



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
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CHRIS CHRISTIE  
*Governor*

KIM GUADAGNO  
*Lt. Governor*

CHARLES A. RICHMAN  
*Commissioner*

**FINAL DECISION**

**September 29, 2016 Government Records Council Meeting**

Jeff Carter  
Complainant

Complaint No. 2011-318

v.

Franklin Fire District No. 1 (Somerset)  
Custodian of Record

At the September 29, 2016 public meeting, the Government Records Council (“Council”) considered the September 22, 2016 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 accept the Honorable Solomon A. Metzger’s July 13, 2016 Initial Decision, which held that “[t]he plain language of [OPRA] suggests that PAC money e-mails are not public records.” Accordingly, “the Fire District’s motion is **GRANTED**; [the Complainant’s] motion is **DENIED** and this matter is **DISMISSED**.”

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 29<sup>th</sup> Day of September, 2016

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: October 4, 2016**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
September 29, 2016 Council Meeting**

**Jeff Carter<sup>1</sup>  
Complainant**

**GRC Complaint No. 2011-318**

v.

**Franklin Fire District No. 1 (Somerset)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Electronic copies of all e-mails dated September 8, 2010, through September 8, 2011, regarding PAC money sent or received by Ms. Melissa Kosensky (“Ms. Kosensky”), Mr. Joseph Danielson (“Mr. Danielson”), and Mr. Ray Betterbid (“Mr. Betterbid”).

**Custodian of Record:** Timothy Szymborski  
**Request Received by Custodian:** September 8, 2011  
**Response Made by Custodian:** September 15, 2011  
**GRC Complaint Received:** October 17, 2011

**Background**

**February 26, 2013 Council Meeting:**

At its February 26, 2013 public meeting, the Council considered the February 19, 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 said findings and recommendations. The Council, therefore, found that:

[S]ince there are issues of contested facts, specifically whether the e-mails responsive to the Complainant’s request were created in the course of official business pursuant to N.J.S.A. 47:1A-1.1, this complaint should be referred to the Office of Administrative Law (“OAL”) for an *in camera* review *de novo* and a determination of whether the Custodian unlawfully denied access to the requested e-mails. Additionally, if necessary, OAL should make a determination of whether the Custodian knowingly and willfully violated OPRA and unlawfully denied access to the requested e-mails under the totality of the circumstances. Further, OAL should determine whether the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee pursuant to N.J.S.A. 47:1A-6. *See also*

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<sup>1</sup> Represented by John A. Birmingham, Jr., Esq. (Port Monmouth, NJ) and Walter M. Luers, Esq., of Law Offices of Walter M. Luers, LLC (Clinton, NJ). Mr. Birmingham entered notice of appearance before the GRC on February 15, 2012. Mr. Luers entered notice of appearance as co-counsel on June 24, 2013.

<sup>2</sup> Represented by Dominic DiYanni, Esq., of Eric M. Bernstein & Associates, LLC (Warren, NJ).

Lewen v. Robbinsville Pub. Sch. Dist. (Mercer), GRC Complaint No. 2008-211 (February 2011).

Procedural History:

On February 27, 2013, the Council distributed its Interim Order to all parties. On May 10, 2013, the GRC transmitted the complaint to the Office of Administrative Law (“OAL”).

On July 13, 2016, the Honorable Solomon A. Metzger, Administrative Law Judge (“ALJ”), issued an Initial Decision in this matter. The ALJ’s Initial Decision, set forth as “Exhibit A,” determined that:

[T]he Fire District’s motion is **GRANTED**; [the Complainant’s] motion is **DENIED** and this matter is **DISMISSED**.

Id. at 3.

Complainant’s Exceptions

On July 25, 2016, the Complainant’s Counsel filed exceptions to the ALJ’s Initial Decision. The Complainant’s Counsel requested that the GRC conduct its own *in camera* review because of 1) the GRC’s unique expertise in OPRA cases, and 2) the facts on the record.

Exception No. 1

The Complainant’s Counsel first (1<sup>st</sup>) argued that the ALJ inappropriately granted summary judgement in favor of the Custodian.

