



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

CHRIS CHRISTIE  
*Governor*

KIM GUADAGNO  
*Lt. Governor*

CHARLES A. RICHMAN  
*Commissioner*

**FINAL DECISION**

**June 28, 2016 Government Records Council Meeting**

J.C. McCormack  
Complainant

v.

NJ Department of Treasury  
Custodian of Record

Complaint No. 2014-336

At the June 28, 2016 public meeting, the Government Records Council (“Council”) considered the June 21, 2016 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds this complaint should be dismissed because the Complainant withdrew the complaint in writing to the GRC by letter dated May 31, 2016.

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 28<sup>th</sup> Day of June, 2016

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: June 30, 2016**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
June 28, 2016 Council Meeting**

**J.C. McCormack<sup>1</sup>  
Complainant**

**GRC Complaint No. 2014-336**

v.

**New Jersey Department of Treasury<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Copies via electronic transmission of all e-mails sent by or received by Michael Giacobbe, Chief of Taxpayer Accounting Branch, Division of Taxation, for the period March 1, 2014, to June 30, 2014, on the subject of organizational changes (e.g., promotions and/or reassignments) within the Taxpayer Accounting Branch.<sup>3</sup>

**Custodian of Record:** Gary Dallett  
**Request Received by Custodian:** July 15, 2014  
**Response Made by Custodian:** July 24, 2014  
**GRC Complaint Received:** October 6, 2014

**Background**

April 26, 2016 Council meeting:

At its April 26, 2016 public meeting, the Government Records Council (“Council”) considered the April 19, 2016 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. Because OPRA provides that “an individual’s name” is a government record subject to disclosure, the Custodian unlawfully denied access by redacting the employees’ names from the records identified as Bates stamped numbers 000001 to 000012, and must therefore disclose the records without the names redacted. N.J.S.A. 47:1A-10. See also Scheeler v. New Jersey Motor Vehicle Commission, GRC Complaint No. 2014-75 (Interim Order October 28, 2014).
2. **The Custodian shall comply with paragraph #1 above within five (5) business days from receipt of the Council’s Interim Order and simultaneously provide**

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

<sup>2</sup> Represented by Deputy Attorney General Heather Lynn Anderson.

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

J.C. McCormack v. New Jersey Department of Treasury, 2014-336 – Supplemental Findings and Recommendations of the Executive Director

**certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**

3. Pursuant to Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the requested records Bates stamped number 000014 and 000015 to determine the validity of the Custodian's assertion that they were lawfully denied and/or redacted as advisory, consultative, or deliberative material exempt from access pursuant to N.J.S.A. 47:1A-1.1.
4. **The Custodian must deliver to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see #3 above), nine (9) copies of the redacted records, a document or redaction index, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, 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.**
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.

Procedural History:

On April 26, 2016, the Council ordered the above-referenced compliance. On April 28, 2016, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Therefore, compliance was due on or before May 5, 2016.

On May 4, 2016, the fourth (4<sup>th</sup>) business day after the Custodian received the Interim Order, the Custodian's Counsel requested a twenty (20) day extension of time to comply with the Council's Order. On May 4, 2016, the GRC granted the Custodian an extension of time until May 18, 2016 to comply with the Council's Order. On May 17, 2016, the Custodian's Counsel requested, and was granted, a five (5) business day extension of time to comply with the Council's Order. On May 25, 2016, the Custodian delivered to the GRC a sealed envelope purportedly containing the records requested by the Council for the *in camera* examination.<sup>4</sup> The Custodian's Counsel also filed a request for reconsideration alleging mistake.

By letter to the GRC dated May 31, 2016, the Complainant withdrew the complaint.

**Analysis**

No analysis required.

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<sup>4</sup> The seal was never broken by the GRC.

## **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that this complaint should be dismissed because the Complainant withdrew the complaint in writing to the GRC by letter dated May 31, 2016.

Prepared By: John E. Stewart

June 21, 2016



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

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

CHARLES A. RICHMAN  
Commissioner

INTERIM ORDER

April 26, 2016 Government Records Council Meeting

J.C. McCormack  
Complainant

Complaint No. 2014-336

v.

NJ Department of Treasury  
Custodian of Record

At the April 26, 2016 public meeting, the Government Records Council (“Council”) considered the April 19, 2016 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.

Because OPRA provides that “an individual’s name” is a government record subject to disclosure, the Custodian unlawfully denied access by redacting the employees’ names from the records identified as Bates stamped numbers 000001 to 000012, and must therefore disclose the records without the names redacted. N.J.S.A. 47:1A-10. See also Scheeler v. New Jersey Motor Vehicle Commission, GRC Complaint No. 2014-75 (Interim Order October 28, 2014).

2. **The Custodian shall comply with paragraph #1 above within five (5) business days from receipt of the Council’s Interim Order 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>**

3. Pursuant to Paff v. NJ Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the requested records Bates stamped number 000014 and 000015 to determine the validity of the Custodian’s assertion that they were lawfully denied and/or redacted as advisory, consultative, or deliberative material exempt from access pursuant to N.J.S.A. 47:1A-1.1.

<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.



