



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

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

**FINAL DECISION**

**May 18, 2021 Government Records Council Meeting**

Stacie Percella  
Complainant

Complaint No. 2020-73

v.

City of Bayonne (Hudson)  
Custodian of Record

At the May 18, 2021 public meeting, the Government Records Council (“Council”) considered the May 11, 2021 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. Although Ms. LaGatta responded in writing to the Complainant’s OPRA request within statutorily mandated time frame to respond, said written response was insufficient pursuant to N.J.S.A. 47:1A-5(i) and Papiez v. Cnty. of Mercer, Office of Cnty. Counsel, GRC Complaint No. 2012-59 (March 2013), because she failed to provide a date certain upon which she or the Custodian would respond to the Complainant providing any responsive records. See also Bentz v. Borough of Paramus (Bergen), GRC Complaint No. 2008-89 (June 2011).
2. The Custodian unlawfully denied access to the Dev Mata and Bayonne Developers Residential Urban Renewal, LLC. agreements because they were fully executed at the time of the subject OPRA request and should have been disclosed accordingly. N.J.S.A. 47:1A-6. However, the GRC declines to order disclosure of these agreements because they were disclosed as part of the Statement of Information. Further, the Custodian lawfully denied access to the Gauri and Malakshmi agreements under the “inter-agency or intra-agency advisory, consultative, or deliberative material” exemption because they were in draft form until executed by the City on May 21, 2020. N.J.S.A. 47:1A-1.1; Libertarians for Transparent Gov't v. Gov't Records Council, 453 N.J. Super. 83 (App. Div. 2018) (certif. denied, 233 N.J. 484 (2018)). Also, the Custodian has borne her burden of proof that she lawfully denied access to the Costco agreement because she certified in the Statement of Information, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
3. Ms. LaGatta’s response to the subject OPRA request was insufficient because she failed to include a date certain on which the City of Bayonne would respond. N.J.S.A. 47:1A-5(i). Further, the Custodian unlawfully denied access to two (2) agreements responsive to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. However, the Custodian

lawfully denied access to two (2) agreements that were not fully executed at the time of the Complainant's OPRA request, and lawfully denied access to agreements with Costco because none existed. N.J.S.A. 47:1A-6. Additionally, the evidence of record does not indicate that either the Custodian or Ms. LaGatta's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, neither the Custodian nor Ms. LaGatta's actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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 18<sup>th</sup> Day of May 2021

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: May 20, 2021**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
May 18, 2021 Council Meeting**

**Stacie Percella<sup>1</sup>  
Complainant**

**GRC Complaint No. 2020-73**

v.

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

**Records Relevant to Complaint:** Electronic copies via e-mail of all PLOT program financial agreements between the City of Bayonne (“City”) and Mahalaxmi Bayonne Urban Renewal (“Mahalaxmi”), Malakshmi Goldsborough Urban Renewal (“Malakshmi”), and Bayonne Developers Residential Urban Renewal (“BDRUR”) (collectively “Mahalaxmi properties”), as well as Costco.<sup>3</sup>

**Custodian of Record:** Madelene C. Medina

**Request Received by Custodian:** January 22, 2020

**Response Made by Custodian:** January 31, 2020

**GRC Complaint Received:** April 6, 2020

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

**Request and Response:**

On January 22, 2020, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On January 31, 2020, the seventh (7<sup>th</sup>) business day after receipt of the OPRA request, OPRA Secretary Christina LaGatta responded in writing on behalf of the Custodian stating that the City is awaiting receipt of executed financial agreements for the Mahalaxmi properties. Ms. LaGatta stated that the City expected to receive them within a week and would disclose them thereafter. On February 10, 2020, Ms. LaGatta responded stating that the City was still waiting on the executed financial agreements and needed to extend the statutory response time through February 28, 2020.

On February 11, 2020, the Complainant e-mailed Ms. LaGatta stating that she did not receive any agreements for Costco. Ms. LaGatta responded stating that she would investigate the

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

<sup>2</sup> Represented by Jessica H. Connors, Esq. (Bayonne, NJ).

