



**State of New Jersey**  
DEPARTMENT OF COMMUNITY AFFAIRS  
101 SOUTH BROAD STREET  
PO Box 819  
TRENTON, NJ 08625-0819

**PHILIP D. MURPHY**  
*Governor*

**LT. GOVERNOR SHEILA Y. OLIVER**  
*Commissioner*

**FINAL DECISION**

**October 30, 2018 Government Records Council Meeting**

Charles J. Femminella, Jr.  
Complainant

Complaint No. 2012-232

v.

City of Atlantic City (Atlantic)  
Custodian of Record

At the October 30, 2018 public meeting, the Government Records Council (“Council”) considered the October 23, 2018 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that the Council dismiss the complaint because the Complainant withdrew the matter via letter to the Office of Administrative Law on August 20, 2018. Therefore, no further adjudication 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 October, 2018

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: November 1, 2018**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Council Staff  
October 30, 2018 Council Meeting**

**Charles J. Femminella, Jr.<sup>1</sup>  
Complainant**

**GRC Complaint No. 2012-232**

v.

**City of Atlantic City (Atlantic)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:<sup>3</sup> Copies of:**

1. Copies of all bills, vouchers and checks for services rendered in 2009 by DeCotiis, Fitzpatrick, Cole & Wisler, LLP.
3. Copies of all bills, vouchers and checks for services rendered in 2010, 2011 and 2012 by Zarwin, Baum, DeVito, Kaplan, Schaer and Toddy, P.C.
7. All tax appeals filed by the City of Atlantic City to the Tax Court of New Jersey concerning tax years 2008 through [June 7] 2012.
11. A report and letter dated November 16, 2009, from Certified Valuations, Inc., addressed to Mayor Langford and the Assessor which suggested reducing assessed values for residential properties due to the reductions granted to similar properties by the Atlantic County Board of Taxation.

**Custodian of Records:** Rhonda Williams

**Request Received by Custodian:** June 11, 2012

**Response Made by Custodian:** June 21, 2012

**GRC Complaint Signed by Complainant:** July 31, 2012

**Background**

**January 28, 2014 Council Meeting:**

At its January 28, 2014 public meeting, the Government Records Council (“Council”) considered the January 21, 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:

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

<sup>2</sup> Represented by Karl Timbers, Esq. (Atlantic City, NJ).

<sup>3</sup> There were other records requested that are not relevant to this complaint.

1. The Custodian, Rhonda Williams, has not complied with the terms of the Council's October 29, 2013 Interim Order because she failed to disclose to the Complainant the records responsive to request items numbered 1, 3, 7 and 11; failed to refund the Complainant the prepaid copying fees; and failed to provide a detailed document index explaining the lawful basis for any redactions and provide certified confirmation of compliance to the Executive Director within five (5) business days from date of receipt of the Order. The Council thus finds that the Custodian, Rhonda Williams, is hereby in contempt of the Council's Order.
2. "The Council shall, pursuant to New Jersey Rules Governing the Courts, *R. 4:67-6*, have the authority to enforce compliance with the orders and decisions issued by the Council." N.J.A.C. 5:105-2.9(c). The Council's October 29, 2013 Interim Order is enforceable in the Superior Court if Complainant chooses that option. *R. 4:67-6*. As this complaint should be referred to the Office of Administrative Law for the limited purposes described within, the Council emphasizes that the issues as to the disclosure of the records responsive to request items numbered 1, 3 7 and 11, as well as the Council's directive that the Custodian shall refund the Complainant the \$317.80 he prepaid in copying fees have already been determined by the Council, and thus are not outstanding issues before the Office of Administrative Law.
3. The Custodian violated OPRA due to the following: (a) she did not bear her burden of proof that she timely responded to the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-6 (As such, her failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated period resulted in a "deemed" denial of the Complainant's OPRA request. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i)); (b) she failed to provide immediate access to the requested bills and vouchers in redacted or unredacted form, said bills and vouchers being subject to immediate access. N.J.S.A. 47:1A-5(e); (c) she denied access to the remaining records relevant to the complaint and failed to provide a legal reason for denying such access; (d) she refused to refund the Complainant the \$317.80 he prepaid in copying fees for which she was unable to provide a proper accounting; and (e) she failed to comply with the terms of the Council's October 29, 2013 Interim Order, and as such is in contempt of said Order. Accordingly, based on the evidence of record, the Custodian's actions appear to be intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. Therefore, this complaint should be referred to the Office of Administrative Law for a determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denying access under the totality of the circumstances.

