



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**

**December 20, 2013 Government Records Council Meeting**

Joel L. Shain, Esq. (On behalf of  
Richard Pucci, Mayor, & Monroe Township)  
Complainant

Complaint No. 2013-107

v.  
State of NJ, Office of the Governor  
Custodian of Record

At the December 20, 2013 public meeting, the Government Records Council (“Council”) considered the December 10, 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. Since the Custodian initially responded that no records responsive to request item Nos. 2, 4, 7 and 9 exist, and further certified in the Statement of Information that no records responsive to the Complainant’s OPRA request item Nos. 2, 3, 4, 7, 8 and 9 exist, and because the Complainant did not submit any evidence to refute the Custodian’s certifications, the Custodian did not unlawfully deny access to the requested records. *See Pusterhofer v. NJ Dep’t of Educ.*, GRC Complaint No. 2005-49 (July 2005).
2. The Custodian did not unlawfully deny access to the redacted information contained in the records provided under OPRA request item Nos. 5 and 10. *N.J.S.A.* 47:1A-9; Executive Order No. 26 (Gov. McGreevey, 2002).
3. The Custodian bore her burden of proving that she provided all mailing lists responsive to item No. 11 on February 22, 2013. *N.J.S.A.* 47:1A-6.
4. The Complainant’s request item Nos. 13, 14, 15, 16 and 17 are invalid requests requiring the Custodian to conduct research in order to determine whether any records were responsive to same. *Levine v. NJ Dep’t of Cmty. Affairs, Div. of Fire Safety*, GRC Complaint No. 2010-339 (Interim Order dated July 31, 2012); *MAG Entm’t, LLC v. Div. of ABC*, 375 *N.J. Super.* 534, 546 (App. Div. 2005); *Bent v. Stafford Police Dep’t*, 381 *N.J. Super.* 30, 37 (App. Div. 2005); *NJ Builders Assoc. v. NJ Council on Affordable Hous.*, 390 *N.J. Super.* 166, 178-79 (App. Div. 2007); *Schuler*



v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). Thus, the Custodian did not unlawfully deny access to the requested records.

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 20th Day of December, 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: December 23, 2013**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
December 20, 2013 Council Meeting**

**Joel L. Shain, Esq. (on Behalf of  
Richard Pucci, Mayor, & Monroe Township)<sup>1</sup>  
Complainant**

**GRC Complaint No. 2013-107**

v.

**State of NJ, Office of the Governor<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies via e-mail of:

1. The mailing list (names and addresses) of all residents of Monroe Township (“Township”) that received the Governor’s November 3, 2012 letter (“Letter”) concerning the Township’s reissuance of tax bills.
2. Any contracts made by the State with any vendor related to the Letter, including but not limited to any contracts relating to the production or compilation of the mailing list in item No. 1.
3. All correspondence, including e-mails, between the State and any vendor related to the Letter, including but not limited to any correspondence relating to the production or compilation of the mailing list in item No. 1.
4. Any invoices submitted to or paid by the State related to the Letter, including but not limited to any invoices relating to the production or compilation of the mailing list in item No. 1.
5. Any correspondence, including e-mails, sent by any residents of the Township to the State in response to the Letter.
6. The mailing list (names and addresses) of all residents of the Township that received the Governor’s survey entitled “Christie Middle-Class Reform Agenda” (“Survey”).
7. Any contracts made by the State with any vendor related to the Survey, including but not limited to any contracts relating to the production or compilation of the mailing list in item No. 5 and production or creation of the Survey.
8. All correspondence, including e-mails, including but not limited to any correspondence relating to the production or compilation of the mailing list in item No. 5 and production or creation of the Survey.
9. Any invoices submitted to or paid by the State related to the Survey, including but not limited to any invoices relating to the production or compilation of the mailing list in item No. 5 and production or creation of the Survey.
10. Any and all completed or partially completed Surveys received by the State.

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<sup>1</sup> The Complainant represents the Township of Monroe in this complaint.

<sup>2</sup> Represented by Deputy Attorney General Christopher Huber.

