



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

January 25, 2022 Government Records Council Meeting

Lisa D. Taylor Esq.
Complainant

Complaint No. 2015-395

v.

NJ Department of Treasury,
Division of Purchase & Property
Custodian of Record

At the January 25, 2022 public meeting, the Government Records Council (“Council”) considered the January 18, 2022, 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 complied with the Council’s September 24, 2019 Interim Order because he responded in the prescribed time frame providing nine (9) copies of the redacted, withheld, and unredacted portions of the responsive bids and a document index. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.
2. **The *In Camera* Examination set forth in the above table reveals the Custodian has lawfully denied access to, or redacted portions of, the records listed in the document index pursuant to N.J.S.A. 47:1A-6.**
3. Because it is determined that the Custodian did not unlawfully deny access to any of the responsive records here and did not commit any violations of OPRA’s provisions, the GRC declines to address whether a knowing and willful violation occurred.
4. The Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian’s conduct. Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, no factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 71 (2008). Specifically, the Custodian disclosed records within the extended time frame set forth prior to the filing of this complaint. Additionally, the GRC has determined that no unlawful denial of access occurred here and has not ordered disclosure of any of those records to which the Complainant sought access. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney’s fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51.



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 25th Day of January 2022

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 27, 2022

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
January 25, 2022 Council Meeting**

**Lisa D. Taylor, Esq.¹
Complainant**

GRC Complaint No. 2015-395

v.

**New Jersey Department of Treasury,
Division of Purchase & Property²
Custodial Agency**

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

1. Regarding Request for Proposal (“RFP”) 2016-X-23964 – Fiscal Intermediary and Financial Cash and Counseling Services, copies of all “Notices of Intent to Award” (“Notice”).
2. Regarding RFP 2016-X-23964, copies of all correspondence and/or communications comprising negotiations.
3. Regarding RFP 2016-X-23964, copies of all correspondence and communications to and from Public Partnerships, LLC.
4. Regarding RFP 2016-X-23964, copies of:
 - a. All evaluation sheets.
 - b. All evaluation scores.
 - c. All evaluation criteria.
 - d. Notes with respect to evaluations and/or review of the responses to the RFP
 - e. Correspondence from New Jersey Department of Human Services (“DHS”) or the New Jersey Department of Treasury (“Treasury”) to each other or any third parties referring to the RFP.
 - f. Any minutes and/or agendas for any meetings or teleconferences at which the RFP or the scoring responses to the RFP was or will be the topic of discussion.
5. Regarding RFP 2016-X-23964, copies of all responses to the RFP.
6. Regarding RFP 2016-X-23964, copies of all requests to redact submitted by bidders in response to a September 30, 2015 letter sent by Marie Boragine.
7. Regarding RFP 2016-X-23964, copies of all best and final offers submitted by bidders.
8. Regarding RFP 2016-X-23964, copies of:
 - a. All questions submitted by bidders or potential bidders, whether or not responses were provided.
 - b. All responses to questions from Treasury (including the Division of Purchase and Property (“DPP”)) and/or DHS (including the Divisions of Disability Services,

¹ Represented by Justin A. Marchetta, Esq., of Inglesino, Webster, Wyciskala & Taylor, LLC (Parsippany, NJ).

² Represented by Deputy Attorney General Eric L. Apar. Previously represented by Deputy Attorney General Clifford T. Rones.

Aging Services, Developmental Disabilities, and/or Medical Assistance and Health Services.

- c. All correspondence and electronic communications between any bidders or potential bidders and representatives from the above agencies.

Custodian of Record: Garry Dales³

Request Received by Custodian: November 24, 2015

Response Made by Custodian: December 3, 2015

GRC Complaint Received: December 8, 2015

Records Submitted for *In Camera* Examination: Redacted and withheld portions of four (4) bid proposals.

Background

September 24, 2019 Council Meeting:

At its September 24, 2019 public meeting, the Council considered the September 17, 2019 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:

1. The Custodian complied with the Council's August 28, 2018 Interim Order because he responded in the extended time frame providing a Vaughn Index as required by the Council. Further, the Custodian confirmed that the records at issue here were not similar to those at issue in Taylor v. N.J. Dep't of Treasury, GRC Complaint No. 2016-62. Finally, the Custodian simultaneously provided certified confirmation of compliance to the Council Staff.
2. The Custodian lawfully denied the Complainant access to the responsive Community Access Unlimited bid submissions because disclosure of same to her "does not advance the purpose of OPRA . . ." Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609, 619 (App. Div. 2008); N.J.S.A. 47:1A-6.
3. The responsive evaluation records, inclusive of the Evaluation Committee Report, are exempt from disclosure under the "inter-agency or intra-agency advisory, consultative, or deliberative material" exemption because they meet the two-prong test as set forth in Educ. Law Ctr. v. N.J. Dep't of Educ., 198 N.J. 274, 285 (2009). N.J.S.A. 47:1A-1.1; Verry v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-287 (Interim Order dated June 30, 2015). Accordingly, the Custodian lawfully denied access to said records. N.J.S.A. 47:1A-6.
4. The GRC must conduct an *in camera* review of the redacted bid proposals to determine the validity of the Custodian's assertion that the redacted portions of the bid proposals

³ Cynthia Jablonski was named in the complaint.

were exempt from disclosure under multiple exemptions in OPRA. N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-1.1. See Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).

5. **The Custodian shall deliver⁴ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 4 above), nine (9) copies of the redacted records, a document or redaction index⁵, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,⁶ 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.**
6. The Custodian did not unlawfully deny access to the remaining records at issue in this complaint. N.J.S.A. 47:1A-6. Specifically, the Custodian certified, and the record reflects, that he disclosed them to the Complainant between December 3, and December 17, 2015. Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint Nos. 2009-156, 2009-157, 2009-158 (Interim Order dated April 28, 2010).
7. 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.
8. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On September 26, 2019, the Council distributed its Interim Order to all parties on. On October 2, 2019, the Custodian responded to the Council's Interim Order. Therein, the Custodian certified that he was providing nine (9) copies of the redacted and unredacted portions of each bid proposal. The Custodian further certified that he was also providing nine (9) copies of the withheld portions of the bid proposals. The Custodian finally certified that he included a document index.

Analysis

Compliance

At its September 24, 2019 meeting, the Council ordered the Custodian to submit for *in camera* review nine (9) copies of the redacted and withheld portions of the responsive bid proposals, nine (9) unredacted copies of each, and a document index. The Council also ordered the

⁴ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives them by the deadline.

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

⁶ "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."

Custodian to simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Executive Director. On September 26, 2019, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on October 3, 2019.

On October 2, 2019, the fourth (4th) business day after receipt of the Council's Order, the Custodian responded by providing the Council with nine (9) copies each of the redacted, withheld, and unredacted portions of the responsive bid proposals. The Custodian also submitted certified confirmation of compliance to the Executive Director. Thus, the Custodian properly complied with the Council's Order.

Therefore, the Custodian complied with the Council's September 24, 2019 Interim Order because he responded in the prescribed time frame providing nine (9) copies of the redacted, withheld, and unredacted portions of the responsive bids and a document index. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.

Unlawful Denial of Access

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

OPRA provides that "a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy . . ." N.J.S.A. 47:1A-1. Further, OPRA provides that:

A government record shall not include . . . trade secrets and proprietary commercial or financial information obtained from any source. For the purposes of this paragraph, trade secrets shall include data processing software obtained by a public body under a licensing agreement which prohibits its disclosure (emphasis added).

[N.J.S.A. 47:1A-1.1.]

In Newark Morning Star Ledger Co. v. N.J. Sports & Exposition Auth., 423 N.J. Super. 140, 168 (App. Div. 2011), the Appellate Division elaborated on defining trade secret and proprietary information and its application to OPRA's proprietary and trade secret exemption:

Relying on the Court's guidance set forth in Lamorte Burns & Co. v. Walters, 167 N.J. 285, 299-301, 770 A.2d 1158 (2001), we considered "the key elements" to determine when commercial financial information was proprietary. [Commc'ns Workers of America v. Rousseau, 417 N.J. Super. 341, 356, 9 A.3d 1064 (App.

Div. 2010)]. Lamorte suggested we must analyze “the relationship of the parties at the time of disclosure[,] . . . the intended use of the information[,]” and “the expectations of the parties.” Ibid. (citing Lamorte, *supra*, 167 N.J. at 299-300, 770 A.2d 1158). “[U]nder OPRA, if the document contains commercial or proprietary information it is not considered a government record and not subject to disclosure.” Id. at 358, 9 A.3d 1064. We concluded the investment agreements sought by the plaintiffs were proprietary as their content was not intended for wide dissemination, the “[d]efendants’ expectation of confidentiality [was] manifest” and the agreements delineated the specific terms and specific persons who may review the information. Id. at 359, 9 A.3d 1064. Further,

[e]ach agreement contains specific information about the capitalization of the partnership, its commencement and termination date, and other information pertinent to the operational fortunes of the partnership. Finally, each agreement is a complex document. Each reflects years of experience and expertise by trained legal and financial professionals. Id. at 359-60, 9 A.3d 1064.

In analyzing whether information qualifies as “trade-secrets,” a term not defined by OPRA, Id. at 360, 9 A.3d 1064, we considered the Court's prior reliance on Comment b of the Restatement of Torts § 757 (1939). Id. at 361, 9 A.3d 1064 (citing Hammock v. Hoffmann-LaRoche, 142 N.J. 356, 384, 662 A.2d 546 (1995)). The comment provides: “[a] trade secret may consist of any . . . compilation of information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.” Ibid. (quoting Restatement of Torts § 757 cmt. b (1939)). Other considerations include the extent to which the information is known outside of the owner’s business, the extent to which it is known by employees of the owner, the measures taken to guard the secrecy of the information, the value of the information to the owner and competitors, the effort expended to develop the information, and the ease or difficulty by which the information can be duplicated. Ibid. (citing Hoffmann-LaRoche, 142 N.J. at 384, 662 A.2d 546).

“Trade secrets are a peculiar kind of property. Their only value consists in their being kept private. If they are disclosed or revealed, they are destroyed.” Trump's Castle Assocs. v. Tallone, 275 N.J. Super. 159, 163, 645 A.2d 1207 (App. Div. 1994) (quoting In re Iowa Freedom of Info. Council, 724 F.2d 658, 662 (8th Cir. 1983)).

[Newark Morning Ledger, 423 N.J. Super. at 169.]

OPRA also exempts access to “information which, if disclosed, would give an advantage to competitors or bidders . . .” N.J.S.A. 47:1A-1.1.

Additionally, the Council is permitted to raise additional defenses regarding the disclosure of records pursuant to Paff v. Twp. of Plainsboro, 2007 N.J. Super. Unpub. LEXIS 2135 (App.