<sup>3</sup> The Complainant sought additional records that are not at issue in this complaint.

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

issue. On February 14, 2020, the Complainant again sought an update on the Costco agreement. The Complainant noted that the City did not seek an extension of time; thus, the responsive agreement should be forwarded to her.

On February 24, 2020, Ms. LaGatta responded in writing advising the Complainant that the City still had not received the executed agreements; thus, no records existed. Ms. LaGatta suggested that the Complainant submit a new OPRA request in “1-2 months.” On February 24, 2020, the Complainant e-mailed Ms. LaGatta acknowledging the response that no records existed. On March 24, 2020, the Complainant e-mailed Ms. LaGatta requesting the outstanding Mahalaxmi property agreements and noting that the City was already “behind on this OPRA request.” On the same day, Ms. LaGatta advised the Complainant that the City was trying to obtain them from Mahalaxmi and would disclose them upon receipt.

#### Denial of Access Complaint:

On April 6, 2020, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted the City failed to disclose to her multiple agreements regarding the Mahalaxmi properties and Costco. The Complainant contended that the City’s failure to comply with her OPRA request represented a violation of OPRA, among other laws on redevelopment. The Complainant contended that if the City maintained signed contracts, they should have been disclosed in a timely manner.

The Complainant contended that the City’s actions are part of a larger pattern of their lack of transparency, which has resulted in nearly twenty-five (25) Denial of Access Complaints. The Complainant argued that notwithstanding the complaint filings, “the GRC fails to do their part and fine this administration for all the wrong doings.” The Complainant contended that this complaint presents a clear knowing and willful violation; the GRC “needs to follow through with the rules and regulations of OPRA” by determining that the City knowingly and willfully violated OPRA.

#### Statement of Information:

On May 22, 2020, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on January 22, 2020. The Custodian certified that the search for responsive records included the Law Department reviewing its records for responsive agreements. The Custodian further affirmed that Law Director John F. Coffey, II also contacted the developer attorney to obtain responsive agreements. See Coffey Cert. ¶ 15. The Custodian certified that Ms. LaGatta responded in writing on her behalf on January 31, 2020 stating that the City did not possess Mahalaxmi agreements but should be receiving them the next week. The Custodian certified that the Complainant and City exchanged communications over the next few months regarding the subject OPRA request.

The Custodian stated that this complaint in part addresses three (3) separate agreements comprising the Mahalaxmi properties as follows, noting that the Complainant’s portion of the OPRA request relating to Harbor Station South is contained in parts of the below:

1. Guari Shankar Flagship Urban Renewal, LLC. (“Guari”) (formerly Mahalaxmi Bayonne Urban Renewal, LLC) at Block 751, Lot 1.06.
2. Malakshmi at Block 751, Lots 1.08, 1.09 and 1.12 (formerly Block 751, Lot 1.05 and portions of Lot 1.01).
3. Devi Mata Flagship Urban Renewal, LLC (“Devi Mata”) at Block 751, Lot 1.03.

The Custodian stated that on January 10, 2020, the City engaged in four (4) separate closings for the properties in question but Devi Mata was the only developer that could execute the agreement at that time. See Coffey Cert ¶ 8-14. The Custodian stated that on that day, the title company “took possession of all executed and unexecuted agreements pending perfection by the entities. Id. The Custodian stated that the Guari and Malakshmi agreements were finally executed on March 10, 2020. Id. The Custodian averred that between February and May 2020, Mr. Coffey made multiple attempts to obtain executed agreements from Mahalaxmi counsel Donald Pepe. See Coffey Cert. ¶ 15. The Custodian stated that after discussing the agreements with Mr. Pepe, Mr. Coffey was able to obtain and sign all three (3) on May 21, 2020. See Coffey Cert. ¶ 15-17; Pepe Cert. The Custodia stated that all three (3) agreements were attached to the SOI.

