



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

April 30, 2013 Government Records Council Meeting

Robert G. Dooley  
Complainant

Complaint No. 2011-257

v.

City of Newark (Essex)  
Custodian of Record

At the April 30, 2013 public meeting, the Government Records Council (“Council”) considered the April 23, 2013 *Reconsideration* Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian’s Counsel has failed to establish in his request for reconsideration of the Council’s February 26, 2013 Interim Order that 1) the GRC’s decision is based upon a “palpably incorrect or irrational basis” or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, and has failed to show that the GRC acted arbitrarily, capriciously or unreasonably, and failed to submit any evidence to the contrary. Thus, Counsel’s request for reconsideration is denied. Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996); D’Atria v. D’Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003). However, Counsel provided the layoff plan responsive to OPRA request Item No. 8 as part of the reconsideration. Thus, the GRC declines to refer this complaint to the Office of Administrative Law to determine the disclosability of the layoff plan because the Complainant is now in possession of the record.
2. The Custodian timely complied with the Council’s February 26, 2013 Interim Order within the extended time frame because the Custodian submitted the requisite records to the Complainant and certification to the GRC.
3. The Custodian’s failure to respond to the Complainant’s OPRA request resulted in a “deemed” denial pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) and the Custodian failed to bear his burden of proving a lawful denial of access to the Complainant’s request Item Nos. 2 and 8. However, the Complainant’s request Item Nos. 1 and 3 through 7 are invalid. Additionally, the Custodian provided the Complainant with the records responsive to request Item Nos. 2 and 8 as well as Mr.



Marasco's legal certification. Thus, the Custodian complied with the Council's Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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

Final Decision Rendered by the  
Government Records Council  
On The 30<sup>th</sup> Day of April, 2013

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: May 2, 2013**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

***Reconsideration***  
**Supplemental Findings and Recommendations of the Executive Director**  
**April 30, 2013 Council Meeting**

**Robert G. Dooley<sup>1</sup>**  
**Complainant**

**GRC Complaint No. 2011-257**

**v.**

**City of Newark (Essex)<sup>2</sup>**  
**Custodian of Records**

**Records Relevant to Complaint:<sup>3</sup>** Copies of information specific to the following persons:

- Mehdi Mohammadish, Director of Engineering
- Richard Lopez, Manager of Public Buildings
- Samie Shokry
- Pierre Lajili

1. In what portion of the City of Newark's ("City") budget is each employee's salary allocated?
2. What is each employee's civil service title as assigned by the Civil Service Commission ("CSC") to include the job specification number and job description?
3. Do the duties of the employees match the duties defined under their civil service titles?
4. Have the employees or responsibilities changed to the extent that they are no longer similar to the duties and responsibilities set forth in job descriptions?
5. If duties have changed, was there a reclassification of their positions?
6. Were any of the employees assigned to or managed by the Chief Architect's Unit ("CAU") prior to November 30, 2010?
7. As of December 2010, are any of the employees engaged in any work or projects started before this time?<sup>4</sup>
8. Provide a copy of any plan prepared by the Director of Engineering as requested by the City justifying layoffs and the termination of the CAU and the Director's explanation of his plan for handling the CAU's workload.

**Request Made:** December 21, 2010

**Response Made:** January 7, 2011

**GRC Complaint Filed:** August 3, 2011<sup>5</sup>

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

<sup>2</sup> Robert P. Marasco, Custodian of Records. Represented by Guenther Waldow, Jr., Esq. (Newark, NJ).

<sup>3</sup> The Complainant requested additional records that are not at issue in this complaint.

<sup>4</sup> The Complainant lists 14 different projects being conducted within the City.

