BRIAN KUBIEL, Petitioner, v. TOMS RIVER DISTRICT NO. 1 BOARD OF FIRE COMMISSIONERS (OCEAN), Respondent.	**SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION** **CIVIL ACTION** **On Appeal From: a Final Agency Decision of the New Jersey Government Records Council** **A-3458-22** **Docket Below No.:** **GRC Complaint No. 2019-163**

BRIEF OF APPELLANT JESSE SIPE

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PRELIMINARY STATEMENT

This appeal, and its related appeal pending under Docket Number A-003464-22, presents (among other issues) an opportunity for this Court to hold that a former public official and current private citizen is not subject to the jurisdiction of an administrative agency without first being formally placed on notice of the action and being given an adequate opportunity to be heard by that agency.

This appeal arises from a final agency decision by the Government Records Council ("GRC") against Appellant Jesse Sipe ("Ápellant" or "Mr. Sipe") stemming from a Denial of Access complaint filed by Complainant-Respondent Brian Kubiel's ("Complainant" or "Mr. Kubiel"). This appeal raises issues and arguments that overlap with Brian Kubiel v. Jesse Sipe and Toms River District No. 1 Board of Fire Commissioners (Ocean), A-003464-22, which we have previously identified as a related appeal, and is pending before this Court.

By this appeal, we ask that the Court hold that Mr. Sipe's right to procedural due process was violated because he did not receive adequate advance notice and an opportunity to be heard prior to being the subject of adverse GRC orders, one of which held him "in contempt of the GRC," and was not provided with any opportunity to participate in the proceedings before the

matter referred to the Office of Administrative Law ("OAL") as a contested case.

Second, we ask that the Court void the GRC's order that held Mr. Sipe "in contempt of the GRC" because under both OPRA and the GRC's implementing regulations, the GRC has no authority to hold any person in contempt. The GRC's sole punitive power is the authority, after notice and an opportunity to be heard, to impose civil fines for knowing and willful denials of access to records.

Third, we ask that the Court hold that Mr. Kubiel's initial request for records under the Open Public Records Act, N.J.S.A. 47:1A-1 to -13 ("OPRA"), was invalid as a matter of law, and should have been dismissed by the GRC.

For these reasons, the Court should vacate or void all of the orders entered by the GRC, dismiss Kubiel's GRC Complaint, and direct the GRC to adopt formal rules for notice and an opportunity to be heard in those circumstances when the GRC issues orders that affect the rights and obligations of current and former employees.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

From approximately November 2013 to March 2020, Mr. Sipe served as a member of the Board of Fire Commissioners for the Fire District ("Fire

[1] Because the facts and procedural history are intertwined, those sections have been combined.

District"). (Da218)[2].

A. *The July 2019 OPRA Request & the August 2019 GRC Proceedings*

On July 3, 2019, Mr. Kubiel[3] filed an OPRA request with the Fire District seeking, *inter alia*, emails[4] sent to and from Mr. Sipe's personal email address, and text messages sent to and from Mr. Sipe's personal or business cell phone which concerned "any fire Commissioner, former fire Commissioner, employee, Township employee or any other individual concerning fire Commissioner business." (Da28). This request implicated "approximately 800 people". (Da124)

On July 15, 2019, an attorney on behalf of the Fire District responded to Mr. Kubiel, assessing a special service charge "due to the extraordinary time and effort to process the potential volume of records." (Da85). The attorney informed Mr. Kubiel that the hourly rate of $185 would be charged for the time spent by an attorney reviewing the records for redaction purposes. (Ibid.).

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[2] Though Mr. Sipe was not a formal party to the GRC proceedings, therefore is not actually either a "Defendant" or a "Respondent," we use "Da" to indicate references to Appellant's appendix.

[3] On July 27, 2023, Mr. Kubiel filed a Letter of Non-Participation, indicating that he had settled all claims against the Fire District.

[4] On February 5, 2021, in an email that was circulated among Mr. Kubiel, Mr. Kubiel's counsel, the Fire District's counsel and the GRC, but omitted Mr. Sipe, Mr. Kubiel conceded that "the emails at issue have already been produced" and that he was still seeking "**text messages only**." (Da112) (emphasis in original).

Thereafter, though Mr. Kubiel and the Fire District communicated regarding the reasonableness of the special service charge, they were unable to reach a consensus. (Da52-55; Da85-87). While Mr. Sipe was a member of the Board of Fire Commissioners for the Fire District at the time of these negotiations, and the Fire District was represented by special counsel, Mr. Sipe was not individually noticed or included in these communications. (Da52-55).

On August 13, 2019, Mr. Kubiel filed a complaint with the GRC, under GRC Complaint No. 2019-163 (the "GRC Complaint"), naming the Fire District and the custodian of records, Richard Tutela, as respondents to that complaint. (Da1-6). In relevant part, the GRC Complaint challenged the reasonableness of the special service charge. (Ibid.).

Mr. Sipe was not named as a respondent. (Da1). Kubiel could have identified a second or other person on the form as being the person who denied the records request, but that space was blank. (Ibid.).

On Friday, December 6, 2019, the GRC requested that the Fire District complete a Statement of Information ("SOI") related to the GRC Complaint. (Da7-9). On Thursday, December 12, 2019, the Fire District provided a completed SOI to the GRC, with a copy to Mr. Kubiel and his attorney. (Da10-72). The GRC did not request that Mr. Sipe complete an SOI in response to the GRC Complaint. (Da9).

On Friday, December 13, 2019, Mr. Kubiel submitted an objection to the SOI. (Da73-75). In this objection, the Fire District was placed on notice that it should conduct a search for Mr. Sipe's text messages. (Ibid.).

On January 3, 2020, the GRC returned the SOI to the Fire District for more specific information and additional documentation. (Da76-78). Notably, the Fire District was directed to include the text messages within the document index. (Da77).

On January 9, 2020, the Fire District responded by stating, in part, that "none of the approximately 45,000 text messages were provided." (Da80). Furthermore, in response to a request from the GRC, the Fire District provided a certification with responses to fourteen questions to justify a special service charge. (Da82-83). In response to a question which requested a "general nature description and number of the government records requested," the Fire District certified that

> The request is for a period of thirty months. Commissioner Sipe has provided information that he sends and receives approximately 50 text messages in a day. The total text messages could be in excess of 45,000. All of them would have to be reviewed to determine which of them are actually government records.

(Da82). In the same certification, the Fire District estimated that it was "anticipated that the request will take at least 30 hours." (Da83). Of course, in

order for the Fire District to include the text messages as directed, they would have to conduct a search of Mr. Sipe's devices, isolate the text messages, and conduct a review of them, but they failed to do so at this time. (Da73-74; Da82).

During these communications, Mr. Sipe was not individually noticed, included, or given any notice that he might be required to participate in the case or defend himself. (Da1-82). In March 2020, after the GRC Complaint was filed, Mr. Sipe's term as Commissioner of the Fire District ended, as he was not re-elected in February. Mr. Sipe was not re-elected as one of the District Fire Commissioners and in March 2020, his term ended. (Da114; Da218).