The Custodian argued that a fourth (4<sup>th</sup>) agreement between the City and BDRUR actually existed at the time of the Complainant’s OPRA request. The Custodian noted that the City’s failure to locate and disclose the agreement was an administrative oversight due to the sometimes-convoluted nature of entities engaging in redevelopment projects. See Coffey Cert. ¶ 18-19.

The Custodian certified that a fifth (5<sup>th</sup>) agreement sought was between the City and Costco. The Custodian asserted that Ms. LaGatta did not clearly state to the Complainant that no agreement existed because it never entered into an agreement with Costco. See Coffey Cert. ¶ 20. The Custodian noted that, to avoid further litigation, she assisted Custodian’s Counsel in locating an agreement between the City and Bayonne Developers Urban Renewal, LLC (“BDUR”) that related to the Costco property. The Custodian certified that a copy of the agreement was attached to this SOI.

The Custodian argued that the City complied with the Complainant’s OPRA request. The Custodian noted that the City went to extensive lengths to obtain the records sought. The Custodian further noted that all outstanding agreements sought by the Complainant have been provided through the SOI.

#### Additional Submissions:

On December 1, 2020, the Complainant e-mailed the GRC seeking an update on her complaint. The Complainant noted that the City continued to assert that they did not have “this (one) developer[‘s agreement” regarding the Military Ocean Terminal Bayonne (“MOTB”) property, which is currently nearing completion. The Complainant contended that the City purposely withheld the responsive agreement and knowingly and willfully denied access under OPRA.

## Analysis

### Sufficiency of Response

OPRA provides that a custodian may have an extension of time to respond to a complainant's OPRA request, but the custodian must provide a date certain. N.J.S.A. 47:1A-5(i). OPRA further provides that should the custodian fail to provide a response on that specific date, "access shall be deemed denied." N.J.S.A. 47:1A-5(i).

In Papiez v. Cnty. of Mercer, Office of Cnty. Counsel, GRC Complaint No. 2012-59 (March 2013), the custodian responded in a timely manner seeking an extension of time; however, she failed to identify a date certain on which she would respond. The Council determined that, although the custodian timely sought an extension of time, she failed to provide a date certain on which she would respond. N.J.S.A. 47:1A-5(i). Citing Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008).

Here, Ms. LaGatta responded in writing on behalf of the Custodian responded on the seventh (7<sup>th</sup>) business day after receipt of same stating that the City would receive the responsive records within a week and disclose them thereafter. However, Ms. LaGatta failed to provide a date certain on which she or the Custodian would respond to the Complainant providing access to any responsive records. Thus, said response was insufficient and a violation of OPRA. N.J.S.A. 47:1A-5(i).

Therefore, although Ms. LaGatta responded in writing to the Complainant's OPRA request within statutorily mandated time frame to respond, said written response was insufficient pursuant to N.J.S.A. 47:1A-5(i) and Papiez, GRC 2012-59, because she failed to provide a date certain upon which she or the Custodian would respond to the Complainant providing any responsive records. See also Bentz v. Borough of Paramus (Bergen), GRC Complaint No. 2008-89 (June 2011).

### Unlawful Denial of Access

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

OPRA excludes from the definition of a government record "inter-agency or intra-agency advisory, consultative or deliberative [(“ACD”)] material." N.J.S.A. 47:1A-1.1. It is evident that this phrase is intended to exclude from the definition of a government record the types of documents that are the subject of the "deliberative process privilege."

In O’Shea v. West Milford BOE, GRC Complaint No. 2004-93 (April 2006), the Council stated that:

[N]either the statute nor the courts have defined the terms . . . ACD in the context of the public records law. The Council looks to an analogous concept, the deliberative process privilege, for guidance in the implementation of OPRA's ACD exemption. Both the ACD exemption and the deliberative process privilege enable a governmental entity to shield from disclosure material that is pre-decisional and deliberative in nature. Deliberative material contains opinions, recommendations, or advice about agency policies. In Re the Liquidation of Integrity Ins. Co., 165 N.J. 75, 88 (2000); In re Readoption With Amendments of Death Penalty Regulations, 182 N.J. 149 (App. Div. 2004).