#### Procedural History:

On January 29, 2014, the Council distributed its January 28, 2014 Interim Order to all parties. On February 9, 2015, the complaint was transmitted to the Office of Administrative Law ("OAL"). On February 2, 2016, the complaint was transmitted from the OAL to the Council, categorized as a withdrawal by the Complainant. On March 10, 2016, the complaint was

transmitted back to the OAL because the Complainant had not properly withdrawn the complaint from either the Council or the OAL, and the Council had not requested return of the complaint pursuant to N.J.A.C. 1:1-3.3(a). On August 20, 2018, the Complainant faxed a letter to the OAL withdrawing the complaint. On September 18, 2018, the OAL returned the complaint back to the GRC marked “withdrawn.”

### **Analysis**

No analysis required.

### **Conclusions and Recommendations**

The Council Staff respectfully recommends the Council dismiss the complaint because the Complainant withdrew the matter via letter to the Office of Administrative Law on August 20, 2018. Therefore, no further adjudication is required.

Prepared By: John E. Stewart

October 23, 2018



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

January 28, 2014 Government Records Council Meeting

Charles J. Femminella, Jr.  
Complainant

Complaint No. 2012-232

v.

City of Atlantic City (Atlantic)  
Custodian of Record

At the January 28, 2014 public meeting, the Government Records Council (“Council”) considered the January 21, 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:

1. The Custodian, Rhonda Williams, has not complied with the terms of the Council’s October 29, 2013 Interim Order because she failed to disclose to the Complainant the records responsive to request items numbered 1, 3, 7 and 11; failed to refund the Complainant the prepaid copying fees; and failed to provide a detailed document index explaining the lawful basis for any redactions and provide certified confirmation of compliance to the Executive Director within five (5) business days from date of receipt of the Order. The Council thus finds that the Custodian, Rhonda Williams, is hereby in contempt of the Council’s Order.
2. “The Council shall, pursuant to New Jersey Rules Governing the Courts, *R. 4:67-6*, have the authority to enforce compliance with the orders and decisions issued by the Council.” N.J.A.C. 5:105-2.9(c). The Council’s October 29, 2013 Interim Order is enforceable in the Superior Court if Complainant chooses that option. *R. 4:67-6*. As this complaint should be referred to the Office of Administrative Law for the limited purposes described within, the Council emphasizes that the issues as to the disclosure of the records responsive to request items numbered 1, 3 7 and 11, as well as the Council’s directive that the Custodian shall refund the Complainant the \$317.80 he prepaid in copying fees have already been determined by the Council, and thus are not outstanding issues before the Office of Administrative Law.
3. The Custodian violated OPRA due to the following: (a) she did not bear her burden of proof that she timely responded to the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-6 (As such, her failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated period resulted in a “deemed” denial of the Complainant’s OPRA request. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i)); (b) she failed to provide immediate access to the requested bills and



vouchers in redacted or unredacted form, said bills and vouchers being subject to immediate access. N.J.S.A. 47:1A-5(e); (c) she denied access to the remaining records relevant to the complaint and failed to provide a legal reason for denying such access; (d) she refused to refund the Complainant the \$317.80 he prepaid in copying fees for which she was unable to provide a proper accounting; and (e) she failed to comply with the terms of the Council's October 29, 2013 Interim Order, and as such is in contempt of said Order. Accordingly, based on the evidence of record, the Custodian's actions appear to be intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. Therefore, this complaint should be referred to the Office of Administrative Law for a determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denying access under the totality of the circumstances.