Div.) (certif. denied, 193 N.J. 292 (2007)).⁷ In Paff, the complainant challenged the GRC's authority to uphold a denial of access for reasons never raised by the custodian. Specifically, the Council did not uphold the basis for the redactions cited by the custodian. The Council, on its own initiative, determined that the Open Public Meetings Act prohibited the disclosure of the redacted portions to the requested executive session minutes. The Council affirmed the custodian's denial to portions of the executive session minutes but for reasons other than those cited by the custodian. The complainant argued that the GRC did not have the authority to do anything other than determine whether the custodian's cited basis for denial was lawful. The court held that:

The GRC has an independent obligation to "render a decision as to whether the record which is the subject of the complaint is a government record which must be made available for public access pursuant to' OPRA . . . The GRC is not limited to assessing the correctness of the reasons given for the custodian's initial determination; it is charged with determining if the initial decision was correct."

The court further stated that:

Aside from the clear statutory mandate to decide if OPRA requires disclosure, the authority of a reviewing agency to affirm on reasons not advanced by the reviewed agency is well established. Cf. Bryant v. City of Atl. City, 309 N.J. Super. 596, 629-30 (App. Div. 1998) (citing Isko v. Planning Bd. of Livingston, 51 N.J. 162, 175 (1968) (lower court decision may be affirmed for reasons other than those given below)); Dwyer v. Erie Inv. Co., 138 N.J. Super. 93, 98 (App. Div. 1975) (judgments must be affirmed even if lower court gives wrong reason), certif. denied, 70 N.J. 142 (1976); Bauer v. 141-149 Cedar Lane Holding Co., 42 N.J. Super. 110, 121 (App. Div. 1956) (question for reviewing court is propriety of action reviewed, not the reason for the action) (aff'd, 24 N.J. 139 (1957)).

Pursuant to N.J.S.A. 47:1A-9(a), the provisions of OPRA "shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to . . . any federal law [or] federal regulation." To this end, 26 U.S.C. § 6103 (2016) ("Section 6103") provides that:

(A) a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense.

[Section 6103(b)(2).]

⁷ On appeal from Paff v. Township of Plainsboro, GRC Complaint No. 2005-29 (March 2006).

Further, in McCormack v. State of N.J. Dep't of Treasury, GRC Complaint No. 2013-357 (Interim Order dated May 24, 2016), the Council performed an *in camera* review of bid proposals related to processing tax returns. The GRC notes that the bids disclosed there contained only redactions, as opposed to some of the records here being withheld in their entirety. Notwithstanding, the Council ultimately held that the Custodian lawfully denied access to multiple information redacted within those proposals, inclusive of the "Federal Employer Identification Number" ("FEIN"), employee and subcontractor contact information, and pertinent information relating to each bidder's internal processes and networks. N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-1.1; Burnett v. Cnty. of Bergen, 402 N.J. Super. 319 (App. Div. 2008); Commc'ns Workers of Am., AFL-CIO v. Rousseau, 417 N.J. Super. 341, 357 (App. Div. 2010).

The GRC conducted an *in camera* examination on the submitted record. The GRC found that twenty-nine (29) redactions accounted for either the FEIN of each bidder or bidder ownership/employee contact information. Thus, and consistent with the Council's decision in McCormack, GRC 2013-357, the GRC is satisfied that these redactions were appropriate under OPRA and will not address them below.

The results of this examination are set forth in the following table:

| Bates Stamp No. | Record Name/Date | Description of Record or Redaction | Custodian's Explanation/ Citation for Non-disclosure or Redactions | Findings of the <i>In Camera</i> Examination⁸ |
|---|---|---|---|--|
| Easter Seals N.J. ("EHS") 829-831 | 2015 Quarterly Federal Tax Return, 2 nd Quarter (3 pages). | Withheld in entirety. | Trade secret and proprietary commercial or financial information. <u>N.J.S.A. 47:1A-1.1.</u> | <i>Sua sponte</i> , the GRC finds that the quarterly tax return is exempt under OPRA. <u>N.J.S.A. 47:1A-9</u> ; 26 <u>U.S.C. § 6103</u> ; see also <u>Scott v. N.J. Health Care Facilities Financing Auth.</u> , GRC Complaint No. 2015-256 (April 2019) (<i>aff'd</i> 2021 <u>N.J. Super.</u> Unpub. LEXIS |

⁸ **Unless expressly identified for redaction, everything in the record shall be disclosed.** For purposes of identifying redactions, unless otherwise noted a paragraph/new paragraph begins whenever there is an indentation and/or a skipped space(s). The paragraphs are to be counted starting with the first whole paragraph in each record and continuing sequentially through the end of the record. If a record is subdivided with topic headings, renumbering of paragraphs will commence under each new topic heading. Sentences are to be counted in sequential order throughout each paragraph in each record. Each new paragraph will begin with a new sentence number. If only a portion of a sentence is to be redacted, the word in the sentence which the redaction follows or precedes, as the case may be, will be identified and set off in quotation marks. If there is any question as to the location and/or extent of the redaction, the GRC should be contacted for clarification before the record is redacted. The GRC recommends the redactor make a paper copy of the original record and manually "black out" the information on the copy with a dark colored marker, then provide a copy of the blacked-out record to the requester.

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| | | | | 3154 (App. Div. 2021)). Thus, the Custodian lawfully denied access to this record. <u>N.J.S.A. 47:1A-6.</u> |
| 836 | Bank Letter to Bidder dated September 9, 2015 (1 page). | Withheld in entirety. | Trade secret and proprietary commercial or financial information. <u>N.J.S.A. 47:1A-1.1.</u> | The contents of the letter containing EHS's financial information clearly falling within the perimeters of the cited exemption. Thus, the Custodian lawfully denied access to this letter in its entirety. <u>N.J.S.A. 47:1A-6.</u> |
| 998-1002 | N.J. Exit Plan for Services (undated) (6 pages). | Withheld in entirety. | Trade secret and proprietary commercial or financial information. <u>N.J.S.A. 47:1A-1.1.</u> Information which, if disclosed, would give an advantage to bidders or competitors. <u>N.J.S.A. 47:1A-1.1.</u> | The contents of this record contain a detailed exit plan for EHS if they are not awarded the contract. Upon review, the GRC is satisfied that disclosure of this document would give other bidders additional knowledge of the current business relationship between EHS and DHS that could be exploited to gain an advantage in the bidding process. Thus, the Custodian lawfully denied access to the responsive record. <u>N.J.S.A. 47:1A-6.</u> |
| 1018-1034 | Security Plan (undated) (16 pages). | Withheld in entirety. | Trade secret and proprietary commercial or financial information. <u>N.J.S.A. 47:1A-1.1.</u> Information which, if disclosed, would give an advantage to bidders or | The contents of this record explain in detail EHS's internal operations with detail, inclusive of organizational structure and technological capabilities. The record also explains those processes EHS planned to utilize to effectuate the terms of the contract. As was the case in |

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| | | | competitors. <u>N.J.S.A. 47:1A-1.1.</u> | <u>McCormack</u> , GRC 2013-357, this record is falls squarely within both exemptions cited. Thus, the Custodian lawfully denied access to the responsive record. <u>N.J.S.A. 47:1A-6;</u> <u>Newark Morning Ledger</u> , 423 <u>N.J. Super.</u> at 169; <u>Hammock</u> , 142 <u>N.J.</u> 356. |
| 1051-1075 | “August 2014 & 2013’ Independent Auditor’s Report” dated December 15, 2014 | Withheld in entirety. | Trade secret and proprietary commercial or financial information. <u>N.J.S.A. 47:1A-1.1.</u> | The report, marked confidential, clearly analyzes EHS’s financial information and its economic health. As such, and consistent with <u>McCormack</u> , GRC 2013-357, this report is exempt from access under OPRA. Thus, the Custodian lawfully denied access to it. <u>N.J.S.A. 47:1A-6;</u> <u>Newark Morning Ledger</u> , 423 <u>N.J. Super.</u> at 169; <u>Hammock</u> , 142 <u>N.J.</u> 356. |
| 1103-1110, 1141 | Letters of Recommendation (various dates) (9 pages) | Personal information (names, addresses, - email addresses) of private citizens. | Citizen’s reasonable expectation of privacy. <u>N.J.S.A. 47:1A-1.</u> | The redacted contact information of Easter Seals customers certainly invokes a reasonable expectation of privacy. Disclosure of this information, especially to other bidders, would expose those individuals to unwanted solicitation from competing commercial operations. Moreover, there is no evidence to suggest that customer contact information carries less of a reasonable expectation of privacy than the employee personal information withheld in |

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| | | | | <u>McCormack</u> , GRC 2013-357. <u>Id.</u> at 5-6. Thus, the Custodian lawfully denied access to this information. <u>N.J.S.A.</u> 47:1A-6; <u>Newark Morning Ledger</u> , 423 <u>N.J. Super.</u> at 169; <u>Hammock</u> , 142 <u>N.J.</u> 356. |
| 1244-1245 | Price Schedule/Sheet (2 pages). | Withheld in entirety. | Information which, if disclosed, would give an advantage to bidders or competitors. <u>N.J.S.A.</u> 47:1A-1.1. | The price sheet is comprised of fees EHS was proposing under the contact by service, year, and position. Disclosure of these estimated costs would necessarily provide an advantage to other bidders or competitors by providing them the opportunity of underbidding these estimates. Thus, the Custodian lawfully denied access to the price list. <u>N.J.S.A.</u> 47:1A-6. |
| Palco, Inc. 1288-1290 | Price Schedule/Sheet (3 pages). | Withheld in entirety. | Information which, if disclosed, would give an advantage to bidders or competitors. <u>N.J.S.A.</u> 47:1A-1.1. | The price sheet is comprised of fees Palco was proposing under the contact by service, year, and position. Disclosure of these estimated costs would necessarily provide an advantage to other bidders or competitors by providing them the opportunity of underbidding these estimates. Thus, the Custodian lawfully denied access to the price list. <u>N.J.S.A.</u> 47:1A-6. |
| Public P'ship, Inc. ("PP") 1440-1464 | "June 30, 2014 & 2013' Financial Statements and | Withheld in entirety. | Trade secret and proprietary commercial or financial | The report, marked confidential, clearly analyzes PP's financial information and its economic health. As such, |