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11. The mailing list (names and addresses) of all residents of the State that received the Survey.
12. Any and all applications by the State sent to the United States Postal Service (“USPS”) concerning the Governor’s Office’s utilization of USPS bulk mail and/or mail sent via “Permit No. 21.”
13. All records reviewed by the Governor which provide the basis for his statement in the Letter that “we’ve been able to increase state funding to our local public schools to their highest level ever.”
14. Records relating to any funding, grants or aid sent by the State to all school districts for 2008, 2009, 2010, 2011 and 2012.
15. Fiscal reports, budgets or audits relating to any funding, grants or aid sent by the State to all school districts for the years 2008, 2009, 2010, 2011 and 2012.
16. Records relating to any funding, grants or aid sent by the State to the Township’s school district for 2008, 2009, 2010, 2011 and 2012.
17. Fiscal reports, budgets or audits relating to any funding, grants or aid sent by the State to the Township’s school district for the years 2008, 2009, 2010, 2011 and 2012.

**Custodian of Record:** Hillary Hewit, Esq.

**Request Received by Custodian:** January 17, 2013

**Response Made by Custodian:** January 29, 2013

**GRC Complaint Received:** April 12, 2013

### **Background**<sup>3</sup>

#### **Request and Response:**

On January 14, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. The request was received by the Custodian on January 17, 2013. On January 29, 2013, the seventh (7<sup>th</sup>) business day after receipt of the request, Ms. Sallye Giordano verbally responded on behalf of the Custodian advising that an extension of time would be necessary. The Complainant requested that an attorney respond in writing seeking an extension with a date certain. The next day, January 30, 2013, the Custodian responded in writing requesting an extension of one (1) month due to the extensive nature of the request – a 17-part OPRA request seeking a broad range of multiple records.

On January 31, 2013, the Complainant informed the Custodian of concerns regarding failure to respond immediately to certain information and that the extension request was improper and untimely because it was sent on the eighth business day. Nevertheless, the Complainant sought to negotiate with the Custodian, indicating that he would be willing to forgo litigation if the parties could “settle this matter amicably.” Complainant further advised that no action would be taken by them until the end of business on February 4, 2013.

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<sup>3</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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On February 12, 2013, Assistant Attorney General (“AAG”) Lew Scheindlin responded that the Governor’s Office timely responded on the seventh (7<sup>th</sup>) business day and further stated that a one (1) month extension is reasonable given the broad scope of the Complainant’s OPRA request, which would require “the Custodian to spend a substantial amount of time and research in an effort to determine whether potentially responsive documents exist.”

Negotiations continued that day with a response from Complainant requesting, as a demonstration of the Custodian’s “good faith with respect to compliance with OPRA,” that the Custodian disclose the mailing list responsive to item No. 1. AAG Scheindlin indicated he would discuss this request for immediate production with his client. At this point the attorneys for both parties were involved in active negotiations in an attempt to satisfy the records request.

On February 13, 2013, the Complainant advised that provided the Custodian disclose the mailing list responsive to item No. 1, “within 5 business days from today, my client has directed me to forbear instituting an action under OPRA in order to work out with you a reasonable time for your client to produce the remaining items.” At this point it is evident that the parties had abandoned OPRA’s statutory timeframes and were attempting to negotiate an amicable outcome.

On February 22, 2013, the Custodian complied with Complainant’s request and disclosed a copy of the mailing list to the Complainant via e-mail.

On February 26, 2013, the Complainant confirmed receipt of the mailing list and further advised that the original one-month extension deadline would be expiring at the end of the week. Complainant sought confirmation “that all outstanding documents would be provided within that time frame.”

On February 27, 2013, AAG Scheindlin stated that he would seek an update from the Custodian.

On March 7, 2013, the Complainant voiced frustration that he had not heard back from AAG Scheindlin in over a week and sought a status update, indicating the desire to resolve the matter without litigation. That day AAG Scheindlin advised that he had not yet been able to confer with his client but would do so and get back to Complainant.

On March 13, 2013, AAG Scheindlin advised the Complainant that his “client has been working diligently on the response to this request and will be ready to send it to you soon.” The Complainant responded by requesting an anticipated time frame in which he could expect to receive the responsive documentation.

On April 12, 2013, the Custodian provided the Complainant with the remainder of the response to the OPRA request (Items No. 2 – 17).