On January 19, 2021, the Executive Director entered Findings and Recommendations to the GRC. (Da84-92). The GRC unanimously voted to accept the Findings and Recommendations, and on January 26, 2021, the GRC entered an Interim Order (the "January Interim Order") which permitted a special service charge but directed that the charge be recalculated based on the "lowest paid Township of Toms River employee capable of performing the work." (Da93). The Fire District was to provide the recalculated special service charge to Mr. Kubiel within five business days of receipt of the Interim Order. (Ibid.). Mr. Kubiel was then given five business days to accept or decline the special service charge. (Ibid.). The Fire District had ten business days to produce the responsive records to Mr. Kubiel. (Da94). The question 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"; at this time, the Custodian was named as Richard Tutela. (Ibid.). Furthermore, the question of prevailing party counsel fees was deferred pending the Fire District's compliance with the January Interim Order. (Ibid.).

The January Interim Order was served on the parties on January 27, 2021. (Da326-327). The distribution list did not include Mr. Sipe individually, and he was not given notice that his conduct would become the subject of the GRC proceedings. (Ibid.).

On February 4, 2021, the Fire District provided the recalculated special service charge to Mr. Kubiel and requested that he either pay the charge or decline to pursue the records. (Da97). On February 5, 2021, the Fire District provided an amended recalculated special service charge to Mr. Kubiel. (Da99).

On February 5, 2021, Mr. Kubiel wrote a letter to the Fire District objecting to the conclusory statement that "the retrieval, review and redaction is estimated to take 30 hours," without providing any explanation of how this estimate was reached, including a failure to state that the Fire District had "obtained the records or independently determined the number of records that exist which must be reviewed." (Da101-105). The letter included a reference to

prior warnings given to the Fire District about preservation of records. (Da103). Mr. Sipe was not copied on this correspondence, despite being specifically discussed therein. (Da101).

The Fire District declined to substantively respond to these objections, only stating that "the [GRC] has already determined that the special service charge is warranted in this matter[.]" (Da106). In response, Mr. Kubiel asked the Fire District to "corroborate Mr. Van Dyke's certification that there are approximately 44,000 text messages either in your possession or that Mr. Sipe has agreed to make available to you?" (Da107). Again, the Fire District declined to substantively respond to this inquiry. (Da108). On Friday, February 5, 2021, Mr. Kubiel paid the special service charge. (Da112).

On February 8, 2021, Mr. Sipe was notified about the July 3, 2019 OPRA request and the resulting GRC Complaint, when Leonard Minkler, the Fire Commissioner of the Fire District and the new Custodian of Records, instructed him to "forward all text messages from [his] personal or business device concerning fire Commissioner business during the relevant time period." (Da118). While Mr. Minkler did not provide Mr. Sipe with a deadline to provide the requested information, he did state that the GRC had ordered the records produced "on or before 2/29/21." (Ibid.). Mr. Minkler did not provide Mr. Sipe with a copy of the OPRA request or the referenced GRC order at that time.

(Da117).

In response to a request from Mr. Sipe, on February 9, 2021, counsel for the Fire District provided Mr. Sipe with the OPRA request and the January 26, 2021 Interim Order of the GRC. (Da128).

On February 18, 2021, Mr. Sipe informed the Fire District that it would take an estimated eighty hours to review and retrieve the records at his hourly rate of $300. (Da127-128). Mr. Sipe also requested that the Fire District provide him with legal representation related to the GRC Complaint. (Ibid.).

On February 18, 2021, the Fire District refused to pay Mr. Sipe the requested hourly rate. (Da126). The Fire District ignored Mr. Sipe's request for legal representation. (Ibid.). However, through their counsel, the Fire District stated to Mr. Sipe that the Fire "District is the entity that will be liable for the costs of the failure to provide the public documents that are required by the order. **Not the requestor, and not you**." (Da125) (emphasis added.)

On February 18, 2021, Mr. Sipe wrote to the Fire District that, once the Fire District approved his reimbursement rate, it would take him approximately eighty hours to complete the review and retrieval of the responsive records. (Da123).

On February 23, 2021, in response to a query from Mr. Kubiel, on which Mr. Sipe was not copied, the GRC stated that it did "not have subpoena power

to require Mr. Sipe to provide responsive records." (Da130-Da131). This was only the first of a series of written email communications, including emails from Mr. Kubiel's attorney to the GRC, in which both Mr. Kubiel and the GRC were contemplating some type of enforcement action against Mr. Sipe, but were not copying Mr. Sipe on those emails.

On March 10, 2021, in response to an inquiry by Mr. Kubiel as to how the GRC intended to enforce its orders against Mr. Sipe, the GRC advised Mr. Kubiel that "orders of the [GRC] are enforceable in the Superior Court[,]" which was the GRC's ex parte signal to Mr. Kubiel that they could and should pursue private enforcement. (Da132-136). Again, Mr. Sipe was not copied on any of these communications. (Ibid.).

On March 23, 2021, the Executive Director entered Supplemental Findings and Recommendations to the GRC. (Da137-143). The Supplemental Findings and Recommendations stated that "Mr. Sipe is required to comply with the Council's Interim Order and produce responsive records to the current Custodian. Failure to do so may subject Mr. Sipe to a knowing and willful violation under OPRA." (Da141).

The GRC unanimously voted to accept the Supplemental Findings and Recommendations, and on March 30, 2021, the GRC entered an Interim Order (the "March Interim Order") which required Mr. Sipe to provide records

pursuant to the January 26, 2021 Interim Order, without being reimbursed for the time necessary to gather and review the documents. (Da144). Mr. Sipe was required to produce the estimated 45,000 documents within five days of receiving the March Interim Order and was further required to create a privilege log to accompany the production. (Ibid.).

In contrast to the GRC's January Interim Order, in which the GRC had stated that the **Custodian** could be found to have "knowingly and willfully violated OPRA," the GRC's March Interim Order stated that the question was whether **Mr. Sipe** had willfully denied access to records under OPRA. (Da145). The attendant question of prevailing party counsel fees was deferred pending **Mr. Sipe's** compliance with the March Interim Order. (Da145). However, Mr. Sipe had not been provided with notice of the proceedings or hearing leading up to the issuance of the March Interim Order, was not provided with an opportunity to be heard, and was not served with a copy of the March Interim Order by the GRC. (Da328-329).

On April 6, 2021,[5] Mr. Sipe received a copy of the March Interim Order from the Fire District. (Da152-153). In the accompanying letter, the Fire

[5] The Fire District sent a copy by email to Mr. Sipe on March 31, 2021, but Mr. Sipe informed the Fire District that he did not monitor his "jsipe@trfire.com.org" email address, and so did not receive a copy until it arrived in the mail on April 6, 2021. (Da147; Da152-153).

District's counsel informed Mr. Sipe that he was required to comply with the March Interim Order within five business days. (Da150).

On April 7, 2021, Mr. Sipe attended a public meeting of the Fire District in which he once again requested that the Fire District provide him with counsel regarding the GRC Complaint, pursuant to the resolution previously by the Fire District stating that any current or former commissioner involved in the GRC Complaint would be represented by special counsel. (Da152-153). During that meeting, three of the commissioners acknowledged that the Fire District had previously agreed to provide counsel for other Fire Commissioners involved in the GRC Complaint (including former commissioners). (Ibid.).