The Complainant’s Counsel stated that in summary proceedings, the motion court must review the facts in the light most favorable to the non-moving party. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995). The Complainant’s Counsel averred that the Brill standard is also applicable to OAL summary decisions. Contini v. Bd. of Educ. of Newark, 286 N.J. Super. 106, 121 (App. Div. 1995)(*citing N.J.A.C. 1:1-12.5(b)*). The Complainant’s Counsel stated that the party defending against a summary judgement motion must submit affidavits “setting forth ‘specific facts showing that there is a genuine issue which can only be determined in an evidentiary hearing.’” Id. The Complainant’s Counsel stated that the Court must accept as true all evidence supporting the defending party’s position. Brill, 142 N.J. at 535. The Complainant’s Counsel further stated that to oppose a motion for summary judgement successfully, a non-moving party must raise facts not “immaterial or of an insubstantial nature . . .” Judson v. People’s Bank & Trust Co. of Westfield, 17 N.J. 67,75 (1954)(*citations omitted*).

The Complainant’s Counsel argued that there is no indication in the Initial Decision demonstrating that the ALJ viewed any facts in a light most favorable to the Complainant. The Complainant’s Counsel contended that a fact-finding hearing was necessary to resolve disputed facts. N.J.A.C. 1:1-2.1; Cunningham v. Dep’t of Civil Serv., 69 N.J. 13, 25 (1975).

## Exception No. 2

The Complainant's Counsel next argued that, in light of the ALJ's reasoning in the Initial Decision, the GRC should perform its own *in camera* review and exercise its unique expertise in determining whether the records at issue were "government records" for purposes of OPRA. Specifically, the Complainant's Counsel disputed the ALJ's statements that: "[n]o rule of the GRC mandates that e-mails sent or received on a public server are automatically public records . . . The contents of the e-mails might reveal that they are in whole or part public records . . ." *Id.*

The Complainant's Counsel contended that the ALJ was constrained in conducting his *in camera* review because of the novel nature of the issues presented, Franklin Fire District No. 1's ("FFD") policy on computer usage, and the lack of GRC guidance. The Complainant's Counsel further asserted that the ALJ "could not make an informed decision" without "a rule of the GRC" mandating that any e-mail sent or received over a public server automatically became a "government record." The Complainant's Counsel asserted that the ALJ's decision was further constrained, particularly by the fact that the FFD declared all e-mails as "property" via agency policy as discussed below.

## Exception No. 3

The Complainant's Counsel contended that the FFD's pre-existing computer usage policy declared all e-mails agency "property;" however, the ALJ determined that the requested e-mails were not "government records" for purposes of OPRA.

The Complainant's Counsel asserted that the FFD's policy on computer usage is set forth in Resolution 07-13.<sup>3</sup> The Complainant's Counsel noted that this policy provided that all of its e-mails were agency "property," thereby ensuring public access. The Complainant's Counsel contended that the FFD should have been required to review and redact any exempt information contained within the e-mails and disclose them. The Complainant's Counsel noted that the Custodian has not advanced any valid exemptions to date.

## Extensions of Time

On August 19, 2016, the GRC requested a forty-five (45) day extension of the statutory period, or until October 11, 2016, to accept, reject, or modify the ALJ's Initial Decision. The OAL granted the GRC's request on August 29, 2016.

## Analysis

### Administrative Law Judge's Initial Decision

The ultimate determination of the agency and the ALJ's recommendations must be accompanied by basic findings of fact sufficient to support them. State, Dep't of Health v. Tegnazian, 194 N.J. Super. 435, 442-43 (App. Div. 1984). The purpose of such findings "is to

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<sup>3</sup> The Complainant allegedly submitted this resolution to the OAL as part of his opposition to the Custodian's Motion for Summary Judgement on September 30, 2013.

enable a reviewing court to conduct an intelligent review of the administrative decision and determine if the facts upon which the order is grounded afford a reasonable basis therefor.” Id. at 443. Additionally, the sufficiency of evidence “must take into account whatever in the record fairly detracts from its weight”; the test is not for the courts to read only one side of the case and, if they find any evidence there, the action is to be sustained and the record to the contrary is to be ignored (citation omitted). St. Vincent’s Hosp. v. Finley, 154 N.J. Super. 24, 31 (App. Div. 1977).

