harm to others or harm to the public interest. Additionally, although the Custodian’s Counsel cited to some case law in the reconsideration submission, Counsel largely failed to set forth how these cases would create a clear likelihood of success on the merits of her claim.

Therefore, the DPB’s request for a stay of the Council’s July 31, 2012 Interim Order is denied because the Custodian and Custodian’s Counsel failed to include the required analysis pursuant to *N.J.A.C. 5:105-2.12(f)* as part of the request for stay.

### **Custodian’s request for reconsideration**

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).

The Custodian submitted a request for reconsideration requesting that the Council review and reverse its determination that “[t]he Custodian did not timely respond to the Complainant’s OPRA request,” and “... the GRC must conduct an *in camera* review of the ... requested records to determine the validity of the Custodian’s assertion that the record constitutes inter-agency or intra-agency advisory, consultative, or deliberative material and contains pension information which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. and N.J.S.A. 47:1A-10 ...” See Council’s July 31, 2012 Interim Order.

Regarding the timeliness issue, in support of her request for reconsideration, the Custodian submitted three (3) letters from Ms. O’Hare to the Complainant timely seeking extensions prior to making an official response on April 1, 2011. The Custodian certified that although proof of these extensions was previously inadvertently omitted, the Council should supplement the record with this evidence. The Custodian’s Counsel further requested that the Council reverse its decision that the Custodian untimely responded.

The Complainant objected to this portion of the request for reconsideration by arguing that the letters the Custodian submitted do not constitute “new evidence.” The Complainant argued that “new evidence,” as footnoted on the GRC’s request for reconsideration form, “... could not have been provided prior to the Council’s Decision because the evidence did not exist at that time.” The Complainant argued that it is clear that the letters existed prior to both the filing of the Custodian’s SOI and the Council’s Interim Order.

The Council notes that the letters certainly prove that Ms. O’Hare sought three (3) extensions on behalf of the Custodian, as the Custodian certified in the SOI. However, because the Custodian did not provide these letters to the GRC as part of the SOI or at any other time prior to the request for reconsideration, the Council determined that the Custodian did not timely respond to the Complainant’s OPRA request.

The Council therefore rejects this portion of the request for reconsideration. Whenever a denial of access complaint is filed, a custodian is required to bear his or her burden of proving a lawful denial of access to any records. N.J.S.A. 47:1A-6. Because a failure to timely respond to an OPRA request within the statutorily mandated time frame results in a “deemed” denial, a custodian must bear the burden of proving that he or she timely responded.

During the pendency of this complaint, the Custodian herein failed to bear her burden of proving a timely response at any time prior to receipt of the Council’s decision. Additionally, although the letters amount to competent, credible evidence that Ms. O’Hare timely responded to the OPRA request on behalf of the Custodian seeking three (3) extensions of time, these letters were not provided to the GRC until after the

dissemination of the Order and thus cannot be considered “new evidence” for which the Council would reverse its holding. The fact remains that prior to the issuance of the Council’s Order, the Custodian herein failed to bear her burden of proof under N.J.S.A. 47:1A-6 that she responded in a timely manner.

Regarding the *in camera* issue, the Custodian asserted that an *in camera* review of the responsive records is unnecessary because the responsive records are exempt from disclosure under OPRA as pension records. N.J.S.A. 47:1A-10. The Custodian certified that although the GRC ordered an *in camera* review to determine the validity of the ACD exemption, she first and foremost determined that the responsive records were pension records exempt from disclosure pursuant to N.J.S.A. 47:1A-10. The Custodian thus requested that the Council review and reverse its Order as the DPB believes the records are exempt from disclosure on their face.

In support of this argument, the Custodian’s Counsel cited to Kovalcik v. Somerset County Prosecutor’s Office, 206 N.J. 581, 592 (2011), McGee v. Twp of East Amwell, 416 N.J. Super. 602, 615 (App. Div. 2010); North Jersey Media Group, Inc. v. Bergen County Prosecutor’s Office, 405 N.J. Super. 386 (App. Div. 2009)(citing to Kovalchik, *supra*, at 592); Trenton Times Corp. v. Bd. Of Ed. Of Trenton, 138 N.J. Super. 357, 363 (App. Div. 1976) and North Jersey Media Group, Inc. v. NJ Department of Personnel, 389 N.J. Super. 527 (Law Division 2006). Counsel argued that in the instant complaint, records obtained, compiled and maintained by the DPB in an individual’s pension file are confidential even if provided to the DPB by the individual employer or from other sources. Counsel also argued that an *in camera* review of these records is thus unnecessary as the records herein are *per se* exempt under OPRA pursuant to N.J.S.A. 47:1A-10. Counsel also argued that the Order erroneously focused on the ACD exemption.

The Council rejects this portion of the reconsideration. The personnel and pension record exemption afforded for in OPRA is not absolute:

“... the *personnel or pension records of any individual* in the possession of a public agency, including but not limited to records relating to any grievance filed by or against an individual, *shall not be considered a government record* and shall not be made available for public access, except that: an individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefor, and the amount and type of any pension received shall be a government record; personnel or pension records of any individual shall be accessible when required to be disclosed by another law, when disclosure is essential to the performance of official duties of a person duly authorized by this State or the United States, or when authorized by an individual in interest ...”  
N.J.S.A. 47:1A-10.

Thus, although personnel or pension records on their face may appear to be exempt from disclosure, the statute also sets forth several exceptions for information that may be

contained therein.<sup>11</sup> As noted by the Complainant, the Court in North Jersey Media Group, Inc. v. NJ Department of Personnel, 389 N.J. Super. 527 (Law Division 2006) ordered disclosure of certain portions of a law enforcement test application even while noting that "... the application is a [New Jersey Department of Personnel] record and part of the employee's personnel file ...” *Id.* at 536. The Court further took a common sense approach to upholding the applicants privacy interest by "... redacting that information from the application.” *Id.* at 539. Moreover, the Appellate Division in North Jersey Media Group, Inc. v. Bergen County Prosecutor's Office, 405 N.J. Super. 386 (App. Div. 2009) took no issue with the Law Division's *in camera* review of records pertaining to outside employment prior to coming to a conclusion that same were exempt based on privacy and personnel issues.

Further, the Council notes that its Interim Order specifically stated that the Council will review the records to determine the validity of the Custodian's assertion that the responsive records are exempt as personnel records pursuant to N.J.S.A. 47:1A-10.

Thus, the Council appropriately ordered an *in camera* review of the records relevant to the request herein to determine the validity of the exemptions to disclosure asserted by the Custodian, including the ACD exemption *as well as* the personnel record exemption set forth in N.J.S.A. 47:1A-10. The Custodian herein has identified 26 records that may very well be contained within Mr. Donovan's pension file; however, some of the records may contain information that is disclosable. Thus, the Council must conduct the *in camera* review to determine the validity of the asserted exemptions for each record and not just the records as a whole.

Thus, the Custodian failed to submit any new evidence in support of her request for reconsideration. As the moving party, the Custodian was required to establish either of the necessary criteria set forth above; namely 1) that the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence. *See Cummings, supra*. The Custodian failed to do so. The Custodian has also failed to show that the GRC acted arbitrarily, capriciously or unreasonably in determining that the Custodian untimely responded and ordering an *in camera* review of the responsive records. *See D'Atria, supra*. Further, the Custodian failed to present any evidence which was not available at the time of the Council's adjudication which would change the substance of the Council's decision.