**Denial of Access Complaint:**

On April 12, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that the Custodian has not

provided records responsive to item Nos. 2 through 17 of his January 17, 2013 OPRA request. The Complainant contends that N.J.S.A. 47:1A-5(e) provides that immediate access be granted to budgets, vouchers and contracts. The Complainant argues that these types of records were sought in item Nos. 2, 4, 7, 9, 15 and 17 and should have been disclosed immediately. The Complainant further contends that the remaining records should have been disclosed within seven (7) business days. The Complainant further argues that even if the Custodian properly requested an extension, she still failed to provide records within the extended time frame and the failure to respond is a “deemed” denial. The Complainant concludes that because the Custodian failed to timely respond and denied access to responsive records, Complainant should be deemed a prevailing party entitled to an award of reasonable attorney’s fees. Mason v. City of Hoboken, 196 N.J. 51, 66-67 (2008).

**Statement of Information:**

On May 6, 2013, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that she received the Complainant’s OPRA request on January 17, 2013. The Custodian certifies that she conducted a search of the Governor’s Office for all valid request items. The Custodian certifies that upon receipt of responsive records numbering 1,138 pages, she reviewed same for possible exemptions and redacted some records accordingly. The Custodian certifies that she responded as follows:

OPRA request item Nos. 1, 6 and 11

The Custodian certifies that on February 22, 2013, she provided the responsive list (342 pages) in its entirety to the Complainant in two (2) separate e-mails.

OPRA request item Nos. 2, 3, 4, 7, 8 and 9

The Custodian certifies that on April 12, 2013, she informed the Complainant that no records responsive exist.

OPRA request item Nos. 5 and 10

The Custodian certifies that on April 12, 2013, she disclosed the responsive correspondence and surveys (796 pages) to the Complainant. The Custodian certifies that she redacted names, addresses, telephone numbers, fax numbers and personal e-mail addresses based on OPRA’s privacy exemption. N.J.S.A. 47:1A-1, Executive Order No. 26 (Gov. McGreevey, 2002)(“EO 26”)(providing privacy interest for communications sent to the Governor’s Office).

OPRA request item No. 12

The Custodian certifies that on April 12, 2013, she advised that she did not maintain the records responsive to this request item and directed the Complainant to the New Jersey Department of Treasury.

OPRA request item Nos. 13, 14, 15, 16, and 17

The Custodian certifies that on April 12, 2013, she advised that these request items were invalid because they required research. The Custodian certifies that she further advised that records from 2008 and 2009 are not in her possession because they are from past governors. EO 26.

The Custodian contends that her denial of access to item Nos. 13 through 17 was lawful because same were overly broad. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005). The Custodian asserts that OPRA does not allow a requestor to make a blanket request for every record in an agency's possession. Gannett N.J. Partners, LP v. Cnty. of Middlesex, 379 N.J. Super. 205, 213 (App. Div. 2005). See also Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005). The Custodian contends that the requests here are very similar to the request in Held v. Tewksbury First Aid and Rescue Squad (Hunterdon), GRC Complaint No. 2011-303 (December 2012)(a request seeking all engineering records for specific properties was invalid). See also Burke v. Borough of Brielle (Monmouth), GRC Complaint No. 2008-65 (September 2009)(a request seeking all financial documents of a fire department and first aid squad over an 11-month period was invalid); Kvederas v. Town of Morristown (Morris), GRC Complaint No. 2009-70 (April 2010)(a request seeking all "CAD" reports relating to a specific incident was invalid). The Custodian contends that item No. 13 is invalid because it seeks information that "provide[s] a basis" for a statement in the Letter. The Custodian asserts that the Appellate Division expressly held that an OPRA request seeking documents "... relied upon, considered, reviewed or otherwise utilized ..." by individuals to reach a decision is invalid. NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 178-79 (App. Div. 2007). The Custodian further contends that all four (4) request items here seek "... fiscal reports, budgets or audits ..." and all "... records relating ..." to State education aid. The Custodian argues that these requests require research and do not identify any specific records.

