



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**

**January 30, 2015 Government Records Council Meeting**

John Hyland  
Complainant

Complaint Nos. 2012-227 and 2021-228

v.

Township of Lebanon (Hunterdon)  
and Township of Tewksbury (Hunterdon)  
Custodian of Record

At the January 30, 2015 public meeting, the Government Records Council (“Council”) considered the January 20, 2015 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:

**GRC Complaint No. 2012-227 – Lebanon Custodian**

1. The Custodian complied with the Council’s December 16, 2014 Interim Order because she replied well within the prescribed time frame providing the responsive minutes with appropriate redactions to the Complainant and simultaneously provided certified confirmation of compliance to the Executive Director.
2. The Custodian unlawfully denied access to portions of the September 29, 2011 memorandum, unlawfully denied access to portions of the redacted executive session minutes, and further unlawfully denied access to portions of all 31 responsive e-mails. However, the Custodian timely complied with the Council’s September 24, 2013, June 24, 2014 and December 16, 2014 Interim Orders, and lawfully denied access to certain portions of the responsive minutes, e-mails and two (2) memoranda in their entirety. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, 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.

**GRC Complaint Nos. 2012-227 and 2012-228**

3. Because all issues regarding both Custodians have been resolved, no further adjudication of these complaints is required.



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 January, 2015

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: February 4, 2015**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
January 30, 2015 Council Meeting**

**John Hyland<sup>1</sup>  
Complainant**

**GRC Complaint Nos. 2012-227 and 2012-228<sup>2</sup>**

**v.**

**Township of Lebanon (Hunterdon)<sup>3</sup>  
and Township of Tewksbury (Hunterdon)<sup>4</sup>  
Custodial Agencies**

**Records Relevant to Complaint:**

GRC Complaint No. 2012-227: Electronic via e-mail of unredacted copies of all records in the Township of Lebanon's ("Lebanon") possession including, but not limited to, correspondence, reports, e-mails, telephone logs and minutes of the executive session of any committee meeting that reflect, refer or relate to discussions of any Shared Service Agreement with any other township for January 1, 2011 to December 1, 2011. This request also includes any materials prepared by any member of the Township Committee, Custodian, Chief Financial Officer, Tax Collector, Road Supervisor and Township attorney. Specific meeting dates are 1) March 16, 2011; 2) April 6, 2011; 3) April 20, 2011; 4) May 4, 2011; 5) May 18, 2011; 6) June 1, 2011; 7) June 15, 2011; 8) July 6, 2011; 9) July 20, 2011; 10) August 3, 2011; 11) August 17, 2011; 12) September 7, 2011; 13) September 21, 2011; 14) October 5, 2011; 15) October 19, 2011; and 16) November 2, 2011.

GRC Complaint No. 2012-228: Electronic via e-mail of all records in the Township of Tewksbury's ("Tewksbury") possession including, but not limited to, correspondence, reports, e-mails, telephone logs and minutes of the executive session of any committee meeting that reflect, refer or relate to discussions of any Shared Service Agreement with any other township for January 1, 2011 to December 1, 2011. This request also includes any materials prepared by any member of the Township Committee, Custodian, Chief Financial Officer, Tax Collector, Road Supervisor, Township attorney, and Township Administrator. Specific meeting dates are 1) March 22, 2011; 2) April 12, 2011; 3) April 26, 2011; 4) May 11, 2011; 5) May 24, 2011; 6) June 14, 2011; 7) June 28, 2011; 8) July 12, 2011; 9) July 26, 2011; 10) August 9, 2011; 11) September 13, 2011; 12) September 27, 2011; 13) October 11, 2011; 14) October 25, 2011; 15) November 7, 2011; and 16) November 22, 2011.

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

<sup>2</sup> The GRC has consolidated these complaints for adjudication because of the commonality of the parties and/or issues.

<sup>3</sup> Represented by Richard P. Cushing, Esq., of Gebhardt & Kiefer (Clinton, NJ). Previously represented by Lorraine Staples, Esq., who retired and is no longer with the firm.

<sup>4</sup> Represented by Katrina L. Campbell, Esq., of Courter, Kobert, & Cohen, PC (Hackettstown, NJ).

**Custodian of Record:** Karen J. Sandorse (Lebanon Custodian) and Roberta A Brassard (Tewksbury Custodian)

**Request Received by Custodian:** June 28, 2012 and June 28, 2012

**Response Made by Custodian:** June 28, 2012 and July 10, 2012

**GRC Complaint Received:** August 1, 2012 and August 2, 2012

### **Background**

#### **December 16, 2014 Council Meeting:**

At its December 16, 2014 public meeting, the Council considered the December 9, 2014 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

#### **GRC Complaint No. 2012-227 – Lebanon Custodian**

1. The Custodian complied with the Council's June 24, 2014 Interim Order to the extent that she responded in the extended time frame providing all records ordered to be disclosed (with the exception of eight (8) sets of minutes for which the Township is seeking reconsideration) and simultaneously provided certified confirmation of compliance to the Executive Director.
2. As the moving party, the Custodian's Counsel was required to establish either of the necessary criteria set forth above: either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. *See Cummings v. Bahr*, 295 N.J. Super. 374, 384 (App. Div. 1996). Counsel failed to establish that the complaint should be reconsidered based on mistake. However, Counsel established that there was a change in circumstance because it ordered disclosure of the executive session minutes based solely on the Custodian's asserted exemption ("not relevant to shared services") without allowing Lebanon to submit additional exemptions that may have applied. *See D'Atria v. D'Atria*, 242 N.J. Super. 392, 401 (Ch. Div. 1990). The Council's June 24, 2014 Interim Order was thus based on a single asserted exemption where others may have existed. Thus, Counsel's request for reconsideration should be granted. *Cummings*, 295 N.J. Super. at 384; *D'Atria*, 242 N.J. Super. at 401; In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).
3. The Custodian must disclose the responsive minutes containing redactions reflected in both the Council's June 24, 2014 Interim Order and as noted in the *In Camera* Examination table above.

4. **On the basis of the Council's determination in this matter, the Custodian shall comply with conclusion No. 3 within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.<sup>5</sup>**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

#### **GRC Complaint No. 2012-228 – Tewksbury Custodian**

6. The Custodian complied with the Council's June 24, 2014 Interim Order because she provided those responsive records ordered to be provided to the Complainant via e-mail and submitted certified confirmation of compliance to the Executive Director within the prescribed time frame to comply.
7. The Custodian's response to the Complainant's OPRA request was insufficient and she unlawfully denied access to certain records in part/whole. However, the Custodian timely complied with the Council's September 24, and June 24, 2014 Interim Orders and further lawfully denied access to certain records in part/whole. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, 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.

#### **Procedural History:**

##### **GRC Complaint No. 2012-227 (Lebanon)**

On December 17, 2014, the Council distributed its Interim Order to all parties. On the same day, the Custodian responded to the Council's Interim Order copying the Complainant. The Custodian certified that she attached all the responsive executive session minutes redacted in accordance with the Council's Orders to her compliance.

#### **Analysis**

##### **GRC Complaint No. 2012-227 – Lebanon Custodian**

#### **Compliance**

At its December 16, 2014 meeting, the Council ordered the Custodian to disclose eight

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<sup>5</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.

(8) sets of executive session minutes based on the Council's *in camera* review and its previous June 24, 2014 Interim Order. On December 17, 2014, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on December 24, 2014.

On December 17, 2014, the same day as receipt of the Council's Order, the Custodian submitted compliance to the GRC and Complainant simultaneously. Therein, the Custodian certified that she was attaching all responsive minutes with appropriate redactions. By virtue of copying both the GRC and the Complainant on her response, she effectively provided the responsive records to the Complainant as ordered and simultaneously provided certified confirmation of compliance to the Executive Director.

Therefore, the Custodian complied with the Council's December 16, 2014 Interim Order because she replied well within the prescribed time frame providing the responsive minutes with appropriate redactions to the Complainant and simultaneously provided certified confirmation of compliance to the Executive Director.

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

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Felder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (*id.*; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); 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)).

In this matter, the Custodian unlawfully denied access to portions of the September 29, 2011 memorandum, unlawfully denied access to portions of the redacted executive session minutes, and further unlawfully denied access to portions of all 31 responsive e-mails. However,

the Custodian timely complied with the Council's September 24, 2013, June 24, 2014 and December 16, 2014 Interim Orders, and lawfully denied access to certain portions of the responsive minutes, e-mails and two (2) memoranda in their entirety. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, 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.

### **GRC Complaint Nos. 2012-227 and 2012-228**

Because all issues regarding both Custodians have been resolved, no further adjudication of these complaints is required.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

#### **GRC Complaint No. 2012-227 – Lebanon Custodian**

1. The Custodian complied with the Council's December 16, 2014 Interim Order because she replied well within the prescribed time frame providing the responsive minutes with appropriate redactions to the Complainant and simultaneously provided certified confirmation of compliance to the Executive Director.
2. The Custodian unlawfully denied access to portions of the September 29, 2011 memorandum, unlawfully denied access to portions of the redacted executive session minutes, and further unlawfully denied access to portions of all 31 responsive e-mails. However, the Custodian timely complied with the Council's September 24, 2013, June 24, 2014 and December 16, 2014 Interim Orders, and lawfully denied access to certain portions of the responsive minutes, e-mails and two (2) memoranda in their entirety. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, 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.

#### **GRC Complaint Nos. 2012-227 and 2012-228**

3. Because all issues regarding both Custodians have been resolved, no further adjudication of these complaints is required.

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

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

January 20, 2015



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

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

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Commissioner

INTERIM ORDER

December 16, 2014 Government Records Council Meeting

John Hyland  
Complainant

Complaint Nos. 2012-227 and 2012-228

v.

Township of Lebanon (Hunterdon) and  
Township of Tewksbury (Hunterdon)  
Custodian of Record

At the December 16, 2014 public meeting, the Government Records Council (“Council”) considered the December 9, 2014 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

**GRC Complaint No. 2012-227 – Lebanon Custodian**

1. The Custodian complied with the Council’s June 24, 2014 Interim Order to the extent that she responded in the extended time frame providing all records ordered to be disclosed (with the exception of eight (8) sets of minutes for which the Township is seeking reconsideration) and simultaneously provided certified confirmation of compliance to the Executive Director.
2. As the moving party, the Custodian’s Counsel was required to establish either of the necessary criteria set forth above: either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. *See Cummings v. Bahr*, 295 N.J. Super. 374, 384 (App. Div. 1996). Counsel failed to establish that the complaint should be reconsidered based on mistake. However, Counsel established that there was a change in circumstance because it ordered disclosure of the executive session minutes based solely on the Custodian’s asserted exemption (“not relevant to shared services”) without allowing Lebanon to submit additional exemptions that may have applied. *See D'Atria v. D'Atria*, 242 N.J. Super. 392, 401 (Ch. Div. 1990). The Council’s June 24, 2014 Interim Order was thus based on a single asserted exemption where others may have existed. Thus, Counsel’s request for reconsideration should be granted. *Cummings*, 295 N.J. Super. at 384; *D'Atria*, 242 N.J. Super. at 401; *In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J.*, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).
3. The Custodian must disclose the responsive minutes containing redactions reflected in both the Council’s June 24, 2014 Interim Order and as noted in the *In Camera* Examination table above.





4. **On the basis of the Council's determination in this matter, the Custodian shall comply with conclusion No. 3 within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.<sup>1</sup>**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

**GRC Complaint No. 2012-228 – Tewksbury Custodian**

6. The Custodian complied with the Council's June 24, 2014 Interim Order because she provided those responsive records ordered to be provided to the Complainant via e-mail and submitted certified confirmation of compliance to the Executive Director within the prescribed time frame to comply.
7. The Custodian's response to the Complainant's OPRA request was insufficient and she unlawfully denied access to certain records in part/whole. However, the Custodian timely complied with the Council's September 24, and June 24, 2014 Interim Orders and further lawfully denied access to certain records in part/whole. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, 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.

Interim Order Rendered by the  
Government Records Council  
On The 16<sup>th</sup> Day of December, 2014

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: December 17, 2014**

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<sup>1</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**

**Supplemental Findings and Recommendations of the Executive Director  
December 16, 2014 Council Meeting**

**John Hyland<sup>1</sup>  
Complainant**

**GRC Complaint Nos. 2012-227 and 2012-228<sup>2</sup>**

**v.**

**Township of Lebanon (Hunterdon)<sup>3</sup>  
and Township of Tewksbury (Hunterdon)<sup>4</sup>  
Custodial Agencies**

**Records Relevant to Complaint:**

GRC Complaint No. 2012-227: Electronic via e-mail of unredacted copies of all records in the Township of Lebanon's ("Lebanon") possession including, but not limited to, correspondence, reports, e-mails, telephone logs and minutes of the executive session of any committee meeting that reflect, refer or relate to discussions of any Shared Service Agreement with any other township for January 1, 2011 to December 1, 2011. This request also includes any materials prepared by any member of the Township Committee, Custodian, Chief Financial Officer, Tax Collector, Road Supervisor and Township attorney. Specific meeting dates are 1) March 16, 2011; 2) April 6, 2011; 3) April 20, 2011; 4) May 4, 2011; 5) May 18, 2011; 6) June 1, 2011; 7) June 15, 2011; 8) July 6, 2011; 9) July 20, 2011; 10) August 3, 2011; 11) August 17, 2011; 12) September 7, 2011; 13) September 21, 2011; 14) October 5, 2011; 15) October 19, 2011; and 16) November 2, 2011.

GRC Complaint No. 2012-228: Electronic via e-mail of all records in the Township of Tewksbury's ("Tewksbury") possession including, but not limited to, correspondence, reports, e-mails, telephone logs and minutes of the executive session of any committee meeting that reflect, refer or relate to discussions of any Shared Service Agreement with any other township for January 1, 2011 to December 1, 2011. This request also includes any materials prepared by any member of the Township Committee, Custodian, Chief Financial Officer, Tax Collector, Road Supervisor, Township attorney, and Township Administrator. Specific meeting dates are 1) March 22, 2011; 2) April 12, 2011; 3) April 26, 2011; 4) May 11, 2011; 5) May 24, 2011; 6) June 14, 2011; 7) June 28, 2011; 8) July 12, 2011; 9) July 26, 2011; 10) August 9, 2011; 11) September 13, 2011; 12) September 27, 2011; 13) October 11, 2011; 14) October 25, 2011; 15) November 7, 2011; and 16) November 22, 2011.

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

<sup>2</sup> The GRC has consolidated these complaints for adjudication because of the commonality of the parties and/or issues.

<sup>3</sup> Represented by Richard P. Cushing, Esq., of Gebhardt & Kiefer (Clinton, NJ). Previously represented by Lorraine Staples, Esq., who retired and is no longer with the firm.

<sup>4</sup> Represented by Katrina L. Campbell, Esq., of Courter, Kobert, & Cohen, PC (Hackettstown, NJ).

**Custodian of Record:** Karen J. Sandorse (Lebanon Custodian) and Roberta A Brassard (Tewksbury Custodian)

**Request Received by Custodian:** June 28, 2012 and June 28, 2012

**Response Made by Custodian:** June 28, 2012 and July 10, 2012

**GRC Complaint Received:** August 1, 2012 and August 2, 2012

### **Background**

#### June 24, 2014 Council Meeting:

At its June 24, 2014 public meeting, the Council considered the June 17, 2014 *In Camera* 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:

#### **GRC Complaint No. 2012-227 – Lebanon Custodian**

1. The Custodian complied with the Council's September 24, 2013 Interim Order because she submitted nine (9) copies of the 47 records at issue to the GRC along with a document index and submitted certified confirmation of compliance to the Executive Director within the extended time frame to comply.
2. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.<sup>5</sup>**
3. The Custodian must disclose all other portions of the 31 requested e-mails to the Complainant (*i.e.* sender, recipients, date, time, subject, and salutations where applicable). As to these portions of the requested e-mails, the Custodian has unlawfully denied access. See Ray v. Freedom Academy Charter School (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010).
4. **The Custodian must comply with conclusion No. 3 within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.**

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<sup>5</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.

### **GRC Complaint No. 2012-228 – Tewksbury Custodian**

5. The Custodian complied with the Council's September 24, 2013 Interim Order because she submitted nine (9) copies of the records at issue to the GRC and submitted certified confirmation of compliance to the Executive Director within the extended time frame to comply.
6. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.<sup>6</sup>**
7. The Custodian must disclose all other portions of the 9 requested e-mails to the Complainant (*i.e.* sender, recipients, date, time, subject, and salutations where applicable). As to these portions of the requested e-mails, the Custodian has unlawfully denied access. *See* Ray v. Freedom Academy Charter School (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010).
8. **The Custodian must comply with conclusion No. 7 within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.**

### **GRC Complaint Nos. 2012-227 and 2012-228**

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

#### Procedural History:

##### GRC Complaint No. 2012-227 (Lebanon)

On June 25, 2014, the Council distributed its Interim Order to all parties. On June 27, 2014, the Custodian's Counsel sought an extension until July 18, 2014, to respond to the Interim Order. On July 3, 2014, the Custodian's Counsel sought the status of their request for an extension and amended the proposed extension to July 22, 2014. On July 8, 2014, the GRC granted said extension and advised that, due to the extraordinary length of time given, no additional extensions would be granted.