Interim Order Rendered by the  
Government Records Council  
On The 28<sup>th</sup> Day of January, 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: January 29, 2014**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
January 28, 2014 Council Meeting**

**Charles J. Femminella, Jr.<sup>1</sup>  
Complainant**

**GRC Complaint No. 2012-232**

v.

**City of Atlantic City (Atlantic)<sup>2</sup>  
Custodial Agency**

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7. All tax appeals filed by the City of Atlantic City to the Tax Court of New Jersey concerning tax years 2008 through [June 7] 2012.
11. A report and letter dated November 16, 2009, from Certified Valuations, Inc., addressed to Mayor Langford and the Assessor which suggested reducing assessed values for residential properties due to the reductions granted to similar properties by the Atlantic County Board of Taxation.

**Custodian of Records:** Rhonda Williams

**Request Received by Custodian:** June 11, 2012

**Response Made by Custodian:** June 21, 2012

**GRC Complaint Signed by Complainant:** July 31, 2012

**Background**

At its October 29, 2013 public meeting, the Government Records Council (“Council”) considered the October 22, 2013 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i),

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

<sup>2</sup> Represented by Benjamin Kaufman, Esq. (Atlantic City, NJ).

<sup>3</sup> There were other records requested that are not relevant to this complaint.

Charles J. Femminella, Jr. v. City of Atlantic City (Atlantic), 2012-232 – Supplemental Findings and Recommendations of the Executive Director

and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). Additionally, the Custodian violated N.J.S.A. 47:1A-5(e) by failing to provide immediate access to the requested bills and vouchers.

2. The Custodian has failed to bear her burden of proving that the denial of access to request items numbered 1 and 3 was authorized by law. N.J.S.A. 47:1A-6. Therefore, the Custodian must immediately disclose said records to the Complainant. *See* Wilcox v. Twp. Of West Caldwell, GRC Complaint No. 2003-142 (June 2004).
3. The Custodian has failed to bear her burden of proving that the denial of access to request items numbered 7 and 11 was authorized by law. N.J.S.A. 47:1A-6. Therefore, the Custodian must disclose said records to the Complainant.
4. Since the Custodian was unable to provide a proper accounting for use of the Complainant's prepaid copying fees, and since the Complainant asserted that only some of the copies provided to him were of records responsive to his request, the Custodian must refund the Complainant the \$317.80 he prepaid in copying fees. The Custodian may subsequently charge the Complainant for copies of records responsive to the Complainant's request pursuant to N.J.S.A. 47:1A-5(b) and the terms of this Order.
5. **The Custodian shall comply with paragraph numbers 2, 3 and 4 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

#### Procedural History:

On October 30, 2013, the Council distributed its October 29, 2013 Interim Order to all parties.

#### Analysis

#### Compliance

On October 29, 2013, the Council ordered the above-referenced compliance. On October 30, 2013, the Council distributed its Interim Order to the parties. The Order provided that the Custodian shall immediately disclose to the Complainant immediate access records in request items numbered 1 and 3. N.J.S.A. 47:1A-5(e). The Order also directed the Custodian to disclose to the Complainant within five (5) business days from receipt of the Council's Order request



items numbered 7 and 11. The Order further directed the Custodian to refund the Complainant the \$317.80 he prepaid in copying fees, but reserved for the Custodian the opportunity to subsequently charge the Complainant for copies of records responsive to the Complainant's request pursuant to N.J.S.A. 47:1A-5(b) and the terms of the Council's Order. Finally, the Order required the Custodian to include a detailed document index explaining the lawful basis for any redactions and to provide certified confirmation of compliance to the Executive Director within five (5) business days from receipt thereof. As November 7, 2013 was the deadline date for compliance with the Council's Order, the Custodian failed to comply with the terms of the Council's October 29, 2013 Interim Order.