The ALJ’s July 13, 2016 Initial Decision, set forth as “Exhibit A,” determined that:

The plain language of [OPRA] suggests that PAC money e-mails are not public records. They relate to expenditures in pursuit of public office, but are detached from the official business of that office. No rule of the GRC mandates that e-mails sent or received on a public server are automatically public records. Neither does [FFD’s] policy governing the use of its computers convert the e-mails into public records . . . The content of the e-mails might reveal that they are in whole or part public records, but on review I see nothing in the writing that intersects with fire district business.

[T]he Fire District’s motion is **GRANTED**; [the Complainant’s] motion is **DENIED** and this matter is **DISMISSED**.

Id. at 3.

Thereafter, the Complainant’s Counsel submitted exceptions, arguing that the GRC should conduct an independent *in camera* review of the responsive records because of: 1) the GRC’s unique expertise in OPRA cases, and 2) the facts on the record. The GRC addresses Complainant Counsel’s Exceptions henceforth:

#### Exception No. 1

The GRC rejects Complainant Counsel’s first exception that the ALJ inappropriately granted summary judgement in favor of the Custodian. As Counsel noted, a judge considering a motion for summary judgement must review the facts in the light most favorable to the non-moving party and consider all evidence supporting that party’s position as true. *See Brill*, 142 N.J. at 523, 535. However, a judge may grant summary judgement when all submissions, including affidavits, “show that there is no genuine issue of material fact challenged and that the moving party is entitled to a judgement or order as a matter of law.” *Brill*, 142 N.J. at 529. In relation to summary judgements, a fact:

[I]s ‘material’ and precludes grant of a summary judgement if proof of that fact would have effect of stablishing or refuting one of [the] essential elements of a cause of action or defense asserted by the parties, and would necessarily affect application of appropriate principle of law and the rights and obligations of the parties.

Black’s Law Dictionary (Abridged Fifth Edition)(1983) at 505.

Thus, the threshold for a successful summary judgement stands on a non-moving party's inability to "defeat a motion . . . merely by pointing to *any* fact in dispute . . ." Id.

Counsel contended that the Initial Decision does not indicate that the ALJ viewed any facts in a light most favorable to the Complainant. However, the ALJ set out the undisputed facts before engaging in an analysis of whether the PAC e-mails fell within the definition of a "government record." The ALJ then addressed the Complainant's submissions by stating that "ours is a narrow question concerning the term 'official business;' the definition does not expand to a larger panorama." Initial Decision at 3. Thus, the ALJ signaled that the Complainant's submissions did not persuade him that the "evidence supporting" his position amounted to a "material fact" impacting the narrow question of whether the PAC e-mails fell under the definition of a "government record." The ALJ also addressed the Complainant's concerns that not allowing for disclosure would embolden others to use public systems for politics by noting, "the workplace does not rely on OPRA alone for its governance." Id.

### Exception Nos. 2 and 3

The GRC also rejects Complainant Counsel's second and third exceptions. Therein, Counsel argued that the ALJ's *in camera* review was constrained because of the novel nature of this complaint. Further, Counsel argued that the FFD's computer usage policy effectively designated the potentially responsive e-mails as FFD property, rendering them disclosable under OPRA.

Regarding Counsel's *in camera* argument at exception No. 2, he pointed to the ALJ's partial statement that the e-mail content might reveal that the records are subject to OPRA. However, the ALJ completes this statement by noting, "but on review I see nothing in writing that intersects with [FFD] business." Id. at 2. Further, the ALJ specifically stated that that neither GRC rules nor OPRA provides that e-mails sent or received over a public server automatically be designated as "government records."

Regarding the Counsel's argument about the FFD's computer usage policy, it is clear that, to meet the basis definition of a "government record," a record must be "made, maintained or kept on file . . . or . . . received in the course of . . . official business . . ." N.J.S.A. 47:1A-1.1. In fact, the ALJ's determination that the FFD's policy did not convert any e-mails into "government records" simply because they were sent over public servers is consistent with the GRC's holding in Dittrich v. City of Hoboken (Hudson), GRC Complaint No. 2007-193 (April 2009). There, the Council held that a license application in the back of a City binder was not a "government record" because the employee did not "make, maintain, or keep on file the license application in the ordinary course of his duties as a plumber inspector." Id. at 5 (*citing* Michelson v. Wyatt and the City of Plainfield, 379 N.J. Super. 611, 619 (App. Div. 2005); Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005- 127 (December 2005)).