On April 8, 16, and 29, 2021, Mr. Sipe requested that the Fire District provide him with counsel regarding the GRC Complaint. (Da152-153; Da158-159).

On April 26, 2021, through counsel, Mr. Kubiel wrote an email to the GRC which requested an update on the status of the GRC adjudication and stated that "It is evident that Mr. Sipe has acted in blatant disregard of my client's rights under OPRA." (Da155). Mr. Sipe was not included on this email. (Ibid.).

On April 27, 2021, the GRC informed Mr. Kubiel, the Fire District, with a copy to Mr. Sipe at his "jsipe@trfire.org" email address that the GRC Complaint was "currently under review by the [GRC] for further action based

upon the submissions by the parties," and requested that it be provided with Mr. Sipe's updated contact information. (Da156). This email correspondence was the **first attempt by the GRC to communicate directly with Mr. Sipe**. (Ibid.).

Ultimately, the Fire District declined to provide Mr. Sipe with independent counsel. (Da157). On April 30, 2021, the Fire District's counsel stated outright to Mr. Sipe that neither prior counsel for the Fire District nor their firm represented him personally. (Ibid.). Furthermore, the Fire District's counsel told Mr. Sipe that "the recent Interim Order of the [GRC] was directed towards [him] individually, and [he was] responsible for making sure [he complied] with their orders and filing deadlines." (Ibid.).

On May 11, 2021, the GRC informed the Fire District, with a copy to Mr. Sipe, for the first time, at his correct email address, that the GRC Complaint was scheduled for adjudication on May 18, 2021 at 1:30 PM. (Da161). This email stated that "the [GRC] adjudication is based solely on the written submissions provided to the GRC" and that "the GRC will not accept any additional submissions beyond this notice." (Ibid.)

Also on May 11, 2021, the Executive Director entered Supplemental Findings and Recommendations to the GRC. (Da164-168). The Supplemental Findings recommended to the GRC that it find that "Mr. Jesse Sipe failed to comply with the [GRC's March Interim Order] because he failed to timely

provide the current Custodian with copies of the responsive test messages for review and simultaneously provide certified confirmation of compliance to the Executive Director." (Da168). Furthermore, Supplemental Findings recommended to the GRC that it find that "Mr. Jesse Sipe is in contempt of the [GRC's March Interim Order.]" (Ibid.) Mr. Sipe was not provided with these Supplemental Findings and Recommendations. (Ibid.).

On Friday, May 14, 2021, Mr. Sipe responded to the GRC staff attorney requesting a stay so that he could present written submissions and evidence on his behalf. (Da162). Mr. Sipe asked, "How can a decision be made if you haven't received a written submission from a party to the matter? Especially one that has been omitted from all prior testimony or written submission." (Ibid.).

On Monday, May 17, 2021, Mr. Sipe again emailed the GRC staff attorney regarding his request for a stay of the proceedings. (Da162). Finally, on May 17, 2021, the day before the scheduled adjudication, the GRC staff attorney informed Mr. Sipe that his request for a stay was denied and no further submissions would be accepted. (Da163).

The GRC unanimously voted to accept the May 11, 2021 Findings and Recommendations, and on May 18, 2021, the GRC entered an Interim Order (the "May Interim Order") which found that Mr. Sipe failed to comply with the March 30, 2021 Interim Order because he failed to provide the responsive

records. (Da169-170). The GRC also found that the January 26 and March 30, 2021 Interim Orders were enforceable in Superior Court pursuant to Rule 4:67-6. (Ibid.). Lastly, the GRC held Mr. Sipe in contempt of the March 30, 2021 Interim Order and that the complaint should be referred to the Office of Administrative Law ("OAL") for a determination of whether Mr. Sipe's actions had been knowing and willful, and for an attendant determination of whether prevailing party counsel fees were warranted. (Ibid.). Incredibly, Mr. Sipe was not served with a copy of the May Interim Order by the GRC. (Da330-331).

The GRC held Mr. Sipe "in contempt of the GRC" even though the word "contempt" does not appear anywhere in the GRC's regulations and OPRA never authorized the GRC to hold any person "in contempt." (See generally, N.J.S.A. 47:1A-1, et seq., and N.J.A.C. 5:105).

On May 20, 2021, Mr. Kubiel wrote an email to the GRC which asked questions regarding enforcement of the Interim Orders in the Superior Court and the timing for referral of the matter to the OAL. (Da171). Again, even though the orders being discussed now imposed obligations and possibly penalties directly on Mr. Sipe, Mr. Sipe was not included in this correspondence. (Ibid.). The GRC responded to Mr. Kubiel (now copying Mr. Sipe) to tell him that after forty-five days the GRC complaint would be transmitted to the OAL "to address the outstanding issues of willfulness and they attorney fee award." (Da172).

B. *The June 2021 Trial Court Proceedings*

On June 22, 2021, Mr. Kubiel filed a verified complaint and order to show cause in the Superior Court of New Jersey (the "Trial Court") pursuant to Rule 4:67-7 seeking enforcement of the March Interim Order entered by the GRC. (Da174-206). Mr. Kubiel requested that the Trial Court hold Sipe in contempt for his failure to produce records, and further ordering Mr. Sipe to pay Mr. Kubiel's attorneys' fees and costs. (Da180).

On July 9, 2021, Mr. Sipe retained independent counsel who filed a Notice of Appearance in the GRC proceedings. (Da207).

On August 2, 2021, Mr. Sipe filed an answer to the verified complaint, asserting deprivation of due process and lack of jurisdiction as affirmative defenses, and also included a claim for indemnity against the Fire District for "all of his legal fees, costs and expenses incurred in relation to this matter and all matters that relate to or arise out of [Mr. Kubiel's] July 3, 2019 OPRA request." (Da208-215). He (and his counsel) also filed an affidavit in opposition, setting forth the history of the GRC Complaint. (Da217-331).

After the parties filed opposition papers, the Trial Court held oral argument on Mr. Kubiel's order to show cause and on Mr. Sipe's request for indemnification on January 28, 2022. (Da437-541). In relevant part, the Trial Court found,

> while Sipe was no longer on the Board by the time the GRC issued its first decision, . . . he had been represented as a Board member at all times from when the OPRA request was made, while the GRC was still considering the merits of the matter and accepting briefs and legal argument."

(Da490, 54:4-10). As a result, the Trial Court rejected Mr. Sipe's arguments on the issue of due process violations. (Da490, 54:11-23). The Trial Court also refused to consider Mr. Sipe's arguments as to the merits of the GRC orders, citing Rule 4:67-6(c)(3) which provides that, "The validity of an agency order shall not be justiciable in an enforcement proceeding." (Da493, 57:6-13). And the Trial Court deferred on any question of attorneys' fees pending a determination by the OAL the existence of a prevailing party. (Da494, 58:5-60:3). On February 9, 2022, the Trial Court entered an order which granted the order to show cause. (Da338).

On March 1, 2022, Mr. Sipe moved to stay the Trial Court's February 9, 2022 Order, which was denied. (Da346-348). Mr. Sipe also filed a motion for leave to appeal, which this Court denied on March 21, 2022. (Da409).