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| | Reports” (25 pages). | | information. <u>N.J.S.A. 47:1A-1.1.</u> | and consistent with <u>McCormack</u> , GRC 2013-357, this report is exempt from access under OPRA. Thus, the Custodian lawfully denied access to it. <u>N.J.S.A. 47:1A-6</u> ; <u>Newark Morning Ledger</u> , 423 <u>N.J. Super.</u> at 169; <u>Hammock</u> , 142 <u>N.J.</u> 356. |
| 1631-1632 | Price Schedule/Sheet (2 pages). | Withheld in entirety. | Information which, if disclosed, would give an advantage to bidders or competitors. <u>N.J.S.A. 47:1A-1.1.</u> | The price sheet is comprised of fees PP was proposing under the contract by service, year, and position. Disclosure of these estimated costs would necessarily provide an advantage to other bidders or competitors by providing them the opportunity of underbidding these estimates. Thus, the Custodian lawfully denied access to the price list. <u>N.J.S.A. 47:1A-6.</u> |
| Pub. Health Mgmt. Corp. (“PHMC”) 1653-1689 | Proposal Volume No. 1 Section 2 (33 pages). | Redactions for description of services, charts, and figures. | Trade secret and proprietary commercial or financial information. <u>N.J.S.A. 47:1A-1.1.</u> Information which, if disclosed, would give an advantage to bidders or competitors. <u>N.J.S.A. 47:1A-1.1.</u> | The contents of the redacted portions of this record explain in detail PHMC’s internal operations with detail, inclusive of organizational structure and technologic capabilities. The record also explains those processes PHMC planned to utilize to effectuate the terms of the contract. As was the case in <u>McCormack</u> , GRC 2013-357, this record is falls squarely within both exemptions cited. Thus, the Custodian lawfully denied access to the |

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| | | | | responsive record. <u>N.J.S.A. 47:1A-6;</u> <u>Newark Morning Ledger,</u> 423 <u>N.J. Super.</u> at 169; <u>Hammock,</u> 142 <u>N.J.</u> 356. |
| 1692-1711 | Proposal Volume No. 1 Section 3 (20 pages). | Redactions for description of organization and experience. | Trade secret and proprietary commercial or financial information. <u>N.J.S.A. 47:1A-1.1.</u> Information which, if disclosed, would give an advantage to bidders or competitors. <u>N.J.S.A. 47:1A-1.1.</u> | The contents of the redacted portions of this record explain in detail PHMC’s internal operations with detail, inclusive of organizational structure and technologic capabilities. The record also explains those processes PHMC planned to utilize to effectuate the terms of the contract. As was the case in <u>McCormack,</u> GRC 2013-357, this record is falls squarely within both exemptions cited. Thus, the Custodian lawfully denied access to the responsive record. <u>N.J.S.A. 47:1A-6;</u> <u>Newark Morning Ledger,</u> 423 <u>N.J. Super.</u> at 169; <u>Hammock,</u> 142 <u>N.J.</u> 356. |
| 1726 | Organizational Chart | Withheld in entirety. | Trade secret and proprietary commercial or financial information. <u>N.J.S.A. 47:1A-1.1.</u> Information which, if disclosed, would give an advantage to bidders or competitors. <u>N.J.S.A. 47:1A-1.1.</u> | The contents of this chart include a top-down view of PHMC inclusive of internal titles, job duties, full time employee (“FTE”) allocations. As was the case in <u>McCormack,</u> GRC 2013-357, this record is falls squarely within both exemptions cited. Thus, the Custodian lawfully denied access to the responsive record. <u>N.J.S.A. 47:1A-6;</u> <u>Newark Morning Ledger,</u> |

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| | | | | 423 <u>N.J. Super.</u> at 169; <u>Hammock</u> , 142 <u>N.J.</u> 356. |
| 1730-1744 1746-1763 | Experience and References (32 pages). | Withheld in entirety. | Trade secret and proprietary commercial or financial information. <u>N.J.S.A.</u> 47:1A-1.1. Information which, if disclosed, would give an advantage to bidders or competitors. <u>N.J.S.A.</u> 47:1A-1.1. | In accordance with <u>McCormack</u> , GRC 2013-357, current contract information inclusive of client contact information is protected as trade secret proprietary commercial and financial information. Thus, the Custodian lawfully denied access to these records. <u>N.J.S.A.</u> 47:1A-6; <u>Newark Morning Ledger</u> , 423 <u>N.J. Super.</u> at 169; <u>Hammock</u> , 142 <u>N.J.</u> 356. |
| 1802-1804 | Project Mobilization Plan (3 pages). | Withheld in entirety. | Trade secret and proprietary commercial or financial information. <u>N.J.S.A.</u> 47:1A-1.1. Information which, if disclosed, would give an advantage to bidders or competitors. <u>N.J.S.A.</u> 47:1A-1.1. | This record contains a chart showing various proposed program tasks and identifying the specific timeline for 96 “Work Plan” tasks identifying specific start dates and task duration. The information contained in the Plan falls squarely within the exemptions cited. Thus, the Custodian lawfully denied to the responsive record. |
| 1806-1807 | “Contract Schedule” (2 pages). | Withheld in entirety. | Trade secret and proprietary commercial or financial information. <u>N.J.S.A.</u> 47:1A-1.1. Information which, if disclosed, would give an advantage to bidders or competitors. <u>N.J.S.A.</u> 47:1A-1.1. | As discussed above, this record contains a specific proposed schedule of contractual tasks include the service delivered, date, and summary of the service. The information contained in the Schedule falls squarely within the exemptions cited. Thus, the Custodian lawfully denied to the responsive record. <u>N.J.S.A.</u> 47:1A-6. |

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| 1809-1819 | Quality Management Plan (13 pages). | Withheld in entirety. | <p>Trade secret and proprietary commercial or financial information. <u>N.J.S.A. 47:1A-1.1.</u></p> <p>Information which, if disclosed, would give an advantage to bidders or competitors. <u>N.J.S.A. 47:1A-1.1.</u></p> | <p>This record sets forth PHMC’s process for delivering services to include program structure, methodology, performance, goals, and training. As was the case in <u>McCormack</u>, GRC 2013-357, this record is falls squarely within both exemptions cited. Thus, the Custodian lawfully denied access to the responsive record. <u>N.J.S.A. 47:1A-6;</u> <u>Newark Morning Ledger</u>, 423 <u>N.J. Super.</u> at 169; <u>Hammock</u>, 142 <u>N.J.</u> 356.</p> |
| 1821-1844 | Continuity of Operations Plan (24 pages). | Withheld in entirety. | <p>Trade secret and proprietary commercial or financial information. <u>N.J.S.A. 47:1A-1.1.</u></p> <p>Information which, if disclosed, would give an advantage to bidders or competitors. <u>N.J.S.A. 47:1A-1.1.</u></p> | <p>This record, which is incidentally marked as a “draft,” sets forth an in-depth continuity of operations plans in the event of an emergency or disaster, including notification processes, movement on facilities and personnel, and positional emergency functions. The record falls squarely within the exemptions cited. Thus, the Custodian lawfully denied to the responsive record. <u>N.J.S.A. 47:1A-6.</u></p> |
| 1847-1898 | Disaster Recovery Plan (48 pages). | Withheld in entirety. | <p>Trade secret and proprietary commercial or financial information. <u>N.J.S.A. 47:1A-1.1.</u></p> <p>Information which, if disclosed, would give an advantage to bidders or</p> | <p>This record contains in-depth discussions of PHMC’s technological disaster recovery plan, including specific personnel contact, appendices containing significant technological information, disaster recovery scenarios, and internal report forms. The</p> |

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| | | | competitors. <u>N.J.S.A. 47:1A-1.1.</u> | record falls squarely within the exemptions cited. Thus, the Custodian lawfully denied to the responsive record. <u>N.J.S.A. 47:1A-6.</u> |
| 1963-1968 | Fifth Amendment to Loan and Security Agreement (6 pages). | Withheld in entirety. | Trade secret and proprietary commercial or financial information. <u>N.J.S.A. 47:1A-1.1.</u> Information which, if disclosed, would give an advantage to bidders or competitors. <u>N.J.S.A. 47:1A-1.1.</u> | This record is comprised of an amendment to PHMC's "Loan Agreement" from its lender (misidentified in the document index as part of the Disaster Recovery Plan). The record contains significant commercial financial information exempt from disclosure under OPRA. Thus, the Custodian lawfully denied access to this record. <u>N.J.S.A. 47:1A-6.</u> |
| 1970 | PHMC Bank Reference. | Withheld in entirety. | Trade secret and proprietary commercial or financial information. <u>N.J.S.A. 47:1A-1.1.</u> Information which, if disclosed, would give an advantage to bidders or competitors. <u>N.J.S.A. 47:1A-1.1.</u> | In conjunction with the above record, disclosure of this information would specifically identify PHMC's lender and expose the company to potential financial inquiries. Thus, the Custodian lawfully denied access to this information. <u>N.J.S.A. 47:1A-6.</u> |
| 1972-1992 | "June 30, 2014 and 2013 Financial Statements" dated December 19, 2014 (21 pages). | Withheld in entirety. | Trade secret and proprietary commercial or financial information. <u>N.J.S.A. 47:1A-1.1.</u> | The report clearly analyzes PHMC's financial information and its economic health. As such, and consistent with <u>McCormack</u> , GRC 2013-357, this report is exempt from access under OPRA. Thus, the Custodian lawfully denied access to it. <u>N.J.S.A. 47:1A-6;</u> |

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| | | | | <u>Newark Morning Ledger</u> , 423 <u>N.J. Super.</u> at 169; <u>Hammock</u> , 142 <u>N.J.</u> 356. |
| 1994-2039 | “Emergency Management Plan” (“EMP”) presentation (46 pages). ⁹ | Withheld in entirety. | Trade secret and proprietary commercial or financial information. <u>N.J.S.A.</u> 47:1A-1.1. Information which, if disclosed, would give an advantage to bidders or competitors. <u>N.J.S.A.</u> 47:1A-1.1. | This record contains a sample training module comprising of slide presentation and commentary notes created by PHMC and specific to client primary care clinics. This course appears to be available through PHMC University, which “serves as the one-stop-shop for all online training at PHMC.” ¹⁰ PHMC’s trainings are only accessible through log-in credentials presented to PHMC employees. Based on the forgoing, the GRC agrees that this training module, which is only available to PHMC employees, falls within at least the trade secret exemption. Thus, the Custodian lawfully denied access to this record. <u>N.J.S.A.</u> 47:1A-6. |
| 2080-2086 | “Price Schedule Sheet” (7 pages). | Withheld in entirety. | Information which, if disclosed, would give an advantage to bidders or competitors. <u>N.J.S.A.</u> 47:1A-1.1. | The price sheet is comprised of fees PHMC was proposing under the contact by service, year, and position. Disclosure of these estimated costs would necessarily provide an advantage to other bidders or competitors by providing them the opportunity of |

⁹ The GRC notes that when addressing similar records maintained by a “public agency,” the Council has held that EMPs are exempt from disclosure under OPRA’s security and surveillance exemption. See e.g. Kaplan v. Twp. of Voorhees (Camden), GRC Complaint No. 2016-150 (April 2017).

¹⁰ About Us (phmcuniversity.com) (accessed January 13, 2022).

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| | | | | underbidding these estimates. Thus, the Custodian lawfully denied access to the price list. <u>N.J.S.A. 47:1A-6.</u> |
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Based on the above *in camera* examination table, the GRC has confirmed that the information withheld, either in its entirety or through redactions, was lawful.