Here, the ALJ reviewed potentially responsive records *in camera* and clearly relied on the plain reading of the definition of a "government record" to reach his determination. The ALJ also fairly summarized the evidence, explaining how he weighed the proofs before him and explaining why he granted FFD's motion for summary judgement. The ALJ's conclusions are aligned and consistent with the submitted facts. As such, the GRC is satisfied that it can ascertain

which facts the ALJ accepted and finds that those facts provide a reasonable basis for the ALJ's conclusions.

Accordingly, the GRC has reviewed the ALJ's Initial Decision and recommends that the Council accept his July 13, 2016 Initial Decision, which held that "[t]he plain language of [OPRA] suggests that PAC money e-mails are not public records." Accordingly, "the Fire District's motion is **GRANTED**; [the Complainant's] motion is **DENIED** and this matter is **DISMISSED**."

### **Conclusions and Recommendations**

The Executive Director respectfully recommends that the Council accept the Honorable Solomon A. Metzger's July 13, 2016 Initial Decision, which held that "[t]he plain language of [OPRA] suggests that PAC money e-mails are not public records." Accordingly, "the Fire District's motion is **GRANTED**; [the Complainant's] motion is **DENIED** and this matter is **DISMISSED**."

Prepared By: Frank F. Caruso  
Communications Specialist/Resource Manager

September 22, 2016



**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

OAL DKT. NO. GRC 7003-13

AGENCY DKT. NO. 2011-318

**JEFF CARTER,**

Complainant,

v.

**FRANKLIN FIRE DISTRICT NO. 1**

**(SOMERSET),**

Respondent.

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**Walter M. Luers, Esq.,** for complainant (Law Offices of Walter M. Luers,  
attorneys)

**Dominic P. DiYanni, Esq.,** for respondent (Eric M. Bernstein and Associates,  
attorneys)

Record Closed: June 17, 2016

Decided: July 13, 2016

BEFORE **SOLOMON A. METZGER**, ALJ t/a:

This matter arises out of a denial of access complaint filed by Jeff Carter against Fire District No. 1 in Franklin Township, pursuant to the Open Public Records Act, N.J.S.A. 47:1A-1 to -13. The Government Records Council transmitted the matter to the Office of Administrative Law as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15. Specifically, the GRC asked for in camera review of certain e-mails. I was



assigned to the matter on April 26, 2016, and the record closed on June 17, 2016, with the submission of additional information. The parties have filed cross-motions for summary decision, pursuant to N.J.A.C. 1:1-12.5; Brill v. Guardian Life Ins. Co. of Amer., 142 N.J. 520 (1995)

The facts are undisputed. Mr. Carter's denial of access complaint was filed in October 2011. It sought e-mails sent or received from September 8, 2010 to September 8, 2011, on the subject of Political Action Committee money between then Commissioners Ray Betterbid and Melissa Kosensky and a former Commissioner, Joseph Danielson. At the time Mr. Danielson was an IT vendor with the Fire District and Chair of the local democratic committee. The e-mails were exchanged over public servers. Mr. Carter believes that disclosure may reveal politicization of the Commission and potential conflicts of interest. This is the substance of the record.

The Fire District argues that PAC money e-mails are not government records as they are not " . . . made, maintained or kept on file in the course of . . . official business," N.J.S.A. 47:1A-1.1; Michelson v. Wyatt & the City of Plainfield, 379 N.J. Super. 611, 619 (App. Div. 2005). Mr. Carter counters that these were exchanged using public computers and thus the public has a right to view them. Moreover, Fire District policy states that its computers are to be used for public business and that e-mails, among other things, are District property.

The plain language of the statute suggests that PAC money e-mails are not public records. They relate to expenditures in pursuit of public office, but are detached from the official business of that office. No rule of the GRC mandates that e-mails sent or received on a public server are automatically public records. Neither does Fire District policy governing the use of its computers convert the e-mails into public records. The policy is designed to give employees notice concerning expectations and forewarning of discipline for breaches. The document itself makes some allowance for personal use (Carter Cert. 9/30/13, Exhibit D). The content of the e-mails might reveal that they are in whole or part public records, but on review I see nothing in the writing that intersects with fire district business.