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

## Background

At its February 26, 2013 public meeting, the Council considered the January 22, 2013 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of the amended findings and recommendations. The Council, therefore, found that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. 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). The Custodian's request for an extension of time is also invalid pursuant to Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008) because the Custodian failed to request same in writing within the statutorily mandated time frame.
2. Because the Complainant's request Item Nos. 1 and 3 through 7 ask questions or seek information rather than identifiable government records, the requests are invalid under OPRA. MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005); New Jersey Builders Association v. New Jersey Council of Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (March 2008); LaMantia v. Jamesburg Public Library (Middlesex), GRC Complaint No. 2008-140 (February 2009); Watt v. Borough of North Plainfield (Somerset), GRC Complaint No. 2007-246 (September 2009). Thus, the Custodian has not unlawfully denied access to the relevant request items. *See also* Ohlson v. Township of Edison (Middlesex), GRC Complaint No. 2007-233 (August 2009).
3. The Custodian has unlawfully denied access to the records responsive to the Complainant's OPRA request Item Nos. 2 and 8. N.J.S.A. 47:1A-6. Thus, the Custodian must disclose the responsive records. However, if records do not exist for certain individuals regarding Item No. 2, the Custodian must certify as such for each individual. Additionally, if no records responsive to Item No. 8 exist, the Custodian must certify to same.
4. Because the City of Newark failed to submit a valid Statement of Information or notify the GRC that a change in the designation of the custodian of record has occurred, Mr. Marasco must certify whether he or someone else is currently serving as the custodian of record for the City.
5. **The Custodian shall comply with Item Nos. 3 and 4 above within five (5) business days from receipt of the Council's Interim Order with appropriate**

**redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>6</sup> to the Executive Director.<sup>7</sup>**

6. This complaint should be referred to the Office of Administrative Law for an *in camera* review of the plan responsive to OPRA request Item No. 8 and a determination as to whether the record is disclosable in part or whole upon completion of compliance. Additionally, this complaint should be referred to OAL to determine whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

On February 27, 2013, the Council distributed its Interim Order to all parties. On March 4, 2013, Ms. Cheryl Coxson (“Ms. Coxson”), City Clerk’s Office, requested an extension of time until March 11, 2013 to comply with the Council’s Order. On the same day, the GRC granted the extension.

On March 11, 2013, the Custodian’s Counsel submitted reconsideration of the Council’s February 26, 2013 Interim Order based on a “mistake” and “extraordinary circumstances”.

Counsel requests that the Council reconsider its Order to find that (1) the Custodian did not improperly deny access to the Complainant’s OPRA request Item No. 2 and that the Custodian’s untimely response does not constitute a knowing and willful violation; (2) the Custodian properly denied access to the records responsive to the Complainant’s OPRA request Item No. 8 pursuant to N.J.S.A. 47:1A-1.1; and (3) the Custodian submitted a valid SOI signed by Mr. Kenneth Louis (“Mr. Louis”), Deputy City Clerk, who was appointed to execute all OPRA documents in the Custodian’s absence.

Counsel asserts that the Custodian’s initial failure to respond to the Complainant’s request Item No. 2 until the eleventh (11<sup>th</sup>) business day was based on administrative oversight and was nothing more than negligence. Counsel asserts that the Custodian acted in good faith by reaching out to all departments to obtain the responsive records and all responsive records were provided to the Complainant on August 24, 2011.<sup>8</sup> Counsel contends that the Custodian’s actions did not rise to the level of a knowing and willful violation as defined in Alston v. City of Camden, 168 N.J. 170, 185 (2001) and ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996).

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

<sup>8</sup> Counsel attaches the records forwarded to the Complainant in response to OPRA request Item No. 2. The GRC notes that this disclosure took place during the mediation process, which is a confidential process pursuant to the Uniform Mediation Act, N.J.S.A. 2A:23C-1 et seq.

Counsel asserts that regarding OPRA request Item No. 8, on August 24, 2011, the Custodian advised the Complainant that the responsive record was exempt from disclosure as “inter-agency or intra-agency advisory, consultative or deliberative” (“ACD”) material pursuant to N.J.S.A. 47:1A-1.1. Counsel contends that this exemption was appropriate at the time because the City was still engaged in ongoing discussions and analysis of the CAU plan. Counsel notes that because the layoffs have occurred, the exemption no longer applies and the City is disclosing the record as part of this reconsideration.

Counsel requests that the GRC also reconsider its conclusion that the City failed to submit a valid Statement of Information (“SOI”) because same is unfounded. Counsel contends that for the past eight (8) years, the GRC has accepted SOIs signed by Ms. Joyce Lanier (“Ms. Lanier”), OPRA Manager. Counsel asserts that despite this stance, on November 21, 2012, the GRC advised the City that the SOI signed by Ms. Lanier was invalid and that the Custodian must execute same. Counsel asserts that at this time, the Custodian was out on sick leave and unable to execute the SOI; thus, Mr. Louis who was designated to execute all documents pertaining to OPRA executed the SOI. *See* R. Marasco legal certification at ¶ 6-8.