Therefore, the Custodian's request for reconsideration be denied because the Custodian has failed to establish in her request for reconsideration of the Council's July 31, 2012 Interim Order that 1) the Council'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 Council acted arbitrarily, capriciously or unreasonably in determining that the Custodian's response was untimely and ordering an *in camera* review of the responsive records. *Cummings, supra*; *D'Atria,*

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<sup>11</sup> The GRC notes that, regarding Counsel's argument that the Council erroneously focused on the ACD exemption, a majority of Counsel's own argument in the SOI focused on the ACD nature of the records in relation to the Chapter 204 title review.

*supra*; Comcast, *supra*. Thus, the Custodian is required to comply with the Council's July 31, 2012 Interim Order.

**Whether the Custodian's actions rise 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. The Division of Pensions & Benefits' request for a stay of the Council's July 31, 2012 Interim Order is denied because the Custodian and Custodian's Counsel failed to include the required analysis pursuant to *N.J.A.C. 5:105-2.12(f)* as part of the request for stay.
2. The Custodian's request for reconsideration be denied because the Custodian has failed to establish in her request for reconsideration of the Council's July 31, 2012 Interim Order that 1) the Council'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 Council acted arbitrarily, capriciously or unreasonably in determining that the Custodian's response was untimely and ordering an *in camera* review of the responsive records. *D'Atria v. D'Atria*, 242 N.J. Super. 392, 401 (Ch. Div. 1990); *Cummings v. Bahr*, 295 N.J. Super. 374, 384 (App. Div. 1996); *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). Thus, the Custodian is required to comply with the Council's July 31, 2012 Interim Order.
3. **The Custodian must deliver<sup>12</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 2 above), a document or redaction index<sup>13</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,<sup>14</sup> 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.**

<sup>12</sup> The *in camera* records 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.

<sup>13</sup> The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

<sup>14</sup> "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."

4. 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: Karyn Gordon, Esq.  
Acting Executive Director

September 18, 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

RICHARD E. CONSTABLE, III  
Commissioner

INTERIM ORDER

July 31, 2012 Government Records Council Meeting

Mark Lagerkvist  
Complainant

Complaint No. 2011-110

v.

New Jersey Department of Treasury,  
Division on Pensions & Benefits  
Custodian of Record

At the July 31, 2012 public meeting, the Government Records Council ("Council") considered the July 24, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian did not timely respond to the Complainant's OPRA request. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
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 following requested records to determine the validity of the Custodian's assertion that the record constitutes inter-agency or intra-agency advisory, consultative, or deliberative material and contains pension information which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. and N.J.S.A. 47:1A-10:
  - Statutory Requirements, Police Training Act dated July 1, 2002.
  - Monmouth County Sheriff's Office, Rules and Regulations revised February 11, 2004.
  - Monmouth County Sheriff's Office, General Order 98-20 (job description) revised March 15, 2007.
  - Oath of office dated September 17, 2007 and February 19, 2008.
  - Monmouth County Sheriff's Office, General Order 98-20 (job description) revised September 16, 2008.
  - Executive session minutes (with redactions) dated September 11, 2008.
  - Monmouth County Sheriff's Office chart dated July 21, 2008.
  - Monmouth County Sheriff's Office chart dated September 22, 2008.



- Interoffice Memorandum from Sergeant (“Sgt”) David Finck to Sheriff Kim Guadagno, Monmouth County Sheriff’s Office, dated August 25, 2008.
- Letter from Mr. Robert Melson, Division of Criminal Justice, to Sheriff Kim Guadagno dated December 3, 2009.
- Letter from Mr. Anthony F. Wieners, President of the New Jersey State Policemen’s Benevolent Association, Inc., to Mr. Fred Beaver, Director, dated February 18, 2010.
- Employment verification form dated April 29, 2010.
- Letter from Mr. Michael Czyzyk to Mr. Craig Marshall, Monmouth County, dated April 29, 2010.
- Complaint dated May 12, 2010.
- Letter from Mr. Michael Czyzyk to Mr. Craig Marshall, Monmouth County, dated June 2, 2010.
- Member and employer screen prints.
- Job specifications No. 07595, No. 03696 and No. 05851 dated June 9, 2010.
- E-mail from Mr. David Finck to Mr. Donovan dated June 9, 2010.
- Letter from Mr. Craig Marshall to Mr. Michael Czyzyk dated June 14, 2010.
- Letter from Mr. Craig Marshall to Mr. Michael Czyzyk dated June 15, 2010.
- Letter from Mr. Shaun Golden, Acting Sheriff of the Monmouth County Sheriff’s Office, to Ms. Andrea Bazer, County Counsel of the County of Monmouth, dated June 15, 2010.
- Memorandum regarding Hiring and Removal Procedures dated June 15, 2010.
- E-mail from Mr. Michael Czyzyk to the Custodian dated July 8, 2010 (with attachment memorandum).
- Memorandum from Mr. Michael Czyzyk dated September 27, 2010.
- Letter from Mr. Anthony F. Wieners to the Custodian dated December 14, 2010.
- Letter from Mr. Anthony F. Wieners to the Custodian dated January 7, 2011.

The Custodian must also certify to whether a Chapter 204 review is defined as an investigation for purposes of N.J.S.A. 47:1A-3. The Custodian must further certify to why disclosure of the responsive records would be inimical to the public interest.

3. **The Custodian must deliver<sup>1</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 2 above), a document or redaction index<sup>2</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,<sup>3</sup> 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.**
4. Ms. O’Hare responded to the Complainant’s OPRA request Item No. 2 stating that no records responsive exist. Moreover, the Custodian certified in the Statement of

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<sup>1</sup> The *in camera* records 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.

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

<sup>3</sup> "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."

Information that no records responsive exist and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. Thus, the Custodian did not unlawfully deny access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

5. 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 31<sup>st</sup> Day of July, 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: August 2, 2012**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
July 31, 2012 Council Meeting**

**Mark Lagerkvist<sup>1</sup>  
Complainant**

**GRC Complaint No. 2011-110**

v.

**New Jersey Department of Treasury,  
Division of Pensions & Benefits<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Inspection of:

1. All available records concerning an investigation into the pension eligibility of Mr. Michael J. Donovan (“Mr. Donovan”) conducted in 2010-2011.
2. Any e-mails or correspondence re: Mr. Donovan’s pension between the Division of Pensions & Benefits (“DPB”) and the Office of the Governor or Lieutenant (“Lt.”) Governor from 2010 to present.

**Request Made:** March 13, 2011

**Response Made:** April 1, 2011

**Custodian:** Florence Sheppard

**GRC Complaint Filed:** April 11, 2011<sup>3</sup>

**Background**

**March 13, 2011**

Complainant’s Open Public Records Act (“OPRA”) request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form. The Complainant requests that the Custodian advise him via e-mail when the records are ready for inspection.

**April 1, 2011**

Custodian’s response to the OPRA request. On behalf of the Custodian, Ms. Barbara O’Hare (“Ms. O’Hare”), Manager of the Government Records Access Unit (“GRAU”), responds in writing via letter to the Complainant’s OPRA request on the fourteenth (14<sup>th</sup>) business day following receipt of such request.<sup>4</sup>

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

<sup>2</sup> Represented by DAG Kellie Pushko, on behalf of the NJ Attorney General.

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

<sup>4</sup> The Custodian certifies in the Statement of Information that she received the Complainant’s OPRA request on March 14, 2011.