Accordingly, the Custodian has not complied with the terms of the Council's October 29, 2013 Interim Order because she failed to disclose to the Complainant the records responsive to request items numbered 1, 3 7 and 11; failed to refund the Complainant the prepaid copying fees; and failed to provide a detailed document index explaining the lawful basis for any redactions and provide certified confirmation of compliance to the Executive Director within five (5) business days from date of receipt of the Order. The Council thus finds that the Custodian, Rhonda Williams, is hereby in contempt of the Council's Order.

### **Council's October 29, 2013 Interim Order is Enforceable**

"The Council shall, pursuant to New Jersey Rules Governing the Courts, *R. 4:67-6*, have the authority to enforce compliance with the orders and decisions issued by the Council." N.J.A.C. 5:105-2.9(c). The Council's October 29, 2013 Interim Order is enforceable in the Superior Court if Complainant chooses that option. *R. 4:67-6*. As this complaint should be referred to the Office of Administrative Law ("OAL") for the limited purposes described below, the Council emphasizes that the issues as to the disclosure of the records responsive to request items numbered 1, 3 7 and 11, as well as the Council's directive that the Custodian shall refund the Complainant the \$317.80 he prepaid in copying fees have already been determined by the Council, and thus are not outstanding issues before the OAL.

### **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)); and 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)).

Here, the Custodian violated OPRA due to the following: (a) she did not bear her burden of proof that she timely responded to the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-6 (As such, her failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated period resulted in a "deemed" denial of the Complainant's OPRA request. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i).); (b) she failed to provide immediate access to the requested bills and vouchers in redacted or unredacted form, said bills and vouchers being subject to immediate access. N.J.S.A. 47:1A-5(e); (c) she denied access to the remaining records relevant to the complaint and failed to provide a legal reason for denying such access; (d) she refused to refund the Complainant the \$317.80 he prepaid in copying fees for which she was unable to provide a proper accounting; and (e) she failed to comply with the terms of the Council's October 29, 2013 Interim Order, and as such is in contempt of said Order. Accordingly, based on the evidence of record, the Custodian's actions appear to be intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. Therefore, this complaint should be referred to OAL for a determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denying access under the totality of the circumstances.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian, Rhonda Williams, has not complied with the terms of the Council's October 29, 2013 Interim Order because she failed to disclose to the Complainant the records responsive to request items numbered 1, 3, 7 and 11; failed to refund the Complainant the prepaid copying fees; and failed to provide a detailed document index explaining the lawful basis for any redactions and provide certified confirmation of compliance to the Executive Director within five (5) business days from date of receipt of the Order. The Council thus finds that the Custodian, Rhonda Williams, is hereby in contempt of the Council's Order.
2. "The Council shall, pursuant to New Jersey Rules Governing the Courts, *R. 4:67-6*, have the authority to enforce compliance with the orders and decisions issued by the Council." N.J.A.C. 5:105-2.9(c). The Council's October 29, 2013 Interim Order is enforceable in the Superior Court if Complainant chooses that option. *R. 4:67-6*. As this complaint should be referred to the Office of Administrative Law for the limited

purposes described within, the Council emphasizes that the issues as to the disclosure of the records responsive to request items numbered 1, 3 7 and 11, as well as the Council's directive that the Custodian shall refund the Complainant the \$317.80 he prepaid in copying fees have already been determined by the Council, and thus are not outstanding issues before the Office of Administrative Law.