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<sup>6</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.

On July 22, 2014, the Custodian's Counsel submitted compliance and a request for reconsideration for a portion of the Council's Order.

### Compliance

The Custodian certified that being sent to all parties are certain requested records ordered to be redacted and disclosed in accordance with the Council's *in camera* examination. The Custodian further certified that upon advice of Custodian's Counsel that a request for reconsideration was necessary, she did not provide unredacted minutes from the following meetings: April 6, 2011; June 1, 2011; June 15, 2011; July 6, 2011; August 17, 2011; September 7, 2011 and September 21, 2011.

### Request for Reconsideration

The Custodian's Counsel filed a request for reconsideration of conclusion No. 2 of the Council's Interim Order based on a mistake and change in circumstance. Therein, Counsel argued that some information in the eight (8) sets of executive session minutes redacted as "not related to shared services" were subject to the attorney-client privilege and inter-agency or intra-agency advisory, consultative, or deliberative ("ACD") material exemptions. Counsel asserted that Lebanon did not waive its right to assert these other privileges and requested that the GRC reconsider ordering full disclosure of these minutes by conducting an *in camera* of same.

### GRC Complaint No. 2012-228 (Tewksbury)

On June 25, 2014, the Council distributed its Interim Order to all parties. On July 1, 2014, the Custodian certified that she sent the following records to the Complainant via e-mail per the Council's Order:

1. May 10, 2011 executive session minutes.
2. September 13, 2011 executive session minutes.
3. E-mail from current Counsel to Mr. Selvaggi dated December 3, 2011 (with redactions).
4. E-mail from Mr. Landon to the Custodian dated November 18, 2011 (2:17pm) including three (3) other e-mails in a chain (with redactions).
5. E-mail from current Counsel to Mr. Landon and Mr. Selvaggi dated November 2, 2011 (11:27am)(with redactions and excluding the attachment).
6. E-mail from Ms. Hammer to the Custodian, Mr. Landon and Mr. Selvaggi dated October 21, 2011 (9:44am)(with redactions and excluding the attachment).
7. E-mail from Mr. Landon to current Counsel dated October 19, 2011 (1:59pm)(with redactions).
8. E-mail from current Counsel to Mr. Landon, Mr. Selvaggi and the Custodian dated October 19, 2011 (1:36pm)(with redactions).
9. E-mail from current Counsel to Mr. Landon and Mr. Selvaggi dated October 9, 2011 (12:44pm) including one other e-mail in the chain (with redactions).

## Supplemental Submissions<sup>7</sup>

Subsequent to the distribution of the Council's Interim Order, between July 3, 2014 and July 28, 2014, the Complainant and Counsel for both Townships exchanged submissions regarding inquiries arising from the Complainant's review of the Council's Order.

On July 3, 2014, the Complainant advised the GRC that he received the Council's decision and asserted that the GRC failed to address whether Lebanon and Tewksbury waived the attorney-client privilege when they released the April 15, and April 27, 2011 memoranda to each other.

On July 13, 2014, the Complainant stated that his deadline to file a request for reconsideration is July 15, 2014. The Complainant requested an extension of the reconsideration time frame until July 22, 2014, because he would be out-of-state on a personal matter from July 16, 2014 to July 18, 2014. Further, the Complainant noted that the GRC was supposed to advise whether he needed to submit a request for reconsideration or whether the GRC would address the waiver issue as part of its next adjudication. Regarding his issues with the Council's decision, the Complainant advised that he attached an article stating that executive session minutes are subject to OPRA and must be disclosed without redactions once the need for non-public discussions have ended. The Complainant also sought clarification of the following:

1. Whether the minutes should have been disclosed without redactions after the conclusion of the litigation, unless the attached article was incorrect. The Complainant asserted that litigation involving the Shared Tax Collector position started in October 2011 and ended in December 2012.
2. Whether the attorney-client privilege exemption should have ended at the conclusion of litigation or whether it exists in perpetuity.
3. Whether, when evaluating the ACD exemption, the Council considers the date of a final decision in determining whether the exemption applies. The Complainant noted that four (4) dates between May 4, 2011 and September 29, 2011 could be effectively seen as the date Lebanon and Tewksbury finalized the decision to enter into a shared services agreement for the Tax Collector position.
4. Whether factual information or opinions taken from communications (e-mails, memoranda, *etc.*) and discussed in closed session operates to make those reference documents accessible under OPRA.
5. Whether the Council's decision was based on the denial at the time of the OPRA request (and during the pendency of the shared Tax Collector litigation) or whether the decision was based on their disclosability at the present time.

The Complainant identified twelve (12) of the records reviewed *in camera* as applying to his request for clarification of the Council's decision.

On July 14, 2014, Tewksbury Counsel objected to the Complainant's request for an extension of time to submit reconsideration. Counsel contended that the Complainant received

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<sup>7</sup> These e-mails are being presented separately from the "Procedural History" in the interest of clarity of the issues presented.

the Council's decision on June 25, 2014 via e-mail and had ample time to submit reconsideration. Further, Counsel noted that his personal matter did not affect the time frame, as the Complainant advised that he was not going out-of-state until after the deadline expired. Counsel also argued that the Complainant violated N.J.A.C. 5:105-2.10 because he did not copy Tewksbury on either of his two (2) earlier e-mails. Counsel also asserted that those e-mails should not be considered a request for reconsideration because they were not on the GRC's official request for reconsideration form.

On July 15, 2014, the Complainant forwarded his July 3, 2014 e-mail to Tewksbury Counsel, noting that he advised the GRC that it failed to address the attorney-client privilege waiver issue. The Complainant also noted that the GRC must advise whether this issue will be resolved through reconsideration or by clarification. On July 21, 2014, the Complainant sought a status update on the pendency of this complaint.

On July 23, 2014, the GRC advised the parties that, through clarification, it would address the issues the Complainant raised in his July 13, 2014 submission. The GRC further advised that any arguments on the merits of the Complainant's asserted issues should be submitted by July 28, 2014. On July 23, 2014, the Complainant reasserted his argument regarding the waiver of the attorney-client privilege and the GRC's failure to address same.

On July 28, 2014, Lebanon Counsel asserted that she believed the Complainant was seeking "reconsideration"<sup>8</sup> as follows:

1. Does the attorney-client privilege expire after litigation has concluded?
2. Does the ACD material exemption expire after a decision on a matter has been made?
3. Does a municipality waive the attorney-client privilege by disclosing privileged documents to another municipality with a common interest?

Regarding issue No. 1, Lebanon Counsel argued that the attorney-client and work product privilege protect records from disclosure even after litigation has concluded because same is indefinite and not affected by underlying litigation. Rivard v. American Home Products, Inc., 391 N.J. Super. 129, 154 (App. Div. 2007); Keddie v. Rutgers, State Univ., 148 N.J. 36, 54 (1997); Press of Atlantic City v. Ocean Cnty. Joint Ins. Fund, 337 N.J. Super. 480, 492 (Ch. Div. 2000)(*citing* Upjohn Co. v. United States, 449 U.S. 383, 389 (1981)). Counsel asserted that disclosure would reveal Lebanon's strategy in litigation that could provide potential litigants with an advantage. Counsel also argued that disclosure could discourage Lebanon from seeking legal advice on future litigation.

Regarding issue No. 2, Lebanon Counsel argued that the ACD exemption similarly survives a municipality's rendering of a decision. Counsel asserted that revealing the decision-making process would chill a municipality's ability to engage in such a process in a free and uninhibited way. In re: Liquidation of Interglity Ins. Co., 165 N.J. 75, 83 (2000); Educ. Law Ctr. v. NJ Dep't of Educ., 198 N.J. 274, 286 (2009)(*citing* Jordan v. United States Dep't of Justice, 591 F.2d 753, 773 (D.C. Cir. 1978)). Counsel contended that disclosure of the information at

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<sup>8</sup> The GRC notes that the Complainant was not instructed to file a request for reconsideration because the GRC would provide clarification of its prior decision in this adjudication.

issue here would cause the public to judge Lebanon on proposed policies and not those ultimately adopted.

Regarding issue No. 3, Lebanon Counsel disputed that they waived attorney-client privilege by sharing the two (2) memoranda with each other. Counsel noted that the Council provided a brief discourse on the common interest exception. Hyland v. Twp. of Lebanon (Hunterdon), GRC Complaint No. 2012-227 *et seq.* (Interim Order dated June 24, 2014) at 6. Counsel stated that the New Jersey Supreme Court recently clarified and strengthened the common interest rule. O’Boyle v. Borough of Longport, 218 N.J. 168 (July 21, 2014). Counsel stated that there, the Court held that documents remained exempt as attorney-client and work product privileged even though they were exchanged between the municipal attorney and a private attorney where both had a common interest in pending and anticipated litigation with the same individual. *Id.* at 47-49. Further, Counsel stated that the Court did not limit sharing to only attorneys, holding that “[c]ommunications between counsel for a party and a representative of another party with common interest are also protected.” *Id.* at 194. Counsel also noted that the Court held that “the common interest . . . may be legal, factual or strategic in character,” and “[t]he interests of the separately represented clients need not be entirely congruent.” *Id.* (*citing Restatement (Third) of the Law Governing Lawyers* § 76(1)(2000)). Counsel contended that at the time of the April 2011 memoranda, Lebanon and Tewksbury shared a common interest in hiring a shared tax collector. Counsel argued that both municipalities had a common interest in ensuring that the process of establishing a shared tax collector would be done properly and exchanged legal opinions on the matter. Accordingly, Counsel contended that the attorney-client privilege was not waived by the sharing of the two (2) memoranda between Lebanon and Tewksbury.

### Analysis

#### GRC Complaint No. 2012-227 – Lebanon Custodian

##### Compliance

At its June 24, 2014 meeting, the Council ordered the Custodian to comply with the *in camera* examination and disclose all other portions of the 31 requested e-mails to the Complainant (*i.e.* sender, recipients, date, time, subject, and salutations where applicable). On June 25, 2014, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian’s response was due by close of business on July 2, 2014.

On June 27, 2014, the second (2<sup>nd</sup>) business day after receipt of the Council’s Order, the Custodian’s Counsel sought an extension until July 18, 2014, to respond to the Interim Order in order to meet with the Mayor and Committee. On July 3, 2014, the Custodian’s Counsel sought the status of their request for an extension and amended the proposed extension to July 22, 2014. On July 8, 2014, the GRC granted said extension and advised that, due to the extraordinary length of time given, no additional extensions will be granted.



On July 22, 2014, the Custodian certified that she complied with the Council's Order by sending all records required to be disclosed except for eight (8) sets of minutes that the Township was seeking to have the GRC reconsider its order of disclosure.

Therefore, the Custodian complied with the Council's June 24, 2014 Interim Order to the extent that she responded in the extended time frame providing all records ordered to be disclosed (with the exception of eight (8) sets of minutes for which the Township is seeking reconsideration) and simultaneously provided certified confirmation of compliance to the Executive Director.

### **Request for 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).

In the matter before the Council, the Custodian's Counsel filed the request for reconsideration of the Council's Interim Order on July 22, 2014, the last day of the extended time frame to submit same.

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, . . . 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 S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

Here, the Custodian's Counsel requested reconsideration of conclusion No. 2 of the Council's July 22, 2014 Interim Order based on “mistake” and “change in circumstances.” Specially, the GRC ordered disclosure of minutes without certain redactions based on the Custodian's sole denial that “not related to shared services” was not a valid exemption. However,

Counsel argued that Lebanon's denial did not waive their right to assert additional privileges that apply to some of the redactions.

As the moving party, the Custodian's Counsel was required to establish either of the necessary criteria set forth above: either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. *See Cummings*, 295 N.J. Super. at 384. Counsel failed to establish that the complaint should be reconsidered based on mistake. However, Counsel established that there was a change in circumstance because it ordered disclosure of the executive session minutes based solely on the Custodian's asserted exemption ("not relevant to shared services") without allowing Lebanon to submit additional exemptions that may have applied. *See D'Atria*, 242 N.J. Super. at 401. The Council's June 24, 2014 Interim Order was thus based on a single asserted exemption where others may have existed. Thus, Counsel's request for reconsideration should be granted. *Cummings*, 295 N.J. Super. at 384; *D'Atria*, 242 N.J. Super. at 401; *Comcast*, 2003 N.J. PUC at 5-6.

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

Based on the recommendation that the Council should reconsider conclusion No. 2 in regards to the disclosure of certain sets of executive session minutes, the GRC will conduct an *in camera* review of the additional redactions to determine if the Lebanon lawfully denied access to same.

OPRA provides that the definition of a government record ". . . shall not include . . . inter-agency or intra-agency advisory, consultative, or deliberative [(“ACD”)] material." When this exception is invoked, a governmental entity may "withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Educ. Law Center v. N.J. Dep't of Educ.*, 198 N.J. 274, 285 (2009)(*citing NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975)). The custodian claiming an exception to the disclosure requirements under OPRA on this basis must initially satisfy two conditions: (1) the document must be pre-decisional, meaning that the document was generated prior to the adoption of the governmental entity's policy or decision; and (2) the document must reflect the deliberative process, which means that it must contain opinions, recommendations, or advice about agency policies. *Id.* at 286 (internal citations and quotations omitted).

The key factor in this determination is whether the contents of the document reflect "formulation or exercise of . . . policy-oriented judgment or the process by which policy is formulated." *Id.* at 295 (adopting the federal standard for determining whether material is "deliberative" and quoting *Mapother v. Dep't of Justice*, 3 F.3d 1533, 1539 (D.C. Cir. 1993)).

Once the governmental entity satisfies these two threshold requirements, a presumption of confidentiality is established, which the requester may rebut by showing that the need for the materials overrides the government's interest in confidentiality. Id. at 286-87.

Similarly, OPRA exempts access to “. . . any record within the attorney-client privilege.” N.J.S.A. 47:1A-1.1. Further, “[t]he provisions of [OPRA] shall not abrogate or erode any . . . grant of confidentiality . . . recognized by . . . court rule.” N.J.S.A. 47:1A-9(b). As such, OPRA does not allow for the disclosure of attorney work product, consisting of “the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.” Rule 4:10-2(c).

In the context of public entities, these privileges extend to communications between the public body, the attorney retained to represent it, necessary intermediaries and agents through whom communications are conveyed, and co-litigants who have employed a lawyer to act for them in a common interest. *See* Tractenberg v. Twp. Of W. Orange, 416 N.J. Super. 354, 376 (App. Div. 2010); *In re Env'tl. Ins. Declaratory Judgment Actions*, 259 N.J. Super. 308, 313 (App. Div. 1992). At the same time, the attorney-client and work product privileges do not apply to automatically and completely insulate attorney correspondence from disclosure. *See* Hunterdon Cnty. P.B.A. Local 188 v. Twp. of Franklin, 286 N.J. Super. 389, 394; *In the Matter of Grand Jury Subpoenas*, 241 N.J. Super. 18, 30 (App. Div. 1989).

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

<b>Record No.</b>	<b>Record Name/Date</b>	<b>Description of Record or Redaction</b>	<b>Custodian's Explanation/ Citation for Non-disclosure or Redactions</b>	<b>Findings of the <i>In Camera</i> Examination<sup>9</sup></b>
1.	April 6, 2011 executive session minutes	<ul style="list-style-type: none"> <li>• “Police Negotiations” – 1<sup>st</sup> paragraph, 2<sup>nd</sup> sentence.</li> <li>• “Township</li> </ul>	<ul style="list-style-type: none"> <li>• Denied as ACD and collective bargaining negotiations. <u>N.J.S.A.</u> 47:1A-1.1.</li> </ul>	Regarding “Police Negotiations,” the redacted entry provides specific details into Police contract negotiations.

<sup>9</sup> **Unless expressly identified for redaction, everything in the record shall be disclosed.** For purposes of identifying redactions, unless otherwise noted a paragraph/new paragraph begins whenever there is an indentation and/or a skipped space(s). The paragraphs are to be counted starting with the first whole paragraph in each record and continuing sequentially through the end of the record. If a record is subdivided with topic headings, renumbering of paragraphs will commence under each new topic heading. Sentences are to be counted in sequential order throughout each paragraph in each record. Each new paragraph will begin with a new sentence number. If only a portion of a sentence is to be redacted, the word in the sentence which the redaction follows or precedes, as the case may be, will be identified and set off in quotation marks. If there is any question as to the location and/or extent of the redaction, the GRC should be contacted for clarification before the record is redacted. The GRC recommends the redactor make a paper copy of the original record and manually "black out" the information on the copy with a dark colored marker, then provide a copy of the blacked-out record to the requester.