In Libertarians for Transparent Gov't v. Gov't Records Council, 453 N.J. Super. 83 (App. Div. 2018) (certif. denied, 233 N.J. 484 (2018)), the Appellate Division discussed the deliberative process privilege at length regarding a request for draft meeting minutes, stating:

The applicability of the deliberative process privilege is government by a two-prong test. The judge must determine both that a document is (1) "pre-decisional," meaning it was "generated before the adoption of an agency's policy or decision;" and (2) deliberative, in that it "contain[s] opinions, recommendations, or advice about agency policies." [Educ. Law Ctr. v. Dep't of Educ., 198 N.J. at 276 (quoting Integrity, 165 N.J. at 83)]. If a document stratifies both prongs, it is exempt from disclosure under OPRA pursuant to the deliberative process privilege.

Regarding the first prong, the court stated that "a draft is not a final document. It has been prepared for another person or persons' editing and eventual approval." Id. at 90. Therefore, the court held that by their very nature, draft meeting minutes are pre-decisional since they are subject to revision and not yet approved for public release. Id. at 90-91.

Regarding the second prong, the court held that "the document must be shown to be closely related to the 'the formulation or exercise of . . . policy-oriented judgment or [to] the process by which policy is formulated.'" Ciesla v. N.J. Dep't of Health & Sr. Servs., 429 N.J. Super. 127, 138 (App. Div. 2012) (quoting McGee v. Twp. of E. Amwell, 416 N.J. Super. 602, 619-20 (App. Div. 2010)). Id. at 91. The court found that the requested draft minutes, as compiled by the writer in attendance at the meeting, were subject to additions, suggestions, and other edits from the members of the public body. Id. Thus, the draft minutes satisfied the second prong of the test. Id. at 92.

Turning to unexecuted agreements, in Paff v. City of Union City (Hudson), GRC Complaint No. 2012-262 (August 2013), the Council declined to require disclosure of the requested settlement agreement because same was not finalized and completed until November 26, 2012. More specifically, plaintiffs signed the subject agreement on October 10, 2012, but the settlement agreement was not final and subject to disclosure until November 26, 2012, when a representative from the City's insurance carrier executed the form. Thus, at the point that both parties' signatures appeared on the form, the GRC was satisfied that the agreement was finalized. The Council's reinforced its position on unexecuted agreements in Paff v. City of Union City (Hudson), GRC Complaint No. 2013-195 (Interim Order dated January 28, 2014). There, the complainant filed after being denied access to a resubmitted request for the same agreement at issue in Paff, GRC 2012-262. The Council ultimately determined that the custodian unlawfully

denied access to the settlement agreement because it was “finalized and executed” on November 26, 2012.

The above position was recently mirrored in Libertarians for Transparent Gov’t v. William Paterson Univ., 2018 N.J. Super. Unpub. LEXIS 843 (App. Div. 2018). There, the court reversed the trial judge’s decision that defendant unlawfully denied access to an unexecuted settlement agreement. The court reasoned that “[u]ntil a settlement is signed, it remains a draft document subject to continued revision and negotiation.” Id. at 5 (citation omitted); see also Libertarians for Transparent Gov’t v. Borough of Westwood (Bergen), GRC Complaint No. 2016-214 (October 2018).

Here, the Complainant sought access to several PILOT agreements regarding property redevelopment within the City. In the Denial of Access Complaint, the Complainant contended that the City unlawfully denied her access to each of the requested agreements. The Complainant argued that to the extent the City maintained signed agreements, they were obligated to disclose them under OPRA. In the SOI, the Custodian has advanced several arguments as to the finality of the agreements sought, including an argument that two (2) of the five (5) agreements sought were not executed at the time of the subject OPRA request. The GRC thus looks to the above treatment of settlement agreements as comparable to other types of agreements requiring full execution to be considered a finalized agreement. That is, any unexecuted agreements are still in draft form and under consideration until that time which all parties execute said agreements. With this understanding, the GRC now turns to the records at issue here.