On March 29, 2022, in response to a status update request, Mr. Kubiel advised the GRC about the disposition of the motion for interlocutory appeal and the status of the motion to stay and requested an update on the OAL's adjudication of the question of whether Mr. Sipe knowingly and willfully violated OPRA and unreasonably denied access," and the question of prevailing

party counsel fees. (Da345-346). In response, the GRC advised that "transfer to OAL is pending determination on the issue of production that is expected to be heard on April 14, 2022." (Da344-345).

On April 14, 2022, after hearing oral argument, the Trial Court denied Mr. Sipe's motion to stay the February 9, 2022 Order. (Da348-349). On April 18, 2022, Mr. Kubiel informed the GRC of the denial of Mr. Sipe's motion to stay and requested that the GRC Complaint No. 2019-163 be referred to the OAL. (Da344). On May 26, 2022, Mr. Kubiel repeated his request to the GRC (with a copy to the OAL), that the GRC Complaint No. 2019-163 be referred to the OAL. (Da433-434). Mr. Kubiel did not copy Mr. Sipe or his counsel on this communication. (Ibid.).

The GRC Complaint was transmitted to the OAL on June 1, 2022. (Da542-548).

Because the February 9, 2022 Order remained in effect, Mr. Sipe conducted searches of his text messages for documents responsive to Mr. Kubiel's OPRA request, which covered approximately 800 different individuals. (Da350-407; Da414-432; Da549-558). Between April 18, 2022, and July 12, 2022, Mr. Sipe produced seventy-three pages of responsive documentation. (Ibid.).

On July 19, 2022, the OAL held an off-the-record telephonic pre-hearing

conference. (Da549). On September 8, 2022, the OAL held a second off-the-record telephonic pre-hearing conference. (Da561).

On March 1, 2023, while the GRC Complaint was pending before the OAL, Mr. Kubiel and the Fire District reached an agreement regarding prevailing party counsel fees that resolved Mr. Kubiel's claims for counsel fees in the GRC Complaint and in the proceedings before the Trial Court. (Da559-560). Because the Fire District's agreement for counsel fees covered both the GRC Complaint and the Trial Court proceedings, that issue was resolved with respect to both proceedings.

On April 13, 2023, the OAL held a third and final off-the-record telephonic pre-hearing conference. (Da565).

Pursuant to the settlement agreement reached on March 1, 2023, on April 20, 2023, Mr. Kubiel informed the OAL that he wished to withdraw the GRC Complaint. (Da561-562). The OAL returned the complaint to the GRC as withdrawn on May 4, 2023, and the GRC Complaint was dismissed on May 30, 2023. (Da563-567). As a result, the issues referred by the GR to the OAL were never adjudicated on the merits.

This appeal followed. (Da568-572).

LEGAL ARGUMENT

POINT I

THE GRC ORDERS WERE NULL AND VOID BECAUSE THE GRC VIOLATED MR. SIPE'S PROCEDURAL DUE PROCESS RIGHTS TO NOTICE AND AN OPPORTUNITY TO BE HEARD

(Not Raised Below).

First, we comment on this Court's the standard of review applicable to administrative agency decisions. While we acknowledge that, ordinarily, review of an agency's decision is for abuse of discretion, the issues presented in this case are pure legal issues that this Court should review de novo. "[D]eterminations about the applicability of OPRA and its exemptions are legal conclusions and are therefore subject to de novo review." Simmons v. Mercado, 247 N.J. 24, 38 (2021) (citation and internal quotation marks omitted). The Trial Court's legal conclusions and interpretations of law are reviewed de novo. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

To the extent that we are asking this Court to rule on the GRC's failure to give Mr. Sipe notice and an opportunity to be heard, that is an issue of law. This Court owes no deference to an agency's "determination of a strictly legal issue." Mayflower Sec. Co. v. Bureau of Sec. in Div. of Consumer Affairs of Dep't of Law & Public Safety, 64 N.J. 85, 93 (1973); Conley v. New Jersey Dep't of Corrections, 452 N.J. Super. 605, 613 (App. Div. 2018) (holding that a review

court applies "de novo review" to decisions of the GRC that involve "purely legal issues").

In addition, this Court owes no deference to findings that are not based on witness testimony or credibility findings. Yueh v. Yueh, 329 N.J. Super. 447, 461 (App. Div. 2000).

Mr. Sipe was deprived of procedural due process when the GRC failed to provide him with notice and an opportunity to be heard regarding any of the GRC's adjudications or interim orders in this case.

Mr. Kubiel did not name Mr. Sipe as a respondent in the GRC Complaint, because he was not the Custodian of Records of the Fire District. (Da85) (referencing that Peter Van Dyke, Esq., "stated that Commissioner Sipe has not destroyed any government records **nor was he ever designated the Custodian of Record for the [Fire District.]**") (emphasis added). As a result, Mr. Sipe was never given prior notice, or the opportunity to be heard, in connection with the GRC's issuance of the January Interim Order, the March Interim Order, and the May Interim Order, at and subsequent to public meetings held by the GRC. The March Interim Order directed Mr. Sipe to produce certain documents (Da144-145), whereas the May Interim Order held him in contempt for failing to produce these documents pursuant thereto. (Da169-170).

The issuance of these Orders by the GRC constituted a clear and flagrant violation of Mr. Sipe's constitutional rights of due process because he was not provided with adequate notice, nor an opportunity to be heard, with respect to the rulings by the GRC relevant to him. See State v. K.P.S., 221 N.J. 266, 279 (2015) ("A fair and meaningful opportunity to be heard is at the heart of due process."); Jamgochian v. State Parole Bd., 196 N.J. 222, 240 (2008) ("The minimum requirements of due process. . . are notice and the opportunity to be heard") (internal quotation marks omitted); Div. of Youth and Family v. A.R.G., 179 N.J. 264, 286 (2004); and First Resolution Inv. v. Seker, 171 N.J. 502, 513-14 (2002).

Administrative proceedings and agencies must guarantee, protect, and afford procedural due process rights to those affected by their decisions. See US Masters Residential Property (USA) Fund v. New Jersey Department of Environmental Protection, 239 N.J. 145, 160 (2019) ("Regardless of an agency's particular procedure, any agency action must preserve a claimant's basic procedural due process rights . . . Among 'the most important procedural rights in. . . proceedings are adequate notice, a chance to know opposing evidence, and the opportunity to present evidence and argument in response.'"); Provision of Basic Generation, 205 N.J. 339, 347 (2011) (". . .administrative agency action, and an agency's discretionary choice of the procedural mode of action, and valid only when there is compliance with . . . due process requirements."); Northwest Cov. Med. Ctr. v.

Fishman, 167 N.J. 123, 137 (2001) ("An agency has discretion to choose between rulemaking, adjudication, or an informal disposition in discharging its statutory duty, provided it complies with due process requirements. . ."); Gill v. Dept. of Banking, 404 N.J. Super. 1, 12 (App. Div. 2008) ("Although courts normally defer to the procedure chosen by an administrative agency in discharging its statutory duty, that procedure remains subject to the strictures of due process."); In re Casino Simulcasting Sp. Fund, 398 N.J. Super. 7, 21 (App. Div. 2008).