		Garage” – 2 <sup>nd</sup> and 3 <sup>rd</sup> sentences	<ul style="list-style-type: none"> <li>• Denied as attorney-client privileged information. <u>N.J.S.A. 47:1A-1.1.</u></li> </ul>	Regarding “Township Garage,” the redacted entry contains Counsel’s advice to Lebanon regarding a change order. The Custodian has thus lawfully denied access to same. <u>N.J.S.A. 47:1A-6.</u>
2.	June 1, 2011 executive session minutes	<ul style="list-style-type: none"> <li>• “Police Negotiations” – 2<sup>nd</sup> sentence.</li> <li>• “Cell Tower” – entire entry.</li> </ul>	<ul style="list-style-type: none"> <li>• Denied as ACD and collective bargaining negotiations. <u>N.J.S.A. 47:1A-1.1.</u></li> <li>• Denied as ACD and attorney-client privileged information. <u>N.J.S.A. 47:1A-1.1.</u></li> </ul>	Regarding “Police Negotiations,” the redacted entry provides specific details into Police contract negotiations. Regarding “Cell Tower,” the redacted entry contains Counsel’s advice to Lebanon regarding a cell tower. The Custodian has thus lawfully denied access to same. <u>N.J.S.A. 47:1A-6.</u>
3.	June 15, 2011 executive session minutes	“resident Kevin Clark” – 7 <sup>th</sup> sentence.	Denied as attorney-client privileged information. <u>N.J.S.A. 47:1A-1.1.</u>	The redacted sentence contains Counsel’s advice to Lebanon regarding taxes. The Custodian has thus lawfully denied access to same. <u>N.J.S.A. 47:1A-6.</u>
4.	July 6, 2011 executive session minutes	“Rescue Squad Bankruptcy” – 5 <sup>th</sup> sentence.	Denied as ACD material. <u>N.J.S.A. 47:1A-1.1.</u>	The redacted sentence contains opinions of the Council regarding the Rescue Squad’s Bankruptcy. The Custodian has thus lawfully denied access to same. <u>N.J.S.A. 47:1A-6.</u>
5.	July 20, 2011 executive session minutes	“DPW Garage Project” – 3 <sup>rd</sup> sentence.	Denied as attorney-client privileged	The redacted sentence contains Counsel’s advice regarding a

			information. <u>N.J.S.A. 47:1A-1.1.</u>	Project at the “DPW” Garage. The Custodian has thus lawfully denied access to same. <u>N.J.S.A. 47:1A-6.</u>
6.	August 17, 2011 executive session minutes	<ul style="list-style-type: none"> <li>• “Boyer Claim” – 2<sup>nd</sup> sentence of 1<sup>st</sup> paragraph and last 2 sentences of 2<sup>nd</sup> paragraph.</li> <li>• “Police Negotiations” – entire entry.</li> <li>• “Lebanon Township First Aid Squad” – whole entry except for the 1<sup>st</sup> sentence.</li> </ul>	<ul style="list-style-type: none"> <li>• Denied as attorney-client privileged information. <u>N.J.S.A. 47:1A-1.1.</u></li> <li>• Denied as ACD and collective bargaining negotiations. <u>N.J.S.A. 47:1A-1.1.</u></li> <li>• Denied as attorney-client privileged information. <u>N.J.S.A. 47:1A-1.1.</u></li> </ul>	<p>Regarding “Boyer Claim,” the redactions contained therein contain Counsel’s advice regarding Ms. Boyer. The Custodian has thus lawfully denied access to same. <u>N.J.S.A. 47:1A-6.</u></p> <p>Regarding “Police Negotiations,” the entry provides specific details into Police contract negotiations. The Custodian has thus lawfully denied access to same. <u>N.J.S.A. 47:1A-6.</u></p> <p>Regarding “Lebanon Township First Aid Squad,” the redacted portions of the entries contain advice from Counsel regarding Lebanon’s options for obtaining the First Aid Building. The Custodian has thus lawfully denied access to same. <u>N.J.S.A. 47:1A-6.</u></p>
7.	September 7, 2011 executive session minutes	“PBA Local – Negotiations” – entire entry.	Denied as ACD and collective bargaining negotiations. <u>N.J.S.A. 47:1A-1.1.</u>	The entry provides specific details into Police contract negotiations, as well as deliberation on those details. The Custodian has thus lawfully denied access to same. <u>N.J.S.A. 47:1A-6.</u>

8.	September 21, 2011 executive session minutes	<ul style="list-style-type: none"> <li>• “PBA Local – Negotiations” – entire entry.</li> <li>• “Rescue Squad Bankruptcy” – 3<sup>rd</sup> sentence.</li> </ul>	<ul style="list-style-type: none"> <li>• Denied as ACD and collective bargaining negotiations. <u>N.J.S.A. 47:1A-1.1.</u></li> <li>• Denied as attorney-client privileged information. <u>N.J.S.A. 47:1A-1.1.</u></li> </ul>	Regarding “PBA Local - Negotiations,” the redacted entry provides discussion as to the Council’s course of action on negotiations. Regarding “Rescue Squad Bankruptcy,” the redacted entry contains Counsel’s advice to Lebanon regarding the Squad’s bankruptcy. The Custodian has thus lawfully denied access to same. <u>N.J.S.A. 47:1A-6.</u>
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Based on the foregoing, the Custodian must disclose the responsive minutes containing redactions reflected in both the Council’s June 24, 2014 Interim Order and as noted in the *In Camera* Examination table above.

**Knowing & Willful**

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

**GRC Complaint No. 2012-228 – Tewksbury Custodian**

**Compliance**

On June 24, 2014, the Council ordered the Custodian to disclose to the Complainant two (2) sets of minutes (without redactions) and e-mails redacted to reflect the *in camera* examination table and conclusion No. 8. On June 25, 2014, the Council distributed its Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian’s response was due by close of business on July 2, 2014.

On July 1, 2014, the fourth (4<sup>th</sup>) business day after receipt of the Council’s Order, the current Custodian disclosed those records required to be disclosed to the Complainant via e-mail (his preferred method of delivery) and simultaneously submitted certified confirmation of compliance to the Executive Director.

Therefore, the Custodian complied with the Council’s June 24, 2014 Interim Order because she provided those responsive records ordered to be provided to the Complainant via e-

mail and submitted certified confirmation of compliance to the Executive Director within the prescribed time frame to comply.

### **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 “... [i]f 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 (id.; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); 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 response to the Complainant’s OPRA request was insufficient and she unlawfully denied access to certain records in part/whole. However, the Custodian timely complied with the Council’s September 24, and June 24, 2014 Interim Orders and further lawfully denied access to certain records in part/whole. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, 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.

### **Clarification of Issues Raised By Complainant**

The Complainant raised the following issues with regard to the Council’s Interim Order as interpreted by the GRC:

1. Whether the Townships waived the attorney-client privilege by sharing records containing attorney advice on the shared tax collector position with each other?

2. Whether the attorney-client privilege and ACD exemptions expire either at the conclusion of a matter thus requiring a custodian to disclose unredacted minutes and/or records?
3. Whether the Council's decision was based on the Custodians' denial at that time (during the pendency of the shared tax assessor litigation) or present time?

Regarding item No. 1, the GRC noted in its analysis that “[i]n the context of public entities, these privileges extend to communications between the public body, the attorney retained to represent it . . . and co-litigants who have employed a lawyer to act for them in a common interest.” Hyland, GRC 2012-227 *et seq.* (Interim Order dated June 24, 2014) at 6 (citations omitted). Thereafter, the GRC reviewed the responsive records and determined that same were exempt as “attorney-client and work product privileged material.” Id. at 13. The records at issue were clearly created to provide advice on the concept of Lebanon and Tewksbury sharing services for the tax collector position.

As noted in O’Boyle, 218 N.J. at 191:

[D]isclosure of work product to third parties with a common interest may not destroy the privileged character of the work product. New Jersey applies the common interest doctrine in the context of sharing confidential communications between an attorney and client with third parties and in the context of sharing work product with third parties.

Id.

Here, it is abundantly clear that the Townships had a common interest in information contained in the records shared and that they anticipated litigation based on their SOI arguments supporting non-disclosure of same. Thus, the Council was, and still is satisfied, that sharing the records relating to the shared services tax collector between the Townships did not waive the privilege and that access to same was lawfully denied.

Regarding item No. 2, the GRC first directs the Complainant to review Molnar v. Warren Cnty. Cmty. Coll., GRC Complaint No. 2012-04 (July 2013), which addresses the disclosability of attorney-client privileged information in minutes once a matter has concluded. Id. at 4-5 (*citing* Keddie v. Rutgers, 148 N.J. 36, 54 (1997)). As noted by Lebanon Counsel in her July 28, 2014 submission, the Courts have long held that the status of litigation does not impact the attorney-client privilege. Similarly, the ACD exemption is not predicated on the finalization of a matter. Indeed, ACD material could reflect a different though process than the one eventually adopted, thereby causing “confusion . . . from release of information concerning matters that do not bear on an agency's chosen outcome.” Educ. Law Ctr., 198 N.J. at 286 (*citing* Jordan, 591 F.2d at 772-773). Thus, the Council is satisfied that the privileges cited applied to the records in questions.

Further, the Complainant included an article to support his assertion that executive session minutes must be disclosed in their entirety once the need to keep discussions confidential have passed. Under the Open Public Meetings Act (“OPMA”), such a clause exists. N.J.S.A.



10:4-14. However, no such clause exists in OPRA and thus the Council has routinely upheld valid redactions to executive session minutes where applicable.

Finally, regarding item No. 3, the GRC's adjudication of a Denial of Access Complaint focuses on that time frame within which the OPRA request was submitted and addressed by a custodian. For instance, if a complainant files an OPRA request for a record that does not come into existence until after the filing of a complaint, the Council has still determined that no unlawful denial of access occurred. *See Paff v. City of Union City (Hudson)*, GRC Complaint No. 2012-262 (August 2013). As another example, if minutes were not approved by a governing body at the time of an OPRA request, the custodian is not required to provide same once they are approved. *See Paff v. Neptune Twp. Hous. Auth. (Monmouth)*, GRC Complaint No. 2011-174. Finally, in instances where OPRA has been amended, the Council rendered a decision consistent with the law at the time of the OPRA request. *See Wolosky v. Twp. of Randolph (Morris)*, GRC Complaint No. 2010-186 (Interim Order dated December 20, 2011).

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

#### **GRC Complaint No. 2012-227 – Lebanon Custodian**

1. The Custodian complied with the Council's June 24, 2014 Interim Order to the extent that she responded in the extended time frame providing all records ordered to be disclosed (with the exception of eight (8) sets of minutes for which the Township is seeking reconsideration) and simultaneously provided certified confirmation of compliance to the Executive Director.
2. As the moving party, the Custodian's Counsel was required to establish either of the necessary criteria set forth above: either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. *See Cummings v. Bahr*, 295 N.J. Super. 374, 384 (App. Div. 1996). Counsel failed to establish that the complaint should be reconsidered based on mistake. However, Counsel established that there was a change in circumstance because it ordered disclosure of the executive session minutes based solely on the Custodian's asserted exemption ("not relevant to shared services") without allowing Lebanon to submit additional exemptions that may have applied. *See D'Atria v. D'Atria*, 242 N.J. Super. 392, 401 (Ch. Div. 1990). The Council's June 24, 2014 Interim Order was thus based on a single asserted exemption where others may have existed. Thus, Counsel's request for reconsideration should be granted. *Cummings*, 295 N.J. Super. at 384; *D'Atria*, 242 N.J. Super. at 401; In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

3. The Custodian must disclose the responsive minutes containing redactions reflected in both the Council's June 24, 2014 Interim Order and as noted in the *In Camera* Examination table above.
4. **On the basis of the Council's determination in this matter, the Custodian shall comply with conclusion No. 3 within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.**<sup>10</sup>
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

#### **GRC Complaint No. 2012-228 – Tewksbury Custodian**

6. The Custodian complied with the Council's June 24, 2014 Interim Order because she provided those responsive records ordered to be provided to the Complainant via e-mail and submitted certified confirmation of compliance to the Executive Director within the prescribed time frame to comply.
7. The Custodian's response to the Complainant's OPRA request was insufficient and she unlawfully denied access to certain records in part/whole. However, the Custodian timely complied with the Council's September 24, and June 24, 2014 Interim Orders and further lawfully denied access to certain records in part/whole. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, 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  
Communications Specialist/Resource Manager

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

December 9, 2014

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<sup>10</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

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

June 24, 2014 Government Records Council Meeting

John Hyland  
Complainant

Complaint Nos. 2012-227 and 2012-228

v.

Township of Lebanon (Hunterdon)  
and Township of Tewksbury (Hunterdon)  
Custodian of Record

At the June 24, 2014 public meeting, the Government Records Council (“Council”) considered the June 17, 2014 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:

**GRC Complaint No. 2012-227 – Lebanon Custodian**

1. The Custodian complied with the Council’s September 24, 2013 Interim Order because she submitted nine (9) copies of the 47 records at issue to the GRC along with a document index and submitted certified confirmation of compliance to the Executive Director within the extended time frame to comply.
2. **On the basis of the Council’s determination in this matter, the Custodian shall comply with the Council’s Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.<sup>1</sup>**
3. The Custodian must disclose all other portions of the 31 requested e-mails to the Complainant (*i.e.* sender, recipients, date, time, subject, and salutations where applicable). As to these portions of the requested e-mails, the Custodian has unlawfully denied access. See Ray v. Freedom Academy Charter School (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010).
4. **The Custodian must comply with conclusion No. 3 within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of**

<sup>1</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.

compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.

**GRC Complaint No. 2012-228 – Tewksbury Custodian**

5. The Custodian complied with the Council's September 24, 2013 Interim Order because she submitted nine (9) copies of the records at issue to the GRC and submitted certified confirmation of compliance to the Executive Director within the extended time frame to comply.
6. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.<sup>2</sup>**
7. The Custodian must disclose all other portions of the 9 requested e-mails to the Complainant (*i.e.* sender, recipients, date, time, subject, and salutations where applicable). As to these portions of the requested e-mails, the Custodian has unlawfully denied access. *See Ray v. Freedom Academy Charter School (Camden)*, GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010).
8. **The Custodian must comply with conclusion No. 7 within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.**

**GRC Complaint Nos. 2012-227 and 2012-228**

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

Interim Order Rendered by the  
Government Records Council  
On The 24<sup>th</sup> Day of June, 2014

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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<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.

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: June 25, 2014**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**John Hyland<sup>1</sup>  
Complainant**

**GRC Complaint Nos. 2012-227 and 2012-228<sup>2</sup>**

**v.**

**Township of Lebanon (Hunterdon)<sup>3</sup>  
and Township of Tewksbury (Hunterdon)<sup>4</sup>  
Custodial Agencies**

**Records Relevant to Complaint:**

GRC Complaint No. 2012-227: Electronic via e-mail of unredacted copies of all records in the Township of Lebanon's ("Lebanon") possession including, but not limited to, correspondence, reports, e-mails, telephone logs and minutes of the executive session of any committee meeting that reflect, refer or relate to discussions of any Shared Service Agreement with any other township for January 1, 2011 to December 1, 2011. This request also includes any materials prepared by any member of the Township Committee, Custodian, Chief Financial Officer, Tax Collector, Road Supervisor and Township attorney. Specific meeting dates are 1) March 16, 2011; 2) April 6, 2011; 3) April 20, 2011; 4) May 4, 2011; 5) May 18, 2011; 6) June 1, 2011; 7) June 15, 2011; 8) July 6, 2011; 9) July 20, 2011; 10) August 3, 2011; 11) August 17, 2011; 12) September 7, 2011; 13) September 21, 2011; 14) October 5, 2011; 15) October 19, 2011; and 16) November 2, 2011.

GRC Complaint No. 2012-228: Electronic via e-mail of all records in the Township of Tewksbury's ("Tewksbury") possession including, but not limited to, correspondence, reports, e-mails, telephone logs and minutes of the executive session of any committee meeting that reflect, refer or relate to discussions of any Shared Service Agreement with any other township for January 1, 2011 to December 1, 2011. This request also includes any materials prepared by any member of the Township Committee, Custodian, Chief Financial Officer, Tax Collector, Road Supervisor, Township attorney, and Township Administrator. Specific meeting dates are 1) March 22, 2011; 2) April 12, 2011; 3) April 26, 2011; 4) May 11, 2011; 5) May 24, 2011; 6) June 14, 2011; 7) June 28, 2011; 8) July 12, 2011; 9) July 26, 2011; 10) August 9, 2011; 11) September 13, 2011; 12) September 27, 2011; 13) October 11, 2011; 14) October 25, 2011; 15) November 7, 2011; and 16) November 22, 2011.

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

<sup>2</sup> The GRC has consolidated these complaints for adjudication because of the commonality of the parties and/or issues.

<sup>3</sup> Represented by Richard P. Cushing, Esq., of Gebhardt & Kiefer (Clinton, NJ). Previously represented by Lorraine Staples, Esq., who retired and is no longer with the firm.

<sup>4</sup> Represented by Katrina L. Campbell, Esq., of Courter, Kobert, & Cohen, PC (Hackettstown, NJ).

**Custodian of Record:** Karen J. Sandorse and Roberta A Brassard  
**Request Received by Custodian:** June 28, 2012 and June 28, 2012  
**Response Made by Custodian:** June 28, 2012 and July 10, 2012  
**GRC Complaint Received:** August 1, 2012 and August 2, 2012

**Records Submitted for *In Camera* Examination:**

GRC Complaint No. 2012-227

- Executive session minutes for 1) March 2, 2011; 2) April 6, 2011; 3) April 20, 2011; 4) May 4, 2011; 5) May 18, 2011; 6) June 1, 2011; 7) June 15, 2011; 8) July 6, 2011; 9) July 20, 2011; 10) August 3, 2011; 11) August 17, 2011; 12) September 7, 2011; 13) September 21, 2011; and 14) October 5, 2011.
- Two (2) memoranda from Gebhardt & Keifer dated April 15, 2011 and April 27, 2011, discussing shared services for tax collectors.
- Undated memorandum from Jesse Landon “FW: Tax Collector.”
- 32 correspondence records regarding the shared services Tax Collector.