Knowing & Willful

Because it is determined that the Custodian did not unlawfully deny access to any of the responsive records here and did not commit any violations of OPRA’s provisions, the GRC declines to address whether a knowing and willful violation occurred.

Prevailing Party Attorney’s Fees

OPRA provides that:

A person who is denied access to a government record by the custodian of the record, at the option of the requestor, may: institute a proceeding to challenge the custodian's decision by filing an action in Superior Court . . .; or in lieu of filing an action in Superior Court, file a complaint with the Government Records Council . . . A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.

[N.J.S.A. 47:1A-6.]

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Appellate Division held that a complainant is a “prevailing party” if he achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct. Id. at 432. Additionally, the court held that attorney’s fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. Id.

Additionally, the New Jersey Supreme Court has ruled on the issue of “prevailing party” attorney’s fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 71 (2008), the Court discussed the catalyst theory, “which posits that a plaintiff is a ‘prevailing party’ if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant’s conduct.” (quoting Buckhannon Bd. & Care Home v. West Virginia Dep’t of Health & Human Res., 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court stated that the phrase “prevailing party” is a legal term of art that refers to a “party in whose favor a judgment is rendered.” (quoting Black’s Law Dictionary 1145 (7th ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because “[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties . . .” Id. at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863. Further, the

Supreme Court expressed concern that the catalyst theory would spawn extra litigation over attorney's fees. Id. at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

However, the Court noted in Mason, that Buckhannon is binding only when counsel fee provisions under federal statutes are at issue. 196 N.J. at 72, citing Teeters, 387 N.J. Super. at 429; see, e.g., Baer v. Klagholz, 346 N.J. Super. 79 (App. Div. 2001) (applying Buckhannon to the federal Individuals with Disabilities Education Act), certif. denied, 174 N.J. 193 (2002). “But in interpreting New Jersey law, we look to state law precedent and the specific state statute before us. When appropriate, we depart from the reasoning of federal cases that interpret comparable federal statutes.” 196 N.J. at 73 (citations omitted).

The Mason Court accepted the application of the catalyst theory within the context of OPRA, stating that:

OPRA itself contains broader language on attorney's fees than the former RTKL did. OPRA provides that “[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.” N.J.S.A. 47:1A-6. Under the prior RTKL, “[a] plaintiff in whose favor such an order [requiring access to public records] issues . . . may be awarded a reasonable attorney's fee not to exceed \$500.00.” N.J.S.A. 47:1A-4 (repealed 2002). The Legislature's revisions therefore: (1) mandate, rather than permit, an award of attorney's fees to a **prevailing party**; and (2) eliminate the \$500 cap on fees and permit a reasonable, and quite likely higher, fee award. Those changes expand counsel fee awards under OPRA.

[Mason at 73-76.]

The Court in Mason, further held that:

[R]equestors are entitled to attorney’s fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) “a factual causal nexus between plaintiff’s litigation and the relief ultimately achieved”; and (2) “that the relief ultimately secured by plaintiffs had a basis in law.” Singer v. State, 95 N.J. 487, 495, cert denied, New Jersey v. Singer, 469 U.S. 832 (1984).

[Id. at 76.]

Here, the Complainant filed the instant complaint arguing that the Custodian unreasonably extended the time frame to respond and unlawfully denied access to a significant portion of the responsive records, inclusive of those submitted by her organization, Community Access Unlimited. The Complainant requested that the GRC order disclosure of all responsive records and that she was a prevailing party entitled to an award of attorney’s fees. The Custodian argued in the SOI that multiple records were disclosed within the extended time frame, and that the remaining withheld or redacted records were exempt from disclosure. Following the Council’s request for additional information through its August 28, 2018 Interim Order, as well as an *in camera* review, the GRC has determined that no unlawful denial of access occurred here for a variety of reasons set forth in the Council’s September 24, 2019 Interim Order and herein.

The GRC must initially note that because the Council has not ordered disclosure of any records as a result of either Interim Order or the *in camera* review, a change has not occurred in the Custodian's conduct. However, the GRC must also address whether this complaint filing on December 8, 2015 was the causal nexus for the Custodian's disclosures spanning from December 3, through December 17, 2015. In reviewing all applicable evidence, it is clear that the Custodian intended to respond by disclosing records, regardless of the filing of the complaint. Specifically, on December 3, 2015, Cynthia Jablonski responded on behalf of the Custodian obtaining an extension through January 4, 2016, which straddled the filing of the complaint. Both prior to the complaint filing and in the days thereafter, Ms. Jablonski disclosed and or denied access to records responsive to the subject OPRA request. Thus, the evidence of record supports DPP's intent to respond to the subject OPRA request regardless of the filing of this complaint. The GRC also notes that the Council, when presented with a similar set of facts, has determined that complainant is not a prevailing party. See Wolosky v. Borough of Washington (Warren), GRC Complaint No. 2016-19 (September 2017). Thus, the Complainant is not a prevailing party and is not entitled to an award of reasonable attorney's fees.

Therefore, the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Teeters, 387 N.J. Super. 432. Additionally, no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, the Custodian disclosed records within the extended time frame set forth prior to the filing of this complaint. Additionally, the GRC has determined that no unlawful denial of access occurred here and has not ordered disclosure of any of those records to which the Complainant sought access. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's September 24, 2019 Interim Order because he responded in the prescribed time frame providing nine (9) copies of the redacted, withheld, and unredacted portions of the responsive bids and a document index. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.
2. **The *In Camera* Examination set forth in the above table reveals the Custodian has lawfully denied access to, or redacted portions of, the records listed in the document index pursuant to N.J.S.A. 47:1A-6.**
3. Because it is determined that the Custodian did not unlawfully deny access to any of the responsive records here and did not commit any violations of OPRA's provisions, the GRC declines to address whether a knowing and willful violation occurred.
4. The Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Teeters v.

DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 71 (2008). Specifically, the Custodian disclosed records within the extended time frame set forth prior to the filing of this complaint. Additionally, the GRC has determined that no unlawful denial of access occurred here and has not ordered disclosure of any of those records to which the Complainant sought access. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51.

Prepared By: Frank F. Caruso
Executive Director

January 18, 2022



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

INTERIM ORDER

September 24, 2019 Government Records Council Meeting

Lisa D. Taylor, Esq.
Complainant

Complaint No. 2015-395

v.

NJ Department of Treasury,
Division of Purchase & Property
Custodian of Record

At the September 24, 2019 public meeting, the Government Records Council (“Council”) considered the September 17, 2019 Supplemental Findings and Recommendations of the Council Staff 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 complied with the Council’s August 28, 2018 Interim Order because he responded in the extended time frame providing a Vaughn Index as required by the Council. Further, the Custodian confirmed that the records at issue here were not similar to those at issue in Taylor v. N.J. Dep’t of Treasury, GRC Complaint No. 2016-62. Finally, the Custodian simultaneously provided certified confirmation of compliance to the Council Staff.
2. The Custodian lawfully denied the Complainant access to the responsive Community Access Unlimited bid submissions because disclosure of same to her “does not advance the purpose of OPRA . . .” Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609, 619 (App. Div. 2008); N.J.S.A. 47:1A-6.
3. The responsive evaluation records, inclusive of the Evaluation Committee Report, are exempt from disclosure under the “inter-agency or intra-agency advisory, consultative, or deliberative material” exemption because they meet the two-prong test as set forth in Educ. Law Ctr. v. N.J. Dep’t of Educ., 198 N.J. 274, 285 (2009). N.J.S.A. 47:1A-1.1; Verry v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-287 (Interim Order dated June 30, 2015). Accordingly, the Custodian lawfully denied access to said records. N.J.S.A. 47:1A-6.
4. The GRC must conduct an *in camera* review of the redacted bid proposals to determine the validity of the Custodian’s assertion that the redacted portions of the bid proposals were exempt from disclosure under multiple exemptions in OPRA. N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-1.1. See Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).

5. **The Custodian shall deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 4 above), nine (9) copies of the redacted records, a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,³ 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.**
6. The Custodian did not unlawfully deny access to the remaining records at issue in this complaint. N.J.S.A. 47:1A-6. Specifically, the Custodian certified, and the record reflects, that he disclosed them to the Complainant between December 3, and December 17, 2015. Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint Nos. 2009-156, 2009-157, 2009-158 (Interim Order dated April 28, 2010).
7. 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.
8. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 24th Day of September 2019

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: September 26, 2019

¹ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives them by the deadline.

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

³ "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."

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
September 24, 2019 Council Meeting**

**Lisa D. Taylor, Esq.¹
Complainant**

GRC Complaint No. 2015-395

v.

**New Jersey Department of Treasury,
Division of Purchase & Property²
Custodial Agency**

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

1. Regarding Request for Proposal (“RFP”) 2016-X-23964 – Fiscal Intermediary and Financial Cash and Counseling Services, copies of all “Notices of Intent to Award” (“Notice”).
2. Regarding RFP 2016-X-23964, copies of all correspondence and/or communications comprising negotiations.
3. Regarding RFP 2016-X-23964, copies of all correspondence and communications to and from Public Partnerships, LLC.
4. Regarding RFP 2016-X-23964, copies of:
 - a. All evaluation sheets.
 - b. All evaluation scores.
 - c. All evaluation criteria.
 - d. Notes with respect to evaluations and/or review of the responses to the RFP
 - e. Correspondence from New Jersey Department of Human Services (“DHS”) or the New Jersey Department of Treasury (“Treasury”) to each other or any third parties referring to the RFP.
 - f. Any minutes and/or agendas for any meetings or teleconferences at which the RFP or the scoring responses to the RFP was or will be the topic of discussion.
5. Regarding RFP 2016-X-23964, copies of all responses to the RFP.
6. Regarding RFP 2016-X-23964, copies of all requests to redact submitted by bidders in response to a September 30, 2015 letter sent by Marie Boragine.
7. Regarding RFP 2016-X-23964, copies of all best and final offers submitted by bidders.
8. Regarding RFP 2016-X-23964, copies of:
 - a. All questions submitted by bidders or potential bidders, whether or not responses were provided.
 - b. All responses to questions from Treasury (including the Division of Purchase and Property (“DPP”)) and/or DHS (including the Divisions of Disability Services,

¹ Represented by Justin A. Marchetta, Esq., of Inglesino, Webster, Wyciskala & Taylor, LLC (Parsippany, NJ).

² Represented by Deputy Attorney General Eric L. Apar. Previously represented by Deputy Attorney General Clifford T. Rones.

Aging Services, Developmental Disabilities, and/or Medical Assistance and Health Services.

- c. All correspondence and electronic communications between any bidders or potential bidders and representatives from the above agencies.