Mr. Carter has submitted affidavits and extensive exhibits chronicling the ongoing legal disputes that have engaged the parties. He believes these materials buttress his cause and evoke OPRA precedents that welcome public scrutiny of government operations, Kovalcik v. Somerset County Prosecutor's Office, 206 N.J. 581 (2011); Burnett v. County of Bergen and Bergen County's Clerk's Office, 198 N.J. 408 (2009). Yet, ours is a narrow question concerning the term "official business;" the definition does not expand in a larger panorama. OPRA facilitates access to a wide range of materials, but it is not an all-encompassing investigative tool, see, MAG Management LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005). Mr. Carter argues further that to shield these e-mails is to embolden others to pursue electoral politics over public systems. Again, the workplace does not rely on OPRA alone for its governance. Moreover, OPRA cases are often fact sensitive and I cannot speculate about circumstances not before me.

Based on the foregoing, the Fire District's motion is **GRANTED**; Mr. Carter's motion is **DENIED** and this matter is **DISMISSED**.

I hereby **FILE** my initial decision with the **GOVERNMENT RECORDS COUNCIL** for consideration.

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

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



July 13, 2016

DATE

SOLOMON A. METZGER, ALJ t/a

Date Received at Agency:

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Date Mailed to Parties:

\_\_\_\_\_

mph



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**

**February 26, 2013 Government Records Council Meeting**

Jeff Carter  
Complainant

Complaint No. 2011-318

v.

Franklin Fire District No. 1 (Somerset)  
Custodian of Record

At the February 26, 2013 public meeting, the Government Records Council (“Council”) considered the February 19, 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 said findings and recommendations. The Council, therefore, finds that since there are issues of contested facts, specifically whether the e-mails responsive to the Complainant’s request were created in the course of official business pursuant to N.J.S.A. 47:1A-1.1., this complaint should be referred to the Office of Administrative Law (“OAL”) for an *in camera* review *de novo* and a determination of whether the Custodian unlawfully denied access to the requested e-mails. Additionally, if necessary, OAL should make a determination of whether the Custodian knowingly and willfully violated OPRA and unlawfully denied access to the requested e-mails under the totality of the circumstances. Further, OAL should determine whether the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee pursuant to N.J.S.A. 47:1A-6. *See also* Lewen v. Robbinsville Public School District (Mercer), GRC Complaint No. 2008-211 (February 2011).

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**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Jeff Carter<sup>1</sup>  
Complainant**

**GRC Complaint No. 2011-318**

**v.**

**Franklin Fire District No. 1 (Somerset)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Electronic copies of all e-mails dated September 8, 2010 through September 8, 2011 regarding PAC money sent or received by Ms. Melissa Kosensky (“Ms. Kosensky”), Mr. Joseph Danielson (“Mr. Danielson”) and Mr. Ray Betterbid (“Mr. Betterbid”).

**Request Made:** September 8, 2011

**Response Made:** September 15, 2011

**GRC Complaint Filed:** October 17, 2011<sup>3</sup>

**Background<sup>4</sup>**

The Complainant filed an OPRA request on September 8, 2011 for the e-mails listed above. Custodian’s Counsel responded via e-mail on September 15, 2011, the fifth (5<sup>th</sup>) business day following receipt of such request. Counsel denied the Complainant’s request on the grounds that PAC money is not considered a “government record” under OPRA. The Complainant responded to Counsel’s e-mail on September 18, 2011, via e-mail and asserted that he is not seeking any privileged or exempt information and e-mails are considered a government record subject to OPRA. Counsel asserted via e-mail to the Complainant on September 20, 2011 that he is not contending that e-mails are not considered a government record; however, the subject matter for the requested e-mails, PAC money, is not considered a government record.

The Complainant filed his Denial of Access Complaint with the Government Records Council (“GRC”) on October 17, 2011. The Complainant states that if the e-mails responsive to his request do exist, then such e-mails are government records subject to OPRA. The Complainant also states that the Custodian and Counsel never asserted that these e-mails do not

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<sup>1</sup> Represented by John A. Bermingham, Jr., Esq. (Port Monmouth, NJ). Mr. Bermingham entered notice of appearance before the GRC on February 15, 2012.

<sup>2</sup> Timothy Szymborski, Custodian of Records. Represented by Dominic P. DiYanni, Esq., of Davenport & Spiotti, LLC (Seaside Heights, NJ).