Ms. O'Hare states that access to request Item No. 1 is denied. Ms. O'Hare states that the DPB has determined the responsive records are exempt from disclosure pursuant to N.J.S.A. 47:1A-10, which states that:

“... the personnel or pension records of any individual in the possession of a public agency, including but not limited to records relating to any grievance filed by or against an individual, shall not be considered a government record and shall not be made available for public access, except that: an individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefor, and the amount and type of any pension received shall be a government record ...”  
*Id.*

Ms. O'Hare states that the responsive records do not fall within the list of exceptions contained within N.J.S.A. 47:1A-10.

Ms. O'Hare further states that the records are considered to be advisory, consultative and deliberative (“ACD”) in nature and are thus also exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. Ms. O'Hare also states that the records are part of an ongoing investigation and are exempt from disclosure pursuant to N.J.S.A. 47:1A-3. Ms. O'Hare states that this privilege is intended to protect the ability of an agency to make recommendations or determinations regarding an investigation.

Ms. O'Hare states that access to request Item No. 2 is denied because no records responsive to said request item exist. Ms. O'Hare states that no records between the DPB and the Office of the Governor or Lt. Governor from 2010 to present exist. Ms. O'Hare states that if any records did exist, they would be exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1, N.J.S.A. 47:1A-3 and N.J.S.A. 47:1A-10.

#### **April 11, 2011**

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

- Complainant’s OPRA request dated March 13, 2011.
- Letter from Ms. O’Hare to the Complainant dated April 1, 2011.
- OPRA request filed by Mr. James Sage (“Mr. Sage”) dated March 12, 2011.
- Letter from Ms. O’Hare to Mr. Sage dated March 31, 2011.
  - Letter from Mr. Shaun Golden, Acting Sheriff of the Monmouth County Sheriff’s Office, to Ms. Andrea Bazer, County Counsel of the County of Monmouth, dated June 15, 2010.
  - Letter from the Custodian to Mr. Anthony F. Wieners, President of the New Jersey State Policemen’s Benevolent Association, Inc., dated February 11, 2011.

The Complainant states that he submitted an OPRA request to the New Jersey Department of Treasury’s (“DOT”) GRAU on March 13, 2011. The Complainant states

that Ms. O'Hare responded on April 1, 2011 denying access to the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-1.1., N.J.S.A. 47:1A-3 and N.J.S.A. 47:1A-10.

The Complainant disputes the denial of access, contending that on March 31, 2011, Ms. O'Hare disclosed some of the records sought to Mr. Sage, who filed an almost identical OPRA request seeking "a copy of the concluded investigation of Mr. Donovan ...". The Complainant asserts that DOT did not claim any statutory exemptions, but instead released two (2) letters and invited Mr. Sage to submit a new OPRA request in the future for records not yet in existence. The Complainant states that copies of the two (2) letters provided to Mr. Sage are attached. The Complainant further notes that the Custodian stated in her letter to Mr. Anthony Wieners dated February 11, 2011 that "the [DPB] has done an investigation..."

The Complainant requests the following:

1. A determination ordering the Custodian to provide a legal certification regarding the existence of all records responsive to the Complainant's OPRA request.
2. A determination ordering the Custodian to provide all records to the GRC for an *in camera* review.
3. A determination ordering the Custodian to disclose all records not exempt from access under OPRA.
4. A determination that the Custodian knowingly and willfully violated OPRA under the totality of the circumstances and must pay the appropriate fine.

The Complainant does not agree to mediate this complaint.

**April 15, 2011**

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

**April 18, 2011**

E-mail from the Custodian's Counsel to the GRC. Counsel requests an extension of time to submit the SOI. Counsel states that she has reached out to the Complainant to obtain his consent for a two (2) week extension. Counsel requests that the GRC advise as to the deadline for filing a request for an extension of time and the maximum number of days allowed.

**April 18, 2011**

E-mail from the GRC to the Custodian's Counsel. The GRC states that it will, as a courtesy, grant an extension of five (5) business days to submit an SOI. The GRC thus grants Counsel an extension of time until May 2, 2011 to submit the SOI.

**May 2, 2011**

E-mail from Mr. Jeff S. Ignatowitz ("Mr. Ignatowitz"), DAG, to the GRC. Mr. Ignatowitz requests an extension of two (2) days to submit the SOI as the Custodian's Counsel is at a monthly meeting.

**May 3, 2011**

E-mail from the GRC to Mr. Ignatowitz. The GRC grants Mr. Ignatowitz an extension of time until May 4, 2011 for Counsel to submit the SOI.

**May 4, 2011<sup>5</sup>**

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated March 13, 2011.
- Letter from Ms. O'Hare to the Complainant dated April 1, 2011.
- Custodian's legal certification.
- Ms. Wendy Jamison's ("Ms. Jamison"), Board Secretary for the Police and Firemen's Retirement System ("PFRS"), legal certification.
- PFRS meeting minutes dated May 2, 2011.

The Custodian certifies that her search for the records relevant to the Complainant's OPRA request Item No. 1 involved inquiring about those records that may have been responsive and determining that the DPB maintained numerous records responsive to the Complainant's OPRA request. The Complainant certifies that her search for the requested records relevant to the Complainant's OPRA request Item No. 2 involved performing a diligent inquiry based on information and belief.

The Custodian certifies that the last date upon which records that may have been responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by Records Management Services is not applicable.

**Complainant's OPRA request Item No. 1:**

The Custodian certifies that she received the Complainant's OPRA request on March 14, 2011. The Custodian certifies that she determined the following records were responsive to the Complainant's OPRA request Item No. 1:

- Statutory Requirements, Police Training Act dated July 1, 2002.
- Monmouth County Sheriff's Office, Rules and Regulations revised February 11, 2004.
- Monmouth County Sheriff's Office, General Order 98-20 (job description) revised March 15, 2007.
- Oath of office dated September 17, 2007 and February 19, 2008.
- Monmouth County Sheriff's Office, General Order 98-20 (job description) revised September 16, 2008.
- Executive session minutes (with redactions) dated September 11, 2008.
- Monmouth County Sheriff's Office chart dated July 21, 2008.
- Monmouth County Sheriff's Office chart dated September 22, 2008.
- Interoffice Memorandum from Sergeant ("Sgt") David Finck to Sheriff Kim Guadagno, Monmouth County Sheriff's Office, dated August 25, 2008.

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<sup>5</sup> The Custodian did not certify to the search undertaken to locate the records responsive as is required pursuant to Paff v. NJ Department of Labor, 392 N.J. Super. 334 (App. Div. 2007).  
Mark Lagerkvist v. New Jersey Department of Treasury, Division of Pensions & Benefits, 2011-110 – Findings and Recommendations of the Executive Director 4

- Letter from Mr. Robert Melson, Division of Criminal Justice, to Sheriff Kim Guadagno dated December 3, 2009.
- Letter from Mr. Anthony F. Wieners, President of the New Jersey State Policemen's Benevolent Association, Inc., to Mr. Fred Beaver, Director, dated February 18, 2010.
- Employment verification form dated April 29, 2010.
- Letter from Mr. Michael Czyzyk to Mr. Craig Marshall, Monmouth County, dated April 29, 2010.
- Complaint dated May 12, 2010.
- Letter from Mr. Michael Czyzyk to Mr. Craig Marshall, Monmouth County, dated June 2, 2010.
- Member and employer screen prints.
- Job specifications No. 07595, No. 03696 and No. 05851 dated June 9, 2010.
- E-mail from Mr. David Finck to Mr. Donovan dated June 9, 2010.
- Letter from Mr. Craig Marshall to Mr. Michael Czyzyk dated June 14, 2010.
- Letter from Mr. Craig Marshall to Mr. Michael Czyzyk dated June 15, 2010.
- Letter from Mr. Shaun Golden, Acting Sheriff of the Monmouth County Sheriff's Office, to Ms. Andrea Bazer, County Counsel of the County of Monmouth, dated June 15, 2010.
- Memorandum regarding Hiring and Removal Procedures dated June 15, 2010.
- E-mail from Mr. Michael Czyzyk to the Custodian dated July 8, 2010 (with attachment memorandum).
- Memorandum from Mr. Michael Czyzyk dated September 27, 2010.
- Letter from Mr. Anthony F. Wieners to the Custodian dated December 14, 2010.
- Letter from Mr. Anthony F. Wieners to the Custodian dated January 7, 2011.