This Court has previously intervened when the GRC declined to honor the procedural due process rights of an interested party. In the Gill case, the GRC refused to allow the Government Employees Insurance Company ("GEICO") to intervene in a GRC complaint in which Senator Gill sought copies from the New Jersey Department of Banking and Insurance of records that GEICO had submitted to that Department. The GRC denied GEICO's request to intervene, even though the case was about GEICO's own records and information. On appeal, the Appellate Division reversed and held that GEICO had a due process right to intervene and protect information GEICO considered to be proprietary and confidential. Gill, 404 N.J. Super. at 9.

The Court observed that "notices of GRC proceedings and its determinations are limited to the parties and their legal representatives. Id. at 401 (citing N.J.S.A. 47:1A-7e and N.J.A.C. 5:105-2.2). N.J.A.C. 5:105-2.2 states that "The complainant

and custodian shall always be parties to a complaint and, along with their legal representatives, shall be notified of all decisions or orders issued by the Council concerning a complaint."[6]

By stating in its regulations that the "complainant and custodian shall always be parties to a complaint" and excluding all others, the GRC regulations do not authorize the GRC to exercise jurisdiction over any other person, at least not without prior notice and an opportunity to be heard.

The caption of the GRC Complaint was never amended, and, unlike the Fire District, Mr. Sipe was never served with any type of process. Also, unlike the Fire District, which was given an opportunity to file and serve a "Statement of Information," which is the GRC equivalent of an answer, Mr. Sipe was never provided with an opportunity to file a "Statement of Information." Thus, the GRC also violated its own rules, as well as Mr. Sipe's right to due process, when the GRC failed to advise him of any proceeding in advance with an opportunity to present any documents or information on his behalf.

[6] Effective November 7, 2022, the GRC enacted significant changes to its implementing regulations, but the language stating that a complainant and records custodian shall always be parties to a complaint was not amended. Compare 54 N.J.R. 809(a) (proposed rulemaking) with N.J.A.C. 5:105-2.2(a) (final rules as adopted by the GRC).

If a court brought an individual into a case as a party but that person was never served with process or given an opportunity to file an answer, that person would not have been given appropriate notice and an opportunity to be heard.

Had the GRC simply followed their own rules, at least some of these deficiencies would not have occurred. According to the GRC's own regulations, respondents must prepare and file with the GRC a "statement of information" (the GRC's version of an answer) and it must be filed within five days after receipt of a blank statement of information form from the GRC. Such forms must be provided by the GRC to records custodians and respondents. N.J.A.C. 5:105-2.4(a) ("SOI firms will be provided by Council's staff or may also be downloaded from the GRC website . . ."). Since the deadline for a respondent to file a completed SOI is triggered by the date when an SOI is transmitted to a respondent, for the GRC to have jurisdiction over any person, they must transmit a blank SOI form to that person. N.J.A.C. 5:105-2.4(f) ("Custodians shall submit a completed and signed SOI for each complaint to the Council's staff and the complainant not later than five days **from the date of receipt of the SOI form from the Council's staff**.") (emphasis added).

The GRC itself has recognized in at least one other agency decision that prior public employees have a due process right to notice and opportunity to be heard before the GRC imposes a civil penalty. In Doss v. Borough of Bogota, GRC

Complaint Nos. 2013-315 and 2014-152 (consolidated) (June 27, 2017 Interim Order), the GRC held that the due process rights of a prior Borough Administrator were violated when the "evidence of record" showed that the Borough had stipulated to the imposition of a knowing and willful penalty on that former Borough Administrator when the former Borough Administrator was not a party to the action and "there [was] no proof that the custodian agency had authority to speak for the prior Borough Administrator in stipulating to the knowing and willful violation and penalty." (Da589). The GRC cured this "procedural due process defect" by "ordering that notice be issued to the Custodian, former Business Administrator, and any other pertinent municipal officials, advising them of the stipulated knowing and willful violation and penalty and affording them an opportunity for an administrative hearing." (Da589-590).

The GRC cannot credibly dispute that the GRC failed to provide Mr. Sipe with any notice or an opportunity to be heard regarding any of the proceedings that were conducted before the GRC. The first confirmed communication between the GRC and Mr. Sipe was on May 11, 2021, when the GRC case manager assigned to the GRC Complaint (who is also an attorney) transmitted an email to Mr. Sipe, counsel for Mr. Kubiel, counsel for the Records Custodian, and the Records Custodian himself, that the GRC Complaint would be adjudicated on May 18, 2021. (Da161). Mr. Sipe had never received any advance notice of any of the prior GRC

proceedings, including the GRC's adjudication that resulted in the January Interim Order, and the GRC's adjudication that resulted in the March Interim Order. (Ibid.).

Any argument that the May 11, 2021 email provided Mr. Sipe with adequate notice of the May Interim Order must be rejected, because that notice specifically stated that Mr. Sipe was prohibited from submitting anything to the GRC in advance of that meeting: "Please note that the GRC will not accept any additional submissions beyond this notice." (Ibid.). When Mr. Sipe, in response, requested a stay so he could make a submission, GRC Staff Attorney Rosado denied that request. (Da162-163). So, even if the May 11, 2021 GRC email to Mr. Sipe could be considered "notice," it was not meaningful notice because the GRC explicitly advised Mr. Sipe (twice) that no submissions would be accepted by the GRC. (Da161-163). And, since the GRC has never provided Mr. Sipe with an SOI form, the GRC lacks jurisdiction over him.

The GRC's failure to provide Mr. Sipe with an SOI form, provide him with any notice of any prior GRC decisions, or give him any opportunity to submit any documentation has severely prejudiced Mr. Sipe. The fact that Mr. Sipe should have been given formal notice of the GRC Complaint was clear from the outset of the case. In his August of 2019 GRC complaint, Mr. Kubiel alleged that "the Board does not deny that Sipe's text messages contain public records, yet the Board concedes

that is made no effort to review any of them due to Sipe's representations regarding their volume." (Da3).

In the January 9, 2020 certification submitted by the Fire District's attorney, Peter Van Dyke, Esq. to the GRC, he certified that the requested text messages were not in the possession of the Fire District and that at least 45,000 potentially responsive records "would have to be reviewed to determine which of them are actually government records." (Da82-83). Based on these facts, the Fire District requested that the GRC impose a special service charge of $5,550.00, calculated based on thirty hours of the time of Van Dyke at his rate of $185 per hour to review all of the text messages for privilege and confidentiality. (Da3; Da82-83).

Although Mr. Kubiel and the Fire District were arguing over whether the Fire District was entitled to a special service charge and the amount, no one at this point was representing the interests of Mr. Sipe. It was undisputed that potentially responsive text messages were located on Mr. Sipe's personal cell phone. It was also undisputed that the text messages were not within the physical possession of the Fire District because the Fire District had not taken appropriate action to isolate potentially responsive records during Mr. Sipe's tenure as Commissioner. (Da3). The Fire District was not seeking any special service charge for the time of Mr. Sipe, who would be required take time away from his employment to upload and review the text messages for responsiveness, privilege, and confidentiality.