Custodian of Record: Garry Dales³

Request Received by Custodian: November 24, 2015

Response Made by Custodian: December 3, 2015

GRC Complaint Received: December 8, 2015

Background

August 28, 2018 Council Meeting:

At its August 28, 2018 public meeting, the Council considered the August 21, 2018 Findings and Recommendations of the Council Staff 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 has borne his burden of proof that he timely responded to the Complainant's OPRA requests based on a warranted and substantiated extension. N.J.S.A. 47:1A-6; Ciccarone v. N.J. Dep't of Treasury, GRC Complaint No. 2013-280 (Interim Order, dated July 29, 2014). Therefore, no "deemed" denial occurred in the instant matter. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i).
2. The Custodian may have unlawfully denied access to multiple responsive records. N.J.S.A. 47:1A-6. The Custodian must provide a detailed accounting of the 2,051 pages of records, by number of pages, as to what was disclosed, withheld, and otherwise determined to not be responsive. Additionally, the Custodian must identify those records submitted by and to Community Access Unlimited as part of the Request for Proposal 2016-X-23964 process. Finally, the Custodian must identify whether the records provided in response to OPRA request No. 4 were similar to those provided in response to the Complainant's January 19, 2016 OPRA request at issue in Taylor v. N.J. Dep't of Treasury, GRC Complaint No. 2016-62.
3. **The Custodian shall comply with conclusion No. 2 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 1:4-4,⁴ to the Council Staff.⁵**

³ Cynthia Jablonski was named in the complaint.

⁴ "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."

⁵ 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 Lisa D. Taylor, Esq. v. New Jersey Department of Treasury, Division of Purchase & Property, 2015-395 – Supplemental Findings and Recommendations of the Executive Director 2

4. 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.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On August 29, 2018, the Council distributed its Interim Order to all parties. On August 31, 2018, Custodian's Counsel sought an extension of time to address the Council's Order. On September 5, 2018, the Government Records Council ("GRC") granted an extension through September 20, 2018 to respond to said Order. On September 20, 2018, Custodian's Counsel sought a second extension of time through September 27, 2018. On the same day, the GRC granted said extension, noting that no further extensions would likely be granted.

On September 27, 2018, the Custodian responded to the Council's Interim Order. The Custodian certified that in response to all eight (8) OPRA requests, DPP disclosed to the Complainant 1,599 pages of records and withheld 695 pages. The Custodian further certified that DPP did not possess any records "otherwise determined to not be responsive."

Additionally, the Custodian affirmed that his Statement of Information ("SOI") total of 2,051 pages of responsive records was in error: the actual total was 2,294 pages. The Custodian affirmed that the SOI discrepancy was the result of a clerical error. The Custodian certified that he included a detailed accounting of all 2,294 pages in the form of a "Vaughn Index," which also addresses those records "submitted by or to Community Access Unlimited [(“CAU”)]." The Custodian also certified that records at issue in Taylor, GRC 2016-62 were not similar to the records at issue here.

Analysis

Compliance

At its August 28, 2018 meeting, the Council ordered the Custodian to provide a detailed accounting of the responsive records by number of pages and identifying those disclosed, withheld, or redacted. The Council further ordered the Custodian to identify those records submitted by CAU and whether any records at issue here were also at issue in Taylor, GRC 2016-62. Finally, the Council ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Council Staff. On August 29, 2018, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on September 6, 2018.

record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

On August 31, 2018, the second (2nd) business day after receipt of the Council's Order, Custodian's Counsel sought an extension of time to comply with the Council's Order given the number of records responsive to the subject OPRA request. On September 5, 2018, the Government Records Council ("GRC") granted an extension of time through September 20, 2018 based on the circumstances in this complaint. On September 20, 2018, Custodian's Counsel sought another extension of time until September 27, 2018 because DPP had difficulty retrieving the records and compiling the information sought by the Council. On the same day, the GRC granted said extension.

On September 27, 2018, the Custodian responded to the Council's Interim Order. Therein, the Custodian provided a Vaughn Index reflecting all responsive records for each request and including all information sought by the Council. The Custodian further certified that the records sought here were not similar to those sought in Taylor, GRC 2016-62. Finally, the Custodian provided certified confirmation of the Complainant to the Council Staff. Based on a review of the Custodian's compliance submission, the GRC is satisfied that he complied with the Council's Order.

Therefore, the Custodian complied with the Council's August 28, 2018 Interim Order because he responded in the extended time frame providing a Vaughn Index as required by the Council. Further, the Custodian confirmed that the records at issue here were not similar to those at issue in Taylor, GRC 2016-62. Finally, the Custodian simultaneously provided certified confirmation of compliance to the Council Staff.

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.

Based on the Custodian's compliance submission, the GRC is now able to better address whether the Custodian lawfully denied access to the records responsive to the Complainant's eight (8) OPRA requests. The GRC notes that the Custodian certified that the prior estimate of pages was incorrect based on a clerical error: the actual total of pages numbered 2,294.

CAU RFP Submissions

New Jersey Courts have provided that "[t]he purpose of OPRA 'is to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process.'" Times of Trenton Publ'g Corp. v. Lafayette Yard Cmty. Dev. Corp., 183 N.J. 519, 535 (2005) (quoting Asbury Park Press v. Ocean Cnty. Prosecutor's Office, 374 N.J. Super. 312, 329 (Law Div. 2004)). In Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609, 619 (App. Div. 2008),⁶ the Appellate Division looked to the Lafayette Yard case in

⁶ Reversing Bart v. City of Paterson Hous. Auth., GRC Complaint No. 2005-145 (May 2006).

determining whether a custodian knowingly and willfully violated OPRA by not providing to the complainant a record already in his possession. The Court held that a complainant could not have been denied access to a requested record if he already had in his possession at the time of the OPRA request the record sought pursuant to OPRA. Id. at 617. The Appellate Division reasoned that requiring a custodian to duplicate another copy of the requested record and send it to the complainant does not advance the purpose of OPRA, which is to ensure an informed citizenry. Id. at 618 (citing Lafayette Yard, 183 N.J. at 535).

The Appellate Division's decision in Bart, however, turns upon the specific facts of that case. The Council's decision noted that the custodian certified that copies of the requested record were available at the Housing Authority's front desk upon simple verbal request by any member of the public. Bart v. City of Paterson Hous. Auth., GRC Complaint No. 2005-145 (May 2006). Moreover, the complainant admitted that he was in possession of this record at the time of the OPRA request for the same record. Id.

In the instant complaint, the Complainant sought various records submitted in response to RFP 2016-X-23964. In the Denial of Access Complaint, the Complainant noted that she represented CAU, one of the bidders to the RFP, and that the Custodian unlawfully denied access to a number of records that company submitted. The Complainant included in her complaint CAU records that she argued the Custodian failed to provide. In the SOI, the Custodian certified that he provided numerous records to the Complainant shortly after she filed the Complainant. In response to the SOI, Complainant's Counsel reasserted the Complainant's position that the Custodian failed to provide multiple records "include[ing] those submitted by CAU during the bid process." Taylor, Esq. v. N.J. Dep't of Treasury, Div. of Purchase & Prop., GRC Complaint No. 2015-395 (Interim Order dated August 28, 2018) at 6.

Upon receipt of the Custodian's Vaughn Index, the GRC has identified approximately 586 pages of the 2,294 pages of responsive records that CAU submitted and/or received during the bid process. The Custodian disclosed most of those records, some with redactions, and denied access to approximately 169 additional pages of records.

However, the evidence of record is clear that CAU maintained all its bid submission records at the time that they submitted their OPRA request. Of note, the Complainant attached at least one of the responsive records to her Denial of Access Complaint. Complainant's Counsel reaffirmed this point in his January 26, 2016 SOI rebuttal response. Based on the forgoing, the GRC is satisfied that the court's decision in Bart, 403 N.J. Super. 609. Rediscovering these records to CAU through the Complainant does not advance the purpose of OPRA.

Accordingly, the Custodian lawfully denied the Complainant access to the responsive CAU bid submissions because disclosure of same to her "does not advance the purpose of OPRA . . ." Bart, 403 N.J. Super. at 619; N.J.S.A. 47:1A-6.

Evaluation Sheets, Notes, & Committee Report

OPRA provides that the definition of a government record "shall not include . . . inter-agency or intra-agency advisory, consultative, or deliberative [(“ACD”)] material." When the

exception is invoked, a governmental entity may “withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated.” Educ. Law Ctr. v. N.J. Dep’t of Educ., 198 N.J. 274, 285 (2009) (citing NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975)). The New Jersey Supreme Court has also ruled that a record that contains or involves factual components is entitled to deliberative-process protection under the exemption in OPRA when it was used in decision-making process *and* its disclosure would reveal deliberations that occurred during that process. Educ. Law Ctr., 198 N.J. 274.

A custodian claiming an exception to the disclosure requirements under OPRA on that basis must initially satisfy two conditions: 1) the document must be pre-decisional, meaning that the document was generated prior to the adoption of the governmental entity's policy or decision; and 2) the document must reflect the deliberative process, which means that it must contain opinions, recommendations, or advice about agency policies. Id. at 286 (internal citations and quotations omitted). The key factor in this determination is whether the contents of the document reflect “formulation or exercise of . . . policy-oriented judgment or the process by which policy is formulated.” Id. at 295 (adopting the federal standard for determining whether material is “deliberative” and quoting Mapother v. Dep’t of Justice, 3 F.3d 1533, 1539 (D.C. Cir. 1993)). Once the governmental entity satisfies these two threshold requirements, a presumption of confidentiality is established, which the requester may rebut by showing that the need for the materials overrides the government's interest in confidentiality. Id. at 286-87.

OPRA also provides that its provisions:

[S]hall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to [OPRA]; *any other statute*; resolution of either or both Houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law; federal regulation; or federal order.

[N.J.S.A. 47:1A-9(a) (emphasis added).]

The Council has previously found that evaluation records were exempt from disclosure under OPRA as ACD material. For instance, in Verry v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-287 (Interim Order dated June 30, 2015), the Council performed an *in camera* review of responsive correspondence “to determine the validity of” the Custodian’s alleged exemptions. Included as part of that correspondence were score sheets and handwritten notes regarding an RFP. The Council found that said sheets and notes were exempt as ACD material. Id. at 7. The Council reasoned that the sheets and notes meet the two (2) prong test required to be considered ACD material. Id.

Further, N.J.S.A. 52:34-10.3(c), relevant to evaluation committees in State agencies, provides that:

In all cases, persons appointed to an evaluation committee shall have the relevant experience necessary to evaluate the project. *When the contract is awarded, the*

names of the members of any evaluation committee shall be made public and the members' names, educational and professional qualifications, and practical experience, that were the basis for the appointment, shall be reported to the State Treasurer.

[Id.]

Here, the Custodian denied access to 243 pages of records comprising evaluation sheets and notes. Additionally, the Custodian disclosed to the Complainant the Evaluation Committee Report comprising 20 pages, but redacted pricing information, estimated contract values, and Evaluation Committee names. The Custodian cited to multiple exemptions under OPRA to support nondisclosure including the ACD exemption and a State statute. N.J.S.A. 47:1A-1.1; N.J.S.A. 52:34-10.3(c).