The Custodian certifies that after several short administrative extensions, Ms. O'Hare responded on her behalf on April 1, 2011 denying access to the records responsive to the Complainant's OPRA request Item No. 1.

The Custodian certifies that there is an ongoing investigation into the matter involving Mr. Donovan that is commonly referred to as "Chapter 204" review of the title of Chief Warrant Officer. N.J.S.A. 43:16A-1.2(a). The Custodian states that in accordance with N.J.S.A. 43:16A-1.2., the DPB is required to gather and review information pertinent to said review and make recommendations to the PFRS Board who makes a final determination. The Custodian certifies that the responsive records contain data and other material that is ACD and which advise the DPB and PFRS in relation to their duties and fiduciaries of the pension fund. The Custodian further certifies that the records are also pre-decisional until such time as the PFRS Board has an opportunity to review the recommendations and make a final determination. The Custodian thus certifies that she determined that the records were exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. and N.J.S.A. 47:1A-3.

The Custodian further certifies that she also determined that the responsive records were part of Mr. Donovan's pension file and are confidential in accordance with N.J.S.A. 47:1A-10. The Custodian certifies that the records do not fall within the exceptions enumerated in OPRA and are therefore not available for disclosure.



Complainant's OPRA request Item No. 2:

The Custodian certifies that after conducting a diligent search, she determined that no responsive records exist. The Custodian certifies that Ms. O'Hare responded to the Complainant in writing on April 1, 2011 advising that no responsive records exist.

Ms. Jamison certifies that she is the PFRS Board Secretary. Ms. Jamison certifies that at the PFRS's May 2, 2011 public meeting, it considered the recommendations of the DPB regarding the "Chapter 204" title review. Ms. Jamison states that after considering the recommendations of the DPB, the PFRS voted to deny the title of Chief Warrant Officer as a covered PFRS title. Ms. Jamison further certifies that the PFRS made a follow-up motion to refer the Donovan matter to the Attorney General's Office, Division of Criminal Justice, for investigation. *See* PFRS meeting minutes dated May 2, 2011.

The Custodian's Counsel submits a letter brief in support of the DPB's position in this matter. Counsel recapitulates the facts of the instant complaint and contends that the Custodian properly denied access to the responsive records.

Counsel argues the records responsive to request Item No. 1 are exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-10. Counsel states that the statute clearly outlines the parts of a personnel record that are disclosable under OPRA. Counsel argues that none of the responsive records fall within any exception afforded in N.J.S.A. 47:1A-10. Counsel asserts that the DPB would provide records that the Complainant is entitled to receive if the Complainant asserts that they will satisfy his OPRA request: some may even be accessible on the internet at <http://php.app.com/njretire07>. Counsel further asserts that the Custodian reviewed all records responsive to the Complainant's OPRA request Item No. 1 and determined that none were disclosable as information excepted under N.J.S.A. 47:1A-10.

Counsel further contends that the responsive records are exempt as ACD material pursuant to N.J.S.A. 47:1A-1.1. Counsel states that OPRA codifies New Jersey's policy favoring public access to government records, but also contains several exemptions including one for ACD material. *Id.* Counsel argues that the responsive records are clearly protected by this privilege, as they form the basis for the DPB's guidance and opinions to the PFRS on internal policy, as well as assist in the formulation of agency decisions. Counsel asserts that the records relate to an ongoing investigation the DPB was conducting that required action by the PFRS. Counsel notes that the records were assembled to assist the DPB in making a decision regarding the Donovan matter and are therefore ACD material. *See* Custodian's legal certification.

Counsel states that the DPB was created in June 1955 at which time the PFRS was transferred from the Division of Investment to the newly created DPB. N.J.S.A. 52:18A-96. Counsel states that the administrative functions of the State pension funds (except for investment of assets) are assigned to the DPB. *N.J.A.C.* 17:1-1.1. Counsel states that the DPB administers nine (9) retirement systems to include the PFRS. *N.J.A.C.* 17:1-1.1(c). Counsel states that each retirement systems' Board of Trustees provide "oversight and direction to the benefits program." *N.J.A.C.* 17:1-1.1(f). Counsel states that the PFRS has no employees and is therefore dependent on the DPB for its

administrative needs: the DPB investigates matters and provides recommendations to assist the PFRS in its decision-making obligations.

Counsel states that when the PFRS is to determine whether a title is properly included in the PFRS, the DPB conducts a Chapter 204 review and makes recommendations to the PFRS for final determination. N.J.S.A. 43:16A-1.2. Counsel states that N.J.S.A. 43:16A-1.2. provides that:

“[t]he Director of the Division of Pensions shall review the positions of all members of the retirement system on the effective date of this amendatory and supplementary act, P.L.1989, c. 204 (C. 43:16A-15.6 et al.), and shall recommend to the board of trustees whether or not a position shall continue to be covered under the retirement system based upon the definitions of ‘policeman’ and ‘fireman’ in this act. The board shall determine which positions shall continue to be covered under the retirement system ... Upon the recommendation of the Director of the Division of Pensions, the board of trustees shall determine if a position of a law enforcement unit ... is covered by the retirement system.” *Id.* at (a)-(b).

Counsel states that the process is further delineated in *N.J.A.C.* 1:4-2.1(g), which provides that:

“[t]he Director shall review the position and documentation to determine whether the duties and responsibilities of the position meet the definition of ‘police officer’ ... The Director shall then make a recommendation to the Board as to whether the position qualifies for inclusion in the Retirement System.” *Id.*

Counsel states that DPB staff, at the request of the Director, perform a thorough investigation examining the title in question and provide a report and recommendations to that specific retirement system Board. Counsel asserts that all of the records accumulated for this purpose are thus ACD material pursuant to N.J.S.A. 47:1A-1.1.

Counsel states the in Education Law Center v. New Jersey Dept. of Educ., 198 N.J. 274 (2009), the Supreme Court stated that:

“... a record, which contains or involves factual components, is entitled to deliberative-process protection when it was used in the decision-making process and its disclosure would reveal deliberations that occurred during that process. By that standard, an *individual document may not be capable of being determined to be, necessarily, deliberative material, or not, standing alone. A court must assess such fact-based documents against the backdrop of an agency's deliberative efforts in order to determine a document's nexus to that process and its capacity to expose the agency's deliberative processes.*” (Emphasis added.) *Id.* at 280-281.