Thus, when the GRC issued its January Interim Order, it did not address the issue of whether a special service charge should be assessed against Mr. Kubiel for the time spent by Mr. Sipe for reviewing and retrieving records and nor did it address the appropriate rate payable to Mr. Sipe. (Da93-94).

This prejudice was compounded when, without notice from the GRC to Mr. Sipe, the GRC issued the March Interim Order that ordered Mr. Sipe to "provide responsive records to the current Custodian for review in accordance with the Council's January 26, 2021 Interim Order." (Da144-145). The GRC made this order even though the GRC provided no notice to Mr. Sipe or an opportunity to be heard. The GRC ordered Mr. Sipe to produce what it had reason to believe was an estimated 45,000 text messages in five business days. (Ibid.).

When Mr. Sipe did not comply with the GRC's March Interim Order, on May 18, 2021, the GRC held Mr. Sipe "in contempt of the Council's March 30, 2021 Interim Order," without notice and without an opportunity to be heard. (Da169-170). Then when Mr. Sipe requested an opportunity to be heard, he was denied by GRC Staff Attorney Rosado. (Da162-163).

Mr. Sipe received none of the protections of due process here. He received no notice of the first two determinations. He **never** received an opportunity to be heard. Mr. Sipe is not even listed as a party to the complaint on any of the transmittal cover letters to the GRC's interim orders, even though two of them specifically ordered

Mr. Sipe to take specific action and declared him in contempt. (Da326-331). When he asked for such an opportunity to be heard and a stay of proceedings, the GRC denied him that one opportunity. (Da162-163).

The Trial Court implied that Mr. Sipe was not deprived of due process because he could have intervened in the proceedings related to the GRC Complaint at any time if he felt that his interests were not being represented. Ignoring for the moment the fact that his attempts to intervene were denied by the GRC (as set forth above), as previously stated, for an administrative agency to be allowed to issue a substantive order which impacts **any** person or entity not appearing before it would produce an absurd result.

Mr. Sipe was not included in the proceedings related to the GRC Complaint at any point in time, except that he had multiple orders entered against him. The fact that he may have voted as a commissioner to hire an attorney for the Fire District did not mean that said attorney represented his personal and individual interests.

In light of the foregoing, it becomes readily apparent that the proceedings conducted by the GRC that gave rise to the issuance of the above-referenced Interim Orders denied Mr. Sipe his constitutional right to due process in connection therewith, since he was not afforded adequate notice and a fair and meaningful

opportunity to be heard. Consequently, it is respectfully submitted that the Interim and Final Orders issued by the GRC are null and void.

POINT II

THE GRC'S INTERIM ORDERS ARE VOID BECAUSE THE GRC HAS NO PROCEDURE FOR ASSERTING JURISDICTION OVER FORMER PUBLIC EMPLOYEES OR FOR HOLDING THEM IN CONTEMPT

(Not Raised Below).

In its regulations, the GRC has no process for joining or impleading former government officials or government employees in GRC proceedings. When the GRC seeks relief against a former government official like Mr. Sipe, the GRC has no formal process for giving that official notice and an opportunity to be heard. Rather, as happened in this case, the GRC will begin making findings against a former official without prior notice and an opportunity to be heard, thus denying them of the most basic procedural due process protections.

Here, even though the GRC issued three interim orders that directed Mr. Sipe, as a former elected government official, to take certain acts and also held Mr. Sipe "in contempt of the GRC" (which is something not authorized by OPRA or the GRC's own regulations), Mr. Sipe was never given prior notice and an opportunity to be heard before the GRC held him in contempt and granted Mr. Kubiel the right to enforce an interim agency order against Mr. Sipe in Superior Court.

In the May Interim Order, the GRC found that Mr. Sipe was "in contempt" of the March Interim Order

> by failing to provide the current Custodian with the text messages responsive to the Complainant's July 3, 2019 OPRA request. Accordingly, the complaint should be referred to the Office of Administrative Law for determination of whether Mr. Jesse Sipe knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances, and whether the Complainant is a prevailing party entitled to an award of attorney's fees and, if so, the appropriate amount.

(Da169). However, the GRC does not have the ability or authority to find any party before it "in contempt." Furthermore, even if the GRC had that authority, Mr. Sipe was not a records custodian or a requestor before the GRC and therefore the GRC had no jurisdiction to impose any requirements or penalties on him at all.

A. *The GRC Does Not Have Jurisdiction Over Private Citizens Who Are Former Government Officials Without Providing Them First With Notice and an Opportunity to be Heard*

The GRC's powers and duties are governed by N.J.S.A. 47:1A-7. Furthermore, the regulations found at N.J.A.C. 5:105-1.1 to -4.1 provide more specific guidelines for the GRC's procedures.

For instance, the GRC shall "receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a **records custodian**." N.J.S.A. 47:1A-7(b) (emphasis added). Furthermore, the

statute provides for dispute resolution methods between a requestor and the "**custodian** who denied or failed to provide access thereto." N.J.S.A. 47:1A-7(d) (emphasis added). If mediation fails, the statute sets forth the procedure for the GRC's investigation and adjudication of the complaint after the custodian is provided with an "opportunity to present the board with any statement or information concerning the complaint which the **custodian** wishes." N.J.S.A. 47:1A-7(e) (emphasis added).

The parties to a GRC complaint are the complainant requestor and the records custodian. N.J.A.C. 5:105-2.2. Mr. Sipe is not, and never has been, a records custodian for the purposes of Mr. Kubiel's July 3, 2019 OPRA request. (Da85). N.J.A.C. 5:105-1.3 defines a "'Custodian of a Government Record' or 'Custodian . . . in the case of any other public agency, the officer officially designated by formal action of that agency's director or governing body, as the case may be."

The records custodian for the Fire District as of July 3, 2019 was Richard Tutela. (Da1). At the time the GRC issued the January Interim Order, Mr. Tutela was still the records custodian for the Fire District. (Da84-94). As of the March Interim Order, the records custodian for the Fire District was Leonard Minkler. (Da137-145). Mr. Minkler remained the records custodian for the Fire District through the issuance of the May Final Decision. (Da563-567).

In the end, if the GRC determines that "a **custodian** has knowingly and willfully violated" the requestor's right of access to public documents and "is found to have unreasonably denied access under the totality of the circumstances, the [GRC] may impose the penalties provided for in . . . . [N.J.S.A.] 47:1A-11." Ibid.

N.J.S.A. 47:1A-11 allows for the GRC to impose civil penalties on a "**public official, officer, employee or custodian** who knowingly and willfully violates" the requestor's right of access to public documents and "is found to have unreasonably denied access under the totality of the circumstances." (emphasis added). All of the powers given to the GRC pertain to its adjudication of disputes between a records custodian and a requestor of asserted public documents. See N.J.A.C. 5:105-2.2.

There is no provision in the GRC statute or regulations which allows for jurisdiction over someone who is not a records custodian, a requestor, or an intervenor. The GRC denied Mr. Sipe's request to submit evidence and documents on his own behalf, therefore denying his request to intervene.[7] Thus, the GRC had no jurisdiction over Mr. Sipe, and had no authority to impose any penalties on him.