3. The Custodian violated OPRA due to the following: (a) she did not bear her burden of proof that she timely responded to the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-6 (As such, her failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated period resulted in a "deemed" denial of the Complainant's OPRA request. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i)); (b) she failed to provide immediate access to the requested bills and vouchers in redacted or unredacted form, said bills and vouchers being subject to immediate access. N.J.S.A. 47:1A-5(e); (c) she denied access to the remaining records relevant to the complaint and failed to provide a legal reason for denying such access; (d) she refused to refund the Complainant the \$317.80 he prepaid in copying fees for which she was unable to provide a proper accounting; and (e) she failed to comply with the terms of the Council's October 29, 2013 Interim Order, and as such is in contempt of said Order. Accordingly, based on the evidence of record, the Custodian's actions appear to be intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. Therefore, this complaint should be referred to the Office of Administrative Law for a determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denying access under the totality of the circumstances.

Prepared By: John E. Stewart, Esq.

Approved By: Dawn R. SanFilippo, Esq.  
Senior Counsel

January 21, 2014



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

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

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Commissioner

INTERIM ORDER

October 29, 2013 Government Records Council Meeting

Charles J. Femminella, Jr.  
Complainant

Complaint No. 2012-232

v.

City of Atlantic City (Atlantic)  
Custodian of Record

At the October 29, 2013 public meeting, the Government Records Council (“Council”) considered the October 22, 2013 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). Additionally, the Custodian violated N.J.S.A. 47:1A-5(e) by failing to provide immediate access to the requested bills and vouchers.
2. The Custodian has failed to bear her burden of proving that the denial of access to request items numbered 1 and 3 was authorized by law. N.J.S.A. 47:1A-6. Therefore, the Custodian must immediately disclose said records to the Complainant. *See* Wilcox v. Twp. Of West Caldwell, GRC Complaint No. 2003-142 (June 2004).
3. The Custodian has failed to bear her burden of proving that the denial of access to request items numbered 7 and 11 was authorized by law. N.J.S.A. 47:1A-6. Therefore, the Custodian must disclose said records to the Complainant.
4. Since the Custodian was unable to provide a proper accounting for use of the Complainant’s prepaid copying fees, and since the Complainant asserted that only some of the copies provided to him were of records responsive to his request, the Custodian must refund the Complainant the \$317.80 he prepaid in copying fees. The Custodian may subsequently charge the Complainant for copies of records responsive to the Complainant’s request pursuant to N.J.S.A. 47:1A-5(b) and the terms of this Order.



5. **The Custodian shall comply with paragraph numbers 2, 3 and 4 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>1</sup> to the Executive Director.<sup>2</sup>**

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

Interim Order Rendered by the  
Government Records Council  
On The 29th Day of October, 2013

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: October 30, 2013**

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<sup>1</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

<sup>2</sup> Satisfactory compliance requires that the Custodian deliver the record(s) 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  
October 29, 2013 Council Meeting**

**Charles J. Femminella, Jr.<sup>1</sup>  
Complainant**

**GRC Complaint No. 2012-232**

v.

**City of Atlantic City (Atlantic)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:<sup>3</sup> Copies of:**

1. Copies of all bills, vouchers and checks for services rendered in 2009 by DeCotiis, Fitzpatrick, Cole & Wisler, LLP.
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**Custodian of Records:** Rhonda Williams

**Request Received by Custodian:** June 11, 2012

**Response Made by Custodian:** June 21, 2012

**GRC Complaint Signed by Complainant:** July 31, 2012

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

**Request and Response:**

On June 11, 2012, the Complainant's Open Public Records Act ("OPRA") request seeking the above-listed records was received by the Custodian. On June 21, 2012, the eighth

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

<sup>2</sup> Represented by Benjamin Kaufman, Esq. (Atlantic City, NJ).

<sup>3</sup> There were other records requested that are not relevant to this complaint. Also, the Complainant attached to his complaint a letter to Karl Timbers in the Atlantic City Solicitor's Office dated June 22, 2012, wherein he confirmed a telephone conversation with Mr. Timbers clarifying and reducing the Complainant's OPRA request items. The clarified items were subsequently listed in the "Records Denied" section of the complaint and further reduced in number to the present four (4) request items via e-mail from the Complainant to the GRC dated July 1, 2013. The parties have referred to the request items by the Complainant's original request item numbers; therefore, to avoid confusion the listed items are identified throughout with the original request item numbers.