### Analysis

#### Reconsideration

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)*.

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).

Here, the Custodian's Counsel filed the request for reconsideration of the Council's February 26, 2013 Interim Order on March 11, 2013, the last business day of the extended time frame to comply with the Council's Order.

Counsel first argued the Council should reconsider its decision to find that the Custodian did not improperly deny access to the Complainant's OPRA request Item No. 2 and that the Custodian's untimely response does not constitute a knowing and willful violation. Counsel argued that the Custodian's failure to respond in a timely manner was simply an oversight and did not constitute a knowing and willful violation of OPRA. Counsel further noted that the Custodian sent the responsive records to the Complainant on August 24, 2011.

The Council should reject Counsel's request because at the point that the Custodian failed to respond to the Complainant's OPRA request in a timely manner, by law, the Complainant's OPRA request Item No. 2 was "deemed" denied. N.J.S.A. 47:1A-5.g. and 47:1A-5.i. Moreover, the Council has not presently made a determination regarding whether the Custodian knowingly and willfully denied access to the responsive records within the totality of the circumstances; therefore, Counsel's request is premature. The Council finally notes that the evidence submitted by Counsel does show that the Custodian sent the responsive records to the Complainant on August 24, 2011; however, this disclosure came eight (8) months after the submission of the OPRA request.

Counsel next argued that the Council should reconsider its decision to find that the Custodian properly denied access to the records responsive to the Complainant's OPRA request Item No. 8 pursuant to N.J.S.A. 47:1A-1.1. Counsel asserted that the Custodian properly denied access to the layoff plan because same was still under review by the City. Counsel further noted that because the layoffs occurred, the exemption no longer applied and the records were disclosed to the Complainant as part of the reconsideration filing.

The Council should reject Counsel's request. Whenever a custodian denies access to a government record, the custodian must ultimately bear the burden of proving a lawful denial of access. N.J.S.A. 47:1A-6. Here, the Custodian failed to bear his burden of proving a lawful denial of access to the plan by failing to articulate why the record was exempt from disclosure. The GRC notes that although an argument in support of denying access to the plan may have been included in the SOI, the GRC deemed the SOI invalid and thus adjudicated this complaint in accordance with *N.J.A.C.* 5:105-2.4(g)(Providing that "[a] custodian's failure to submit a completed and signed SOI ... may result in the Council's issuing a decision in favor of the complainant.")

Counsel finally argued that the Council should reconsider its decision to find that Mr. Louis' submission of the SOI was valid because he was designated to execute OPRA documents while the actual Custodian, Mr. Marasco, was out on sick leave. Counsel submitted the legal certification required by the Council's compliance in order to support his argument. Counsel further argued that previously the GRC has accepted SOIs signed by Ms. Lanier.

The Council should reject Counsel's request because the SOI letter dated September 21, 2011, and the SOI signature page clearly indicate that the *custodian of record* must execute the

SOI. *See also N.J.C.A. 5:105-2.4(f)*. Further, the City failed to provide any evidence to substantiate the claim that the GRC accepted past SOIs signed by Ms. Lanier or that Ms. Lanier was the City's *custodian of record* at that time. Additionally, it was not until the filing of this reconsideration that the City advised the GRC that Mr. Marasco was out on sick leave at the time the GRC requested the SOI be resubmitted. In the absence of any explanation supporting either of the City's actions regarding the signing of the SOI, the GRC followed its regulations by proceeding with the evidence in the record. *N.J.A.C. 5:105-2.4(g)*.

Thus, the Custodian's Counsel failed to submit any new evidence in support of his motion.<sup>9</sup> As the moving party, Counsel was required to establish either of the necessary criteria set forth above; namely 1) that the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence. *See Cummings, supra*. The Custodian's Counsel failed to do so. Counsel has also failed to show that the GRC acted arbitrarily, capriciously or unreasonably in determining that the Custodian unlawfully denied access to certain records or failed to submit a valid SOI. *See D'Atria, supra*. Notably, Counsel failed to submit any evidence to contradict the GRC's handling of this complaint and subsequent decision.