GRC Complaint No. 2012-228

- Executive session minutes for 1) April 12, 2011; 2) April 26, 2011; 3) May 10, 2011; 4) September 13, 2011; and 5) October 25, 2011.

**Background**

September 24, 2013 Council Meeting:

At its September 24, 2013 public meeting, the Council considered the September 17, 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:

**GRC Complaint No. 2012-227 - Lebanon**

1. The GRC must conduct an *in camera* review of the records responsive to item Nos. 1, 3, 4 and 5 disputed in the Denial of Access Complaint to determine the validity of the Lebanon Custodian’s assertion that the minutes, memoranda and correspondence are attorney-client privileged or contain inter-agency or intra-agency advisory, consultative or deliberative material exempt from disclosure under OPRA. See Paff, 379 N.J. Super. at 346; N.J.S.A. 47:1A-1.1.
2. **The Lebanon Custodian must deliver<sup>5</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 1 above), nine (9) copies**

<sup>5</sup> The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

of the redacted records, a document or redaction index<sup>6</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,<sup>7</sup> that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.

3. The Lebanon Custodian did not bear her burden of proving that all redactions made to the September 29, 2011 memorandum responsive to item No. 2 were lawful because additional personnel information available for disclosure was contained within the memorandum. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-10. However, because the Complainant is in possession of the full text of the record, the Council should decline to order disclosure of the memorandum as doing so "...does not ... advance the purpose of OPRA, which is to ensure an informed citizenry." Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609, 618 (App. Div. 2008). The Council should further decline to address the validity of the memorandum as the validity of a record is not within the Council's authority to adjudicate. Katinsky v. River Vale Twp., GRC Complaint No. 2003-68 (November 2003).

#### **GRC Complaint No. 2012-228 - Tewksbury**

4. Although the Tewksbury Custodian responded to the Complainant's OPRA request in a timely manner, the Custodian's response is insufficient because she failed to provide a lawful basis for a denial. N.J.S.A. 47:1A-5(g); DeAppolonio, Esq. v. Borough of Deal (Monmouth), GRC Complaint No. 2008-62 (September 2009); Darata v. Monmouth Cnty. Bd. Of Chosen Freeholders, GRC Complaint No. 2009-312 (Interim Order dated February 24, 2011).
5. The GRC must conduct an *in camera* review of the five (5) sets of minutes responsive to item No. 1 disputed in the Denial of Access Complaint to determine the validity of the Tewksbury Custodian's assertion that the minutes are attorney-client privileged and/or contain inter-agency or intra-agency advisory, consultative or deliberative material and personnel matters. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9(a); N.J.S.A. 10:4-12. Additionally, because the GRC has already ordered the Lebanon Custodian to provide memoranda responsive to item Nos. 3, and 4 disputed in the Denial of Access Complaint for an *in camera* review, the GRC will render a determination on the validity of the asserted exemptions based on those records.
6. **The Tewksbury Custodian must deliver<sup>8</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 2 above), nine (9) copies**

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<sup>6</sup> The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

<sup>7</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>8</sup> The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.



**of the redacted records, a document or redaction index<sup>9</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,<sup>10</sup> that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**

7. The Tewksbury Custodian may have unlawfully denied access to responsive correspondence. N.J.S.A. 47:1A-6. The Custodian shall determine whether any of the 32 correspondence or additional responsive records are in her possession and provide a legal certification to the GRC advising as such. If no such records are maintained by Tewksbury, the Custodian must also certify to this fact.
8. **The Tewksbury Custodian shall comply with item No. 7 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, to the Executive Director.<sup>11</sup>**

#### **GRC Complaint Nos. 2012-227 and 2012-228**

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

#### **Procedural History:**

On September 25, 2013, the Council distributed its Interim Order to all parties on.

#### **GRC Complaint No. 2012-227**

On October 1, 2013, the Custodian's Counsel sought an extension of time until October 8, 2013 to respond to the Council's Order. On October 2, 2013, the GRC granted Counsel's request.

On October 7, 2013, the GRC received the Custodian's response certifying that the records ordered to be provided for an *in camera* review are attached. The Custodian further noted that no redaction index was provided for the executive session minutes because the exemptions are noted directly on the redacted minutes.

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

<sup>10</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

<sup>11</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.

The Custodian stated that there appeared to be some confusion regarding the memoranda. The Custodian affirmed that the April 15, 2011 memorandum is actually from Robert B. McBriar, Esq., and not Gebhardt & Kiefer. The Custodian certified that the undated memorandum from Jesse Landon was an attachment to the redacted September 29, 2011 memorandum previously provided to the Complainant; however, a copy of same is included per the Council's Order.

#### GRC Complaint No. 2012-228

On September 30, 2013, the Custodian responded to the Council's Order certifying that the records ordered to be provided for an *in camera* review are attached. The Custodian further requested an extension of time to respond to item No. 8 of the Council's Order. On October 2, 2013, the GRC granted an extension until October 8, 2013.

On October 9, 2013, the GRC received the Custodian's response to item No. 8. The Custodian certified that Tewksbury is in possession of nine (9) of the 32 correspondence listed in Lebanon's privilege log. The Custodian certified that attached is a document index for those nine (9) e-mails.

#### Analysis

#### GRC Complaint No. 2012-227 – Lebanon Custodian

##### Compliance

On September 24, 2013, the Council ordered the Custodian to submit nine (9) copies of 49 records for an *in camera* review with a document index and further to provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On September 25, 2013, the Council distributed its Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. The Custodian received the Council's Order on the same day; thus, October 2, 2013 was the last day to comply. On September 30, 2013, the Custodian's Counsel sought an extension until October 8, 2013 to respond. On October 2, 2013, the GRC granted the extension to comply with the Council's Order.

On October 7, 2013, prior to the expiration of the extended time frame, the Custodian submitted to the GRC nine (9) copies of the records, a document index and certified confirmation of compliance. The Custodian further certified that no index was provided for the minutes because the basis for the redacted material is contained next to each redaction.

Therefore, the Custodian complied with the Council's September 24, 2013 Interim Order because she submitted nine (9) copies of the 49 records at issue to the GRC along with a document index and submitted certified confirmation of compliance to the Executive Director within the extended time frame to comply.

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

OPRA provides that the definition of a government record “. . . shall not include . . . inter-agency or intra-agency advisory, consultative, or deliberative [(“ACD”)] material.” When this exception is invoked, a governmental entity may “withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated.” Educ. Law Center v. N.J. Dep't of Educ., 198 N.J. 274, 285 (2009)(citing NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975)). The custodian claiming an exception to the disclosure requirements under OPRA on this basis must initially satisfy two conditions: (1) the document must be pre-decisional, meaning that the document was generated prior to the adoption of the governmental entity's policy or decision; and (2) the document must reflect the deliberative process, which means that it must contain opinions, recommendations, or advice about agency policies. Id. at 286 (internal citations and quotations omitted).

The key factor in this determination is whether the contents of the document reflect “formulation or exercise of . . . policy-oriented judgment or the process by which policy is formulated.” Id. at 295 (adopting the federal standard for determining whether material is “deliberative” and quoting Mapother v. Dep't of Justice, 3 F.3d 1533, 1539 (D.C. Cir. 1993)). Once the governmental entity satisfies these two threshold requirements, a presumption of confidentiality is established, which the requester may rebut by showing that the need for the materials overrides the government's interest in confidentiality. Id. at 286-87.

Similarly, OPRA exempts access to “. . . any record within the attorney-client privilege.” N.J.S.A. 47:1A-1.1. Further, “[t]he provisions of [OPRA] shall not abrogate or erode any . . . grant of confidentiality . . . recognized by . . . court rule.” N.J.S.A. 47:1A-9(b). As such, OPRA does not allow for the disclosure of attorney work product, consisting of “the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.” Rule 4:10-2(c).

In the context of public entities, these privileges extend to communications between the public body, the attorney retained to represent it, necessary intermediaries and agents through whom communications are conveyed, and co-litigants who have employed a lawyer to act for them in a common interest. *See* Tractenberg v. Twp. Of W. Orange, 416 N.J. Super. 354, 376 (App. Div. 2010); In re Env'tl. Ins. Declaratory Judgment Actions, 259 N.J. Super. 308, 313 (App. Div. 1992). At the same time, the attorney-client and work product privileges do not apply to automatically and completely insulate attorney correspondence from disclosure. *See* Hunterdon Cnty. P.B.A. Local 188 v. Twp. of Franklin, 286 N.J. Super. 389, 394; In the Matter of Grand Jury Subpoenas, 241 N.J. Super. 18, 30 (App. Div. 1989).

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

<b>Record No.</b>	<b>Record Name/Date</b>	<b>Description of Record or Redaction</b>	<b>Custodian's Explanation/ Citation for Non-disclosure or Redactions</b>	<b>Findings of the <i>In Camera</i> Examination<sup>12</sup></b>
1.	March 2, 2011 executive session minutes	All entries under specific headings redacted.	Entries marked as "not related to shared services."	Redacting information "not related to" a request is not a lawful basis to deny access to records under OPRA. <b>Thus, the Custodian unlawfully redacted these minutes and must disclose same.</b>
2.	April 6, 2011 executive session minutes	All entries under specific headings redacted.	Entries marked as "not related to shared services."	Redacting information "not related to" a request is not a lawful basis to deny access to records under OPRA. <b>Thus, the Custodian unlawfully redacted these minutes and must disclose same.</b>
3.	April 20, 2011 executive session minutes	All entries under specific headings redacted.	4 of 5 entries marked as "not related to shared services." The 5 <sup>th</sup> entry ("Shared Services") is presumably denied as ACD material and/or attorney-	Redacting information "not related to" a request is not a lawful basis to deny access to records under OPRA. <b>Thus, the Custodian unlawfully redacted those portions of the minutes and must</b>

<sup>12</sup> **Unless expressly identified for redaction, everything in the record shall be disclosed.** For purposes of identifying redactions, unless otherwise noted a paragraph/new paragraph begins whenever there is an indentation and/or a skipped space(s). The paragraphs are to be counted starting with the first whole paragraph in each record and continuing sequentially through the end of the record. If a record is subdivided with topic headings, renumbering of paragraphs will commence under each new topic heading. Sentences are to be counted in sequential order throughout each paragraph in each record. Each new paragraph will begin with a new sentence number. If only a portion of a sentence is to be redacted, the word in the sentence which the redaction follows or precedes, as the case may be, will be identified and set off in quotation marks. If there is any question as to the location and/or extent of the redaction, the GRC should be contacted for clarification before the record is redacted. The GRC recommends the redactor make a paper copy of the original record and manually "black out" the information on the copy with a dark colored marker, then provide a copy of the blacked-out record to the requester.

			client privilege; however, no notation was made.	<b>disclose same.</b> Regarding the 5 <sup>th</sup> entry (Shared Services), there is nothing therein that discloses pre-decisional recommendations, opinions, or advice as to shared services. <b>Thus, the Custodian unlawfully redacted this portion of the minutes and must disclose same.</b>
4.	May 4, 2011 executive session minutes	All entries under specific headings redacted.	2 of 3 entries marked as “not related to shared services.” The 3 <sup>rd</sup> entry (“Shared Services”) is presumably denied as ACD material and/or attorney-client privilege; however, no notation was made.	Redacting information “not related to” a request is not a lawful basis to deny access to records under OPRA. <b>Thus, the Custodian unlawfully redacted those portions of the minutes and must disclose same.</b> Regarding the 3 <sup>rd</sup> entry (Shared Services), there is nothing in the first sentence that discloses pre-decisional recommendations, opinions, or advice as to shared services. <b>Thus, the Custodian unlawfully denied access to the first sentence under the “Shared Services” heading and must disclose same.</b> However, the remainder of the entry contains Counsel’s advice to the Township. Thus, the Custodian lawfully denied access to the

				remainder of the entry under the attorney-client privilege exemption. <u>N.J.S.A. 47:1A-6.</u>
5.	May 18, 2011 executive session minutes	All entries under specific headings redacted.	Entries marked as “not related to shared services.”	Redacting information “not related to” a request is not a lawful basis to deny access to records under OPRA. <b>Thus, the Custodian unlawfully redacted these minutes and must disclose same.</b>
6.	June 1, 2011 executive session minutes	All entries under specific headings redacted.	Entries marked as “not related to shared services.”	Redacting information “not related to” a request is not a lawful basis to deny access to records under OPRA. <b>Thus, the Custodian unlawfully redacted these minutes and must disclose same.</b>
7.	June 15, 2011 executive session minutes	All entries under specific headings redacted.	Entries marked as “not related to shared services.”	Redacting information “not related to” a request is not a lawful basis to deny access to records under OPRA. <b>Thus, the Custodian unlawfully redacted these minutes and must disclose same.</b>
8.	July 6, 2011 executive session minutes	All entries under specific headings redacted.	Entries marked as “not related to shared services.”	Redacting information “not related to” a request is not a lawful basis to deny access to records under OPRA. <b>Thus, the Custodian unlawfully redacted these minutes and must disclose same.</b>
9.	July 20, 2011 executive session minutes	All entries under specific headings redacted.	4 of 5 entries marked as “not related to shared services.” The 5 <sup>th</sup> entry (“Shared	Redacting information “not related to” a request is not a lawful basis to deny access to records under OPRA.

			Services”) is presumably denied as ACD material and/or attorney-client privilege; however, no notation was made.	<p><b>Thus, the Custodian unlawfully redacted those portions of the minutes and must disclose same.</b></p> <p>Regarding the 5<sup>th</sup> entry (Shared Services), there is nothing in the 1<sup>st</sup> sentence that discloses recommendations, opinions, or advice as to shared services.</p> <p><b>Thus, the Custodian unlawfully denied access to the first sentence under the “Shared Services” heading and must disclose same.</b></p> <p>However, the remainder of the entry includes pre-decisional recommendations and opinions that are ACD in nature. Thus, the Custodian lawfully denied access to the remainder of the entry.</p> <p><u>N.J.S.A. 47:1A-6.</u></p>
10.	August 3, 2011 executive session minutes	All entries under specific headings redacted.	4 of 5 entries marked as “not related to shared services.” The 5 <sup>th</sup> entry (“Shared Services”) is presumably denied as ACD material and/or attorney-client privilege; however, no notation was made.	<p>Redacting information “not related to” a request is not a lawful basis to deny access to records under OPRA.</p> <p><b>Thus, the Custodian unlawfully redacted those portions of the minutes and must disclose same.</b></p> <p>Regarding the 5<sup>th</sup> entry (Shared Services), the entry includes pre-decisional recommendations and opinions that are ACD</p>

				in nature. Thus, the Custodian lawfully denied access to the remainder of the entry. <u>N.J.S.A. 47:1A-6.</u>
11.	August 17, 2011 executive session minutes	All entries under specific headings redacted.	5 of 6 entries marked as “not related to shared services.” The 6 <sup>th</sup> entry (“High Bridge Police”) is presumably denied as ACD material and/or attorney-client privilege; however, no notation was made.	Redacting information “not related to” a request is not a lawful basis to deny access to records under OPRA. <b>Thus, the Custodian unlawfully redacted those portions of the minutes and must disclose same.</b> Regarding the 6 <sup>th</sup> entry (High Bridge Police), there is nothing in the 1 <sup>st</sup> sentence that discloses recommendations, opinions, or advice as to the High Bridge Police. <b>Thus, the Custodian unlawfully denied access to the first sentence under the “High Bridge Police” heading and must disclose same.</b> However, the remainder of the entry includes pre-decisional opinions that are ACD in nature. Thus, the Custodian lawfully denied access to the remainder of the entry. <u>N.J.S.A. 47:1A-6.</u>
12.	September 7, 2011 executive session minutes	All entries under specific headings redacted.	Entries marked as “not related to shared services.”	Redacting information “not related to” a request is not a lawful basis to deny access to records under OPRA. <b>Thus, the Custodian unlawfully redacted</b>



				<b>these minutes and must disclose same.</b>
13.	September 21, 2011 executive session minutes	All entries under specific headings redacted.	Entries marked as “not related to shared services.”	Redacting information “not related to” a request is not a lawful basis to deny access to records under OPRA. <b>Thus, the Custodian unlawfully redacted these minutes and must disclose same.</b>
14.	October 5, 2011 executive session minutes	All entries under specific headings redacted.	4 of 5 entries marked as “not related to shared services.” The 5 <sup>th</sup> entry (“Potential Litigation - Hyland”) is presumably denied as ACD material and/or attorney-client privilege; however, no notation was made.	Redacting information “not related to” a request is not a lawful basis to deny access to records under OPRA. <b>Thus, the Custodian unlawfully redacted those portions of the minutes and must disclose same.</b> Regarding the 5 <sup>th</sup> entry (Potential Litigation – Hyland), there is nothing in the 1 <sup>st</sup> sentence that discloses recommendations, opinions, or advice as to the Hyland litigation. <b>Thus, the Custodian unlawfully denied access to the first sentence under the “Potential Litigation – Hyland” heading and must disclose same.</b> However, the remainder of the entry includes pre-decisional opinions that are ACD in nature and advice of Counsel. Thus, the Custodian lawfully denied access to the remainder of the entry.