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

(8<sup>th</sup>) business day following receipt of said request, Karl Timbers from the Atlantic City Solicitor's Office responded telephonically asking the Complainant to clarify some of the request items. Mr. Timbers also informed the Complainant that the Complainant had to submit \$300.00 to pay for the records he requested.

Denial of Access Complaint:

On July 31, 2012, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserts that his request was received by the Custodian on June 11, 2012. The Complainant further states that he received a telephone call from Karl Timbers on June 21, 2012, wherein the parties discussed the request items. The Complainant states that he agreed to eliminate some of the requested items, and to clarify some of the remaining items. The Complainant further states that Mr. Timbers informed him that fulfilling his request would require many pages of records; therefore, he would have to pay approximately \$300.00. The Complainant said that he agreed to pay \$300.00 for the records. The Complainant asserts that he sent Mr. Timbers a letter dated June 22, 2012, confirming their telephone conversation. The Complainant also asserts that he granted the Custodian a two (2) week extension of time to fulfill the request.

The Complainant states that on July 27, 2012 he received a package from the Custodian which contained "only a small fraction of the documents requested." The Complainant further states that on July 30, 2012, he asked Mr. Timbers if more records responsive to his request would be forthcoming and that Mr. Timbers told him that no further records would be disclosed because copies of bills, vouchers and checks are exempt from disclosure as attorney-client privileged material.

Statement of Information:

On August 24, 2012, the Custodian filed a Statement of Information ("SOI"). The Custodian certifies that she received the Complainant's OPRA request on June 11, 2012, and that she responded to the request on June 27, 2012.<sup>5</sup>

The Custodian certifies that the records responsive to request items numbered 1 and 3 are copies of bills, vouchers and checks for services rendered by DeCotiis, Fitzpatrick, Cole & Wisler, LLP in 2009, and Zarwin, Baum from 2010-2012, respectively. The Custodian certifies the records were denied as attorney-client privileged information pursuant to N.J.S.A. 47:1A-1.1. The Custodian also certifies that the records responsive to request item number 7 are copies of all tax appeals filed by the City to the Tax Court of New Jersey from 2008-2012 but does not give any reason for denying access. The Custodian further certifies that the record responsive to request item number 11 is a copy of a report and letter dated November 16, 2009, from Certified Valuations, Inc., addressed to Mayor Langford and the Assessor but does not give any reason for denying access.

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<sup>5</sup> The Custodian attached to the SOI a copy of the June 27, 2012 correspondence as Item #8. The alleged response is not a response to the request but rather an internal e-mail from Rosa Ramos to Rhonda Williams and Paula Geletei.

### Additional Information:

In a letter from the Complainant to the Custodian dated October 4, 2012, the Complainant informed the Custodian that he received some of the requested records but that some of the items in his request still remain unaddressed. In an e-mail from the Complainant to the GRC dated July 1, 2013, the Complainant confirms that he wants the GRC to adjudicate only request items numbered 1, 3, 7 and 11.

On August 1, 2013, the GRC requested from the Custodian a certification setting forth precisely how the Custodian applied the approximately \$300.00 she charged the Complainant. The GRC further advised the Custodian that she must indicate the number of copies corresponding to each of the Complainant's response items, and that failure to do so could result in an Order requiring the city to refund the Complainant's copying fees.

In a certification dated August 5, 2013, the Custodian certified that she charged the Complainant a total of \$317.80 for the requested records: \$297.25 in copying charges at \$0.05 per copy and \$20.28 shipping to forward the copies to the Complainant. The Custodian further certified that she is only able to account for 5,485 copies, which would total \$274.25 in copying charges; therefore she has authorized an overpayment refund to the Complainant in the amount of \$23.27.