Therefore, Counsel has failed to establish in his request for reconsideration of the Council's February 26, 2013 Interim Order that 1) the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, and has failed to show that the GRC acted arbitrarily, capriciously or unreasonably, and failed to submit any evidence to the contrary. Thus, Counsel's request for reconsideration is denied. *Cummings, supra; D'Atria, supra; Comcast, supra*. However, Counsel provided the layoff plan responsive to OPRA request Item No. 8 as part of the reconsideration. Thus, the GRC declines to refer this complaint to the Office of Administrative Law to determine the disclosability of the layoff plan because the Complainant is now in possession of the record.

## **Compliance**

At its February 26, 2013 meeting, the Council determined that:

"The Custodian has unlawfully denied access to the records responsive to the Complainant's OPRA request Item Nos. 2 and 8. *N.J.S.A. 47:1A-6*. Thus, the Custodian must disclose the responsive records. However, if records do not exist for certain individuals regarding Item No. 2, the Custodian must certify as such for each individual. Additionally, if no records responsive to Item No. 8 exist, the Custodian must certify to same.

Because the City of Newark failed to submit a valid [SOI] or notify the GRC that a change in the designation of the custodian of record has occurred, Mr. Marasco

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<sup>9</sup> "New evidence" is evidence that could not have been provided prior to the Council's Decision because the evidence did not exist at that time. The City could have provided evidence that Mr. Marasco was out on sick leave and someone had been designated to execute OPRA documents during the initial adjudication of this complaint, but the City failed to do so.



must certify whether he or someone else is currently serving as the custodian of record for the City.

**The Custodian shall comply ... within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director."** (Footnotes omitted).

On February 27, 2013, the Council disseminated its Order to the parties. Thus, the Custodian's response was due by close of business on March 5, 2013. On March 4, 2013, the Custodian sought an extension of time to comply with the Council's Order. The GRC granted the Custodian said extension until March 11, 2013.

On March 11, 2013, the Custodian's Counsel submitted a request for reconsideration attaching a letter dated August 24, 2012, accompanying the records responsive to request Item No. 2. The reconsideration also included Mr. Marasco's legal certification and the layoff plan responsive to the Complainant's OPRA request Item No. 8. The records for request Item Nos. 2 and 8 were provided to the Complainant by way of the reconsideration submission.

Therefore, the Custodian timely complied with the Council's Order within the extended time frame because the Custodian submitted the requisite records to the Complainant and certification to the GRC.

### **Knowing & Willful**

OPRA states that:

"[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty ..." N.J.S.A. 47:1A-11(a).

OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states:

"... If the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA]..." N.J.S.A. 47:1A-7(e).

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a "knowing and willful" violation of OPRA. The following statements must be true for a determination that the Custodian "knowingly and willfully" violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001); the Custodian must have had

some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

The Custodian's failure to respond to the Complainant's OPRA request resulted in a "deemed" denial pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) and the Custodian failed to bear his burden of proving a lawful denial of access to the Complainant's request Item Nos. 2 and 8. However, the Complainant's request Item Nos. 1 and 3 through 7 are invalid. Additionally, the Custodian provided the Complainant with the records responsive to request Item Nos. 2 and 8 as well as Mr. Marasco's legal certification. Thus, the Custodian complied with the Council's Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian's Counsel has failed to establish in his request for reconsideration of the Council's February 26, 2013 Interim Order that 1) the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, and has failed to show that the GRC acted arbitrarily, capriciously or unreasonably, and failed to submit any evidence to the contrary. Thus, Counsel's request for reconsideration is denied. Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003). However, Counsel provided the layoff plan responsive to OPRA request Item No. 8 as part of the reconsideration. Thus, the GRC declines to refer this complaint to the Office of Administrative Law to determine the disclosability of the layoff plan because the Complainant is now in possession of the record.
2. The Custodian timely complied with the Council's February 26, 2013 Interim Order within the extended time frame because the Custodian submitted the requisite records to the Complainant and certification to the GRC.

3. The Custodian's failure to respond to the Complainant's OPRA request resulted in a "deemed" denial pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) and the Custodian failed to bear his burden of proving a lawful denial of access to the Complainant's request Item Nos. 2 and 8. However, the Complainant's request Item Nos. 1 and 3 through 7 are invalid. Additionally, the Custodian provided the Complainant with the records responsive to request Item Nos. 2 and 8 as well as Mr. Marasco's legal certification. Thus, the Custodian complied with the Council's Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: Frank F. Caruso  
Senior Case Manager

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

April 23, 2013



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

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INTERIM ORDER

February 26, 2013 Government Records Council Meeting

Robert G. Dooley, Jr.  
Complainant

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v.