In applying the ACD test to all records at issue here, the GRC is satisfied that the Custodian lawfully denied to the 243 pages of records because same meet the two-prong ACD test. First, by their very nature, evaluation sheets contain deliberative material created in anticipation of an agency's final decision. The Council's prior decision in Verry, GRC 2013-287 lends additional support to GRC's finding here. Further, the above also applies to the Evaluation Committee Report, which obviously aided DPP in determining which bidder would receive a contract. Thus, notwithstanding the Custodian's disclosure of same, the ACD exempt effectively applies to DPP's evaluation records.

Therefore, the responsive evaluation records, inclusive of the Evaluation Committee Report, are exempt from disclosure under the ACD material exemption because they meet the two-prong test as set forth in Educ. Law Ctr., 198 N.J. 274. N.J.S.A. 47:1A-1.1; Verry, GRC 2013-287. Accordingly, the Custodian lawfully denied access to said records. N.J.S.A. 47:1A-6.

Finally, the GRC notes that N.J.S.A. 52:34-10.3(c) does contain language limiting access to Evaluation Committee names until the bid award is complete. However, this issue is moot as it applies to evaluation records because they are first and foremost exempt under the ACD exemption.

RFP Proposals

In Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the Council⁷ that accepted the custodian's legal conclusion for the denial of access without further review. The Appellate Division noted 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 stated that:

⁷ Paff v. NJ Dep't of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

[OPRA] 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 found that:

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

[Id.]

Here, the Custodian identified in his Vaughn Index 1,293 pages of RFP proposals to which he denied access in part.⁸ The Custodian identified a plethora of information withheld from disclosure, which he certified contained personal or trade secret information. N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-1.1. Notwithstanding the Custodian's description of the responsive records, a "meaningful review" is necessary to determine whether all redacted records reasonably fell within the exemptions cited in the Vaugh Index. The GRC must thus review same in order to determine the full applicability of those exemptions. Such an action is not uncommon, as the GRC will routinely perform an *in camera* review in similar circumstances. See McCormack v. State of N.J. Dep't of Treasury, GRC Complaint No. 2013-357 (Interim Order dated September 30, 2014).

Therefore, the GRC must conduct an *in camera* review of the redacted bid proposals to determine the validity of the Custodian's assertion that the redacted portions of the bid proposals were exempt from disclosure under multiple exemptions in OPRA. N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-1.1. See Paff, 379 N.J. Super. at 346.

All Remaining Records Identified in the Vaughn Index

In Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint Nos. 2009-156, 2009-157, 2009-158 (Interim Order dated April 28, 2010), the Council found that the custodian did not unlawfully deny access to the requested records based on the custodian's certification that all such records were provided to the complainant. The Council held that the custodian's certification, in

⁸ This number does not include CAU's 565-page RFP proposal, which the GRC addressed above.

addition to the lack of refuting evidence from the complainant, was sufficient to meet the custodian's burden of proof. See also Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005); Holland v. Rowan Univ., GRC Complaint No. 2014-63, *et seq.* (March 2015).

In the instant matter, the Complainant argued in the Denial of Access Complaint that the Custodian failed to responsive records to her. In the SOI, the Custodian identified 2,051 pages of records he deemed to be responsive. The Custodian further noted that he disclosed many records between December 14 and 17, 2015, on top of prior disclosures on December 3, 2015. Complainant's Counsel subsequently disputed the Custodian's SOI certification, arguing that the Complainant had received less than 1,000 records to date. Thereafter, in response to the Council's Order, the Custodian produced a Vaugh Index reaffirming the dates on which he provided responsive records, in part or whole, to the Complainant. The Custodian also noted a discrepancy in the number of pages responsive to the Complainant's OPRA requests based on clerical error.

Upon review of the evidence of record and arguments submitted by both parties, the GRC is satisfied that the Custodian provided all responsive records not addressed above. Although Complainant's Counsel asserted that the Custodian failed to provide many of the responsive records, the Vaughn Index reflects the disclosure of almost 1,700 pages of records between December 3 and 17, 2015. Further, there is no other evidence in the record that refutes the Custodian's certification that these disclosures took place. Thus, no unlawful denial of access occurred here because the Custodian disclosed all remaining records responsive to the Complainant's OPRA request.

Therefore, the Custodian did not unlawfully deny access to the remaining records at issue in this complaint. N.J.S.A. 47:1A-6. Specifically, the Custodian certified, and the record reflects, that he disclosed them to the Complainant between December 3 and December 17, 2015. Danis, GRC 2009-156, *et seq.*

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.

Prevailing Party Attorney's Fees

The Council defers analysis of whether the Complainant is a prevailing party 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 complied with the Council's August 28, 2018 Interim Order because he responded in the extended time frame providing a Vaughn Index as required by the

Council. Further, the Custodian confirmed that the records at issue here were not similar to those at issue in Taylor v. N.J. Dep't of Treasury, GRC Complaint No. 2016-62. Finally, the Custodian simultaneously provided certified confirmation of compliance to the Council Staff.

2. The Custodian lawfully denied the Complainant access to the responsive Community Access Unlimited bid submissions because disclosure of same to her “does not advance the purpose of OPRA . . .” Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609, 619 (App. Div. 2008); N.J.S.A. 47:1A-6.
3. The responsive evaluation records, inclusive of the Evaluation Committee Report, are exempt from disclosure under the “inter-agency or intra-agency advisory, consultative, or deliberative material” exemption because they meet the two-prong test as set forth in Educ. Law Ctr. v. N.J. Dep't of Educ., 198 N.J. 274, 285 (2009). N.J.S.A. 47:1A-1.1; Verry v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-287 (Interim Order dated June 30, 2015). Accordingly, the Custodian lawfully denied access to said records. N.J.S.A. 47:1A-6.
4. The GRC must conduct an *in camera* review of the redacted bid proposals to determine the validity of the Custodian’s assertion that the redacted portions of the bid proposals were exempt from disclosure under multiple exemptions in OPRA. N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-1.1. See Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).
5. **The Custodian shall deliver⁹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 4 above), nine (9) copies of the redacted records, a document or redaction index¹⁰, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,¹¹ 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.**
6. The Custodian did not unlawfully deny access to the remaining records at issue in this complaint. N.J.S.A. 47:1A-6. Specifically, the Custodian certified, and the record reflects, that he disclosed them to the Complainant between December 3, and December 17, 2015. Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint Nos. 2009-156, 2009-157, 2009-158 (Interim Order dated April 28, 2010).

⁹ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives them by the deadline.

¹⁰ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

¹¹ "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."

7. 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.
8. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Executive Director

September 17, 2019



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

August 28, 2018 Government Records Council Meeting

Lisa D. Taylor, Esq.
Complainant

Complaint No. 2015-395

v.

NJ Department of Treasury,
Division of Purchase and Property
Custodian of Record

At the August 28, 2018 public meeting, the Government Records Council (“Council”) considered the August 21, 2018 Findings and Recommendations of the Council Staff 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 has borne his burden of proof that he timely responded to the Complainant’s OPRA requests based on a warranted and substantiated extension. N.J.S.A. 47:1A-6; Ciccarone v. N.J. Dep’t of Treasury, GRC Complaint No. 2013-280 (Interim Order, dated July 29, 2014). Therefore, no “deemed” denial occurred in the instant matter. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i).
2. The Custodian may have unlawfully denied access to multiple responsive records. N.J.S.A. 47:1A-6. The Custodian must provide a detailed accounting of the 2,051 pages of records, by number of pages, as to what was disclosed, withheld, and otherwise determined to not be responsive. Additionally, the Custodian must identify those records submitted by and to Community Access Unlimited as part of the Request for Proposal 2016-X-23964 process. Finally, the Custodian must identify whether the records provided in response to OPRA request No. 4 were similar to those provided in response to the Complainant’s January 19, 2016 OPRA request at issue in Taylor v. N.J. Dep’t of Treasury, GRC Complaint No. 2016-62.
3. **The Custodian shall comply with conclusion No. 2 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 1:4-4,¹ to the Council Staff.²**

¹ "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."

² 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



4. 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.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 28th Day of August, 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: August 29, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
August 28, 2018 Council Meeting**

**Lisa D. Taylor, Esq.¹
Complainant**

GRC Complaint No. 2015-395

v.

**New Jersey Department of Treasury,
Division of Purchase & Property²
Custodial Agency**

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

1. Regarding Request for Proposal (“RFP”) 2016-X-23964 – Fiscal Intermediary and Financial Cash and Counseling Services, copies of all “Notices of Intent to Award” (“Notice”).
2. Regarding RFP 2016-X-23964, copies of all correspondence and/or communications comprising negotiations.
3. Regarding RFP 2016-X-23964, copies of all correspondence and communications to and from Public Partnerships, LLC.
4. Regarding RFP 2016-X-23964, copies of:
 - a. All evaluation sheets.
 - b. All evaluation scores.
 - c. All evaluation criteria.
 - d. Notes with respect to evaluations and/or review of the responses to the RFP
 - e. Correspondence from New Jersey Department of Human Services (“DHS”) or the New Jersey Department of Treasury (“Treasury”) to each other or any third parties referring to the RFP.
 - f. Any minutes and/or agendas for any meetings or teleconferences at which the RFP or the scoring responses to the RFP was or will be the topic of discussion.
5. Regarding RFP 2016-X-23964, copies of all responses to the RFP.
6. Regarding RFP 2016-X-23964, copies of all requests to redact submitted by bidders in response to a September 30, 2015 letter sent by Marie Boragine.
7. Regarding RFP 2016-X-23964, copies of all best and final offers submitted by bidders.
8. Regarding RFP 2016-X-23964, copies of:
 - a. All questions submitted by bidders or potential bidders, whether or not responses were provided.
 - b. All responses to questions from Treasury (including the Division of Purchase and Property (“DPP”)) and/or DHS (including the Divisions of Disability Services,

¹ Represented by Justin A. Marchetta, Esq., of Inglesino, Webster, Wyciskala & Taylor, LLC (Parsippany, NJ).

² Represented by Deputy Attorney General Clifford T. Rones

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Aging Services, Developmental Disabilities, and/or Medical Assistance and Health Services.

- c. All correspondence and electronic communications between any bidders or potential bidders and representatives from the above agencies.

Custodian of Record: Garry Dales³

Request Received by Custodian: November 24, 2015

Response Made by Custodian: December 3, 2015

GRC Complaint Received: December 8, 2015

Background⁴

Request and Response:

On November 23, 2015, the Complainant submitted eight (8) Open Public Records Act (“OPRA”) requests to the Custodian seeking the above-mentioned records. On December 3, 2015, the seventh (7th) business day after receipt of the OPRA request, Cynthia Jablonski responded in writing on behalf of the Custodian stating that DPP would need an extension until January 4, 2016. Ms. Jablonski explained that the time was necessary to gather responsive records and conduct a thorough review and redaction process.