				<u>N.J.S.A.</u> 47:1A-6.
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1.	Memorandum from Mr. McBriar to Mr.Selvaggi dated April 15, 2011.	Memo providing advice on issue of interlocal agreements and application to the Tax Collector issue.	Denied in entirety: ACD material and attorney-client privilege. <u>N.J.S.A.</u> 47:1A-1.1.	The memo is exempt because it contains attorney-client and work product privileged material, the disclosure of which would reveal legal advice, strategy, or work product. <u>N.J.S.A.</u> 47:1A-1.1. Thus, the Custodian lawfully denied access to the attachment. <u>N.J.S.A.</u> 47:1A-6.
2.	Memorandum from previous Counsel to current Counsel dated April 27, 2011.	Memo providing advice on shared services and application to the Tax Collector issue.	Denied in entirety: ACD material and attorney-client privilege. <u>N.J.S.A.</u> 47:1A-1.1.	The memo is exempt because it contains attorney-client and work product privileged material, the disclosure of which would reveal legal advice, strategy, or work product. <u>N.J.S.A.</u> 47:1A-1.1. Thus, the Custodian lawfully denied access to the attachment. <u>N.J.S.A.</u> 47:1A-6.

1.	E-mail from Mr. Landon to unknown (undated).	The Council need not review this record because the Custodian certified on October 7, 2013, that this record was an attachment to the redacted September 29, 2011 memorandum previously provided to the Complainant.		
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1.	E-mail from Mr. Selvaggi to current Counsel dated	Discussion of issues in shared services	Denied in entirety: ACD material and attorney-client	The e-mail is exempt because it contains work product
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	December 5, 2011 (3:13pm) <b>*Note: Record No. 2 included in chain.</b>	litigation.	privilege. <u>N.J.S.A. 47:1A-1.1.</u>	privileged material the disclosure of which would reveal legal advice, strategy, or work product. <u>N.J.S.A. 47:1A-1.1.</u> Thus, the Custodian lawfully denied access to the remainder of the e-mail message. <u>N.J.S.A. 47:1A-6.</u>
2.	E-mail from current Counsel to Mr. Selvaggi dated December 3, 2011 (11:11am)	Discussion of issues in shared services litigation.	Denied in entirety: ACD material and attorney-client privilege. <u>N.J.S.A. 47:1A-1.1.</u>	The e-mail is exempt because it contains attorney-client and work product privileged material, the disclosure of which would reveal legal advice, strategy, or work product. <u>N.J.S.A. 47:1A-1.1.</u> Thus, the Custodian lawfully denied access to the remainder of the e-mail message. <u>N.J.S.A. 47:1A-6.</u>
3.	E-mail from Mr. Landon to Patti Hammer, Mr. Selvaggi, Brian Wunder, the Custodian, Patricia Schriver and Ron Milkowski dated November 18, 2011 (8:31am) <b>*Note: Record No. 6 included in chain.</b>	Mr. Landon states "Thanks."	Denied in entirety: ACD material and attorney-client privilege. <u>N.J.S.A. 47:1A-1.1.</u>	The e-mail does not contain attorney-client or work product privileged material. The information is general enough that it does not reveal any legal advice, strategy, or work product and is not exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u> <b>The Custodian must disclose the e-mail.</b>
4.	E-mail from Mr. Landon to the Custodian dated November 18, 2011 (2:17pm) <b>*Note: Record</b>	Mr. Landon provides scheduling information.	Denied as ACD material. <u>N.J.S.A. 47:1A-1.1.</u>	The second sentence of the e-mail beginning "Kay" does not appear to relate to official business and thus is not subject to disclosure.

	<b>Nos. 3, 5 and 6 included in chain.</b>			<u>N.J.S.A.</u> 47:1A-1.1. However, the remainder of the e-mail does not contain attorney-client or work product privileged material. The information is general enough that it does not reveal any legal advice, strategy, or work product and is not exempt from disclosure pursuant to <u>N.J.S.A.</u> 47:1A-1.1. <b>The Custodian must disclose the e-mail redacting the second sentence.</b>
5.	E-mail from the Custodian to Mr. Landon dated November 18, 2011 (1:51pm)	Discussion of issues in shared services litigation.	Denied as ACD material. <u>N.J.S.A.</u> 47:1A-1.1.	The 1 <sup>st</sup> paragraph of the e-mail contains includes pre-decisional recommendations and opinions that are ACD in nature. Thus, the Custodian lawfully denied access to the 1 <sup>st</sup> paragraph. <u>N.J.S.A.</u> 47:1A-6. However, the 2 <sup>nd</sup> paragraph contains not such information. <b>The Custodian must disclose the e-mail redacting the 1<sup>st</sup> paragraph.</b>
6.	E-mail from Ms. Hammer to Mr. Landon; Mr. Selvaggi, Mr. Wunder, the Custodian, Ms. Schriver and Mr. Milkowski dated November 14, 2011 (4:33pm)	Ms. Hammer refers Mr. Cushing's letter to all copied parties.	Denied as ACD material and attorney-client privilege. <u>N.J.S.A.</u> 47:1A-1.1.	The e-mail does not contain ACD material. Further, the e-mail does not contain attorney-client privileged information. The information is general enough that it does not reveal any legal advice, strategy, or work product.

				<u>N.J.S.A. 47:1A-1.1.</u> <b>The Custodian must disclose the e-mail.</b>
7.	Letter from current Counsel to Mr. Landon, Mr. Selvaggi, Mayor, Township Committee and the Custodian dated November 14, 2011 (1 page) <b>Note: Attachment of Record No. 6.</b>	Discussion of issues in shared services litigation.	Denied as ACD material and attorney-client privilege. <u>N.J.S.A. 47:1A-1.1.</u>	The letter is exempt because it contains attorney-client and work product privileged material, the disclosure of which would reveal legal advice, strategy, or work product. <u>N.J.S.A. 47:1A-1.1.</u> Thus, the Custodian lawfully denied access to same. <u>N.J.S.A. 47:1A-6.</u>
8.	E-mail from current Counsel to Mr. Landon and Mr. Selvaggi dated November 2, 2011 (11:27am)(with attachment).	Discussion of shared services tax collector agreement.	Denied as ACD material. <u>N.J.S.A. 47:1A-1.1.</u>	The e-mail contains pre-decisional recommendations and opinions that are ACD in nature. Additionally, the attachment is a draft document exempt as ACD material. <u>Parave-Fogg v. Lower Alloways Creek Twp., GRC Complaint No. 2006-51 (August 2006).</u> Thus, the Custodian lawfully denied access to these records. <u>N.J.S.A. 47:1A-6.</u>
9.	E-mail from Ms. Hammer to the Custodian, Mr. Landon and Mr. Selvaggi dated October 21, 2011 (9:44am)(with attachment).	Discussion of shared services tax collector agreement.	Denied as ACD material. <u>N.J.S.A. 47:1A-1.1.</u>	The e-mail contains pre-decisional recommendations and opinions that are ACD in nature. Additionally, the attachment is a draft document exempt as ACD material. <u>Parave-Fogg, GRC 2006-51.</u> Thus, the Custodian lawfully denied access to these records. <u>N.J.S.A.</u>

				47:1A-6.
10.	E-mail from Mr. Landon to Mr. Selvaggi and current Counsel dated October 20, 2011 (11:10am)(with attachment).	Discussion of shared services tax collector agreement.	Denied as ACD material. <u>N.J.S.A.</u> 47:1A-1.1.	The e-mail contains pre-decisional recommendations and opinions that are ACD in nature. Additionally, the attachment is a draft document exempt as ACD material. <u>Parave-Fogg, GRC 2006-51.</u> Thus, the Custodian lawfully denied access to attachment. <u>N.J.S.A.</u> 47:1A-6.
11.	E-mail from Mr. Landon to Mr. Selvaggi and current Counsel dated October 19, 2011 (3:23pm)(with attachment). <b>*Note: Record Nos. 12 and 13 included in chain.</b>	Discussion of shared services tax collector agreement.	Denied as ACD material. <u>N.J.S.A.</u> 47:1A-1.1.	The e-mail contains pre-decisional recommendations and opinions that are ACD in nature. Additionally, the attachment is a draft document exempt as ACD material. <u>Parave-Fogg, GRC 2006-51.</u> Thus, the Custodian lawfully denied access to these records. <u>N.J.S.A.</u> 47:1A-6.
12.	E-mail from Mr. Landon to current Counsel dated October 19, 2011 (1:59pm).	Discussion of shared services tax collector agreement.	Denied as ACD material and attorney-client privilege. <u>N.J.S.A.</u> 47:1A-1.1.	The e-mail contains pre-decisional recommendations and opinions that are ACD in nature. Thus, the Custodian lawfully denied access to these records. <u>N.J.S.A.</u> 47:1A-6.
13.	E-mail from current Counsel to Mr. Landon, Mr. Selvaggi and the Custodian dated October 19, 2011 (1:36pm)(with attachment).	Discussion of shared services tax collector agreement.	Denied as ACD material and attorney-client privilege. <u>N.J.S.A.</u> 47:1A-1.1.	The e-mail is exempt because it contains attorney-client and work product privileged material, the disclosure of which would reveal legal advice, strategy, or

				work product. <u>N.J.S.A. 47:1A-1.1.</u> Additionally, the attachment is a draft document exempt as ACD material. <u>Parave-Fogg, GRC 2006-51.</u> Thus, the Custodian lawfully denied access to same. <u>N.J.S.A. 47:1A-6.</u>
14.	E-mail from Mr. Landon to current Counsel, Mr. Selvaggi and the Custodian dated October 19, 2011 (1:41pm). <b>*Note: Record No. 13 included in chain (See above).</b>	Mr. Landon states "Thanks."	Denied as ACD material and attorney-client privilege. <u>N.J.S.A. 47:1A-1.1.</u>	The e-mail does not contain ACD or attorney-client privileged material. <u>N.J.S.A. 47:1A-1.1</u> <b>The Custodian must disclose the e-mail.</b>
15.	E-mail from current Counsel to Mr. Landon and Mr. Selvaggi dated October 11, 2011 (1:23pm) <b>*Note: Record No. 16 included in chain.</b>	Discussion of shared services tax collector agreement.	Denied as ACD material and attorney-client privilege. <u>N.J.S.A. 47:1A-1.1.</u>	The e-mail contains pre-decisional recommendations and opinions that are ACD in nature. Further, the e-mail includes attorney-client privileged information consisting of legal advice, strategy, or work product. Thus, the Custodian lawfully denied access to these records. <u>N.J.S.A. 47:1A-6.</u>
16.	E-mail from Mr. Landon to Mr. Selvaggi and current Counsel dated October 11, 2011 (12:04pm)(with attachments)	Discussion of shared services tax collector agreement.	Denied as ACD material and attorney-client privilege. <u>N.J.S.A. 47:1A-1.1.</u>	The e-mail is exempt because it contains attorney-client and work product privileged material, the disclosure of which would reveal legal advice, strategy, or work product. <u>N.J.S.A.</u>

				47:1A-1.1. Additionally, the attachment is a draft document exempt as ACD material. <u>Parave-Fogg</u> , GRC 2006-51. Thus, the Custodian lawfully denied access to same. <u>N.J.S.A.</u> 47:1A-6.
17.	E-mail from Mr. Landon to current Counsel and Mr. Selvaggi dated October 11, 2011 (9:18am) <b>*Note: Record Nos. 18 and 20 included in chain.</b>	Discussion of shared services tax collector agreement.	Denied as ACD material and attorney-client privilege. <u>N.J.S.A.</u> 47:1A-1.1.	The e-mail contains pre-decisional recommendations and opinions that are ACD in nature. Thus, the Custodian lawfully denied access to these records. <u>N.J.S.A.</u> 47:1A-6.
18.	E-mail from current Counsel to Mr. Landon and Mr. Selvaggi dated October 9, 2011 (12:44pm). <b>*Note: Record No. 20 included in chain.</b>	Discussion of shared services tax collector agreement.	Denied as ACD material and attorney-client privilege. <u>N.J.S.A.</u> 47:1A-1.1.	The e-mail contains pre-decisional recommendations and opinions that are ACD in nature. Further, the e-mail includes attorney-client privileged information consisting of legal advice, strategy, or work product. Thus, the Custodian lawfully denied access to these records. <u>N.J.S.A.</u> 47:1A-6.
19.	E-mail from Mr. Landon to Mr. Selvaggi and current Counsel dated October 6, 2011 (3:56pm). <b>*Note: Record No. 21 included in chain.</b>	Discussion of shared services tax collector agreement.	Denied as ACD material and attorney-client privilege. <u>N.J.S.A.</u> 47:1A-1.1.	The e-mail contains pre-decisional recommendations and opinions that are ACD in nature. Thus, the Custodian lawfully denied access to these records. <u>N.J.S.A.</u> 47:1A-6.
20.	E-mail from Mr. Landon to Mr. Selvaggi and	Discussion of shared services tax collector	Denied as ACD material and attorney-client	The e-mail contains pre-decisional recommendations and



	current Counsel dated October 6, 2011 (3:01pm)(with attachment).	agreement.	privilege. <u>N.J.S.A. 47:1A-1.1.</u>	opinions that are ACD in nature. Thus, the Custodian lawfully denied access to these records. <u>N.J.S.A. 47:1A-6.</u> The GRC notes that the attachment is the Kay Winzenried memo that was previously provided to the Complainant with redactions.
21.	E-mail from Mr. Landon to Mr. Selvaggi and current Counsel dated October 6, 2011 (2:40pm).	Discussion of shared services tax collector agreement.	Denied as ACD material and attorney-client privilege. <u>N.J.S.A. 47:1A-1.1.</u>	The e-mail contains pre-decisional recommendations and opinions that are ACD in nature. Further, the e-mail includes attorney-client privileged information consisting of legal advice, strategy, or work product. Thus, the Custodian lawfully denied access to these records. <u>N.J.S.A. 47:1A-6.</u>
22.	E-mail from current Counsel to Mr. Landon, Mr. Selvaggi and George Piazza dated October 6, 2011 (1:44pm) <b>*Note: Record No. 21 included in chain (See above).</b>	Discussion of shared services tax collector agreement.	Denied as ACD material and attorney-client privilege. <u>N.J.S.A. 47:1A-1.1.</u>	The e-mail does not contain ACD or attorney-client privileged material. <u>N.J.S.A. 47:1A-1.1</u> <b>The Custodian must disclose the e-mail.</b>
23.	E-mail from Mr. Landon to the Custodian dated July 6, 2011 (8:27am). <b>*Note: Record Nos. 24 and 26</b>	Discussion of shared services tax collector agreement.	Denied as ACD material. <u>N.J.S.A. 47:1A-1.1.</u>	The e-mail contains pre-decisional recommendations and opinions that are ACD in nature. Thus, the Custodian lawfully denied access to these

	<b>included in chain (See below).</b>			records. <u>N.J.S.A. 47:1A-6.</u>
24.	E-mail from the Custodian to Mr. Landon dated July 6, 2011 (8:29am). <b>*Note: Record Nos. 23 and 26 included in chain.</b>	Discussion of shared services tax collector agreement.	Denied as ACD material. <u>N.J.S.A. 47:1A-1.1.</u>	The 1 <sup>st</sup> , 2 <sup>nd</sup> and 4 <sup>th</sup> sentence and of the e-mail do not contain pre-decisional recommendations and opinions that are ACD in nature. However, the 3 <sup>rd</sup> sentence does; thus, the Custodian lawfully denied access to this portion of the e-mail. <u>N.J.S.A. 47:1A-6.</u> <b>The Custodian must disclose the e-mail redacting the 3<sup>rd</sup> sentence.</b>
25.	E-mail from Mr. Landon to the Custodian dated July 6, 2011 (3:25pm). <b>*Note: Record Nos. 23 and 26 included in chain.</b>	Discussion of shared services tax collector agreement.	Denied as ACD material. <u>N.J.S.A. 47:1A-1.1.</u>	A majority of the e-mail contains pre-decisional recommendations and opinions that are ACD in nature. The “p.s.” portion of the e-mail; however, is not ACD in nature. <b>The Custodian must disclose the e-mail redacting all but the “p.s.” portion.</b>
26.	E-mail from the Custodian to Mr. Landon dated July 5, 2011 (4:07pm).	Discussion of shared services tax collector agreement.	Denied as ACD material. <u>N.J.S.A. 47:1A-1.1.</u>	A majority of the e-mail contains pre-decisional recommendations and opinions that are ACD in nature. The “Happy 4th” portion of the e-mail; however, is not ACD in nature. <b>The Custodian must disclose the e-mail redacting all but the “Happy 4th” portion.</b>
27.	E-mail from current Counsel to Mr. Landon dated	Discussion of shared services tax collector	Denied as ACD material and attorney-client	The e-mail and attachment are exempt because they contain