City of Newark (Essex)  
Custodian of Record

At the February 26, 2013 public meeting, the Government Records Council (“Council”) considered the January 22, 2013 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:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. 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). The Custodian’s request for an extension of time is also invalid pursuant to Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008) because the Custodian failed to request same in writing within the statutorily mandated time frame.
2. Because the Complainant’s request Item Nos. 1 and 3 through 7 ask questions or seek information rather than identifiable government records, the requests are invalid under OPRA. MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005); New Jersey Builders Association v. New Jersey Council of Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (March 2008); LaMantia v. Jamesburg Public Library (Middlesex), GRC Complaint No. 2008-140 (February 2009); Watt v. Borough of North Plainfield (Somerset), GRC Complaint No. 2007-246 (September 2009). Thus, the Custodian has not unlawfully denied access to the relevant request items. *See also* Ohlson v. Township of Edison (Middlesex), GRC Complaint No. 2007-233 (August 2009).
3. The Custodian has unlawfully denied access to the records responsive to the Complainant’s OPRA request Item Nos. 2 and 8. N.J.S.A. 47:1A-6. Thus, the

Custodian must disclose the responsive records. However, if records do not exist for certain individuals regarding Item No. 2, the Custodian must certify as such for each individual. Additionally, if no records responsive to Item No. 8 exist, the Custodian must certify to same.

4. Because the City of Newark failed to submit a valid Statement of Information or notify the GRC that a change in the designation of the custodian of record has occurred, Mr. Marasco must certify whether he or someone else is currently serving as the custodian of record for the City.
5. **The Custodian shall comply with Item Nos. 3 and 4 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>1</sup> to the Executive Director.<sup>2</sup>**
6. This complaint should be referred to the Office of Administrative Law for an *in camera* review of the plan responsive to OPRA request Item No. 8 and a determination as to whether the record is disclosable in part or whole upon completion of compliance. Additionally, this complaint should be referred to OAL to determine whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Interim Order Rendered by the  
Government Records Council  
On The 26<sup>th</sup> Day of February, 2013

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

Robin Berg Tabakin, Esq., Chair  
Government Records Council

**Decision Distribution Date: February 27, 2013**

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

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
February 26, 2013 Council Meeting**

**Robert G. Dooley, Jr.<sup>1</sup>  
Complainant**

**GRC Complaint No. 2011-257**

v.

**City of Newark (Essex)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**<sup>3</sup> Copies of information specific to the following persons:

- Mehdi Mohammadish, Director of Engineering
- Richard Lopez, Manager of Public Buildings
- Samie Shokry
- Pierre Lajili

1. In what portion of the City of Newark's ("City") budget is each employee's salary allocated?
2. What is each employee's civil service title as assigned by the Civil Service Commission ("CSC") to include the job specification number and job description?
3. Do the duties of the employees match the duties defined under their civil service titles?
4. Have the employees or responsibilities changed to the extent that they are no longer similar to the duties and responsibilities set forth in job descriptions?
5. If duties have changed, was there a reclassification of their positions?
6. Were any of the employees assigned to or managed by the Chief Architect's Unit ("CAU") prior to November 30, 2010?
7. As of December 2010, are any of the employees engaged in any work or projects started before this time?<sup>4</sup>
8. Provide a copy of any plan prepared by the Director of Engineering as requested by the City justifying layoffs and the termination of the CAU and the Director's explanation of his plan for handling the CAU's workload.

**Request Made:** December 21, 2010

**Response Made:** January 7, 2011

**Custodian:** Robert P. Marasco

**GRC Complaint Filed:** August 3, 2011<sup>5</sup>

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

<sup>2</sup> Represented by Danielle Torok, Esq. (Newark, NJ).

<sup>3</sup> The Complainant requested additional records that are not at issue in this complaint.

<sup>4</sup> The Complainant lists 14 different projects being conducted within the City.

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

## **Background**

### **December 21, 2010**

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 indicates that the preferred method of delivery is pickup.