On the same day, the Complainant sent a letter to Ms. Jablonski contending that the responsive records were readily available and should have been disclosed within the statutory time frame. The Complainant noted that she had been seeking the requested records for months under OPRA and was repeatedly told that no records would be provided until a contract was awarded. The Complainant stated that Ms. Jablonski should have known that she would file another OPRA request as soon as Treasury issued the “Notice” for RFP 2016-X-23964. The Complainant thus requested that Ms. Jablonski provide records by close of business on December 4, 2015.

On the same day, Ms. Jablonski provided a partial response for OPRA request No. 8 that included addendums to RFP 2016-X-23964 and any communications between the bidders/potential bidders and “any representative of the Agencies.”

Denial of Access Complaint:

On December 8, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant contended that DPP unlawfully denied access to readily available records. For background information, the Complainant stated that she represented Community Access Unlimited (“CAU”) a New Jersey non-profit social services entity that provided services to the State “of the type at issue in [RFP 2016-X-23964].” The Complainant noted that CAU submitted a proposal in response to the RFP. The Complainant

³ Cynthia Jablonski was named in the complaint.

⁴ 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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stated that she submitted multiple OPRA requests from late September through early October 2015, which sought the same records as those sought in OPRA requests No. 4, 5, and 8 at issue here.⁵ The Complainant stated that DPP denied all three (3) requests, stating that it would not disclose any records until a contract was awarded. The Complainant stated that on November 23, 2015, DPP issued a “Notice” awarding the contract to a Massachusetts-based company, which prompted the Complainant to renew her previous OPRA requests and submit five (5) additional OPRA requests. The Complainant asserted that the Custodian responded on December 3, 2015 conveniently seeking additional time until January 4, 2016, which far exceeded the time frame for unsuccessful bidders to protest the bid award, or December 8, 2015.

The Complainant first contended that Ms. Jablonski’s request for an extension of time was unlawful. The Complainant stated that OPRA allowed for custodians to seek extensions of time when records were archived or not otherwise readily available. N.J.S.A. 47:1A-5(i). The Complainant argued that all responsive records were immediately available because it would be impossible for DPP to archive records regarding the RFP within hours of issuing the “Notice.” The Complainant further contended that archiving the responsive records, given the protest process deadline of December 8, 2015, and appeal deadline of “at least” January 7, 2016, would “defy logic.” The Complainant also contended that Ms. Jablonski erroneously asserted that DPP needed the extension to review and redact responsive records. The Complainant stated that during the RFP process, Ms. Boragine wrote to the bidders asking them to identify confidential, proprietary, and/or trade secret information contained in their bids. The Complainant noted that these responses were due by October 7, 2015; thus, DPP had already identified all information requiring redaction nearly two months prior to the subject OPRA requests. The Complainant argued that DPP’s extension request constituted an abuse of OPRA process to frustrate CAU’s protest to the “Notice.”

The Complainant next contended that the DPP provided incomplete records for OPRA request No. 8. The Complainant noted that the DPP previously provided the exact same records to her on October 1, 2015. The Complainant contended that one of the addenda included questions from bidders and potential bidders, as well as responses to those questions. However, the Complainant argued that DPP failed to disclose CAU’s questions, which she included as part of the Denial of Access Complaint. The Complainant thus argued that Ms. Jablonski violated OPRA by failing to provide full disclosure of all records responsive to OPRA request No. 8.

The Complainant ultimately requested that the Council: 1) determine that DPP and Ms. Jablonski unlawfully denied access to responsive records; 2) order DPP and Ms. Jablonski to disclose all responsive records immediately; and 3) determine that she is a prevailing party entitled to an award of reasonable attorney’s fees.

Supplemental Responses:

Between December 14, and 17, 2015, Ms. Jablonski responded in writing providing access to records responsive to the Complainant’s OPRA requests. Regarding certain records responsive to OPRA request Nos. 3, 4, 5, 7, and 8, Ms. Jablonski stated that they were exempt

⁵ The Complainant noted that she did not challenge DPP’s denial of those OPRA requests. As such, the requests are not the subject of this complaint.

from disclosure until the expiration of the protest period. N.J.S.A. 47:1A-1.1. Ms. Jablonski further noted that once the protest period ended, “records may be available.”

Statement of Information:

On January 22, 2016, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s eight (8) OPRA requests on November 24, 2015. The Custodian certified that on the same day, representatives of CAU took advantage of DPP’s policy of allowing bidders to only inspect redacted proposals by appointment. The Custodian certified that the representatives spent approximately two (2) hours reviewing the bids. The Custodian certified that he requested responsive records from the relevant Procurement Specialist, who returned to him 2,051 pages of records. The Custodian affirmed that he quickly determined that DPP could not reasonably disclose all records within the seven (7) business day time frame. The Custodian certified that, on his behalf, Ms. Jablonski responded in writing on December 3, 2015 seeking an extension of time until January 4, 2016. However, the Custodian affirmed that Ms. Jablonski disclosed all responsive records, many with redactions, to the Complainant between December 3, and December 17, 2015 as follows:

- OPRA request No. 1 - On December 16, 2015, disclosed “Notice” with no redactions.
- OPRA request No. 2 - On December 16, 2015, disclosed as a duplicate of OPRA request No. 7 because DPP considered negotiations to be the “Best and Final Offer.”
- OPRA request No. 3 - on December 17, 2015, disclosed correspondence to and from Public Partnership, LLC.
- OPRA request No. 4 - On December 16, 2015, disclosed multiple records, but withheld certain documents pending expiration of the protest period.
- OPRA request No. 5 - On December 14, 2015, disclosed five (5) proposals (including CAU’s submission) withholding certain information under a citizen’s reasonable expectation of privacy. N.J.S.A. 47:1A-1. Also, Ms. Jablonski noted that information under the trade secret and proprietary commercial or financial information and advantage to bidders and competitors exemptions was also redacted. N.J.S.A. 47:1A-1.1.
- OPRA request No. 6 - On December 16, 2015, disclosed five (5) responses to Ms. Boragine’s September 30, 2015 letter with no redactions.
- OPRA request No. 7 - On December 16, 2015, disclosed four (4) responsive records with redactions on two (2) records under the “trade secret and proprietary commercial or financial information” and “advantage to bidders and competitors” exemptions. N.J.S.A. 47:1A-1.1.
- OPRA request No. 8 - On December 3, 2015, disclosed RFP Addenda including questions and answers in final form without redactions. On December 17, 2015, disclosed questions submitted by bidders with redactions for members of the evaluation committee in accordance with N.J.S.A. 52:34-10.3(c). Further, the Custodian certified that the following records responsive to this OPRA request were disclosed as part of other responses:
 - On December 14, 2015, disclosed correspondence as part Ms. Jablonski’s response to OPRA request No. 5.
 - On December 16, 2015, provided correspondence as part of Ms. Jablonski’s response to OPRA request Nos. 1, 6 and 7.

- On December 17, 2015, provided correspondence as part of Ms. Jablonski's response to OPRA request No. 3.

The Custodian stated that relevant GRC case law supports an extension of time to respond where a custodian seeks one in writing and provides a date certain on which he/she will respond. See Paff v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-77 (June 2012); Rivera v. City of Plainfield Police Dep't (Union), GRC Complaint No. 2009-317 (May 2011); Criscione v. Town of Guttenberg (Hudson), GRC Complaint No. 2010-68 (November 2010); Rivera v. Union City Bd. of Educ. (Hudson), GRC Complaint No. 2008-112 (April 2010); O'Shea v. Borough of Hopatcong (Sussex), GRC Complaint No. 2009-223 (December 2010); Starkey v. N.J. Dep't of Transportation, GRC Complaint Nos. 2007-315 through 317 (February 2009). The Custodian asserted that OPRA also recognizes exceptions to the seven (7) business day time frame when used as a solution to accommodate a request that would substantially disrupt agency operations. N.J. Builders Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 183 (App. Div. 2007).

The Custodian certified that DPP received 223 OPRA requests in 2015 and that most sought records related to RFPs. The Custodian affirmed that such a request could yield thousands of pages requiring a detailed page-by-page review for a multitude of information exempt from disclosure. The Custodian also certified that DPP's review process includes contacting the vendors submitting RFPs to seek review for confidential information because they are in the best position to identify such.

The Custodian contended that here, DPP's response to the Complainant's OPRA requests was timely and proper. N.J.S.A. 47:1A-5(i). The Custodian certified that the Complainant submitted eight (8) OPRA requests in one day for a number of records; none were subject to the "immediate access" provision at N.J.S.A. 47:1A-5(e). The Custodian affirmed that the requests yielded 2,051 pages that required additional time to review. The Custodian asserted that DPP was within its right to obtain this extension, contrary to the Complainant's refusal to allow for it. The Custodian also contended that this complaint was without merit because the Complainant filed it prior to allowing DPP to complete its response.

The Custodian further contended that the Complainant mistakenly argued that DPP had already redacted all responsive records at the time of her OPRA requests. The Custodian asserted that the Complainant's reliance on Ms. Boragine's September 30, 2015 misplaced DPP's separate obligation to review and redact records under OPRA. The Custodian thus contended that all responsive records were subject to review by the DPP and Custodian's Counsel. The Custodian noted that a separate review under OPRA was necessary to ensure that the vendors were identifying information that was exempt under OPRA, and that the review accounted for additionally exempt information not covered under the trade secret/proprietary exemption.

Finally, the Custodian contended that the Complainant conflated her argument that DPP sought an extension in bad faith. The Custodian averred that the Complainant failed to acknowledge in the Denial of Access Complaint that CAU staff reviewed all bid proposals on November 24, 2015. See E-mail Chain between Mercedes Witowsky and Ms. Boragine dated November 23, 2015. Also, the Custodian argued that CAU still submitted their bid protest on

December 8, 2015 and a supplement on December 22, 2015 after the Chief Hearing Officer assigned to the protest extended the time period. The Custodian noted that no contract was awarded at this point due to the protest filing.

Additional Submissions:

On January 26, 2016, the Complainant's Counsel submitted a letter brief rebutting the Custodian's SOI. Therein, Counsel contended that, contrary to his SOI certification, the Complainant received less than 1,000 pages of records to date. Counsel argued that it was troubling that DPP failed to disclose more than half the estimated 2,051 pages of records after over two months.

Further, Counsel argued that the Custodian was erroneously under the impression that CAU's November 24, 2015 inspection absolved him from responding to the subject OPRA requests. Counsel confirmed that CAU representatives conducted an inspection but alleged that they were not allowed to make copies. Counsel asserted the Custodian conveniently did not include the whole e-mail chain between Ms. Witowsky and Ms. Boragine, where Ms. Boragine denied CAU access to copies of the bid proposals. Counsel noted that he attached the full e-mail chain supporting the foregoing.