	May 5, 2011 (2:47pm)(with attachment).	agreement.	privilege. <u>N.J.S.A. 47:1A-1.1.</u>	attorney-client and work product privileged material, the disclosure of which would reveal legal advice, strategy, or work product. <u>N.J.S.A. 47:1A-1.1.</u> Thus, the Custodian lawfully denied access to same. <u>N.J.S.A. 47:1A-6.</u>
28.	E-mail from current Counsel to Mr. Landon dated May 4, 2011 (10:49am).	Discussion of shared services tax collector agreement.	Denied as ACD material and attorney-client privilege. <u>N.J.S.A. 47:1A-1.1.</u>	The e-mail is exempt because it contains attorney-client and work product privileged material, the disclosure of which would reveal legal advice, strategy, or work product. <u>N.J.S.A. 47:1A-1.1.</u> Thus, the Custodian lawfully denied access to same. <u>N.J.S.A. 47:1A-6.</u>
29.	E-mail from current Counsel to Mr. Landon dated April 26, 2011 (3:39pm). <b>*Note: Record Nos. 30, 31 and 32 included in chain (See below).</b>	Discussion of shared services tax collector agreement.	Denied as ACD material and attorney-client privilege. <u>N.J.S.A. 47:1A-1.1.</u>	The e-mail is exempt because it contains attorney-client and work product privileged material, the disclosure of which would reveal legal advice, strategy, or work product. <u>N.J.S.A. 47:1A-1.1.</u> Thus, the Custodian lawfully denied access to same. <u>N.J.S.A. 47:1A-6.</u>
30.	E-mail from Mr. Landon to current Counsel dated April 26, 2011 (3:15pm) <b>*Note: Record Nos. 29, 31 and 32 included in chain.</b>	Discussion of shared services tax collector agreement.	Denied as ACD material and attorney-client privilege. <u>N.J.S.A. 47:1A-1.1.</u>	The e-mail is exempt because it contains attorney-client and work product privileged material, the disclosure of which would reveal legal advice, strategy, or work product. <u>N.J.S.A.</u>

				47:1A-1.1. Thus, the Custodian lawfully denied access to same. <u>N.J.S.A. 47:1A-6.</u>
31.	E-mail from current Counsel to Mr. Landon dated April 26, 2011 (3:12pm)(with attachment). <b>*Note: Record No. 32 included in chain (See below).</b>	Discussion of shared services tax collector agreement.	Denied as ACD material and attorney-client privilege. <u>N.J.S.A. 47:1A-1.1.</u>	The e-mail does not contain ACD or attorney-client privileged material. <u>N.J.S.A. 47:1A-1.1</u> <b>The Custodian must disclose the e-mail.</b> However, the attachment is exempt because it contains attorney-client and work product privileged material, the disclosure of which would reveal legal advice, strategy, or work product. <u>N.J.S.A. 47:1A-1.1.</u> Thus, the Custodian lawfully denied access to the attachment. <u>N.J.S.A. 47:1A-6.</u>
32.	E-mail from current Counsel to Mr. Landon dated April 26, 2011 (8:44pm). <b>*Note: Record No. 31 included in chain (See above).</b>	Discussion of shared services tax collector agreement.	Denied as ACD material and attorney-client privilege. <u>N.J.S.A. 47:1A-1.1.</u>	The e-mail is exempt because it contains attorney-client and work product privileged material, the disclosure of which would reveal legal advice, strategy, or work product. <u>N.J.S.A. 47:1A-1.1.</u> Thus, the Custodian lawfully denied access to same. <u>N.J.S.A. 47:1A-6.</u>

Additionally, consistent with N.J.S.A. 47:1A-5(g), if the custodian of a government record asserts that part of a particular record is exempt from public access pursuant to OPRA, the custodian must delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and must promptly permit access to the remainder of the record.

Thus, the Custodian must disclose all other portions of the 31 requested e-mails to the Complainant (i.e. sender, recipients, date, time, subject, and salutations where applicable). As to these portions of the requested e-mails, the Custodian has unlawfully denied access. *See Ray v. Freedom Academy Charter School (Camden)*, GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010).

## **GRC Complaint No. 2012-228 – Tewksbury Custodian**

### **Compliance**

On September 24, 2013, the Council ordered the Custodian to submit nine (9) copies of responsive records for an *in camera* review and further to provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.

On September 25, 2013, the Council distributed its Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. The Custodian received the Council's Order on the same day; thus, October 2, 2013 was the last day to comply. On September 30, 2013, the Custodian's Counsel sought an extension until October 8, 2013 to respond. On October 2, 2013, the GRC granted the extension to comply with the Council's Order.

On October 7, 2013, prior to the expiration of the extended time frame, the Custodian submitted to the GRC nine (9) copies of the records and certified confirmation of compliance.

Therefore, the Custodian complied with the Council's September 24, 2013 Interim Order because she submitted nine (9) copies of the records at issue to the GRC and submitted certified confirmation of compliance to the Executive Director within the extended time frame to comply.

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

The GRC first notes that it will not address the two (2) memoranda and undated e-mail because it has already been determined that the memoranda are exempt from disclosure and the Complainant previously received the undated e-mail. The GRC conducted an *in camera* examination on the submitted records. The results of this examination are set forth in the following table:

<b>Record No.</b>	<b>Record Name/Date</b>	<b>Description of Record or Redaction</b>	<b>Custodian's Explanation/ Citation for Non-disclosure or Redactions</b>	<b>Findings of the <i>In Camera</i> Examination<sup>13</sup></b>
1.	April 12, 2011 executive session minutes	1 <sup>st</sup> paragraph: Personnel matter involving the tax collector position.  2 <sup>nd</sup> paragraph: Discussion of contract negotiation with Police.	1 <sup>st</sup> paragraph: ACD material, attorney-client privilege, pending litigation and personnel matters. <u>N.J.S.A. 47:1A-1.1</u> ; <u>N.J.S.A. 47:1A-9(a)</u> ; <u>N.J.S.A. 10:4-12(7)</u> ; <u>N.J.S.A. 10:4-12(8)</u> .  2 <sup>nd</sup> paragraph: attorney-client privilege, collective bargaining and personnel matters. <u>N.J.S.A. 47:1A-1.1</u> ; <u>N.J.S.A. 47:1A-9(a)</u> ; <u>N.J.S.A. 10:4-12(4)</u> ; <u>N.J.S.A. 10:4-12(8)</u> .	These entries are exempt per the cited exemptions. Both redacted paragraphs provide specific details into the tax collector position and Police contract negotiations. The Custodian has thus lawfully denied access to same. <u>N.J.S.A. 47:1A-6</u> .
2.	April 26, 2011 executive session minutes	N/A	No redactions.	These records were provided to the Complainant previously. Thus, the Custodian did not unlawfully deny access to this record because same were provided to the Complainant without

<sup>13</sup> **Unless expressly identified for redaction, everything in the record shall be disclosed.** For purposes of identifying redactions, unless otherwise noted a paragraph/new paragraph begins whenever there is an indentation and/or a skipped space(s). The paragraphs are to be counted starting with the first whole paragraph in each record and continuing sequentially through the end of the record. If a record is subdivided with topic headings, renumbering of paragraphs will commence under each new topic heading. Sentences are to be counted in sequential order throughout each paragraph in each record. Each new paragraph will begin with a new sentence number. If only a portion of a sentence is to be redacted, the word in the sentence which the redaction follows or precedes, as the case may be, will be identified and set off in quotation marks. If there is any question as to the location and/or extent of the redaction, the GRC should be contacted for clarification before the record is redacted. The GRC recommends the redactor make a paper copy of the original record and manually "black out" the information on the copy with a dark colored marker, then provide a copy of the blacked-out record to the requester.

				redactions.
3.	May 10, 2011 executive session minutes	<p>1<sup>st</sup> paragraph: Personnel matter involving the tax collector position.</p> <p>2<sup>nd</sup> paragraph: Notes that discussion of contract negotiation with Police and teachers took place.</p>	<p>1<sup>st</sup> paragraph: attorney-client privilege, pending litigation and personnel matters. <u>N.J.S.A. 47:1A-1.1</u>; <u>N.J.S.A. 47:1A-9(a)</u>; <u>N.J.S.A. 10:4-12(7)</u>; <u>N.J.S.A. 10:4-12(8)</u>.</p> <p>2<sup>nd</sup> paragraph: attorney-client privilege, collective bargaining and personnel matters. <u>N.J.S.A. 47:1A-1.1</u>; <u>N.J.S.A. 47:1A-9(a)</u>; <u>N.J.S.A. 10:4-12(4)</u>; <u>N.J.S.A. 10:4-12(8)</u>.</p>	<p>None of the exemptions apply to the redacted statements, which memorializes that discussions took place regarding the Tax Collector, Police contract and teacher's contract. These statements do not include any specifics or details warranting non-disclosure. <b>The Custodian must disclose these minutes without redactions.</b></p>
4.	September 13, 2011 executive session minutes	<p>1<sup>st</sup> paragraph: Noting receipt of litigation.</p> <p>2<sup>nd</sup> paragraph: Noting discussion of pending litigation.</p> <p>3<sup>rd</sup> paragraph: Discussion of contract negotiation with Police.</p> <p>4<sup>th</sup> paragraph: Noting discussion of pending litigation.</p>	<p>1<sup>st</sup> paragraph: attorney-client privilege and pending litigation. <u>N.J.S.A. 47:1A-1.1</u>; <u>N.J.S.A. 47:1A-9(a)</u>; <u>N.J.S.A. 10:4-12(7)</u>.</p> <p>2<sup>nd</sup> paragraph: pending litigation. <u>N.J.S.A. 47:1A-9(a)</u>; <u>N.J.S.A. 10:4-12(7)</u>.</p> <p>3<sup>rd</sup> paragraph: attorney-client privilege, collective bargaining and personnel matters. <u>N.J.S.A. 47:1A-1.1</u>; <u>N.J.S.A. 47:1A-9(a)</u>; <u>N.J.S.A. 10:4-12(4)</u>; <u>N.J.S.A. 10:4-12(8)</u>.</p> <p>4<sup>th</sup> paragraph: attorney-client privilege and pending litigation.</p>	<p>None of the exemptions apply to the redacted statements, which memorializes that discussions took place regarding the a court matter, citizen concern, and contract issues. These statements do not include any specifics or details warranting non-disclosure. <b>The Custodian must disclose these minutes without redactions.</b></p>

			<u>N.J.S.A. 47:1A-1.1</u> ; <u>N.J.S.A. 47:1A-9(a)</u> ; <u>N.J.S.A. 10:4-12(7)</u> .	
5.	October 25, 2011 executive session minutes	1 <sup>st</sup> paragraph: Personnel matter involving the tax collector position.  2 <sup>nd</sup> paragraph: Discussion of contract negotiation with Police.	1 <sup>st</sup> paragraph: ACD material, attorney-client privilege, pending litigation and personnel matters. <u>N.J.S.A. 47:1A-1.1</u> ; <u>N.J.S.A. 47:1A-9(a)</u> ; <u>N.J.S.A. 10:4-12(7)</u> ; <u>N.J.S.A. 10:4-12(8)</u> .  2 <sup>nd</sup> paragraph: attorney-client privilege, collective bargaining and personnel matters. <u>N.J.S.A. 47:1A-1.1</u> ; <u>N.J.S.A. 47:1A-9(a)</u> ; <u>N.J.S.A. 10:4-12(4)</u> ; <u>N.J.S.A. 10:4-12(8)</u> .	These entries are exempt per the cited exemptions. Both redacted paragraphs provide specific details into the tax collector position and Police contract negotiations. The Custodian has thus lawfully denied access to same. <u>N.J.S.A. 47:1A-6</u> .

The GRC notes that it previously discussed what constitutes an appropriate redaction. *See Wolosky v. Township of Randolph (Morris)*, GRC Complaint No. 2010-308 (Interim Order dated August 28, 2012 (*citing Wolosky v. Andover Regional School District (Sussex)*, GRC Complaint No. 2009-94 (April 2010)). In this matter, the Custodian appeared to employ a method of redaction in which she electronically deleted portions of the minutes prior to providing them to the Complainant, thus “whiting out” the sections asserted to be exempt from disclosure under OPRA. This method does not show a requestor the specific location of the redacted material or the volume of material redacted; thus, the specific location of the material underlying the redactions made was not visually obvious to the Complainant. Therefore, the Custodian’s method of “whiting out” the requested minutes is not a visually obvious method that shows the specific location of any redacted material in the record and is not appropriate under OPRA. N.J.S.A. 47:1A-5(g).

Additionally, the Custodian certified that Tewksbury is in possession of nine (9) of the 32 correspondence listed in Lebanon’s privilege log (record No. corresponding with Lebanon’s *in camera* table above). The Tewksbury Custodian must conform with the findings as noted in the Lebanon *in camera* table above:

2.	E-mail from current Counsel to Mr. Selvaggi dated December 3, 2011	Discussion of issues in shared services litigation.	Denied in entirety: ACD material and attorney-client privilege. <u>N.J.S.A. 47:1A-1.1</u> .	<i>See Council’s finding above.</i>
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	(11:11am)			
4.	E-mail from Mr. Landon to the Custodian dated November 18, 2011 (2:17pm) <b>*Note: Record Nos. 3, 5 and 6 included in chain (See Lebanon.</b>	Mr. Landon provides scheduling information.	Denied as ACD material. <u>N.J.S.A.</u> 47:1A-1.1.	<i>See Council's finding above.</i>
5.	E-mail from the Custodian to Mr. Landon dated November 18, 2011 (1:51pm)	Discussion of issues in shared services litigation.	Denied as ACD material. <u>N.J.S.A.</u> 47:1A-1.1.	<i>See Council's finding above.</i>
6.	E-mail from Ms. Hammer to Mr. Landon; Mr. Selvaggi, Mr. Wunder, the Custodian, Ms. Schriver and Mr. Milkowski dated November 14, 2011 (4:33pm)(with attachment)	Discussion of issues in shared services litigation.	Denied as ACD material and attorney-client privilege. <u>N.J.S.A.</u> 47:1A-1.1.	<i>See Council's finding above.</i>
8.	E-mail from current Counsel to Mr. Landon and Mr. Selvaggi dated November 2, 2011 (11:27am)(with attachment).	Discussion of shared services tax collector agreement.	Denied as ACD material. <u>N.J.S.A.</u> 47:1A-1.1.	<i>See Council's finding above.</i>
9.	E-mail from Ms. Hammer	Discussion of shared services tax	Denied as ACD material. <u>N.J.S.A.</u>	<i>See Council's finding above.</i>

	to the Custodian, Mr. Landon and Mr. Selvaggi dated October 21, 2011 (9:44am).	collector agreement.	47:1A-1.1.	
12.	E-mail from Mr. Landon to current Counsel dated October 19, 2011 (1:59pm).	Discussion of shared services tax collector agreement.	Denied as ACD material and attorney-client privilege. <u>N.J.S.A. 47:1A-1.1.</u>	See Council's finding above.
13.	E-mail from current Counsel to Mr. Landon, Mr. Selvaggi and the Custodian dated October 19, 2011 (1:36pm)(with attachment).	Discussion of shared services tax collector agreement.	Denied as ACD material and attorney-client privilege. <u>N.J.S.A. 47:1A-1.1.</u>	See Council's finding above.
18.	E-mail from current Counsel to Mr. Landon and Mr. Selvaggi dated October 9, 2011 (12:44pm). <b>*Note: Record No. 20 included in chain.</b>	Discussion of shared services tax collector agreement.	Denied as ACD material and attorney-client privilege. <u>N.J.S.A. 47:1A-1.1.</u>	See Council's finding above.

Further, as noted above for the Lebanon Custodian, the Tewksbury Custodian must disclose all other portions of the 9 requested e-mails to the Complainant (*i.e.* sender, recipients, date, time, subject, and salutations where applicable). As to these portions of the requested e-mails, the Custodian has unlawfully denied access. *See* Ray v. Freedom Academy Charter School (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010).

## **Knowing & Willful**

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

## **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

### **GRC Complaint No. 2012-227 – Lebanon Custodian**

1. The Custodian complied with the Council's September 24, 2013 Interim Order because she submitted nine (9) copies of the 47 records at issue to the GRC along with a document index and submitted certified confirmation of compliance to the Executive Director within the extended time frame to comply.
2. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.<sup>14</sup>**
3. The Custodian must disclose all other portions of the 31 requested e-mails to the Complainant (*i.e.* sender, recipients, date, time, subject, and salutations where applicable). As to these portions of the requested e-mails, the Custodian has unlawfully denied access. *See Ray v. Freedom Academy Charter School (Camden)*, GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010).
4. **The Custodian must comply with conclusion No. 3 within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.**

### **GRC Complaint No. 2012-228 – Tewksbury Custodian**

5. The Custodian complied with the Council's September 24, 2013 Interim Order because she submitted nine (9) copies of the records at issue to the GRC and submitted certified confirmation of compliance to the Executive Director within the extended time frame to comply.

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<sup>14</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.

6. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.<sup>15</sup>**
7. The Custodian must disclose all other portions of the 9 requested e-mails to the Complainant (*i.e.* sender, recipients, date, time, subject, and salutations where applicable). As to these portions of the requested e-mails, the Custodian has unlawfully denied access. *See Ray v. Freedom Academy Charter School (Camden)*, GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010).
8. **The Custodian must comply with conclusion No. 7 within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.**

**GRC Complaint Nos. 2012-227 and 2012-228**

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

Prepared By: Frank F. Caruso  
Senior Case Manager

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

June 17, 2014

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<sup>15</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

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CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Commissioner

INTERIM ORDER

September 24, 2013 Government Records Council Meeting

John Hyland  
Complainant

Complaint Nos. 2012-227 and 2012-228

v.