[7] The GRC regulations, as amended by notice and comment rulemaking effective November 7, 2022, now define the term "intervenor," and further set forth procedures for the GRC's consideration of applications to intervene. N.J.A.C. 5:105-1.3; N.J.A.C. 5:105-2.2(b). Prior to these amendments, the GRC considered applications to intervene pursuant to Gill v. N.J. Department of Banking & Insurance, 404 N.J. Super. 1 (App. Div. 2009).

We request that the Court order the GRC to adopt regulations that would protect the due process rights of former public employees. This would be similar to what this Court did in Slaughter v. Government Records Council, 413 N.J. Super. 544 (App. Div. 2010). In Slaughter, the GRC affirmed an agency's denial of access to records based on interim agency regulations that were eight years old that had never been formally finalized. Id. at 552-55. This Court ordered disclosure, but stayed its decision for five months, which gave all agencies time to issue new regulations and finalize them pursuant to the Administrative Procedure Act. Id. at 555.

Here, similar intervention is required. At best, the GRC has an ad hoc procedure for protecting the due process rights of former employees. This Court should order the GRC to issue and adopt a rule that addresses specifically how public employees, especially former employees, shall be given notice and an opportunity to be heard regarding potentially adverse agency actions.

B. The GRC Does Not Have the Authority to Find A Party "In Contempt"

Even assuming that the GRC had jurisdiction over Mr. Sipe, there is no such thing as being held "in contempt" of a GRC interim order, and the GRC exceeded its statutorily granted authority when it found Mr. Sipe in contempt.

If the GRC determines after investigation that "a **custodian** has knowingly and willfully violated" the requestor's right of access to public documents and "is

found to have unreasonably denied access under the totality of the circumstances, the [GRC] may impose the penalties provided for in . . . . [N.J.S.A.] 47:1A-11." Ibid.; see also N.J.A.C. 5:105-1.3 (defining "penalty" as the civil penalty which may be imposed upon an official, officer, employee, or custodian who knowingly and willfully violates the Act and is found to have unreasonably denied access to the requested government record under the totality of the circumstances pursuant to N.J.S.A. 47:1A-11).

N.J.S.A. 47:1A-11 allows for the GRC to impose civil penalties on a "**public official, officer, employee or custodian** who knowingly and willfully violates" the requestor's right of access to public documents and "is found to have unreasonably denied access under the totality of the circumstances." Nowhere in N.J.S.A. 47:1A-11 is the GRC granted the power to find a party or a non-party "in contempt."

Based on the foregoing, the GRC has no legal authority to hold anyone in "contempt." Neither OPRA nor the GRC's regulations give the GRC the power to hold any person in "contempt." The sole punitive power that the GRC has is to issue civil penalties under OPRA. N.J.S.A. 47:1A-7. Even if it has the authority to find someone in "contempt," it certainly cannot do so without providing the person with notice and an opportunity to be heard, which the GRC explicitly denied to Mr. Sipe.

Logically, if an administrative agency could issue a substantive order which impacts **any** person or entity not appearing before it, then every single

person or entity would bear an affirmative obligation to monitor all potential and active cases in any administrative agency, to keep track of which actions have a possibility negatively impacting them. This is especially difficult when considering that for many agencies, including the GRC, the filings and orders are not easily available on a public docket.

POINT III

MR. KUBIEL'S UNDERLYING OPRA REQUEST WAS OVERBROAD AND UNENFORCEABLE

(Raised Below at Da082 to Da083; Da088).

The original OPRA request was invalid because it was overbroad. (Da29; Da467, 28:14-21). To truly understand the overbroad and opaque nature of the two OPRA requests that Plaintiff seeks to enforce, they must be quoted in full:

> 1) Please provide me a copy of all emails, text messages, correspondence or other documents relating to fire commissioner business, discussions, etc. that were sent to and from Jsipe@communityclaims.com or telephonic communications device from 1/1/17 through current to and from any fire commissioner, former commissioner, employee, township employee or any other individual which may have used the personnel [sic] email account to conduct fire commissioner business.
>
> 2) Please provide me a copy of all emails, text messages, correspondence or other documents relating to fire commissioner business, discussions, etc. that were sent to and from Jsipe@sipeadjustmentgroup.com or telephonic communications device from 1/17/17 through current to and from any fire commissioner, former commissioner, employee, township employee or any other individual which may have used the personnel [sic] email account to

conduct fire commissioner business.

[(Da29).]

"OPRA requires a party requesting access to a public record to specifically describe the document sought." New Jersey Partners, L.P. v. County of Middlesex, 379 N.J. Super. 205, 212 (App. Div. 2005). A "proper request" describes the records being sought "with reasonable clarity." Bent v. Township of Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005).

Courts have rejected blanket requests for all documents sent or received between two parties, or all documents sent to or from all of a public agency's employees. In Shipyard Associates, L.P. v. City of Hoboken, 2015 WL 10352982 (App. Div. Sept. 1, 2015) (Da315-321), the Appellate Division affirmed the Trial Court's holding that OPRA requests that asked for copies of "any and all documents, including but not limited to, correspondence (including e-mails), transcripts, reports, memos, notes and/or minutes of Hoboken employees, Hoboken's agents, members of Hoboken City Council and others concerning [two ordinances]." Id. at *1.

The Appellate Division also held that similarly-worded OPRA requests in that case for "[c]opies of all documents in the City of Hoboken's Clerk's office's files concerning [two ordinances]" and "all correspondence (including e-mails), transcripts, reports, memos, notes, minutes prepared by and received by Hoboken employees, Hoboken's agents, members of Hoboken City Council concerning [two

ordinances]" were not sufficiently specific. Ibid. "Calling for the custodian to research and compile a database of responsive records within a topic, prior to determining what records were exempted or could be redacted was overbroad." Shipyard Associates, 2015 WL 10352982 at *4; see also MAG Ent't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005) (holding that OPRA requests cannot require a records custodian to conduct research).

The OPRA request in this case is even more broad than the OPRA request that was held invalid in Shipyard Associates. In Shipyard Associates, the scope of the OPRA request was limited to two ordinances. In this case, Mr. Kubiel's OPRA requests were for all text messages regarding "fire commissioner business, discussions, etc." (Da29). A request for all text messages regarding "fire commissioner business" is overly broad because it does not identify a reasonably specific subject matter, such as "settlement agreements." OPRA does not "authorize a party to make a blanket request for every document" a public agency has on file. Bent, 381 N.J. Super. at 37. Neither does OPRA "authorize unbridled searches of an agency's property." Ibid.

The GRC acknowledged the invalidity of Mr. Kubiel's requests when it held that the requests "are invalid on their face because they failed to meet the necessary criteria for a valid request for test [sic] messages." (Da88).

Notwithstanding this acknowledgment, the GRC nonetheless ordered the review and disclosure of what the Fire District certified were approximately 45,000 text messages, an astronomical amount and what should be considered reversible error. (Da93-94). No case has held that a records request that failed to identify a subject matter or that encompassed text messages sent to or from any Fire District commissioner, former commissioner, or any Toms River employee for a period of two years and six months was valid.