Counsel states that the Court further held that the data inputted into the record at issue was “not raw, neutral, data. ... It plainly was created during, and used as part of, DOE's deliberative process.” *Id.* at 301. Counsel states that in so ruling, the Court stated that the deliberative process privilege applies to records that are “pre-decisional’ ... the document must be deliberative; explaining that such documents ‘contain opinions, recommendations, or advice about agency policies.’” (Citation omitted.) *Id.* at 286. Counsel contends that because the Custodian has asserted that the deliberative exemption extends to the responsive records, the Complainant bears the burden of proving an overriding need for access.

Counsel states that the DPB is statutorily required pursuant to N.J.S.A. 43:16A-1.2 to assist the PFRS in collecting data and information to formulate recommendations in conjunction with a Chapter 204 title review. Counsel contends that by the nature of the statute, the DPB’s relationship with the PFRS is ACD; thus, any materials gathered and used to formulate the opinion expressed by the DPB to advise the PFRS are exempt from disclosure. Counsel argues that it is essential that the nature of the records at issue be viewed within the confines of the DPB’s statutorily mandated function. Counsel asserts that the actual records are not determinative in and of themselves but must be considered against the DPB’s deliberative efforts and the nexus of that process. Education Law Center, at 299-300. Counsel thus contends that the records at issue are ACD material pursuant to N.J.S.A. 47:1A-1.1.

Counsel notes that subsequent to the filing of this complaint, the PFRS, at its May 2, 2011 meeting, considered and accepted the DPB’s recommendations that the title of Chief Warrant Officer remain excluded from participation in the PFRS. Counsel states that the PFRS additionally directed the Secretary to refer certain cases including the Donovan matter for further investigation. Counsel contends that even if the investigation was completed, the records used for the Chapter 204 title review remain exempt simply because they were pre-decisional. Education Law Center, at 300 (holding “... the fact that a new funding formula now has been chosen, and disclosed, does not obviate the need to maintain confidentiality of the decision-making process in order to ensure free deliberative communication within government ...”). Counsel further contends that the fruits of the title review investigation could likely form the basis for future action by the PFRS, thus underscoring the ACD quality of the records accumulated by DPB staff.

Counsel further contends that the records responsive to request Item No. 1 are also exempt from disclosure pursuant to N.J.S.A. 47:1A-3 because they are the subject of an ongoing investigation. Counsel states that OPRA provides that:

“... where it shall appear that the record or records which are sought to be inspected, copied, or examined shall pertain to an investigation in progress by any public agency, the right of access ... may be denied if the inspection, copying or examination of such record or records shall be inimical to the public interest ...” N.J.S.A. 47:1A-3.a.

Counsel argues that all records relating to the status of Mr. Donovan and his right to a public pension, including the title in which he was employed, is the subject of an ongoing investigation. Counsel asserts that the PFRS relies upon the advice of the DPB in

considering the title classification and making its final determination. Counsel asserts that the determination here lies with the PFRS and is pre-decisional until the matter is considered and concluded.

Counsel further contends that the Complainant indicated in the Denial of Access Complaint that he only sought records related to a concluded investigation based on the Custodian's statement in a letter to Mr. Wieners dated February 11, 2011 that "the [DPB] has done an investigation..." Counsel contends that when read in toto, the Custodian's letter clearly indicates that the PFRS rendered no decision regarding Mr. Donovan and his title at that time. Counsel asserts that a more thorough review of the letter shows that the Custodian requested "staff in [the DPB] to gather data regarding this title to determine if another [Chapter] 204 analysis should be done ..." after which time the matter would be referred back to the PFRS for a determination. Counsel asserts that the matter will not be concluded until after referral back and a final determination by the PFRS. Counsel thus contends that the Complainant's argument that the records sought were part of a concluded investigation are erroneous.

Counsel asserts that no records responsive to the Complainant's OPRA request Item No. 2 exist. Counsel asserts that even though the request item was overly broad, no records exist. Counsel notes that the request item sought "any" e-mails or correspondence between the DPB and the Governor's Office regarding the Donovan matter: the request does not identify specific records but requires the agency to research its files.

Counsel states that pursuant to OPRA, a government record is a record that is required to be "made, maintained or kept on file in the course of ... official business ..." N.J.S.A. 47:1A-1.1. Counsel states that OPRA does not require a custodian to create a record in order to satisfy an OPRA request. Counsel states that a public agency is "required to disclose only 'identifiable' governmental records not otherwise exempt. Wholesale requests for general information to be analyzed, collated and compiled by the responding government entity are not encompassed therein. In short, OPRA does not countenance open-ended searches of an agency's files." MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 549 (App. Div. 2005).

Counsel contends that despite the overly broad nature of the request item, the Custodian attempted to locate records responsive to same. Counsel asserts that after a diligent search, the Custodian determined and affirmed that no responsive records exist.

#### **May 5, 2011**

E-mail from the Complainant to the GRC. The Complainant states that he wishes to submit a response to the Custodian's SOI. The Complainant requests that the GRC advise the proper format and timetable for such a submission.

#### **May 5, 2011**

E-mail from the GRC to the Complainant. The GRC states that its regulations at N.J.A.C. 5:105-2 set forth the complaint process, including which submissions a party must provide. The GRC states that although N.J.A.C. 5:105-2 does not expressly afford for additional submissions and is silent as to whether any additional submissions are prohibited, as a matter of practice the GRC will, in its sole discretion, consider additional

submissions which provide new information or evidence that was not available at the time of the Complainant's Denial of Access Complaint.

The GRC thus states that if the Complainant wishes to submit additional correspondence that provides new information or proof such as evidence or a certification, he may do so at this time.

**May 5, 2011**

E-mail from the Complainant to the GRC. The Complainant states that he will provide a supplemental submission by no later than May 9, 2011.

**May 9, 2011**

Letter from the Complainant to the GRC attaching NJ.com article, "N.J. Officials Launch Investigation Into Possible Double-Dipping by Sheriff's Officers" dated May 3, 2011.

The Complainant states that since filing the instant Denial of Access Complaint, there have been some developments in the Donovan matter. The Complainant contends that the DPB and Counsel cleverly used the GRC's procedural process to delay submitting the SOI until after the PFRS referred the Donovan matter to the Attorney General's Office. The Complainant states that at the PFRS meeting on May 2, 2011 with the Custodian's Counsel in attendance, the PFRS voted to refer the Donovan matter and two (2) other matters to the Attorney General's Office for investigation. The Complainant asserts that Counsel could thus submit an SOI arguing that the records responsive to the Complainant's OPRA request are part of an active investigation and therefore are supposedly exempt from access pursuant to N.J.S.A. 47:1A-3.

Complainant's OPRA request Item No. 1:

The Complainant contends that the Custodian's SOI is severely flawed as it fails to identify any specific exemptions that apply to any particular record. The Complainant states that the Custodian broadly asserted in the document index that 25 records "are exempt from disclosure ... pursuant to Executive Order 26 and N.J.S.A. 47:1A-1." The Complainant contends that the Custodian failed to identify the specific exemption contained in N.J.S.A. 47:1A-1 that applied to each record. The Complainant contends that this is contrary to the Appellate Division's holding in Paff v. NJ Dept. of Labor, 392 N.J. Super. 334 (App. Div. 2007) that:

"The index is essentially a 'privilege log' that must provide sufficient information 'respecting the basis of the privilege-confidentiality-exception claim vis a vis each document.' Hartz Mountain Indus., Inc. v. N.J. Sports & Exposition Auth., 369 N.J. Super. 175, 185, 848 A.2d 793 (App. Div.), *certif. denied*, 182 N.J. 147, 862 A.2d 56 (2004). An accurate index is necessary for substantive review by the requesting party as well as the reviewing court." *Id.* at 341.