On September 30, 2013, the GRC informed the Complainant of the content of the Custodian's August 5, 2013 certification and asked the Complainant if any of the 5,485 pages of records were responsive to his request. The GRC also asked the Complainant if he received the overpayment refund in the amount of \$23.27. On October 1, 2013, the Complainant e-mailed the GRC and stated that he did not receive the overpayment refund. The Complainant also stated that some of the records requested that were not relevant to the complaint were charged against his payment of \$317.80; however, the balance of the records for which he prepaid copying charges and which are the records relevant to the complaint, were never disclosed.<sup>6</sup>

### Analysis

#### Timeliness

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

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<sup>6</sup> The Complainant stated that he paid \$317.80 to the Custodian in prepayment of copying charges for the requested records by check no. 2957 dated September 20, 2012.

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



complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). Additionally, a custodian must ordinarily provide immediate access to bills and vouchers. N.J.S.A. 47:1A-5(e).

Here, the evidence of record reveals that Karl Timbers from the Atlantic City Solicitor's Office telephoned the Complainant on June 21, 2012, the eighth (8<sup>th</sup>) business day following receipt of the request, to ask the Complainant to clarify some of the request items. Mr. Timbers also informed the Complainant that the Complainant had to submit \$300.00 to pay for copies of the records he requested.

Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, supra. Additionally, the Custodian violated N.J.S.A. 47:1A-5(e) by failing to provide immediate access to the requested bills and vouchers.

### **Unlawful Denial of Access**

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

Request item number 1 - copies of all bills, vouchers and checks for services rendered in 2009 by DeCotiis, Fitzpatrick, Cole & Wisler, LLP.

Request item number 3 - copies of all bills, vouchers and checks for services rendered in 2010, 2011 and 2012 by Zarwin, Baum, DeVito, Kaplan, Schaer and Toddy, P.C.

The Custodian denied the Complainant access to the records responsive to request item numbers 1 and 3 because she certified the records were exempt from disclosure as attorney-client privileged information pursuant to N.J.S.A. 47:1A-1.1. Conversely, the Complainant asserts that he was unlawfully denied access to said records.

The Council has long held that attorney bills are not exempt from disclosure. In Wilcox v. Twp. Of West Caldwell, GRC Complaint No. 2003-142 (June 2004), the Council stated:

The custodian has invoked the attorney-client privilege exemption under OPRA. Specifically, OPRA provides that "[a] government record shall not include the following information which is deemed confidential for the purposes of [OPRA]: ... any record within the attorney-client privilege. This paragraph

shall not be construed as exempting from access attorney or consultant bills or invoices except that such bills or invoices may be redacted to remove any information protected by the attorney-client privilege.” N.J.S.A. 47:1A-1.1.

Furthermore, when a custodian does redact attorney billing records pursuant to the attorney-client privilege, a specific lawful basis must be set forth each such redaction. The issue of providing a specific lawful basis for redacting attorney billing records was addressed by the Council in Renna v. Union Cnty. Improvement Auth., GRC Complaint No. 2008-86 (May 2010). In Renna, the custodian provided the complainant with invoices responsive to the complainant’s OPRA request stating that information was redacted. The complainant filed a Denial of Access Complaint arguing that the custodian violated OPRA by failing to provide a specific lawful basis for the redactions made to the responsive invoices. The Council, noting that N.J.S.A. 47:1A-5(g) requires a custodian to indicate the specific basis for noncompliance with a request for access, held that the custodian violated OPRA by failing to provide the complainant with the specific legal basis for the redactions. *See also* Foregger v. Twp. of Berkeley Heights (Union), GRC Complaint No. 2012-114 (Interim Order February 26, 2013).

Accordingly, the Custodian has failed to bear her burden of proving that the denial of access to request items numbered 1 and 3 was authorized by law. N.J.S.A. 47:1A-6. Therefore, the Custodian must immediately disclose said records to the Complainant. *See* Wilcox, supra.