### **January 7, 2011**

Custodian's response to the OPRA request. The Custodian responds in writing via letter to the Complainant's OPRA request on the eleventh (11<sup>th</sup>) business day following receipt of such request. The Custodian requests an extension of time until April 1, 2011 to respond to the Complainant's OPRA request.

### **August 3, 2011**

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

- Complainant's OPRA request dated December 21, 2010.
- Letter from the Custodian to the Complainant dated January 7, 2011.

The Complainant states that he hand-delivered an OPRA request to the Custodian on December 21, 2010. The Complainant states that the Custodian responded on January 7, 2011 requesting an extension of time until April 1, 2011 to respond. The Complainant states that after many inquiries regarding the status of his OPRA request, the Department of Engineering's clerk informed him that the request was denied per the City's Law Department. The Complainant states that he has yet to receive a formal response from the City.

The Complainant contends that contrary to the City's alleged denial of access, OPRA provides that personnel and pension records are not government records "...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 ..." N.J.S.A. 47:1A-10. The Complainant asserts that he is the former Chief Architect of the City and the City is purposely denying access to the responsive records under the pretext of defending its layoff plan that is contrary to both City policy and State law. The Complainant asserts that the requested information would provide him with the basis for a wrongful termination lawsuit. The Complainant notes that he was still employed by the City when it asked the Director of the Department of Engineering for a detailed plan of how to handle the CAU workload: the Complainant sought this plan in Item No. 9.

The Complainant agrees to mediate this complaint.

### **August 3, 2011**

Offer of Mediation sent to the Custodian.

### **August 4, 2011**

The Custodian agrees to mediate this complaint.

**August 10, 2011**

Complaint referred to mediation.

**September 21, 2011**

Complaint referred back from mediation.

**September 21, 2011**

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

**September 28, 2011**

E-mail from Ms. Cheryl Coxson (“Ms. Coxson”), City Clerk’s Office, to the GRC. Ms. Coxson requests and extension of time until September 30, 2011 to submit the SOI.

**September 28, 2011**

E-mail from the GRC to Ms. Coxson. The GRC grants Ms. Coxson and extension of time until September 30, 2011 to submit the SOI.

**September 30, 2011<sup>6</sup>**

Custodian’s SOI.

**November 21, 2012**

Letter from GRC to the Custodian. The GRC sends a letter to the Custodian indicating that the GRC provided the Custodian with a request for an SOI on September 21, 2011. The GRC states that it is returning same because the Custodian failed to sign the SOI. The GRC requests that the Custodian sign the SOI and return same by close of business on November 28, 2012.

**November 28, 2012**

E-mail from Ms. Coxson to the GRC attaching the Custodian’s signature page.<sup>7</sup>

**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).

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<sup>6</sup> The Custodian SOI was signed by Ms. Joyce Lanier, who is not identified as the Custodian of Record on page 1 of the SOI. Therefore, the SOI is invalid pursuant to *N.J.A.C.* 5:105-2.4(a).

<sup>7</sup> The Custodian of Record for this complaint did not sign the signature page; thus, the SOI’s deficiency was not cured.



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>8</sup> Thus, a custodian’s failure to respond in writing to a complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

In the instant complaint, the Custodian responded to the Complainant in writing on the eleventh (11<sup>th</sup>) business day after receipt of the Complainant’s OPRA request requesting an extension until April 1, 2011 to respond to same, and failed to grant access, deny access or request clarification of the request at issue herein by that extended date. Moreover, the Custodian’s request for an extension of time is invalid because he failed to respond in writing requesting same within the statutorily mandated time frame. *See Hardwick v. NJ Department of Transportation*, GRC Complaint No. 2007-164 (February 2008).

Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. 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*. The Custodian’s request for an extension of time is also invalid pursuant to Hardwick, *supra*, because the Custodian failed to request same in writing within the statutorily mandated time frame.

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<sup>8</sup> It is the GRC’s position that a custodian’s written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA.