The Complainant states that under OPRA, the burden of proving a lawful denial of access rests with the Custodian. The Complainant requests that the GRC order the Custodian to

produce a document index that provides the specific lawful basis for each record. The Complainant further argues that absent a document index that conforms with Paff, the GRC should order disclosure of all responsive records.

The Complainant further argues that the Custodian's document index fails to specify which records are exempt from disclosure as personnel and pension records pursuant to N.J.S.A. 47:1A-10 and which records are exempt as ACD material pursuant to N.J.S.A. 47:1A-1.1. The Complainant contends that the exemptions do not appear to apply to at least the following:

- Statutory Requirements, Police Training Act dated July 1, 2002.
- Monmouth County Sheriff's Office, Rules and Regulations revised February 11, 2004.
- Monmouth County Sheriff's Office, General Order 98-20 (job description) revised March 15, 2007.
- Oath of office dated September 17, 2007 and February 19, 2008.
- Monmouth County Sheriff's Office, General Order 98-20 (job description) revised September 16, 2008.
- Monmouth County Sheriff's Office chart dated July 21, 2008.
- Monmouth County Sheriff's Office chart dated September 22, 2008.
- Job specifications No. 07595, No. 03696 and No. 05851 dated June 9, 2010.

The Complainant contends that 14 of the records withheld are identified as letters, e-mails or memos, but the document index gives no indication as to the substance or purpose of those records.

The Complainant further argues that the Custodian's SOI is deficient because it fails to list the Custodian's February 11, 2011 letter as responsive even after providing same to Mr. Sage in response to a separate but similar OPRA request.

The Complainant next disputes Counsel's argument that all records gathered by the DPB in relation to the Chapter 204 title review are exempt as ACD material pursuant to N.J.S.A. 47:1A-1.1. and Education Law Center, supra. The Complainant states that the Court in Education Law Center considered whether a "Simulation Memo," a record containing both factual and deliberative material, should be exempt from disclosure as ACD material. The Complainant states that the Education Law Center Court further acknowledged that the Simulation memo was "... created during, and used as part of, DOE's deliberative process ..." and contained "... factual data converted into scenarios for the purpose of assisting in an agency's consideration of options." *Id.* at 301. The Complainant asserts that although the Court ruled in favor of the public agency, there are key differences between that case and the instant complaint. The Complainant contends that here, many of the responsive records obtained from other agencies were created by those agencies for purposes other than the Chapter 204 title review. The Complainant asserts that these records include the oath of office, organizational charts and statutory requirements of the Police Training Act. The Complainant further contends that the Custodian's blanket exemption must be rejected and the GRC should conduct an *in camera* review to determine if the ACD exemption applies to the responsive records.

The Complainant contends that the deficiencies in the Custodian's document index further make it difficult to ascertain what some of the records actually are: *i.e.*, "Executive session minutes" of an unnamed public body, unidentified "Member and employer screen prints," and an unspecified "Complaint dated May 12, 2010."

The Complainant further contends that the Custodian failed to prove that disclosure of the responsive records would be "inimical to the public interest," as is required for proper application of the exemption set forth in N.J.S.A. 47:1A-3.a. The Complainant asserts that the Custodian's Counsel presented no evidence to support this exemption. The Complainant notes that, according to the attached article, even members of the PFRS discussed aspects of the Donovan matter with the media after the May 2, 2011 meeting. The Complainant states that N.J.S.A. 47:1A-3.a provides that public agencies cannot prohibit access to records that were not exempt before an investigation commenced. The Complainant contends that even if the records were not exempt under N.J.S.A. 47:1A-3.a, the records were accessible to the public before the PFRS referred the Donovan matter to the Attorney General's Office. The Complainant requests that the GRC review the responsive records *in camera* and determine whether each record was a government record before the onset of any investigation.

The Complainant contends that a Chapter 204 title review is not defined as an investigation and should not be viewed as such within the purview of OPRA. The Complainant states that the review was created under N.J.S.A. 43:16A-1.2 and is not defined as an investigation; thus, the review should not be considered an investigation for purposes of N.J.S.A. 47:1A-3. The Complainant states that he submitted his OPRA request after receiving the Custodian's letter to Mr. Anthony Wieners dated February 11, 2011 from other sources. The Complainant states that in said letter, the Custodian loosely refers to the Chapter 204 title review as an investigation, which is why the Complainant used the term in his OPRA request. The Complainant asserts that based on his review of the submissions for this complaint, he realizes that the investigation is actually a title review. The Complainant further contends that even if the Chapter 204 title review is deemed an investigation for purposes of OPRA, the review concluded on May 2, 2011 and is no longer an ongoing investigation.

#### Complainant's OPRA request Item No. 2:

The Complainant disputes Counsel's argument that the Complainant's OPRA request Item No. 2 was overly broad. The Complainant states that said request item sought "[a]ny e-mails or correspondence re: Mr. Donovan's pension between the [DPB] and the Office of the Governor or [Lt.] Governor from 2010 to present." The Complainant contends that this request is not a fishing expedition because it identifies the senders, recipients, a range of dates and a particular subject matter.

The Complainant states that in the June 15, 2010 letter from Mr. Golden to Ms. Bazer attached to the Denial of Access Complaint, Mr. Golden requests that the DPB contact Lt. Governor Guadagno regarding the Donovan matter. The Complainant states that it is this communication for which he seeks access, if it exists.

The Complainant further argues that the Custodian's SOI was deficient because she failed to adequately detail her search for the records responsive to request Item No. 2. The Complainant states that in Paff, the Appellate Division held that "... the agency to which the request is made shall be required to produce sworn statements by agency personnel setting forth in detail the following information: (1) the search undertaken to satisfy the request ..." *Id.* at 341. The Complainant contends that the Custodian failed to provide the level of detail required pursuant to Paff.

The Complainant finally contends that the discrepancies between the records provided to Mr. Sage and the wholesale denial of access to the Complainant's OPRA request goes to the question of whether the Custodian knowingly and willfully violated OPRA. The Complainant contends that the mixed responses raise significant questions as to why the Custodian would disclose records on one hand and deny access on the other. The Complainant requests that the GRC order Counsel to provide a supplemental legal certification.

### Analysis

#### **Whether the Custodian timely responded to the Complainant's OPRA request?**

OPRA provides that:

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

Further, OPRA provides that:

"[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request* ... In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request* ..." (Emphasis added.) N.J.S.A. 47:1A-5.i.

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian's failure to respond within the required seven (7) business days results in a "deemed" denial. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.<sup>6</sup> Thus, a custodian's failure to respond in writing to a complainant's OPRA

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<sup>6</sup> It is the GRC's position that a custodian's written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, *Mark Lagerkvist v. New Jersey Department of Treasury, Division of Pensions & Benefits, 2011-110 – Findings and Recommendations of the Executive Director* 13



request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

The Complainant submitted his OPRA request to DOT on March 13, 2011. Ms. O’Hare responded in writing on behalf of the Custodian on the fourteenth (14<sup>th</sup>) business day after receipt of said request. Although the Custodian certified in the SOI that DOT received several administrative extensions, the Custodian provided no proof that it requested said extensions in writing. Thus, the Custodian’s failure to respond in a timely manner results in a “deemed” denial.