4. **The Custodian must deliver<sup>3</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see #3 above), *nine (9) copies of the redacted records*, a document or redaction index<sup>4</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, 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.**
  
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.

Interim Order Rendered by the  
Government Records Council  
On The 26<sup>th</sup> Day of April, 2016

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: April 28, 2016**

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<sup>3</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>4</sup> The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
April 26, 2016 Council Meeting**

**J.C. McCormack<sup>1</sup>  
Complainant**

**GRC Complaint No. 2014-336**

v.

**New Jersey Department of Treasury<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Copies via electronic transmission of all e-mails sent by or received by Michael Giacobbe, Chief of Taxpayer Accounting Branch, Division of Taxation, for the period March 1, 2014, to June 30, 2014, on the subject of organizational changes (e.g., promotions and/or reassignments) within the Taxpayer Accounting Branch.<sup>3</sup>

**Custodian of Record:** Gary Dallett  
**Request Received by Custodian:** July 15, 2014  
**Response Made by Custodian:** July 24, 2014  
**GRC Complaint Received:** October 6, 2014

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

**Request and Response:**

On July 15, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On July 24, 2014, the seventh (7<sup>th</sup>) business day following receipt of said request, Cynthia Jablonski, on behalf of the Custodian, responded in writing, informing the Complainant that the agency needed an extension of time until August 7, 2014, to search for and review records responsive to the request. On August 7, 2014, Cynthia Jablonski, on behalf of the Custodian, notified the Complainant that the agency was disclosing some responsive records and seeking an extension of time until August 21, 2014, to gather and review records responsive to the remainder of the request. On August 21, 2014, Cynthia Jablonski, on behalf of the Custodian, informed the Complainant that the agency was disclosing the records relevant to the complaint.

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

<sup>2</sup> Represented by Deputy Attorney General Heather Lynn Anderson.

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

<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.

### Denial of Access Complaint:

On October 6, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant attached a chart to the complaint, which contains a list of disclosed e-mails sent or received by Michael Giacobbe during the period May 30, 2014, to June 17, 2014, Bates stamped 000001 – 000015. The chart reveals that redactions were made to all of the records except for the e-mail Bates stamped #000013. The reason listed for redactions to e-mails Bates stamped 000001 – 000012 is “N.J.S.A. 47:1A-1 Confidential Personal Expectation of Privacy.” The reason listed for denial of e-mails Bates stamped 000014 and 000015 is “inter-agency or intra-agency advisory, consultative, or deliberative material.”<sup>5</sup>

The Complainant contends that the Custodian’s redactions are not lawful under OPRA. The Complainant states that under N.J.S.A. 47:1A-1, the only public employee records deemed confidential are those that contain, “[p]ublic employee related information generated by or on behalf of public employers or public employees in connection with any sexual harassment complaint filed with a public employer, or with any grievance filed by or against an individual, or in connection with collective negotiations, including documents and statements of strategy or negotiating position.”<sup>6</sup> The Complainant further contends that, pursuant to N.J.S.A. 47:1A-5, custodians shall only redact social security, credit card, driver license, and unlisted telephone numbers.

The Complainant asserts that the Custodian disclosed copies of employee e-mails that responded to Mr. Giacobbe’s e-mail asking employees if they were interested in transfer or reassignment. The Complainant states that the redacted employees’ names were those employees sending e-mails to the Division of Taxation management requesting a transfer or reassignment. The Complainant argues that there is no difference between the employees whose names were disclosed and those whose names were redacted. The Complainant contends that the employees whose names were redacted have no reasonable expectation of privacy and that there is no potential for harm stemming from disclosure of the employee names.

The Complainant attached to the complaint all of the disclosed e-mails, with the exception of those Bates stamped 000003, 000004, 000006, 000014, and 000015.

### Statement of Information:

On October 28, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on July 15, 2014, and that he responded in writing on August 7, 2014, and August 21, 2014, following an extension with the Complainant’s consent. The Custodian certifies on August 21, 2014, he sent to the Complainant, through Ms. Jablonski, all records relevant to the complaint. The Custodian further certifies that the records were redacted for confidentiality pursuant to OPRA. The

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<sup>5</sup> It is unclear from the complaint (the Complainant failed to complete the Records Denied List) if the records Bates stamped 000014 and 000015 were denied in whole or in part. However, it appears that the records were denied in their entirety because copies of the records were not attached to the complaint.

<sup>6</sup> Emphasis added by the Complainant.



Custodian certifies that, “[s]pecifically, I redacted all employee names and identifying information pursuant to N.J.S.A. 47:1A-10. I also provided a privilege log with the response.”

The Custodian’s Counsel asserts that the Custodian properly redacted the disclosed records because the denied information is confidential and not subject to disclosure under OPRA. Counsel argues that the records responsive to the request are documents requesting and/or discussing promotions and/or transfers between employees and their supervisors and, as such, are clearly personnel records exempt from disclosure pursuant to N.J.S.A. 47:1A-10.