## Whether the Complainant's request Item Nos. 1 and 3 through 7 are valid under OPRA?

The Complainant's request Item Nos. 1 and 3 through 7 asked a series of questions regarding four (4) employees to include assignments, responsibilities, and budget allocation. These request items ask questions or seek information rather than specific identifiable government records; as such, these requests are invalid under OPRA. The New Jersey Superior Court has held that "[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records 'readily accessible for inspection, copying, or examination.'* N.J.S.A. 47:1A-1." (Emphasis added.) MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005). The Court further held that "[u]nder OPRA, agencies are required to disclose only 'identifiable' government records not otherwise exempt ... In short, OPRA does not countenance open-ended searches of an agency's files." (Emphasis added.) *Id.* at 549.

Further, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),<sup>9</sup> the Superior Court references MAG in that the Court held that a requestor must specifically describe the document sought because OPRA operates to make identifiable government records "accessible." "As such, a proper request under OPRA must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting all of an agency's documents."<sup>10</sup>

Additionally, in New Jersey Builders Association v. New Jersey Council of Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007), the court cited MAG by stating that "...when a request is 'complex' because it fails to specifically identify the documents sought, then that request is not 'encompassed' by OPRA..."

Furthermore, in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (March 2008), the Council held that "[b]ecause the Complainant's OPRA requests [No.] 2-5 are not requests for identifiable government records, the requests are invalid and the Custodian has not unlawfully denied access to the requested records pursuant to [MAG, supra] and [Bent, supra]."

In LaMantia v. Jamesburg Public Library (Middlesex), GRC Complaint No. 2008-140 (February 2009), the complainant requested the number of Jamesburg residents that hold library cards. The GRC deemed that the complainant's request was a request for information, holding that:

"because request Item No. 2 of the Complainant's June 25, 2008 OPRA request seeks information rather than an identifiable government record, the request is invalid pursuant to [MAG, supra] ..." *Id.* at pg. 6.

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<sup>9</sup> Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

<sup>10</sup> As stated in Bent, supra.

The GRC also decided a similar issue in Watt v. Borough of North Plainfield (Somerset), GRC Complaint No. 2007-246 (September 2009). Specifically, the complainant submitted an OPRA request to the Borough on September 13, 2007 seeking answers to five (5) questions regarding a property named the Villa Maria. The GRC held that the complainant's request was invalid because it failed to identify a specific government record. *See also* Ohlson v. Township of Edison (Middlesex), GRC Complaint No. 2007-233 (August 2009).

Therefore, because the Complainant's request Item Nos. 1 and 3 through 7 ask questions or seek information rather than identifiable government records, the requests are invalid under OPRA. MAG, *supra*; Bent, *supra*; New Jersey Builders, *supra*; Schuler, *supra*; LaMantia, *supra*; Watt, *supra*. Thus, the Custodian has not unlawfully denied access to the relevant request items. *See also* Ohlson, *supra*.

### **Whether the Custodian unlawfully denied access to the records responsive to the Complainant's OPRA request Item Nos. 2 and 8?**

OPRA provides that:

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

Additionally, OPRA defines a government record as:

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

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

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

OPRA 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* ..." (Emphasis added.) 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.

The Complainant’s OPRA request Item No. 2 sought “civil service title as assigned by the CSC to include the job specification number and job description” for four (4) individuals. The Complainant’s OPRA request Item No. 8 sought “any plan prepared by the Director of Engineering as requested by the City justifying layoffs and the termination of the CAU ...”

Regarding request Item No. 2, N.J.S.A. 47:1A-10 provides that certain personnel information be disclosed under OPRA, including “an individual’s ... title, position ...” *Id.* The Complainant herein sought the civil service title for which disclosure is expressly required in N.J.S.A. 47:1A-10. *See Danis v. Garfield Board of Education (Bergen)*, GRC Complaint Nos. 2009-156 *et seq.* (Interim Order dated June 29, 2010). Additionally, the GRC has previously ordered disclosure of “job descriptions” that included the job specification number. *See Baker v. New Jersey Civil Service Commission*, GRC Complaint No. 2009-253 (Interim Order dated October 26, 2010). Therefore, the Custodian should have disclosed these records to the Complainant; however, there is no evidence in the record to support that disclosure occurred.

Therefore, the Custodian has unlawfully denied access to the records responsive to the Complainant’s OPRA request Item No. 2 N.J.S.A. 47:1A-6. Thus, the Custodian must disclose the responsive records. However, if records do not exist for certain individuals regarding Item No. 2, the Custodian must certify as such for each individual. Additionally, if no records responsive to Item No. 8 exist, the Custodian must certify to same.