Finally, Counsel reiterated that the Custodian failed to produce all responsive records. Further, Counsel noted that the missing records included those submitted by CAU during the bid process. Counsel asserted that it was impossible to determine whether DPP provided any other records in an incomplete form, but its intent to stall access is clear. Counsel renewed the Complainant's requested relief as set forth in the Denial of Access Complaint.

Analysis

Timeliness

OPRA provides that a custodian may request an extension of time to respond to the complainant's OPRA request, but the custodian must provide a specific date by which he/she will respond. Should the custodian fail to respond by that specific date, "access shall be deemed denied." N.J.S.A. 47:1A-5(i).

In Rivera, GRC 2009-317, the custodian responded in writing to the complainant's request on the fourth (4th) business day by seeking an extension of time to respond and providing an anticipated date by which the requested records would be made available. The complainant did not consent to the custodian's request for an extension of time. The Council stated that:

The Council has further described the requirements for a proper request for an extension of time. Specifically, in [Starkey, GRC 2007-315, *et seq.*], the Custodian provided the Complainant with a written response to his OPRA request on the second (2nd) business day following receipt of said request in which the Custodian requested an extension of time to respond to said request and provided the Complainant with an anticipated deadline date upon which the Custodian

would respond to the request. The Council held that “because the Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated deadline date of when the requested records would be made available, the Custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5(g) [and] N.J.S.A. 47:1A-5(i).”

Further, in Criscione, GRC 2010-68, the Council held that the custodian did not unlawfully deny access to the requested records, stating in pertinent part that:

[B]ecause the Custodian provided a written response requesting an extension on the sixth (6th) business day following receipt of the Complainant’s OPRA request and providing a date certain on which to expect production of the records requested, and, notwithstanding the fact that the Complainant did not agree to the extension of time requested by the Custodian, the Custodian’s request for an extension of time [to a specific date] to respond to the Complainant’s OPRA request was made in writing within the statutorily mandated seven (7) business day response time.

Moreover, in Werner, GRC 2011-151, the Council again addressed whether the custodian lawfully sought an extension of time to respond to the complainant’s OPRA request. The Council concluded that because the custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated date by which the requested records would be made available, the custodian properly requested the extension pursuant to OPRA. See also Rivera, GRC 2009-317; Criscione, GRC 2010-68; and Starkey, GRC 2007-315, *et seq.*

Although extensions are rooted in well-settled case law, the Council need not find valid every request for an extension containing a clear deadline. In Ciccarone v. NJ Dep’t of Treasury, GRC Complaint No. 2013-280 (Interim Order, dated July 29, 2014), the Council found that the custodian could not lawfully exploit the process by repeatedly rolling over an extension once obtained. In reaching the conclusion that the continuous extensions resulted in a “deemed” denial of access, the Council looked to what is “reasonably necessary.”

In the instant matter, the Custodian sought one (1) extension of twenty (20) business days for the Complainant’s November 23, 2015 OPRA request. As noted above, a requestor’s approval is not required for a valid extension. Notwithstanding, the GRC notes that the Complainant objected to the extension in writing on December 3, 2015.

To determine if the extended time for a response is reasonable, the GRC must first consider the complexity of the request as measured by the number of items requested, the ease in identifying and retrieving requested records, and the nature and extent of any necessary redactions. Ciccarone, GRC 2013-280. The GRC must next consider the amount of time the custodian already had to respond to the request. Id. Finally, the GRC must consider any

extenuating circumstances that could hinder the custodian's ability to respond effectively to the request.⁶ Id.

Here, the Complainant submitted eight (8) OPRA requests on the same day seeking multiple types of records regarding the RFP. Those records included communications between bidding parties and Treasury, evaluations, and RFP responses. In the SOI, the Custodian affirmed that the Procurement Specialist working on the RFP returned 2,051 pages of records, at which point he realized an extension would be necessary. The Custodian certified that the subject OPRA requests were part of the 223 total requests, many for RFP information, received at Treasury in 2015. The Custodian also affirmed that these requests often yielded thousands of pages of records requiring significant review. The Custodian averred that such was the case here: the DPP had to review all potentially responsive records regardless of the Complainant's assertion that the submitted bids were already redacted.

From the Custodian's receipt of the Complainant's OPRA request, through Ms. Jablonski, the Custodian sought twenty (20) business days to respond. The Custodian sought no additional extensions. The Custodian, through Ms. Jablonski ultimately sent written responses on December 3, 2015 and between December 14, and 17, 2015 disclosing and/or denying access to records in part or whole. Thus, the Custodian utilized at most ten (10) of the twenty (20) extended business days.

Given the extensiveness of each OPRA request submitted, as well as the number of responsive pages, the GRC is persuaded that the extension was warranted and substantiated. The GRC also notes that it does not agree with Complainant's assertion that the extension was unwarranted because redactions to the submitted bids were already made. This is especially true because the Complainant sought more than the submitted bids.

Accordingly, the Custodian has borne his burden of proof that he timely responded to the Complainant's OPRA requests based on a warranted and substantiated extension. N.J.S.A. 47:1A-6; Ciccarone, GRC 2013-280. Therefore, no "deemed" denial occurred in the instant matter. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i).

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.

The focus of this complaint revolves around whether the Custodian ultimately disclosed those records responsive to the Complainant's OPRA request. While the GRC understands that

⁶ "Extenuating circumstances" could include, but not necessarily be limited to, retrieval of records that are in storage or archived (especially if located at a remote storage facility), conversion of records to another medium to accommodate the requestor, emergency closure of the custodial agency, or the custodial agency's need to reallocate resources to a higher priority due to *force majeure*.

some records were provided and other denied, there is still a threshold question as to how many of the 2,051 pages of records: 1) were responsive; 2) were denied by the Custodian under N.J.S.A. 47:1A-1.1; 3) were submitted by and remained in the possession of CAU; and 4) were subsequently disclosed as part of the OPRA requests at issue in Taylor v. N.J. Dep't of Treasury, GRC Complaint No. 2016-62.⁷

Regarding the first two points above, the Custodian certified to the number of responsive records located, but Complainant's Counsel argued in a subsequent submission that she received far less than 1,000 pages. Further, while the Custodian provided a Vaughn index for each OPRA request, it is unclear how many pages comprises the records provided/ denied.

Regarding the third point above, the Complainant and Complainant's Counsel both confirmed that the Custodian failed to provide certain records that CAU submitted. The Complainant included examples of the records in question as part of the Denial of Access Complaint. To this end, the Appellate Division has held that a complainant could not have been denied access to a requested record if he already had in his possession at the time of the OPRA request the document he sought pursuant to OPRA. Bart, 403 N.J. Super. 609. The Appellate Division noted that "requiring a custodian to duplicate another copy of the requested record and send it to the complainant does not . . . advance the purpose of OPRA, which is to ensure an informed citizenry." Bart, 403 N.J. Super. at 618 (citations omitted). The Appellate Division's decision in Bart, however, turns upon the specific facts of that case. The Court stated it was "undisputed that Bart at all times had within his possession a copy of [the requested record] . . . Indeed, he attached a copy to the complaint he filed with the Council." Id. (emphasis supplied).

Similarly, the GRC has held that when a complainant admits that they were in possession of the requested record at the time he made the request, it is not a denial of access if the custodian failed to provide another copy. Rodriguez v. Kean Univ., GRC Complaint No. 2014-121 (October 2014). See also Owoh (on behalf of O.R.) v. West-Windsor Reg'l Sch. Dist. (Mercer), GRC Complaint No. 2012-330 (February 2013). In addition, "[a]ny limitations on the right of access accorded by [OPRA] as amended and supplemented shall be construed in favor of the public's right of access[.]" Paff v. City of Bayonne (Hudson), GRC Complaint No. 2012-245 (Interim Order dated July 23, 2013).

Regarding the fourth and final point, the Complainant subsequently submitted additional OPRA requests to the DPP regarding the RFP that became the subject of Taylor, GRC 2016-62. Of the three (3) subject requests, the January 19, 2016 OPRA request sought records similar to request No. 4 here. The Complainant also noted that she filed that request based on information received in conjunction with "a prior OPRA request." While it is unclear whether the Complainant was referring to OPRA request No. 4, it is obvious that there may have been some post-complaint interactions between the parties that could impact the Council's decision here.

⁷ The GRC further notes that a number of the subject OPRA requests seeking communications and minutes inclusive of a certain topic were, on their face, invalid in accordance with OPRA. Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-7 (April 2010); Valdes v. Union City Bd. of Educ. (Hudson), GRC Complaint Nos. 2011-147, 2011-157, 2011-172, and 2011-181 (July 2012). Notwithstanding, the Custodian's ability to locate records responsive to each request negates any argument to that effect. See Burke v. Brandes, 429 N.J. Super. 169, 176 (App. Div. 2012).

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Based on all the forgoing, the GRC cannot reach a conclusion as to whether an unlawful denial of access occurred here. Specifically, the GRC cannot determine whether all of the 2,051 pages of records were responsive to the request, how many of them were withheld from disclosure, how many were CAU records in the Complainant's possession, and how many were disclosed or denied as part of the OPRA request subject to Taylor, GRC 2016-62.

Accordingly, the Custodian may have unlawfully denied access to multiple responsive records. N.J.S.A. 47:1A-6. The Custodian must provide a detailed accounting of the 2,051 pages of records, by number of pages, as to what was disclosed, withheld, and otherwise determined to not be responsive. Additionally, the Custodian must identify those records submitted by and to CAU as part of the RFP process. Finally, the Custodian must identify whether the records provided in response to OPRA request No. 4 were similar to those provided in response to the Complainant's January 19, 2016 OPRA request at issue in Taylor, GRC 2016-62.

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.

Prevailing Party Attorney's Fees

The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. The Custodian has borne his burden of proof that he timely responded to the Complainant's OPRA requests based on a warranted and substantiated extension. N.J.S.A. 47:1A-6; Ciccarone v. N.J. Dep't of Treasury, GRC Complaint No. 2013-280 (Interim Order, dated July 29, 2014). Therefore, no "deemed" denial occurred in the instant matter. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i).
2. The Custodian may have unlawfully denied access to multiple responsive records. N.J.S.A. 47:1A-6. The Custodian must provide a detailed accounting of the 2,051 pages of records, by number of pages, as to what was disclosed, withheld, and otherwise determined to not be responsive. Additionally, the Custodian must identify those records submitted by and to Community Access Unlimited as part of the Request for Proposal 2016-X-23964 process. Finally, the Custodian must identify whether the records provided in response to OPRA request No. 4 were similar to those provided in response to the Complainant's January 19, 2016 OPRA request at issue in Taylor v. N.J. Dep't of Treasury, GRC Complaint No. 2016-62.

3. **The Custodian shall comply with conclusion No. 2 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 1:4-4,⁸ to the Council Staff.⁹**
4. 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.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

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

August 21, 2018

⁸ "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."

⁹ 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.

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