Township of Lebanon (Hunterdon) and  
Township of Tewksbury (Hunterdon)  
Custodian of Record

At the September 24, 2013 public meeting, the Government Records Council ("Council") considered the September 17, 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:

**GRC Complaint No. 2012-227 - Lebanon**

1. The GRC must conduct an *in camera* review of the records responsive to item Nos. 1, 3, 4 and 5 disputed in the Denial of Access Complaint to determine the validity of the Lebanon Custodian's assertion that the minutes, memoranda and correspondence are attorney-client privileged or contain inter-agency or intra-agency advisory, consultative or deliberative material exempt from disclosure under OPRA. *See Paff*, 379 N.J. Super. at 346; N.J.S.A. 47:1A-1.1.
2. **The Lebanon Custodian must deliver<sup>1</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 1 above), nine (9) copies of the redacted records, a document or redaction index<sup>2</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,<sup>3</sup> that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
3. The Lebanon Custodian did not bear her burden of proving that all redactions made to the September 29, 2011 memorandum responsive to item No. 2 were lawful because additional personnel information available for disclosure was contained within the memorandum. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-10. However, because the

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

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

<sup>3</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

Complainant is in possession of the full text of the record, the Council should decline to order disclosure of the memorandum as doing so "...does not ... advance the purpose of OPRA, which is to ensure an informed citizenry." Bart v. City of Paterson Housing Authority, 403 N.J. Super. 609, 618 (App. Div. 2008). The Council should further decline to address the validity of the memorandum as the validity of a record is not within the Council's authority to adjudicate. Katinsky v. River Vale Twp., GRC Complaint No. 2003-68 (November 2003).

#### **GRC Complaint No. 2012-228 - Tewksbury**

4. Although the Tewksbury Custodian responded to the Complainant's OPRA request in a timely manner, the Custodian's response is insufficient because she failed to provide a lawful basis for a denial. N.J.S.A. 47:1A-5(g); DeAppolonio, Esq. v. Borough of Deal (Monmouth), GRC Complaint No. 2008-62 (September 2009); Darata v. Monmouth Cnty. Bd. Of Chosen Freeholders, GRC Complaint No. 2009-312 (Interim Order dated February 24, 2011).
5. The GRC must conduct an *in camera* review of the five (5) sets of minutes responsive to item No. 1 disputed in the Denial of Access Complaint to determine the validity of the Tewksbury Custodian's assertion that the minutes are attorney-client privileged and/or contain inter-agency or intra-agency advisory, consultative or deliberative material and personnel matters. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9(a); N.J.S.A. 10:4-12. Additionally, because the GRC has already ordered the Lebanon Custodian to provide memoranda responsive to item Nos. 3, and 4 disputed in the Denial of Access Complaint for an *in camera* review, the GRC will render a determination on the validity of the asserted exemptions based on those records.
6. **The Tewksbury Custodian must deliver<sup>4</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 2 above), nine (9) copies of the redacted records, a document or redaction index<sup>5</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,<sup>6</sup> that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
7. The Tewksbury Custodian may have unlawfully denied access to responsive correspondence. N.J.S.A. 47:1A-6. The Custodian shall determine whether any of the 32 correspondence or additional responsive records are in her possession and provide a legal certification to the GRC advising as such. If no such records are maintained by Tewksbury, the Custodian must also certify to this fact.
8. **The Tewksbury Custodian shall comply with item No. 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**

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<sup>4</sup> The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

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

<sup>6</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

**each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>7</sup> to the Executive Director.<sup>8</sup>**

**GRC Complaint Nos. 2012-277 and 2012-228**

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

Interim Order Rendered by the  
Government Records Council  
On The 24th Day of September, 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: September 25, 2013**

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<sup>7</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>8</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  
September 24, 2013 Council Meeting**

**John Hyland<sup>1</sup>  
Complainant**

**GRC Complaint Nos. 2012-227 and 2012-228<sup>2</sup>**

**v.**

**Township of Lebanon (Hunterdon)<sup>3</sup>  
and Township of Tewksbury (Hunterdon)<sup>4</sup>  
Custodial Agencies**

**Records Relevant to Complaint:**

GRC Complaint No. 2012-227: Electronic via e-mail of unredacted copies of all records in the Township of Lebanon's ("Lebanon") possession including, but not limited to, correspondence, reports, e-mails, telephone logs and minutes of the executive session of any committee meeting that reflect, refer or relate to discussions of any Shared Service Agreement with any other township for January 1, 2011 to December 1, 2011. This request also includes any materials prepared by any member of the Township Committee, Custodian, Chief Financial Officer, Tax Collector, Road Supervisor and Township attorney. Specific meeting dates are 1) March 16, 2011; 2) April 6, 2011; 3) April 20, 2011; 4) May 4, 2011; 5) May 18, 2011; 6) June 1, 2011; 7) June 15, 2011; 8) July 6, 2011; 9) July 20, 2011; 10) August 3, 2011; 11) August 17, 2011; 12) September 7, 2011; 13) September 21, 2011; 14) October 5, 2011; 15) October 19, 2011; and 16) November 2, 2011.

GRC Complaint No. 2012-228: Electronic via e-mail of all records in the Township of Tewksbury's ("Tewksbury") possession including, but not limited to, correspondence, reports, e-mails, telephone logs and minutes of the executive session of any committee meeting that reflect, refer or relate to discussions of any Shared Service Agreement with any other township for January 1, 2011 to December 1, 2011. This request also includes any materials prepared by any member of the Township Committee, Custodian, Chief Financial Officer, Tax Collector, Road Supervisor, Township attorney, and Township Administrator. Specific meeting dates are 1) March 22, 2011; 2) April 12, 2011; 3) April 26, 2011; 4) May 11, 2011; 5) May 24, 2011; 6) June 14, 2011; 7) June 28, 2011; 8) July 12, 2011; 9) July 26, 2011; 10) August 9, 2011; 11) September 13, 2011; 12) September 27, 2011; 13) October 11, 2011; 14) October 25, 2011; 15) November 7, 2011; and 16) November 22, 2011.

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

<sup>2</sup> The GRC has consolidated these complaints for adjudication because of the commonality of the parties and/or issues.

<sup>3</sup> Represented by Lorraine Staples, Esq., of Gebhardt & Kiefer (Clinton, NJ).

<sup>4</sup> Represented by Katrina L. Campbell, Esq., of Courter, Kobert, & Cohen, PC (Hackettstown, NJ).

John Hyland v. Township of Lebanon (Hunterdon) & Township of Tewksbury (Hunterdon), 2012-227 & 2012-228 – Findings and Recommendations of the Executive Director



**Custodian of Record:** Karen J. Sandorse and Roberta A Brassard  
**Request Received by Custodian:** June 28, 2012 and June 28, 2012  
**Response Made by Custodian:** June 28, 2012 and July 10, 2012  
**GRC Complaint Received:** August 1, 2012 and August 2, 2012

### Background<sup>5</sup>

#### Request and Response:

##### GRC Complaint No. 2012-227:

On June 28, 2012, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On July 10, 2012, the Custodian responded in writing advising that the Complainant’s OPRA request is very similar to a previous request in which the Custodian already responded stating that no telephone logs exist and the Complainant’s request for e-mails was invalid. *See Wolosky v. Borough of Riverdale (Morris)*, GRC Complaint No. 2010-192 (October 2011). The Custodian stated that she can provide the Complainant with copies of the records previously provided, but that she will not disclose unredacted copies because that information is attorney-client privileged or inter-agency or intra-agency advisory, consultative or deliberative (“ACD”) material. The Custodian further stated that no additional records exist based on the Complainant’s addition of “Tax Collector.”

The Complainant responded that his current request sought unredacted records. The Complainant stated that once a nonpublic issue has concluded, the discussions contained in the minutes are no longer exempt. The Complainant stated that since a June court opinion voided a shared services agreement between Lebanon and Tewksbury, the minutes should be disclosed unredacted. The Complainant reiterated that he is requesting unredacted copies of all identified meeting minutes. The Complainant further stated that three (3) memoranda should be disclosed because the attorney-client privilege was negated when Lebanon obtained copies of the memoranda from Tewksbury. On July 13, 2012, the Complainant amended his request to seek minutes for 1) March 2, 2011; 2) March 16, 2011; 3) April 4, 2011; 4) April 20, 2011; 5) May 4, 2011; 6) May 18, 2011; 7) June 1, 2011; 8) June 15, 2011; 9) July 6, 2011; 10) July 20, 2011; 11) August 3, 2011; 12) August 17, 2011; 13) September 7, 2011; 14) September 21, 2011; and October 5, 2011. On July 23, 2012, the Custodian responded seeking a two (2) day extension.

##### GRC Complaint No. 2012-228:

On June 28, 2012, the Complainant submitted an OPRA request to the Custodian seeking the above-mentioned records. On June 28, 2012, the Custodian responded in writing stating that once she received confirmation from the Township Attorney that the Shared Tax Collector matter is completed, she would forward the Complainant the responsive records. The Complainant advised that the Custodian’s response is due within seven (7) business days and he would not grant her an extension. On July 2, 2012, the Custodian responded denying the

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<sup>5</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.  
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Complainant access to unredacted copies of the records sought because the Tax Collector matter did not result in a dismissal or resolution of all claims. On July 2, 2012, the Complainant disputed that the Custodian could deny access to any portions of minutes prior to October 4, 2011, because the Shared Tax Collector litigation was not pending until Tewksbury received notice of litigation dated October 4, 2011. On July 16, 2012, the Custodian stated that there are still pending claims regarding the Lebanon Tax Collector and thus she is unable to disclose the redacted portions of the minutes. The Complainant asked the Custodian to identify the specific lawful basis for denying access to the minutes. On July 18, 2012, the Custodian advised that she would review the minutes and determine which exemptions apply. The Complainant sought clarification as to whether the Custodian reviewed the minutes prior to denying access. The Complainant further stated that because a court opinion nullified the shared services resolutions and agreement between Tewksbury and Lebanon, there is no lawful basis by which the Custodian can deny access to those portions of the minutes.

#### Denial of Access Complaint:

On August 1 and 2, 2012, the Complainant filed GRC Complaint No. 2012-227 and 2012-228, respectively, with the Government Records Council (“GRC”). The Complainant states that he previously sought access to records in December 2011. The Complainant states that Lebanon provided redacted records stating that information was either not relevant to the Complainant’s OPRA request, exempt as ACD material, or exempt attorney-client privileged. The Complainant states that Tewksbury denied access stating that the Shared Tax Collector issue was still in litigation.

The Complainant states that on June 22, 2012, the Superior Court, Hunterdon County, voided all resolutions and a shared services agreement between Tewksbury and Lebanon for violating the Tenure Act. The Complainant states that he subsequently submitted OPRA requests to both Townships for unredacted copies of the same records and was denied access.

The Complainant states that these complaints are based on the Custodians’ denial of access to: (1) unredacted copies of the executive session meetings minutes from meetings for both Townships; (2) a memorandum from the Administrator of Tewksbury to the Tax Collector of Tewksbury dated September 29, 2011, regarding an offer for the position of Shared Tax Collector; (3) two (2) memoranda from Gebhardt & Keifer dated April 15, 2011 and April 27, 2011, discussing shared services for tax collectors; (4) an undated memorandum from Jesse Landon “FW: Tax Collector;” and (5) 32 correspondence records regarding the shared services Tax Collector. The Complainant asserts that items No. 2 through 5 were not identified by the Tewksbury Custodian, but he believes both are mutually available to each custodian for disclosure.

#### GRC Complaint No. 2012-227

The Complainant contends that the minutes should be disclosed without redactions because the resolutions were invalidated and the matter is concluded. The Complainant further argues that the attorney-client privilege applies to discussions after litigation has commenced and does not operate to retroactively exempt discussions prior to the onset of litigation. The

Complainant asserts that the minutes he requested all precede the filing of litigation and should be disclosed without redactions.

The Complainant contends that since the September 29, 2011 memorandum from the Administrator to the Tax Collector is a Tewksbury record, the Custodian cannot assert any privilege because it was waived when the memorandum was provided to the Township. The Complainant notes that Tewksbury provided the Complainant with an unredacted copy of what appears to be the same memorandum.<sup>6</sup>

The Complainant further contends that no attorney-client privilege to the two (2) Gebhardt & Kiefer memoranda applies because both were disclosed to Lebanon. The Complainant asserts that the attorney-client privilege was waived when the memoranda were disclosed to someone outside of the attorney-client relationship.

The Complainant argues that the responsive 31 e-mails and 1 letter should be disclosed for the same reason the redacted portions of the minutes should be disclosed: the Shared Tax Collector resolutions were deemed to be invalid and the matter has concluded. The Complainant further reiterates that the attorney-client exemption would not apply to the e-mails as they preceded litigation.

#### GRC Complaint No. 2012-228

The Complainant contends that the responsive minutes should be disclosed and that the Custodian's denial of access was unlawful. The Complainant contends that the term "active" is not a specific exemption identified in OPRA. The Complainant states that he subsequently received minutes for April 12, 2011, April 26, 2011, May 10, 2011, September 13, 2011 and October 25, 2011, in response to a separate OPRA request that appeared to be improperly redacted. The Complainant notes that the Custodian advised that no executive sessions occurred on the other dates; thus, those minutes are no longer at issue here.

The Complainant argues that the Custodian did not provide access to any other records; thus, he is relying on Lebanon's response to identify those records at issue. The Complainant contends that the two (2) Gebhardt & Kiefer memoranda should be in the possession of Tewksbury and cannot be exempt for the reasons stated above. The Complainant requests that the GRC order the Custodian to state whether the memoranda exist and disclose same. The Complainant further asserts that the Custodian should also be ordered to state whether the September 29, 2011 memorandum exists, identify all other notes prepared by Tewksbury regarding the Shared Tax Collector and disclose same to the Complainant.

The Complainant further argues that the Custodian did not acknowledge the existence of the 32 privilege log records and should be ordered to create a privilege log for all records and disclose those not exempt from disclosure.

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<sup>6</sup> The Complainant further requests that an independent investigation be launched into whether public records were tampered with because the date of the memorandum disclosed by Lebanon does not match the date of the memorandum disclosed by Tewksbury. However, the GRC has no authority over the content of a record. N.J.S.A. 47:1A-7(b).

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Regarding both complaints, the Complainant contends that Lebanon denied access to an unredacted copy of the September 29, 2011 memorandum and Tewksbury granted access to same; however, Tewksbury provided him with an unredacted memorandum dated August 5, 2011, that appears to contain the same exact content as the redacted September 29, 2011 memorandum. The Complainant questions why both memoranda were not identified as responsive to his OPRA requests and why each Township selectively chose to disclose different dated records that appear the same.

Statement of Information:

GRC Complaint No. 2012-227<sup>7</sup>

On November 6, 2012, the Lebanon Custodian filed a Statement of Information (“SOI”). The Custodian certifies that she received the Complainant’s OPRA request on June 28, 2012. The Custodian certifies that over the course of the next few weeks, the Custodian and Complainant exchanged e-mails regarding the availability of unredacted copies of the responsive records. The June 28, 2012 OPRA request was nearly identical to a prior OPRA request wherein the Custodian disclosed redacted copies of the records now at issue.

The Custodian states that the attorney-client privilege exemption is recognized by New Jersey statutes, rules and the courts. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9(b); N.J.S.A. 2A-84A-20(1); N.J.R.E. 504. The Custodian states that the privilege is applicable to communications between a public body and its attorney. Paff v. Div. of Law, 412 N.J. Super. 140 (App. Div. 2010). The Custodian further argues that the privilege is indefinite in duration (*citing* Rivard v. American Home Products, Inc., 391 N.J. Super. 129, 154 (App. Div. 2007)); thus, the fact that litigation ended does not affect the privilege. *See also* Keddie v. Rutgers, State Univ., 148 N.J. 36, 54 (1997).

The Custodian further states that OPRA exempts access to ACD material. N.J.S.A. 47:1A-1.1; In Re the Liquidation of Integrity Ins. Co., 165 N.J. 75, 88 (2000); Educ. Law Ctr. v. NJ Dep’t of Educ., 198 N.J. 274, 284 (2007); Mason v. City of Hoboken, 196 N.J. 51 (2008) at 65.

Meeting Minutes:

The Custodian contends that her redaction of the responsive minutes was appropriate. The Custodian contends that most of the redactions were for information that was not relevant to the Complainant’s OPRA request, which identified the topic “Shared Services Agreement.” The Custodian certifies that based on the initial request, six (6) sets of minutes contained shared services discussions for which redactions for attorney-client privileged and ACD material were lawful. N.J.S.A. 47:1A-1.1.