#### Dev Mata and BDRUR Agreements

In the SOI, the Custodian admitted that the Dev Mata Agreement was fully executed at the January 10, 2020 closing. The Custodian noted that on that day, the presiding title company took possession of this agreement, as well as others that remained unexecuted, and did not return it until May 20, 2020. The Custodian also admitted that the BDRUR Agreement was fully executed, but that the City inadvertently failed to disclose the record prior to the SOI. The Custodian certified that both were attached to the SOI.

The GRC has confirmed that both agreements were finalized prior to submission of the subject OPRA request. For this reason, the Custodian unlawfully denied access to these two (2) agreements.

#### Gauri and Malakshmi Agreements

In the SOI, the Custodian averred that the Gauri and Malakshmi agreements were not executed during the January 10, 2020 closing. The Custodian certified that the agreements were ultimately signed by the developers on March 10, 2020. The Custodian also noted that the City did not receive the unexecuted Agreements on May 20, 2020 and the City signed them on May 21, 2020. The Custodian certified that these agreements were also attached to the SOI.

In applying long-standing precedential court and GRC case law, the GRC is satisfied that these two (2) agreements were not disclosable at the time of the Complainant’s OPRA request



because they had not been fully executed. Libertarians, 453 N.J. Super. at 90-91. To wit, the agreements remained in draft form subject to deliberations and additional changes until that time which the City completely executed each agreement on May 20, 2020.

### Costco Agreement

The Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. See Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005). In the matter before the Council, the Custodian certified in the SOI that the City did not maintain any PILOT agreements with Costco. The Custodian supported his position by locating the agreement relevant to the property whereon Costco was located. To this point, the Custodian certified that the City researched the property and found that it entered into an agreement with BDUR for development. The Custodian certified that a copy of that agreement was attached to the SOI. Upon review of the arguments submitted, the GRC is persuaded that the Custodian lawfully denied access to a specific agreement with Costco because no records existed. The GRC bases this conclusion on the Custodian's SOI statements and Custodian Counsel's certification regarding the development of the Costco property. Thus, no unlawful denial of access occurred here

Accordingly, the Custodian unlawfully denied access to the Dev Mata and BDRUR agreements because they were fully executed at the time of the subject OPRA request and should have been disclosed accordingly. N.J.S.A. 47:1A-6. However, the GRC declines to order disclosure of these agreements because they were disclosed as part of the SOI. Further, the Custodian lawfully denied access to the Gauri and Malakshmi agreements under the ACD exemption because they were in draft form until executed by the City on May 21, 2020. N.J.S.A. 47:1A-1.1; Libertarians, 453 N.J. Super. 83. Also, the Custodian has borne her burden of proof that she lawfully denied access to the Costco agreement because she certified in the SOI, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer, GRC 2005-49.

Finally, the GRC notes that the Complainant responded to the SOI arguing that the Custodian failed to disclose all responsive records because none of the agreements related to the MOTB property. However, the GRC was able to locate two (2) agreements relating to the parcels identified as MOTB. The first was an agreement between the City and KRE Fleet Bayonne Urban Renewal, LLC., which was disclosed on January 31, 2020 and is not at issue in this complaint. The second was the agreement with BDUR for development of the property where Costco is located, which was disclosed as part of the SOI. Thus, the GRC is not persuaded by the Complainant's assertion because the evidence of record indicates that the City disclosed agreements regarding the MOTB property.

### Knowing & Willful

OPRA states that “[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty . . .” N.J.S.A. 47:1A-11(a). OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states “. . . [i]f the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA],

and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA] . . .” N.J.S.A. 47:1A-7(e).