Finally, the Custodian contends that the Complainant's Denial of Access Complaint is based on the allegation that he received no records responsive to request item Nos. 2 through 17. The Custodian certifies that contrary to this argument, she responded to all request items via letter on April 12, 2013; thus, the Custodian believes the complaint is moot and should be dismissed. The Custodian asserts that if the Council decides to examine the timeliness of the Custodian's response, it should find that the Custodian acted properly under OPRA. The Custodian contends that her delayed response was not an attempt to delay access; rather, she reasonably provided records given the voluminous nature of the request necessitating an extensive search of 17 individual request items. The Custodian asserts that the Governor's Office remained in constant contact with the Complainant throughout the search and review process and even initially provided the mailing list on February 22, 2013. The Custodian indicates that while handling this request she was also tasked with responding to dozens of other OPRA requests.

### **Additional Submissions:**

#### **May 23, 2013 Response from Complainant:**

On May 23, 2013, the Complainant withdrew from consideration request item Nos. 1, 6 and 12 because unredacted copies of the responsive records were provided. The Complainant also withdrew the portion of request item Nos. 14 through 17 for records from 2008 and 2009. The Complainant further withdrew request item Nos. 2, 4, 7 and 9 conditionally based on the Custodian certifying to the truthfulness of her response and subject to the continuing obligation to produce any records that may be located in the future. The Complainant further disputes the Custodian's responses to the remaining OPRA requests as follows:

#### **OPRA request item Nos. 3 and 8**

The Complainant asserts that in the Custodian's April 12, 2013 response, she only identified that no contracts or invoices existed and did not address correspondence. The Complainant contends that because the Custodian failed to respond to both items, they are "deemed" denied. Regarding item No. 8, the Complainant disputes that no records exist based on an April 17, 2013 New Jersey Politicker article regarding a recent Monmouth University Institute ("Institute") poll. The Complainant notes that according to the article, the Institute replicated two (2) questions from the Survey sent to Township residents. The Complainant contends that because the Governor's Office would have had to communicate with the Institute about the April poll, it is unlikely that no records exist. The Complainant requests that in light of this apparent misrepresentation of the facts, the Custodian should be required to submit certifications for all items to which she contends no records exist.

#### **OPRA request item Nos. 5 and 10**

The Complainant disputes redacted names, addresses, telephone numbers, fax numbers and e-mail addresses in the responsive records, arguing that same were inappropriate. The Complainant argues that the courts have adopted a balancing test to weigh a citizen's reasonable expectation of privacy in government records. Burnett v. Cnty. Of Bergen, 198 N.J. 408, 427 (2009). The Complainant notes that in a recent lower court decision a judge ordered disclosure of names and addresses. Bolkin v. Borough of Fair Lawn, 2012 N.J. Super. Unpub. LEXIS 2641 (December 5, 2012).

The Complainant argues that notwithstanding the balancing test, the Custodian is relying on EO 26 to exempt this information. The Complainant states that EO 26 empowered the Privacy Study Commission ("Commission") created under OPRA to study the privacy implications of home addresses and telephone numbers and report to the Governor and Legislature. The Complainant states that the Commission reported its findings in December 2004, and none of the guidelines were subsequently adopted. The Complainant thus contends that EO 26 does not apply here.<sup>4</sup>

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<sup>4</sup> The Complainant includes a common law argument of why the names and addresses should be disclosed. The GRC's authority is limited to adjudicating denials of access under OPRA; thus, it does not have the authority to address a requestor's common law right of access. N.J.S.A. 47:1A-7.

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OPRA request item No. 11

The Complainant contends that the Custodian disclosed a mailing list for the Township, but failed to disclose the State-wide list sought in this request item. The Complainant contends that the Politicker article noted that the Governor sent a mailing to "... Central Jersey residents that included a survey ...". The Complainant asserts that because the Letter and Survey were sent to persons outside of the Township, including but not limited to the residents in Princeton, the Custodian failed to provide the responsive list. The Complainant further argues that the Custodian should be required to submit certifications for all items to which she contends she provided all records.

OPRA request item No. 13

The Complainant contends that the Custodian failed to respond to item No. 13 in her April 12, 2013 response and thus same is "deemed" denied.

OPRA request item Nos. 14, 15, 16 and 17

Regarding records from 2010, 2011 and 2012, the Complainant disputes that these items are invalid. The Complainant argues that his request items sought specific types of records: grants, aid packages, fiscal reports, budgets and audits. The Complainant contends that these are government records even to the point that OPRA specifically identifies that some of these types of records be disclosed immediately. N.J.S.A. 47:1A-5(e). The Complainant further argues that the Custodian would not be required to perform any analysis or collation; rather, she would only be required to locate and provide responsive records.