The Custodian asserts that Lebanon met in executive session to discuss the legal issues involved in creating a shared tax collector position and other shared positions as well as to obtain

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<sup>7</sup> On August 16, 2012, GRC Complaint No. 2012-227 was referred to mediation. On September 27, 2012, the complaint was referred back to the GRC for adjudication.  
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legal advice. The Custodian asserts that the Complainant attempted to compel disclosure in order to gain an advantage in on-going litigation between Lebanon and the Complainant's wife regarding the shared tax collector position. The Custodian contends that disclosure of the discussions would have opened Lebanon up to a waiver claim by voluntarily disclosing the information. The Custodian further asserts that she lawfully redacted the minutes under the ACD exemption because Lebanon used executive session to formulate a policy related to sharing services for the tax collector position and others.

#### Memoranda:

The Custodian argues that she lawfully denied access to redacted portions of the memoranda responsive to the OPRA request as attorney-client privileged. The Custodian contends that the attorney-client privilege was not waived when Tewksbury forwarded the responsive memoranda to Lebanon based on the common interest exception. O'Boyle v. Borough of Longport, 426 N.J. Super. 1 (App. Div. 2012); LaPorte v. Gloucester Cnty. Bd. of Chosen Freeholders, 349 N.J. Super. 254 (App. Div. 2001). The Custodian argues that the common interest exemption applied here because the Complainant's wife previously sued Lebanon over her position and litigation from the shared tax collector was a real possibility. The Complainant's wife eventually sued both Lebanon and Tewksbury in 2011 over the shared tax collector position. The Custodian certifies that the memoranda were exchanged to further the common interest of Lebanon and were not disclosed to any adverse parties.

The Custodian also notes that the September 29, 2011 memorandum is a personnel record exempt from disclosure under OPRA. N.J.S.A. 47:1A-10. The Custodian certifies that she provided the Complainant with a redacted copy of the memorandum to disclose name, title and salary as is required by OPRA. The Custodian argues that regardless of the fact that the person was not an employee of Lebanon, the exemption still applies to personnel records of "any individual" in the possession a public agency. The Custodian thus argues that because she possessed the memorandum, she was obligated to redact same in accordance with N.J.S.A. 47:1A-10. However, if the Custodian's interpretation of OPRA is misapplied, she is still required to safeguard a citizens personal information. N.J.S.A. 47:1A-1. The Custodian argues that the memorandum contains personal information that required redaction.

The Custodian further contends that the three (3) memoranda were part of the ACD discussions that occurred between Lebanon and Tewksbury. The Custodian asserts that the records aided executive session discussions focused on formulating a policy for the tax collector position.

#### Correspondence (E-mails and letter):

The Custodian states that the GRC has previously decided that a valid request for e-mails must contain 1) content and/or subject; 2) specific date or range of dates; 3) sender and/or recipient. Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (March 2010); Sandoval v. NJ State Parole Bd., GRC Complaint No. 2006-167 (October 2008). The Custodian contends that the Complainant's request for e-mails failed to identify specific recipients but a class of recipients. Wolosky v. Borough of Riverdale (Morris), GRC Complaint No. 2010-192

(October 2011). The Custodian notes that in Wolosky, the complainant sought e-mails “to and from each and every other Municipal Clerk in Morris County,” that the Council determined was invalid. The Custodian contends that the Complainant’s OPRA request here seeking e-mails with “any other townships” is clearly invalid. The Custodian further argues that the privilege log and e-mails attached to the complaint were in response to another request and are not at issue here.

#### GRC Complaint No. 2012-228

On October 4, 2012, the Tewksbury Custodian filed a Statement of Information (“SOI”). The Custodian certifies that she provided the Complainant with existing minutes for five (5) meetings with redactions for attorney-client privilege, ACD material and personnel matters. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9(a); N.J.S.A. 10:4-12. The Custodian certifies that the Complainant is the husband of the Lebanon Tax Collector, who sued both Townships over the Shared Tax Collector agreement that would have abolished the position in Lebanon. The Custodian certifies that although the Superior Court voided the agreement in June 2012, there were still extent issues of damages in the lawsuit.

The Custodian asserts that the Complainant submitted multiple OPRA requests starting in December 2011; however, all responsive records are exempt from disclosure. The Custodian asserts that the Complainant has been repeatedly advised that the records are exempt because of on-going litigation and that because she did not identify a specific provision in OPRA does not negate her denial of access.

#### Minutes:

The Custodian contends that the Complainant is not entitled to the discussions of the Committee, Administrator and Attorney. The Custodian argues that contrary to the Complainant’s assertion, the attorney-client privilege covers all discussions regarding the legality of an issue and not just once an issue has entered into litigation. N.J.S.A. 47:1A-1.1. The Custodian asserts that the discussions were also related to personnel issues surrounding the sharing of the Tax Collector position with Lebanon. N.J.S.A. 47:1A-9(a); N.J.S.A. 10:4-12.

#### Memoranda:

The Custodian contends that the memoranda between two (2) attorneys discussing the Shared Tax Collector agreement are exempt as attorney-client privileged material. The Custodian argues that sharing these records with Lebanon does not negate the privilege since both parties were in the process of negotiating the agreement. The Custodian asserts that because the status of the agreement is not fully resolved, disclosure of the records would waive the privilege and have a chilling effect on the use of shared services between the Townships going forward.

Regarding the September 29, 2011 memorandum, the Custodian certifies that the Complainant does not dispute that he was provided with the responsive record. The Custodian certifies that the August 5, 2011 memorandum she provided the Complainant and memorandum Lebanon provided different in date and letterhead included in the latter. The Custodian contends that she cannot explain the difference in date but that the Complainant has received the record

that Tewksbury was not technically required to disclose because it is a personnel record offering a position to a perspective employee.

Additional Submissions:

GRC Complaint No. 2012-227

On November 15, 2012, the Complainant disputed that the correspondence identified in the privilege log are part of this complaint. The Complainant contends that he believed he was denied access to unredacted copies of the correspondence and was not informed that he had to resubmit a request for same. The Complainant requests that the Council not require him to resubmit an OPRA request for the correspondence and make a determination based on the privilege log.

The Complainant further contends that the common-interest exception does not apply to the memoranda shared with Lebanon. The Complainant argues that at the time the memoranda were composed and shared with Lebanon, no agreement was in place until November 9, 2011, and no litigation was pending until December 2011. The Complainant further asserts that Tewksbury has repeatedly claimed they have no liability in the Tax Collector litigation because she was an employee of Lebanon and Tewksbury's only interest is saving money by sharing services.

GRC Complaint No. 2012-228

On October 5, 2012, the Complainant argued that the court's decision voiding the shared services agreement resolved the question of whether that agreement superseded the Tenure Act. The Complainant contends that since this issue was resolved, Tewksbury's legal opinions are now moot. The Complainant further argues that the Custodian did not address the 31 e-mails and 1 letter in her SOI. The Complainant argues that absent a written agreement to enter into a joint venture between the Townships preceding the memorandums, the Custodian has acknowledged that the records were shared outside the attorney-client privilege relationship and waived same. The Complainant further reiterates that the court's ruling effectively ended all litigation regarding the shared services agreement.

Analysis<sup>8</sup>

GRC Complaint No. 2012-227 – Lebanon Custodian

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

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<sup>8</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.  
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“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.

Regarding item Nos. 1, 3, 4 and 5 indicated in the Denial of Access Complaint at issue, in Paff v. NJ Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the Complainant appealed a final decision of the GRC<sup>9</sup> dismissing the complaint by accepting the custodian’s legal conclusion for the denial of access without further review. The Court stated that “OPRA contemplates the GRC’s meaningful review of the basis for an agency’s decision to withhold government records...When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers.” Id. The Court also stated that:

The statute also contemplates the GRC’s *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the ‘Open Public Meetings Act,’ N.J.S.A. 10:4-6 to -21, it also provides that the GRC ‘may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.’ N.J.S.A. 47:1A-7(f). This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.

Id. at 355.

Further, the Court stated that:

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

Id.

Here, the Complainant disputed the Lebanon Custodian’s denial of access to the responsive records or redacted portions of records. In the SOI, the Custodian contended that the responsive minutes and memoranda were attorney-client privileged and contained ACD material. N.J.S.A. 47:1A-1.1. The Custodian further asserted that she redacted portions of the minutes not relevant to the Complainant’s OPRA request. The Custodian further argued that the Complainant’s request for “e-mails” was invalid and that the privilege log attached to the denial of access complaint was in response to a previous OPRA request and not at issue here.

Regarding the item No. 5 composed of the 32 records contained in a privilege log the Complainant attached to his Denial of Access Complaint, the Custodian disputed that the records

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<sup>9</sup> Paff v. NJ Dep’t of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

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were at issue here. However, the evidence of record indicates that the OPRA request at issue here was similar to a request submitted in December 2011. Additionally, the Complainant's OPRA request does seek correspondence and e-mails regarding shared services agreements for a specific time frame. It is reasonable to conclude that these records are at issue here because they were at issue in December 2011, and the Complainant sought unredacted copies of same. Thus, the GRC will include these records as part of the universe of responsive records.

Therefore, the GRC must conduct an *in camera* review of the records responsive to item Nos. 1, 3, 4 and 5 disputed in the Denial of Access Complaint to determine the validity of the Lebanon Custodian's assertion that the minutes, memoranda and correspondence are attorney-client privileged or contain ACD material exempt from disclosure under OPRA. See Paff, 379 N.J. Super. at 346; N.J.S.A. 47:1A-1.1.

Regarding item No. 2, the Custodian redacted a majority of the record based on OPRA's privacy and personnel exemptions. N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-10. There is no need to perform an *in camera* review of the September 29, 2011 memorandum because the Tewksbury Custodian confirmed that the August 5, 2011 memorandum she provided is the same and thus can be reviewed to determine whether the Lebanon Custodian unlawfully denied access to the record.

The GRC is satisfied that the memorandum represented a job offering to the incoming Shared Tax Collector and can reasonably be construed as a personnel record. However, a review of both memoranda indicates that the Lebanon Custodian redacted certain information that is not exempt under OPRA. This information, including work hours considered payroll records, position description and type of pension, is expressly subject to disclosure under N.J.S.A. 47:1A-10. Jackson v. Kean University, GRC Complaint No. 2002-98 (Interim Order dated November 13, 2003)(describing the type of information included in a payroll records).

Therefore, the Lebanon Custodian did not bear her burden of proving that all redactions made to the September 29, 2011 memorandum responsive to item No. 2 were lawful because additional personnel information available for disclosure was contained within the memorandum. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-10. However, because the Complainant is in possession of the full text of the record, the Council should decline to order disclosure of the memorandum as doing so "...does not ... advance the purpose of OPRA, which is to ensure an informed citizenry." Bart v. City of Paterson Housing Authority, 403 N.J. Super. 609, 618 (App. Div. 2008). The Council should further decline to address the validity of the memorandum as the validity of a record is not within the Council's authority to adjudicate. Katinsky v. River Vale Twp., GRC Complaint No. 2003-68 (November 2003).

## **GRC Complaint No. 2012-228 – Tewksbury Custodian**

### **Sufficiency of Custodian's Response**

OPRA provides that if a "...custodian is unable to comply with a request for access, the custodian *shall indicate the specific basis therefor ... on the request form and promptly return it to the requestor*" N.J.S.A. 47:1A-5(g) (emphasis added). In DeAppolonio, Esq. v. Borough of

Deal (Monmouth), GRC Complaint No. 2008-62 (September 2009), the complainant argued in the Denial of Access Complaint that although the custodian responded in writing in a timely manner, the custodian failed to provide some of the records responsive and further failed to provide a specific lawful basis for denying access to said records.

In Darata v. Monmouth Cnty. Bd. Of Chosen Freeholders, GRC Complaint No. 2009-312 (Interim Order dated February 24, 2011), the Board denied access to the responsive records because of on-going litigation. The Council determined that:

[T]he original Custodian's response was legally insufficient because he failed to provide a specific lawful basis for said denial of access ... pending litigation is not a lawful basis for denial of access to records requested under OPRA ... [which] ... provides a statutory right of access to government records which is not in any way supplanted by pending or on[-]going litigation.

Id. at 8.

Here, the Custodian denied access to the responsive records based on on-going litigation. Thus, the Council's decision in Darata, applies here and the Custodian's response was insufficient.

Therefore, although the Tewksbury Custodian responded to the Complainant's OPRA request in a timely manner, the Custodian's response is insufficient because she failed to provide a lawful basis for a denial. N.J.S.A. 47:1A-5(g); DeAppolonio, GRC 2008-62; Darata, GRC 2009-312.

### **Unlawful Denial of Access**

As stated above, Paff, 379 N.J. Super. at 346, provides that the GRC may conduct an *in camera* review to determine the validity of an asserted exemption. In the SOI, the Custodian contended that the responsive five (5) sets of minutes were redacted for attorney-client privilege, ACD material and personnel matters. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9(a); N.J.S.A. 10:4-12.

Therefore, the GRC must conduct an *in camera* review of the five (5) sets of minutes responsive to item No. 1 disputed in the Denial of Access Complaint to determine the validity of the Tewksbury Custodian's assertion that the minutes are attorney-client privileged and/or contain ACD material and personnel matters. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9(a); N.J.S.A. 10:4-12. Additionally, because the GRC has already ordered the Lebanon Custodian to provide memoranda responsive to item Nos. 3, and 4 disputed in the Denial of Access Complaint for an *in camera* review, the GRC will render a determination on the validity of the asserted exemptions based on those records.

Regarding the 32 correspondence contained in the privilege log responsive to item No. 5 disputed in the Denial of Access Complaint, the Complainant contended that he believed the records were mutually available to both Custodians. The evidence of record here is silent on

whether the Tewksbury Custodian maintains these records or any other correspondence responsive to the Complainant's OPRA request

Thus, the Tewksbury Custodian may have unlawfully denied access to responsive correspondence. N.J.S.A. 47:1A-6. The Custodian shall determine whether any of the 32 correspondence or additional responsive records are in her possession and provide a legal certification to the GRC advising as such. If no such records are maintained by Tewksbury, the Custodian must also certify to this fact.

### **Knowing & Willful**

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

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

#### **GRC Complaint No. 2012-227 - Lebanon**

1. The GRC must conduct an *in camera* review of the records responsive to item Nos. 1, 3, 4 and 5 disputed in the Denial of Access Complaint to determine the validity of the Lebanon Custodian's assertion that the minutes, memoranda and correspondence are attorney-client privileged or contain inter-agency or intra-agency advisory, consultative or deliberative material exempt from disclosure under OPRA. *See Paff*, 379 N.J. Super. at 346; N.J.S.A. 47:1A-1.1.
2. **The Lebanon Custodian must deliver<sup>10</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 1 above), nine (9) copies of the redacted records, a document or redaction index<sup>11</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,<sup>12</sup> that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
3. The Lebanon Custodian did not bear her burden of proving that all redactions made to the September 29, 2011 memorandum responsive to item No. 2 were lawful because additional personnel information available for disclosure was contained within the memorandum. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-10. However, because the

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<sup>10</sup> The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

<sup>11</sup> The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

<sup>12</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."

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Complainant is in possession of the full text of the record, the Council should decline to order disclosure of the memorandum as doing so "...does not ... advance the purpose of OPRA, which is to ensure an informed citizenry." Bart v. City of Paterson Housing Authority, 403 N.J. Super. 609, 618 (App. Div. 2008). The Council should further decline to address the validity of the memorandum as the validity of a record is not within the Council's authority to adjudicate. Katinsky v. River Vale Twp., GRC Complaint No. 2003-68 (November 2003).

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4. Although the Tewksbury Custodian responded to the Complainant's OPRA request in a timely manner, the Custodian's response is insufficient because she failed to provide a lawful basis for a denial. N.J.S.A. 47:1A-5(g); DeAppolonio, Esq. v. Borough of Deal (Monmouth), GRC Complaint No. 2008-62 (September 2009); Darata v. Monmouth Cnty. Bd. Of Chosen Freeholders, GRC Complaint No. 2009-312 (Interim Order dated February 24, 2011).
5. The GRC must conduct an *in camera* review of the five (5) sets of minutes responsive to item No. 1 disputed in the Denial of Access Complaint to determine the validity of the Tewksbury Custodian's assertion that the minutes are attorney-client privileged and/or contain inter-agency or intra-agency advisory, consultative or deliberative material and personnel matters. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9(a); N.J.S.A. 10:4-12. Additionally, because the GRC has already ordered the Lebanon Custodian to provide memoranda responsive to item Nos. 3, and 4 disputed in the Denial of Access Complaint for an *in camera* review, the GRC will render a determination on the validity of the asserted exemptions based on those records.
6. **The Tewksbury Custodian must deliver<sup>13</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 2 above), nine (9) copies of the redacted records, a document or redaction index<sup>14</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,<sup>15</sup> that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
7. The Tewksbury Custodian may have unlawfully denied access to responsive correspondence. N.J.S.A. 47:1A-6. The Custodian shall determine whether any of the 32 correspondence or additional responsive records are in her possession and provide a legal certification to the GRC advising as such. If no such records are maintained by Tewksbury, the Custodian must also certify to this fact.

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<sup>13</sup> The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

<sup>14</sup> The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

<sup>15</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."

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8. **The Tewksbury Custodian shall comply with item No. 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>16</sup> to the Executive Director.<sup>17</sup>**

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

Prepared By: Frank F. Caruso  
Senior Case Manager

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

September 17, 2013

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<sup>16</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>17</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.

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