Request item number 7 - all tax appeals filed by the City of Atlantic City to the Tax Court of New Jersey concerning tax years 2008 through June 7, 2012.

Request item number 11 - a report and letter dated November 16, 2009, from Certified Valuations, Inc., addressed to Mayor Langford and the Assessor which suggested reducing assessed values for residential properties due to the reductions granted to similar properties by the Atlantic County Board of Taxation.

The Custodian certified that the following records were responsive to request item number 7: “copy of all tax appeals filed by the City to the Tax Court of NJ (2008-2012).” The Custodian further certified that the following records were responsive to request item number 11: “copy of a report and letter dated November 16, 2009 from Certified Valuations, Inc. and addressed to Mayor Langford and the Assessor.” The Custodian failed to provide any lawful reason for denying the Complainant access to the records responsive to request items number 7 and 11.

Accordingly, the Custodian has failed to bear her burden of proving that the denial of access to request items numbered 7 and 11 was authorized by law. N.J.S.A. 47:1A-6. Therefore, the Custodian must disclose said records to the Complainant.

OPRA provides that:

A copy or copies of a government record may be purchased by any person upon payment of the fee prescribed by law or regulation. Except as otherwise provided by law or regulation, the fee assessed for the duplication of a government record

embodied in the form of printed matter shall be \$ 0.05 per letter size page or smaller, and \$ 0.07 per legal size page or larger.

N.J.S.A. 47:1A-5(b).

There is no dispute between the parties that the Custodian demanded the Complainant prepay \$317.80 in copying charges for the requested records, which the Complainant paid by check on September 20, 2012. The Custodian certified that she delivered 5,485 copies of the records at \$0.05 per copy, but she failed to indicate the number of copies corresponding to each of the Complainant's response items as requested by the GRC. Therefore, the Custodian was unable to provide a proper accounting for use of the Complainant's funds to make copies of records responsive to the request. The Complainant stated that only some of the copies were records responsive to his request, and none of the records relevant to the complaint were copied and disclosed to him.

Accordingly, since the Custodian was unable to provide a proper accounting for use of the Complainant's prepaid copying fees, and since the Complainant asserted that only some of the copies provided to him were of records responsive to his request, the Custodian must refund the Complainant the \$317.80 he prepaid in copying fees. The Custodian may subsequently charge the Complainant for copies of records responsive to the Complainant's request pursuant to N.J.S.A. 47:1A-5(b) and the terms of this Order.

### **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.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). Additionally, the Custodian violated N.J.S.A. 47:1A-5(e) by failing to provide immediate access to the requested bills and vouchers.
2. The Custodian has failed to bear her burden of proving that the denial of access to request items numbered 1 and 3 was authorized by law. N.J.S.A. 47:1A-6. Therefore, the Custodian must immediately disclose said records to the Complainant. *See* Wilcox v. Twp. Of West Caldwell, GRC Complaint No. 2003-142 (June 2004).

3. The Custodian has failed to bear her burden of proving that the denial of access to request items numbered 7 and 11 was authorized by law. N.J.S.A. 47:1A-6. Therefore, the Custodian must disclose said records to the Complainant.
4. Since the Custodian was unable to provide a proper accounting for use of the Complainant's prepaid copying fees, and since the Complainant asserted that only some of the copies provided to him were of records responsive to his request, the Custodian must refund the Complainant the \$317.80 he prepaid in copying fees. The Custodian may subsequently charge the Complainant for copies of records responsive to the Complainant's request pursuant to N.J.S.A. 47:1A-5(b) and the terms of this Order.
5. **The Custodian shall comply with paragraph numbers 2, 3 and 4 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>8</sup> to the Executive Director.<sup>9</sup>**
6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: John E. Stewart, Esq.

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

October 22, 2013

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<sup>8</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>9</sup> Satisfactory compliance requires that the Custodian deliver the record(s) 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.