Therefore, the Custodian did not timely respond to the Complainant’s OPRA request. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley, supra.

#### **Whether the Custodian unlawfully denied access to the requested records?**

OPRA provides that:

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

Additionally, OPRA defines a government record as:

“... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ... The terms shall not include *inter-agency or intra-agency advisory, consultative, or deliberative material.*” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA provides that:

“... where it shall appear that the record or records which are sought to be inspected, copied, or examined *shall pertain to an investigation in progress* by any public agency, the right of access provided for in [OPRA] *may be denied* if the inspection, copying or examination of such record or

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even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA.

records *shall be inimical to the public interest; provided, however, that this provision shall not be construed to allow any public agency to prohibit access to a record of that agency that was open for public inspection, examination, or copying before the investigation commenced.*” (Emphasis added.) N.J.S.A. 47:1A-3.a.

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 further provides that:

“... the *personnel or pension records of any individual* in the possession of a public agency, including but not limited to records relating to any grievance filed by or against an individual, *shall not be considered a government record* and shall not be made available for public access, except that: an individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefor, and the amount and type of any pension received shall be a government record; personnel or pension records of any individual shall be accessible when required to be disclosed by another law, when disclosure is essential to the performance of official duties of a person duly authorized by this State or the United States, or when authorized by an individual in interest ...” N.J.S.A. 47:1A-10.

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 OPRA request Item No. 1:

The Complainant’s OPRA request Item No. 1 sought “[a]ll available records concerning ...” the Donovan matter. Ms. O’Hare responded in writing to the Complainant stating that the responsive records were exempt from access pursuant N.J.S.A. 47:1A-1.1., N.J.S.A. 47:1A-3.a. and N.J.S.A. 47:1A-10. The Complainant filed this complaint thereafter arguing that Mr. Sage received records in response to a similar request. The Complainant thus requested that the GRC conduct an *in camera* review of all responsive records and order disclosure of those records deemed to be disclosable under OPRA.

In the SOI, the Custodian identified 26 records that were responsive to the request item to include, among other types of records, minutes, job descriptions, letters, memos and e-mails. The Custodian certified that all of these records were part of an on-going

Chapter 204 review in the Donovan matter, thus the records are exempt from disclosure as ACD material pursuant to N.J.S.A. 47:1A-1.1. and are part of an on-going investigation pursuant to N.J.S.A. 47:1A-3.a. Moreover, the Custodian argued that the records were part of Mr. Donovan's pension file and are confidential pursuant to N.J.S.A. 47:1A-10.

Counsel, in support of the DPB's position, argued that DPB's statutory requirement to conduct the Chapter 204 review and make recommendations to the PFRS for a final determination pursuant to N.J.S.A. 43:16A-1.2 rendered all the accumulated records exempt from disclosure as ACD material. Counsel argued that this position was consistent with the Court's holding in Education Law Center, because the exemption must be considered against the DPB's deliberative efforts and the nexus of that process. Counsel further reiterated that the records are part of an on-going investigation. N.J.S.A. 47:1A-3.a. Counsel finally argued that none of the responsive records contain information required to be disclosed under N.J.S.A. 47:1A-10.

The Complainant responded on May 9, 2011 noting that on May 2, 2011, the PFRS voted to transfer the Donovan matter to the Attorney General's Office for an investigation. The Complainant further disputed the Custodian's document index and argued that the Custodian failed to identify the specific exemption that applied to each record. The Complainant also argued that Education Law Center does not apply to at least some of the responsive records because they were not created "during, and used as part of ..." DPB's review. The Complainant further argued that the Custodian failed to prove that disclosure of the records would be inimical to the public interest, as is required under N.J.S.A. 47:1A-3.a. The Complainant argued that a Chapter 204 review is not defined as an investigation and should not be viewed as such under OPRA. N.J.S.A. 43:16A-1.2.

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 GRC<sup>7</sup> 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

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<sup>7</sup> Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005).  
Mark Lagerkvist v. New Jersey Department of Treasury, Division of Pensions & Benefits, 2011-110 – Findings and Recommendations of the Executive Director 16

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. 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.” *Id.*

Therefore, pursuant to Paff, *supra*, the GRC must conduct an *in camera* review of the following requested records to determine the validity of the Custodian’s assertion that the record constitutes ACD material and contains pension information which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. and N.J.S.A. 47:1A-10:

- Statutory Requirements, Police Training Act dated July 1, 2002.
- Monmouth County Sheriff’s Office, Rules and Regulations revised February 11, 2004.
- Monmouth County Sheriff’s Office, General Order 98-20 (job description) revised March 15, 2007.
- Oath of office dated September 17, 2007 and February 19, 2008.
- Monmouth County Sheriff’s Office, General Order 98-20 (job description) revised September 16, 2008.
- Executive session minutes (with redactions) dated September 11, 2008.
- Monmouth County Sheriff’s Office chart dated July 21, 2008.
- Monmouth County Sheriff’s Office chart dated September 22, 2008.
- Interoffice Memorandum from Sergeant (“Sgt”) David Finck to Sheriff Kim Guadagno, Monmouth County Sheriff’s Office, dated August 25, 2008.
- Letter from Mr. Robert Melson, Division of Criminal Justice, to Sheriff Kim Guadagno dated December 3, 2009.
- Letter from Mr. Anthony F. Wieners, President of the New Jersey State Policemen’s Benevolent Association, Inc., to Mr. Fred Beaver, Director, dated February 18, 2010.
- Employment verification form dated April 29, 2010.
- Letter from Mr. Michael Czyzyk to Mr. Craig Marshall, Monmouth County, dated April 29, 2010.
- Complaint dated May 12, 2010.
- Letter from Mr. Michael Czyzyk to Mr. Craig Marshall, Monmouth County, dated June 2, 2010.
- Member and employer screen prints.
- Job specifications No. 07595, No. 03696 and No. 05851 dated June 9, 2010.

- E-mail from Mr. David Finck to Mr. Donovan dated June 9, 2010.
- Letter from Mr. Craig Marshall to Mr. Michael Czyzyk dated June 14, 2010.
- Letter from Mr. Craig Marshall to Mr. Michael Czyzyk dated June 15, 2010.
- Letter from Mr. Shaun Golden, Acting Sheriff of the Monmouth County Sheriff's Office, to Ms. Andrea Bazer, County Counsel of the County of Monmouth, dated June 15, 2010.
- Memorandum regarding Hiring and Removal Procedures dated June 15, 2010.
- E-mail from Mr. Michael Czyzyk to the Custodian dated July 8, 2010 (with attachment memorandum).
- Memorandum from Mr. Michael Czyzyk dated September 27, 2010.
- Letter from Mr. Anthony F. Wieners to the Custodian dated December 14, 2010.
- Letter from Mr. Anthony F. Wieners to the Custodian dated January 7, 2011.

The Custodian must also certify to whether a Chapter 204 review is defined as an investigation for purposes of N.J.S.A. 47:1A-3. The Custodian must further certify to why disclosure of the responsive records would be inimical to the public interest.

The GRC notes that the Complainant's OPRA request Item No. 1 sought "[a]ll available records ..." regarding the Donovan matter. This request item on its face is overly broad because it is a generic request that fails to identify any specific government records. A custodian seeking to locate "all ... records" would be forced to locate any type of record from papers and documents to data and information maintained electronically. OPRA only requires a custodian "*to disclose only 'identifiable' government records not otherwise exempt ....*" (Emphasis added.) MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 549 (App. Div. 2005).