June 17, 2013 Response from Custodian:

On June 17, 2013, in response to Complainant's submission, Custodian's Counsel disputed that the Custodian had a continuing obligation to provide records not in existence at the time of the Complainant's OPRA request. Counsel further contends that an additional certification as to whether records exist is unnecessary because the Custodian already certified to the truthfulness of her statements in the SOI.

OPRA request item Nos. 3 and 8

Counsel disputes that the Custodian failed to respond to these items. Counsel asserts that because the Custodian certified that no records responsive to the Complainant's requests for contracts and invoices existed, it follows that no correspondence existed either. Counsel further asserts that no discrepancy exists with the Custodian's response to item No. 8; no records exist and the Complainant's allegations based on the Politicker news article do not substantiate the evidence of record here.

OPRA request item Nos. 5 and 10

Counsel contends that the Supreme Court set forth seven factors in Burnett v. Cnty. of Bergen, 198 N.J. 408, 427 (2009), used to balance privacy interest against the public's right to access certain personal information. Counsel contends that applying those factors here, one could definitively conclude that resident names and addresses on correspondence and Surveys returned to the Governor's Office should be redacted. Counsel asserts that the residents likely believed their identities would not be made public and that disclosure could discourage future residents from sharing their views with an elected official in the future. Counsel further asserts that this chilling effect could deter frank conversation between the public and elected officials, thus hindering the political process. Additionally, Counsel asserts that the Complainant has no legitimate interest in the redacted information. Counsel argues that the Complainant is in possession of the mailing list of every resident that received the Letter and Survey and also received the responses.

OPRA request item No. 11

Counsel argues that the Complainant's position that a State mailing list must exist because of the Politicker article does not substantiate the evidence of record here. Counsel argues that the mailing list provided is the responsive record and this complaint should be dismissed.

OPRA request item Nos. 13 through 17

Counsel asserts that these requests are overly broad and thus invalid for all the reasons set forth in the SOI.

Finally, Counsel argues that notwithstanding the fact that the Complainant is not a prevailing party here, the Council should conclude that an award of attorney's fees would be invalid. Counsel argues that OPRA's fee-shifting provision is intended to enable "... the ordinary citizen ..." to gain records from a public agency. NJDPM v. NJ Dep't of Corrections, 185 N.J. 137, 153 (2005). Counsel states that the request here was made on behalf of the Mayor and Township. Counsel contends that the purpose of the fee-shifting provision would not be fulfilled if public agencies were permitted to obtain attorney's fees from other public entities.

Analysis<sup>5</sup>

Timeliness

Complainant's Denial of Access argues that, "[e]ven if the Governor's Office properly requested a one-month extension, they failed to timely provide documents responsive to Nos. 2 through 17 of the Request", which is a "deemed" denial. However, this argument ignores the fact that between the date the OPRA request was received on January 17, 2013, and the time the Denial of Access was filed on April 12, 2012, the attorneys for both parties were involved in extensive negotiations in an attempt to satisfy the records request. There were over a dozen

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

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communications between the attorneys, as indicated above, which included discussions of dates for production. The communications show that the negotiations involved abandoning OPRA's statutory timeframes in an attempt to negotiate an amicable outcome. That the negotiations ultimately failed, leading to the filing of the Denial of Access Complaint, does not revive the original OPRA timeframes. This determination is limited to the narrow situation where after an extension request the parties enter into negotiations that specifically involve dates for response or production.

### **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.

#### *OPRA request item Nos. 2, 3, 4, 7, 8 and 9*

In Pusterhofer v. NJ Dep't of Educ., GRC Complaint No. 2005-49 (July 2005), the complainant sought a copy of a telephone bill from the custodian in an effort to obtain proof that a phone call was made to him by an official from the Department of Education. The custodian provided a certification in his submission to the GRC that certified that the requested record was nonexistent and the complainant submitted no evidence to refute the custodian's certification. The Council subsequently determined that "[t]he Custodian has certified that the requested record does not exist. Therefore, the requested record cannot be released and there was no unlawful denial of access."