Certain legal standards must be considered when making the determination of whether the Custodian’s actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian’s actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian’s actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian’s actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (*id.*; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); the Custodian’s actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

Here, Ms. LaGatta’s response to the subject OPRA request was insufficient because she failed to include a date certain on which the City would respond. N.J.S.A. 47:1A-5(i). Further, the Custodian unlawfully denied access to two (2) agreements responsive to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. However, the Custodian lawfully denied access to two (2) agreements that were not fully executed at the time of the Complainant’s OPRA request, and lawfully denied access to agreements with Costco because none existed. N.J.S.A. 47:1A-6. Additionally, the evidence of record does not indicate that either the Custodian or Ms. LaGatta’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, neither the Custodian nor Ms. LaGatta’s actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

In closing, the GRC notes that the Complainant criticized the GRC for not finding a knowing and willful violation in the face of more than twenty (20) Denial of Access Complaints. This argument insinuates that the GRC should have decided that specific issue on a compounding basis. To this end, at the outset of OPRA, the GRC created a list known as the “Matrix.” to track custodians that violated OPRA multiple times to assess the civil penalty. However, the Council unanimously voted to discontinue the “Matrix” at its November 10, 2005 meeting because:

“[T]he statutory language of the OPRA allows for penalties based on a Custodian's knowing and willful violation of the OPRA ‘under the totality of the circumstances’ for a particular complaint, not multiple complaints. Based on that fact, it was determined that the time matrix could not be used given the statutory language or requirements for assessing penalties for knowing and willful violations . . .” Paff v. Cumberland County Sheriff’s Office, GRC Complaint No. 2005-159 (January 2006)(citing Renna v. County of Union, GRC Complaint No. 2005-89 (October 2005)).

Based on the forgoing, the GRC has routinely addressed the knowing and willful analysis within the framework of each individual complaint and the facts presented therein and without weighing the impact of other complaints filed against the same agency.

## Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Although Ms. LaGatta responded in writing to the Complainant's OPRA request within statutorily mandated time frame to respond, said written response was insufficient pursuant to N.J.S.A. 47:1A-5(i) and Papiez v. Cnty. of Mercer, Office of Cnty. Counsel, GRC Complaint No. 2012-59 (March 2013), because she failed to provide a date certain upon which she or the Custodian would respond to the Complainant providing any responsive records. See also Bentz v. Borough of Paramus (Bergen), GRC Complaint No. 2008-89 (June 2011).
2. The Custodian unlawfully denied access to the Dev Mata and Bayonne Developers Residential Urban Renewal, LLC. agreements because they were fully executed at the time of the subject OPRA request and should have been disclosed accordingly. N.J.S.A. 47:1A-6. However, the GRC declines to order disclosure of these agreements because they were disclosed as part of the Statement of Information. Further, the Custodian lawfully denied access to the Gauri and Malakshmi agreements under the "inter-agency or intra-agency advisory, consultative, or deliberative material" exemption because they were in draft form until executed by the City on May 21, 2020. N.J.S.A. 47:1A-1.1; Libertarians for Transparent Gov't v. Gov't Records Council, 453 N.J. Super. 83 (App. Div. 2018) (certif. denied, 233 N.J. 484 (2018)). Also, the Custodian has borne her burden of proof that she lawfully denied access to the Costco agreement because she certified in the Statement of Information, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
3. Ms. LaGatta's response to the subject OPRA request was insufficient because she failed to include a date certain on which the City of Bayonne would respond. N.J.S.A. 47:1A-5(i). Further, the Custodian unlawfully denied access to two (2) agreements responsive to the Complainant's OPRA request. N.J.S.A. 47:1A-6. However, the Custodian lawfully denied access to two (2) agreements that were not fully executed at the time of the Complainant's OPRA request, and lawfully denied access to agreements with Costco because none existed. N.J.S.A. 47:1A-6. Additionally, the evidence of record does not indicate that either the Custodian or Ms. LaGatta's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, neither the Custodian nor Ms. LaGatta's actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: Frank F. Caruso  
Executive Director

May 11, 2021