However, the GRC has recognized that although a request on its face may be invalid, a custodian nonetheless was provided with enough information to identify responsive records. In Bond v. Borough of Washington (Warren), GRC Complaint No. 2009-324 (Final Decision dated March 29, 2011), the complainant requested "all proposals submitted for the position of ... solicitor." The custodian responded stating that three (3) records responsive had been identified but that access to same was denied. The GRC noted that:

"... while the Complainant's OPRA request on its face is overly broad and unclear due to the absence of a specific time period within which the Custodian could narrow her search ... the Complainant's OPRA request was sufficient for the Custodian to identify the responsive records ... Additionally, the Custodian responded to the Complainant's OPRA request identifying three (3) proposals as responsive: the Custodian's response is an indication that she needed no additional information to identify the records responsive to the Complainant's OPRA request." *Id.* at pg. 15. *See also* Darata v. Monmouth County Board of Chosen Freeholders, GRC Complaint No. 2009-312 (Interim order dated February 24, 2011).

Similar to the facts of Bond, in the matter before the Council, the evidence of record indicates that the DPB was clearly able to identify the records sought. Specifically, the Custodian was clearly able to accurately identify the specific records sought based on the Complainant's OPRA request Item No. 1. Thus, while the Complainant's OPRA request on its face is overly broad and unclear due to the absence of a specific type of government record (*i.e.*, letter, memo, e-mail, etc.), the OPRA request was sufficiently clear for the Custodian to identify the responsive records.

Finally, the Complainant noted that the Custodian did not list as part of the responsive records the letter from the Custodian to Mr. Wieners dated February 11, 2011. The GRC notes that the Complainant attached an unredacted copy of the record to his Denial of Access Complaint and further noted in his May 9, 2011 letter to the GRC that he submitted the OPRA request at issue herein after receiving the letter. The GRC acknowledges that this record clearly falls within the scope of the Complainant's OPRA request; however, making a determination regarding this record "does not advance the purpose of OPRA, which is to ensure an informed citizenry." Bart v. City of Paterson Housing Authority, 403 N.J. Super. 609 (App. Div. 2008)(holding that the complainant could not have been unlawfully denied access to a record if he was already in possession of the record sought at the time of his OPRA request).

#### Complainant's OPRA request Item No. 2:

Ms. O'Hare responded in writing to the Complainant's second (2<sup>nd</sup>) OPRA request stating that no records responsive exist. The Custodian subsequently certified to this fact in the SOI. In a letter to the GRC dated May 9, 2011, the Complainant noted that he made this request based on a statement in a letter from Mr. Golden to Ms. Bazer in which Mr. Golden requests that the DPB contact Lt. Governor Guadagno regarding the Donovan matter. Although the Complainant states that he is seeking the resulting communication, the Complainant offered no evidence that any such communication exists.

In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the complainant sought telephone billing records showing a call made to him from the New Jersey Department of Education. The custodian certified in the SOI that no records responsive to the complainant's request existed. The complainant submitted no evidence to refute the custodian's certification in this regard. The GRC determined that, because the custodian certified that no records responsive to the request existed and no evidence existed in the record to refute the custodian's certification, there was no unlawful denial of access to the requested records.

Here, Ms. O'Hare responded to the Complainant's OPRA request Item No. 2 stating that no records responsive exist. Moreover, the Custodian certified in the SOI that no records responsive exist and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. Thus, the Custodian did not unlawfully deny access to the requested records pursuant to Pusterhofer.

The GRC notes that Counsel argued in the SOI that the Complainant's OPRA request Item No. 2 was overly broad because it sought "any" e-mails or correspondence

between DPB and the Governor's Office regarding the Donovan matter. The GRC further notes that the Complainant did include a time frame regarding the records sought of 2010 to the date of the OPRA request, or March 13, 2011. Though the GRC has already determined that the Custodian did not unlawfully deny access to this request item, the GRC notes that the request item for "e-mails or correspondence ... between the [DPB] and the Office of the Governor or [Lt.] Governor ..." on its face is invalid. See Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2010-302 (Interim Order dated January 31, 2012)(holding that the complainant's request sought correspondence was overly broad on its face because "correspondence" is a general record that could include letters, memos, e-mails, etc.) and Wolosky v. Borough of Morris Plains (Morris), GRC Complaint No. 2010-190 (October 2011)(holding that the complainant's request for e-mails "... sent or received by the Municipal Clerk's office to or from each and every other Municipal Clerk in Morris County ..." is invalid because the complainant failed to name specifically identifiable individual recipients and senders.").

**Whether the Custodian's actions rise 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. The Custodian did not timely respond to the Complainant's OPRA request. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
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 following requested records to determine the validity of the Custodian's assertion that the record constitutes inter-agency or intra-agency advisory, consultative, or deliberative material and contains pension information which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. and N.J.S.A. 47:1A-10:
  - Statutory Requirements, Police Training Act dated July 1, 2002.
  - Monmouth County Sheriff's Office, Rules and Regulations revised February 11, 2004.
  - Monmouth County Sheriff's Office, General Order 98-20 (job description) revised March 15, 2007.

- Oath of office dated September 17, 2007 and February 19, 2008.
- Monmouth County Sheriff's Office, General Order 98-20 (job description) revised September 16, 2008.
- Executive session minutes (with redactions) dated September 11, 2008.
- Monmouth County Sheriff's Office chart dated July 21, 2008.
- Monmouth County Sheriff's Office chart dated September 22, 2008.
- Interoffice Memorandum from Sergeant ("Sgt") David Finck to Sheriff Kim Guadagno, Monmouth County Sheriff's Office, dated August 25, 2008.
- Letter from Mr. Robert Melson, Division of Criminal Justice, to Sheriff Kim Guadagno dated December 3, 2009.
- Letter from Mr. Anthony F. Wieners, President of the New Jersey State Policemen's Benevolent Association, Inc., to Mr. Fred Beaver, Director, dated February 18, 2010.
- Employment verification form dated April 29, 2010.
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- Letter from Mr. Craig Marshall to Mr. Michael Czyzyk dated June 15, 2010.
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- Memorandum regarding Hiring and Removal Procedures dated June 15, 2010.
- E-mail from Mr. Michael Czyzyk to the Custodian dated July 8, 2010 (with attachment memorandum).
- Memorandum from Mr. Michael Czyzyk dated September 27, 2010.
- Letter from Mr. Anthony F. Wieners to the Custodian dated December 14, 2010.
- Letter from Mr. Anthony F. Wieners to the Custodian dated January 7, 2011.

The Custodian must also certify to whether a Chapter 204 review is defined as an investigation for purposes of N.J.S.A. 47:1A-3. The Custodian must further certify to why disclosure of the responsive records would be inimical to the public interest.



3. **The Custodian must deliver<sup>8</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 2 above), a document or redaction index<sup>9</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,<sup>10</sup> 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.**
4. Ms. O'Hare responded to the Complainant's OPRA request Item No. 2 stating that no records responsive exist. Moreover, the Custodian certified in the Statement of Information that no records responsive exist and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. Thus, the Custodian did not unlawfully deny access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
5. 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: Karyn Gordon, Esq.  
Acting Executive Director

July 24, 2012

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<sup>8</sup> The *in camera* records 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.

<sup>9</sup> The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

<sup>10</sup> "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."