Here, the Custodian responded in writing on April 12, 2013, advising the Complainant that no records responsive to item Nos. 2, 4, 7 and 9 existed and subsequently certified to such. Further, notwithstanding the Custodian's failure to address item Nos. 3 and 8 in her original response, she certified in the SOI that no records existed. Additionally, there is no evidence in the record to refute the Custodian's certifications. Specifically, the Complainant all but conceded that no records for Nos. 2, 4, 7 and 9 existed, but sought a second (2<sup>nd</sup>) certification as to the truthfulness of the Custodian's SOI certification.<sup>6</sup> Further, the April 17, 2013 Politicker article written nearly four (4) months after submission of the OPRA request is not competent, credible evidence supporting the possibility that records responsive to request item Nos. 3 and 8 existed.<sup>7</sup>

Thus, since the Custodian initially responded that no records responsive to request item Nos. 2, 4, 7 and 9 exist, and further certified in the SOI that no records responsive to the Complainant's OPRA request item Nos. 2, 3, 4, 7, 8 and 9 exist, and because the Complainant

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<sup>6</sup> The GRC notes that the Custodian's certified SOI statements need not be supplemented by an additional certification as sought by the Complainant.

<sup>7</sup> The Complainant incorrectly asserted that the Custodian had a continuing obligation to provide records. The GRC has previously decided that OPRA does not contemplate on-going requests. See Braden v. Toms River Twp. Police Dep't, GRC Complaint No. 2009-245 (July 2010).

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did not submit any evidence to refute the Custodian's certifications, the Custodian did not unlawfully deny access to the requested records. See Pusterhofer, GRC 2005-49.

OPRA request item Nos. 5 and 10

OPRA provides that “[t]he provisions of [OPRA] shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to ... Executive Order of the Governor ...” N.J.S.A. 47:1A-9(a).

EO 26 provides that:

In addition to those records of the Office of the Governor that are exempted by the provisions of [OPRA], the following records ... shall not be subject to public inspection, copying or examination ... All portions of records containing information provided by an identifiable natural person outside the Office of the Governor which contains information that the sender is not required by law to transmit and which would constitute a clearly unwarranted invasion of personal privacy if disclosed. If any of the foregoing records shall contain information not exempted by the provision of the Open Public Records Act or the preceding subparagraphs (a), (b) or (c) hereof then, in such event, that portion of the record so exempt shall be deleted or excised and access to the remainder of the record shall be promptly permitted.

Id. at 2(a) – (d).

Here, the Custodian certified in the SOI that she redacted names, addresses, telephone numbers, fax numbers and personal e-mail addresses based on OPRA's privacy exemption and EO 26, which provides for privacy interest in communications sent to the Governor's Office where such information was not required by law to be submitted. The Complainant argued that EO 26 only empowered the Privacy Study Commission to recommend certain privacy information that should be exempt from disclosure and that those findings were never included in OPRA. Id. at ¶ 5. However, the Complainant did not address the portion of EO 26 that exempted access to certain identifiable natural persons, which is the portion of the executive order that the Custodian specifically cited in the SOI.

Regarding the exemption, the Complainant's items sought correspondence and returned surveys from residents of the Township to the Governor's Office. Thus, it is inherent that the redacted information would refer directly to an identifiable, natural person communicating with the Governor's Office as a direct result of the Letter and Survey. Further, there is no evidence in the record that the information sent back as part of the Letter and Survey was required by law to be provided to the Governor's Office. Thus, the GRC is satisfied that the exemption applies to the information redacted and that the Custodian provided same as expressly provided for in EO 26.

Therefore, the Custodian did not unlawfully deny access to the redacted information contained in the records provided under OPRA request item Nos. 5 and 10. N.J.S.A. 47:1A-9; EO 26.

OPRA request item No. 11

Here, the Custodian certified in the SOI that the Complainant was provided with the responsive mailing list. The Complainant contended that he was not provided with a State-wide list that he believes exists based on the Politicker article that noted that a mailing was sent to “ ... Central Jersey residents ...” The Custodian’s Counsel argued that the article did not substantiate that some other mailing list existed.

The GRC is satisfied that the responsive record was provided to the Complainant on February 22, 2013. The Politicker article was published nearly four (4) months after submission of the OPRA request and is not competent, credible evidence supporting that any other mailing list containing additional residents outside of the Township existed on the date of the Complainant’s OPRA request.