Counsel states that, “the specific provisions of OPRA, N.J.S.A. 47:1A-10 states:

[T]he personnel or pension records of any individual in the possession of a public agency, including but not limited to records relating to any grievance filed by or against an individual, shall not be considered a government record and shall not be made available for public access, except that:

an individual’s name, title, position, salary, payroll record, length of service, date of separation and the reason therefor, and the amount and type of any pension received shall be a government record.”

The Custodian’s Counsel also cites Executive Order No. 9 (Hughes), which Counsel asserts provides that, “[p]ersonnel and pension records which are required to be made, maintained or kept by any State or local government agency” are not public records. Counsel also cites Executive Order No. 11 (Byrne), which Counsel argues expands upon Executive Order No. 9 by providing that, “an instrumentality of the government shall not disclose to anyone . . . personnel or pension records of an individual, except that the following shall be public: a. An individual’s name, title, position, salary, payroll record, length of service . . . date of separation from government service and the reason therefor; and the amount and type of pension he is receiving.” The Custodian’s Counsel also cites several court decisions which hold that personnel records are confidential.

Counsel concludes that the agency properly redacted the names of the employees and identifying information from the e-mails pursuant to N.J.S.A. 47:1A-10.

#### Additional Submissions:

On November 12, 2014, the Complainant submitted to the GRC a response to the Custodian’s SOI. The Complainant argues that the records relevant to the complaint are not personnel or pension records because they are not required to be made, maintained, or kept by any State or local government agency, as defined in Executive Order No. 9 (Hughes). The Complainant further argues that the records relevant to the complaint are not personnel records because they contain no confidential, personal, or sensitive information other than employees’ names. The Complainant states that the GRC should order disclosure of the records in unredacted form.

## Analysis

### 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.

Here, the records relevant to the complaint are e-mails sent or received by Michael Giacobbe during the period May 30, 2014, to June 17, 2014, further identified as Bates stamped numbers 000001 – 000015. The records were disclosed in redacted form, except for the e-mail Bates stamped #000013.

The Custodian’s Counsel argued that the records relevant to the complaint are personnel records because they request and/or discuss promotions and/or transfers between employees and their supervisors. Counsel further argued that the Custodian properly redacted the records because personnel or pension records of any individual in the possession of a public agency are exempt from access pursuant to N.J.S.A. 47:1A-10.

The Complainant argued that the requested records are not personnel records because they are not required to be made, maintained, or kept by any government agency and that they contain no confidential, personal, or sensitive information. The Complainant asserted that the records should therefore be disclosed in unredacted form.

The Custodian’s denial rests upon the requested records being personnel records, and the parties differ on such categorization. However, in a light most favorable to the Custodian, even if the records are personnel records, “an individual’s name” is a government record subject to disclosure under N.J.S.A. 47:1A-10. The Custodian certified that he only redacted the employee names and identifying information from the records.

In Scheeler v. New Jersey Motor Vehicle Commission, GRC Complaint No. 2014-75 (Interim Order October 28, 2014), the Complainant requested a list of employee names. The Custodian disclosed to the Complainant a redacted record which provided only the first name and first letter of the last name for each employee. The Council held that the Custodian, by providing records redacted to reveal only the first name and first letter of the last name of each employee, unlawfully denied access under N.J.S.A. 47:1A-10.

Accordingly, because OPRA provides that “an individual’s name” is a government record subject to disclosure, the Custodian unlawfully denied access by redacting the employees’ names from the records identified as Bates stamped numbers 000001 to 000012 and must therefore disclose the records without the names redacted. N.J.S.A. 47:1A-10. *See also* Scheeler, GRC Complaint No. 2014-75.

With respect to the requested e-mails Bates stamped numbers 000014 and 000015, the Custodian stated that these records were denied as inter-agency or intra-agency advisory, consultative, or deliberative (“ACD”) material.

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 Council<sup>7</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.

Therefore, pursuant to Paff, 379 N.J. Super. at 346, the GRC must conduct an *in camera* review of the requested records Bates stamped number 000014 and 000015 to determine the validity of the Custodian’s assertion that they were lawfully denied and/or redacted as ACD material exempt from access pursuant to N.J.S.A. 47:1A-1.1.

### **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.

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<sup>7</sup> Paff v. NJ Dep’t of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

## Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because OPRA provides that “an individual’s name” is a government record subject to disclosure, the Custodian unlawfully denied access by redacting the employees’ names from the records identified as Bates stamped numbers 000001 to 000012, and must therefore disclose the records without the names redacted. N.J.S.A. 47:1A-10. *See also Scheeler v. New Jersey Motor Vehicle Commission*, GRC Complaint No. 2014-75 (Interim Order October 28, 2014).
2. **The Custodian shall comply with paragraph #1 above within five (5) business days from receipt of the Council’s Interim Order 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>**
3. Pursuant to Paff v. NJ Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the requested records Bates stamped number 000014 and 000015 to determine the validity of the Custodian’s assertion that they were lawfully denied and/or redacted as advisory, consultative, or deliberative material exempt from access pursuant to N.J.S.A. 47:1A-1.1.
4. **The Custodian must deliver<sup>10</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see #3 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, 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.**
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.

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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.

<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.

Prepared By: John E. Stewart

April 19, 2016