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

<sup>4</sup> The parties may have submitted additional correspondence, or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

exist, which leads the Complainant to believe that these e-mails do exist and the Custodian and Counsel are intentionally shielding these e-mails from disclosure. The Complainant argues that the e-mails are disclosable because such e-mails were sent and received on a public computer discussing PAC money.

The Custodian filed his Statement of Information (“SOI”) on November 14, 2011. Custodian’s Counsel argues that the e-mails responsive to the Complainant’s request have nothing to do with Franklin Fire District’s official business. Counsel also argues that just because the e-mails were made, maintained or kept on a former Commissioner’s public e-mail account, does not automatically make them “government records” pursuant to OPRA. Counsel further argues that disclosure of any and all e-mails received on a public account, including those which might be personal in nature, would be in direct violation of an individual’s privacy rights. The Custodian certifies that as a District Commissioner, he is not required to make, maintain or keep on file in the course of official business any type of communication regarding PAC money.

### Analysis<sup>5</sup>

#### Unlawful Denial of Access

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.

Custodian’s Counsel asserted in the SOI that the e-mails responsive to the Complainant’s request have nothing to do with Franklin Fire District’s official business. Counsel also argued that the mere fact that the requested e-mails were maintained on a government e-mail account does not automatically make such e-mails government records subject to OPRA. Conversely, the Complainant argues in his Denial of Access Complaint that the e-mails responsive to his request are disclosable because such e-mails were sent and received on a public computer discussing PAC money.

The Appellate Division of the New Jersey Superior Court has proffered ways in which the GRC may determine whether a Custodian’s claimed exemption applies to a record. In Hyman v. City of Jersey City, 2012 N.J. Super. Unpub. LEXIS 2032 (App. Div. 2012), the court held that:

“[t]he GRC functions in an adjudicative capacity and is statutorily charged, if it is able to do so, to ‘make a determination as to a record’s accessibility based upon the complaint and the custodian’s response thereto[.]’ N.J.S.A. 47:1A-7(e) (emphasis added). If the custodian’s response to the complaint does not justify the denial of access based upon the claimed privilege or exception, the GRC has a number of options available to it...It may conclude the proffered privilege does

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<sup>5</sup> There may be other OPRA issues in this matter; however, the Council’s analysis is based solely on the claims made in the Complainant’s Denial of Access Complaint.

not apply and order the release of the document. Ibid. It may, through its Executive Director, require the custodian to submit, within prescribed time limits, additional information deemed necessary for the GRC to adjudicate the complaint. N.J.S.A. 47:1A-7(c)...Additionally, it may 'conduct a hearing on the matter in conformity with the rules and regulations provided for hearings by a state agency in contested cases under the 'Administrative Procedure Act,' . . . insofar as they may be applicable and practicable.' N.J.S.A. 47:1A-7(e)."

The Administrative Procedures Act provides that the Office of Administrative Law ("OAL") "shall acquire jurisdiction over a matter only after it has been to be a contested case by an agency head and has been filed with the [OAL]..." N.J.A.C. 1:1-3.2(a).

Therefore, since there are issues of contested facts, specifically whether the e-mails responsive to the Complainant's request were created in the course of official business pursuant to N.J.S.A. 47:1A-1.1., this complaint should be referred to OAL for an *in camera* review *de novo* and a determination of whether the Custodian unlawfully denied access to the requested e-mails. Additionally, if necessary, OAL should make a determination of whether the Custodian knowingly and willfully violated OPRA and unlawfully denied access to the requested e-mails under the totality of the circumstances. Further, OAL should determine whether the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6. *See also Lewen v. Robbinsville Public School District (Mercer)*, GRC Complaint No. 2008-211 (February 2011).

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that since there are issues of contested facts, specifically whether the e-mails responsive to the Complainant's request were created in the course of official business pursuant to N.J.S.A. 47:1A-1.1., this complaint should be referred to the Office of Administrative Law ("OAL") for an *in camera* review *de novo* and a determination of whether the Custodian unlawfully denied access to the requested e-mails. Additionally, if necessary, OAL should make a determination of whether the Custodian knowingly and willfully violated OPRA and unlawfully denied access to the requested e-mails under the totality of the circumstances. Further, OAL should determine whether the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6. *See also Lewen v. Robbinsville Public School District (Mercer)*, GRC Complaint No. 2008-211 (February 2011).

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Case Manager

Approved By: Karyn Gordon, Esq.  
Acting Executive Director

February 19, 2013