Therefore, the Custodian bore her burden of proving that she provided all mailing lists responsive to item No. 11 on February 22, 2013. N.J.S.A. 47:1A-6.

OPRA request item No. 13, 14, 15, 16 and 17

The New Jersey Superior Court has held that “[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records ‘readily accessible for inspection, copying, or examination.’* N.J.S.A. 47:1A-1.” MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005)(emphasis added). The Court reasoned that:

Most significantly, the request failed to identify with any specificity or particularity the governmental records sought. *MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past.* Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted.

Id. at 549 (emphasis added).

The Court further held that “[u]nder OPRA, *agencies are required to disclose only ‘identifiable’ government records* not otherwise exempt ... In short, OPRA does not countenance

open-ended searches of an agency's files.” Id. (emphasis added). *See also Bent*, 381 N.J. Super. at 37 (App. Div. 2005), NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). Further, in Levine v. NJ Dep’t of Cmty. Affairs, Div. of Fire Safety, GRC Complaint No. 2010-339 (Interim Order dated July 31, 2012), the Council held that the complainant’s request seeking “... other documentation reviewed, relied upon or considered in preparation of the Final Report ...” was invalid because it failed to identify any records and instead was a blanket request forcing the Custodian to “... research her files to determine which records are responsive to said request.” Id. at 20.

Regarding item No. 13, the Custodian argued in the SOI that the request seeking “... records reviewed ... which provide the basis for his statement ...” was invalid based on the Appellate Division’s reasoning that a request seeking documents “... relied upon, considered, reviewed or otherwise utilized ...” by individuals to reach a decision is invalid. NJ Builders, 390 N.J. Super. at 178-79. The Council’s decision in Levine further reinforces the Appellate Division’s decision in NJ Builders, and both apply here. Thus, The Complainant’s item No. 13 is invalid because the request seeks records relied upon to develop language in the Letter and would require research.

Item Nos. 14 & 15 seek all records, fiscal reports, budgets, or audits relating to any funding, grants or aid sent by the state to all school districts. Item Nos. 16 & 17 seek all records, fiscal reports, budgets or audits relating to any funding, grants or aid sent by the state to the Township’s school district. As noted above, these requests fail to identify a specific record to be produced; they are blanket requests that would have required the Custodian to research every record in order to determine whether any applied to “... funding, grants or aid ...” for numerous schools districts including the Township. Thus, these request items are invalid and were properly denied.

Thus, the Complainant’s request item Nos. 13, 14, 15 and 16 are invalid requests requiring the Custodian to conduct research in order to determine whether any records were responsive to same. Levine, GRC 2010-339; MAG, 375 N.J. Super. at 546; Bent, 381 N.J. Super. at 37; NJ Builders, 390 N.J. Super. at 178-79; Schuler, GRC 2007-151. Thus, the Custodian did not unlawfully deny access to the requested records.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Since the Custodian initially responded that no records responsive to request item Nos. 2, 4, 7 and 9 exist, and further certified in the Statement of Information that no records responsive to the Complainant’s OPRA request item Nos. 2, 3, 4, 7, 8 and 9 exist, and because the Complainant did not submit any evidence to refute the Custodian’s certifications, the Custodian did not unlawfully deny access to the requested records. *See Pusterhofer v. NJ Dep’t of Educ.*, GRC Complaint No. 2005-49 (July 2005).

2. The Custodian did not unlawfully deny access to the redacted information contained in the records provided under OPRA request item Nos. 5 and 10. N.J.S.A. 47:1A-9; Executive Order No. 26 (Gov. McGreevey, 2002).
3. The Custodian bore her burden of proving that she provided all mailing lists responsive to item No. 11 on February 22, 2013. N.J.S.A. 47:1A-6.
4. The Complainant's request item Nos. 13, 14, 15, 16 and 17 are invalid requests requiring the Custodian to conduct research in order to determine whether any records were responsive to same. Levine v. NJ Dep't of Cmty. Affairs, Div. of Fire Safety, GRC Complaint No. 2010-339 (Interim Order dated July 31, 2012); MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 178-79 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). Thus, the Custodian did not unlawfully deny access to the requested records.

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December 10, 2013