Regarding the issues with the submission of the SOI, OPRA defines a custodian of record as “... in the case of a municipality, the municipal clerk and in the case of any other public agency, the officer officially designated by formal action of that agency's director or governing body, as the case may be.” N.J.S.A. 47:1A-1.1. The Custodian in this complaint is identified as Mr. Robert P. Marasco (“Mr. Marasco”). However, the SOI was initially signed by Ms. Joyce Lanier. The GRC notes that the SOI letter and signature page both clearly indicate that the actual custodian of record must sign the certification. The GRC determined that the SOI was invalid because Mr. Marasco did not sign same and the City never informed the GRC that there had been a change in the designation of the custodian of record. Thus, the GRC returned the SOI to the City and requested that it be resubmitted with the Custodian’s signature. On November 28, 2012, the City returned the signature page; however, same was executed by Mr. Kenneth Louis (“Mr. Louis”), Deputy City Clerk, with no indication as to whether Mr. Louis had been officially designated the custodian of record. Thus, the GRC determined that the SOI deficiency was not cured and proceeded with the evidence contained in the record.

Therefore, because the City failed to submit a valid SOI or notify the GRC that a change in the designation of the custodian of record has occurred, Mr. Marasco must certify whether he or someone else is currently serving as the custodian of record for the City.

Regarding request Item No. 8, while the request on its face may appear to be overly broad, the Complainant identified a type of government record and a narrowly construed subject for that record. Thus, it is reasonable to believe that the Custodian could easily identify the record sought, if same exists. *See also* Burke v. Brandes, et als, Docket No. A-3051-11T3 (App. Div. 2012).

However, because the City failed to submit a valid SOI, there are questions as to the disclosability of the requested plan. Specifically, it is possible that the record could be "... inter-agency or intra-agency advisory, consultative or deliberative," ("ACD") material. N.J.S.A. 47:1A-1.1. Without any additional information, the GRC cannot make a determination regarding this record.

Therefore, this complaint should be referred to the Office of Administrative Law ("OAL") for an *in camera* review of the plan responsive to OPRA request Item No. 8 and a determination as to whether the record is disclosable in part or whole upon completion of compliance. Additionally, this complaint should be referred to OAL to determine whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. 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). The Custodian's request for an extension of time is also invalid pursuant to Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008) because the Custodian failed to request same in writing within the statutorily mandated time frame.
2. Because the Complainant's request Item Nos. 1 and 3 through 7 ask questions or seek information rather than identifiable government records, the requests are invalid under OPRA. MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005); New Jersey Builders Association v. New Jersey Council of Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of

Bloomsbury, GRC Complaint No. 2007-151 (March 2008); LaMantia v. Jamesburg Public Library (Middlesex), GRC Complaint No. 2008-140 (February 2009); Watt v. Borough of North Plainfield (Somerset), GRC Complaint No. 2007-246 (September 2009). Thus, the Custodian has not unlawfully denied access to the relevant request items. *See also* Ohlson v. Township of Edison (Middlesex), GRC Complaint No. 2007-233 (August 2009).

3. The Custodian has unlawfully denied access to the records responsive to the Complainant's OPRA request Item Nos. 2 and 8. N.J.S.A. 47:1A-6. Thus, the Custodian must disclose the responsive records. However, if records do not exist for certain individuals regarding Item No. 2, the Custodian must certify as such for each individual. Additionally, if no records responsive to Item No. 8 exist, the Custodian must certify to same.
4. Because the City of Newark failed to submit a valid Statement of Information or notify the GRC that a change in the designation of the custodian of record has occurred, Mr. Marasco must certify whether he or someone else is currently serving as the custodian of record for the City.
5. **The Custodian shall comply with Item Nos. 3 and 4 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>11</sup> to the Executive Director.<sup>12</sup>**
6. This complaint should be referred to the Office of Administrative Law for an *in camera* review of the plan responsive to OPRA request Item No. 8 and a determination as to whether the record is disclosable in part or whole upon completion of compliance. Additionally, this complaint should be referred to OAL to determine whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Prepared By: Frank F. Caruso  
Senior Case Manager

Approved By: Karyn Gordon, Esq.  
Acting Executive Director

January 22, 2013

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<sup>11</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>12</sup> Satisfactory compliance requires that the Custodian deliver the records to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.