Mr. Kubiel's OPRA request "failed to identify with any specificity or particularity the governmental records sought," and were instead "open-ended searches of an agency's files," which "OPRA does not countenance[.]" MAG Entertainment, LLC, 375 N.J. Super. at 549. If a request for records "fails to specifically identify the documents sought, then the request is not 'encompassed' by OPRA and OPRA's deadlines do not apply." New Jersey Builders Ass'n v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 179 (App. Div. 2007).

Mr. Kubiel's request did not meet any measure of reasonability, specificity, or clarity. The scope of the request was so broad, it encompassed any text message sent to any person who was in **any way connected with Toms River or with the Fire District for thirty months**.

We submit that this Court should reject the GRC's claim that "the request contained sufficient information for record identification." (Da88). The only way

for specific records to be identified would be to conduct a manual search of all text messages, collating, reviewing, cataloging, and copying every communication on Mr. Sipe's electronic devices to even make the **preliminary** determination regarding whether any communications are "relating to fire commissioner business, discussions, etc." The request is so broad, the only way to respond to it would be to manually search every single potentially responsive text message and pick out which ones are responsive and which ones are not. OPRA is "not intended as a research tool litigants may use to force government officials to identify and siphon useful information." MAG Entertainment, 375 N.J. Super. at 546. Yet, that is exactly what Mr. Kubiel was attempting to do.

Setting aside the undue burden that retrieving and searching for responsive records would entail, the OPRA requests is virtually unlimited in scope. While the OPRA requests have, nominally, a date range of January 17, 2017 to July 3, 2019, Mr. Kubiel did not identify a specific subject matter. Instead of providing the requisite specificity, he identified the subject matter as "fire commissioner business, discussions, etc." This description is overly broad because it does not distinguish between specific categories of records. Every single text message ever sent or received by Mr. Sipe is potentially responsive.

Courts have held that OPRA requests for correspondence, records, or electronic communications such as text messages must identify a specific subject

matter. In Burke v. Brandes, 429 N.J. Super. 169, 176-77 (App. Div. 2012), this Court held that the OPRA request was sufficiently specific because it was limited to emails to or from the Governor's office regarding EZPass benefits provided by the Port Authority to its employees. In Burnett v. County of Gloucester, 415 N.J. Super. 506, 513-14 (App. Div. 2010), this Court held that the plainitiff's OPRA request for "settlement agreements" over a twenty-six-month time period was sufficiently specific.

Compliance with Mr. Kubiel's OPRA requests would have been potentially overwhelmingly burdensome, especially without compensation. At the time of the OPRA request, the Fire District estimated that Mr. Sipe had at least 45,000 potentially responsive text messages, which would take at least eighty hours to review. (Da82-83; Da123). Mr. Sipe is no longer a member of the Fire District Board of Commissioners, has not been an elected member of the Board since March 2020, and it was unreasonable and erroneous for the GRC to require him to conduct research through tens of thousands of text messages; he reasonably approximated that he would need to step away from his employment and his business for an estimated eighty hours without reasonable compensation. (Da123).

In the end, Mr. Sipe was in possession of seventy-three pages of responsive documents, which took several weeks to collate, review, and produce, as he had to conduct searches of his text messages with hundreds of different individuals for

documents responsive to Mr. Kubiel's OPRA request. (Da350-407; Da414-432; Da549-558).

Based on the foregoing, it is respectfully submitted that the original OPRA request was invalid because it was overbroad.

CONCLUSION

For the foregoing reasons, the March Interim Order and the May Interim Order of the GRC must be reversed, and this Court should determine that Mr. Sipe's due process rights were violated and that the July 3, 2019 OPRA request was invalid on its face.

Respectfully submitted,

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March 27, 2024

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Re: Brian Kubiel v. Toms River District No. 1 Board of Fire Commissioners (Ocean)
Docket No. A-3458-22T2

Civil Action: On Appeal from a Decision of the New Jersey Government Records Council

Letter Brief on Behalf Of Respondent New Jersey Government Records Council On The Merits Of The Appeal

Dear Mr. Orlando:

Please accept this letter brief on behalf of Respondent, Government Records Council ("Council") on the merits of the appeal.

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PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

On July 3, 2019, Brian Kubiel submitted a public record request pursuant to the Open Public Records Act, N.J.S.A. 47:1A-1 to -13 ("OPRA"), to the Toms

[1] Because these sections are closely related, they are combined for efficiency and the court's convenience.

River District No. 1 Board of Fire Commissioners (the "Board") for electronic copies of the following records related to Appellant Jesse Sipe:

> 1. [A]ll text messages relating to fire commissioner business, discussions, etc., that were sent to and from jsipe@communityclaims.com or telephonic communication device[s] from 1/1/17 through current to and from any fire commissioner, former commissioner, employee, [Township of Toms River ("Township")] employee or any other individual which have used the personnel e-mail account to conduct fire commissioner business.
>
> 2. [A]ll text messages relating to fire commissioner business, discussions, etc., that were sent to and from jsipe@sipeadjustmentgroup.com or telephonic communication device[s] from 1/1/17 through current to and from any fire commissioner, former commissioner, employee [Township of Toms River ("Township")] employee or any other individual which may have used the personnel e-mail account to conduct fire commissioner business.
>
> [Da569 (alterations in original).][2]

In response, the custodian asserted that a special service charge pursuant to N.J.S.A. 47:1A-5(c) was required due to the time and effort required to process responsive records. (Da84-85). Kubiel asserted that the estimated special service charge was excessive and unreasonable. (Da86-87).

On August 13, 2019, Kubiel filed a denial of access complaint with the Council. (Da1-7). On December 12, 2019, the Board filed its Statement of

[2] "Da" refers to Sipe's Amended Appendix. "Db" refers to Sipe's Amended Brief.

Information in response to the denial of access complaint. (Da10-72). At the time the OPRA request was made and the denial of access complaint was filed, Sipe was a member of the Board. (Da218). Sipe remained a member of the Board until March 2020. Ibid. Sipe was aware of the OPRA request and that he had records responsive because he "provided information that he sends and receives approximately 50 text messages in a day" and that the "total text messages could be in excess of 45,000." (Da82; Da220-21).

On January 26, 2021, the Council issued an Interim Order adopting the January 19, 2021 Findings and Recommendations of the Executive Director that a special service charge was warranted. (Da93-94). However, it found that the custodian's hourly rate was unreasonable and ordered him to recalculate the cost of reviewing and redacting the responsive documents "based on the lowest paid Township of Toms River employee capable of performing the work." Ibid. On February 8, 2021, Board member Leonard Minkler attempted to comply with the Interim Order of the Council, by emailing Sipe and requesting that he produce the previously-identified responsive records. (Da218-19).

On February 9, 2021, Sipe acknowledged the OPRA request and the January 26, 2021 Interim Order. (Da139; Da220). On February 28, 2021, after additional communication, Sipe refused to produce the records unless the Board compensated him; he estimated about eighty hours of work to produce the

records and claimed that his "hourly rate" for that work was $300 an hour, totaling $24,000. (Da220-21; Da234). Sipe did not move to intervene in the denial of access complaint pending before the Council.

On March 30, 2021, the Council issued a second Interim Order adopting the Supplemental Findings and Recommendations of the Executive Director which found that the custodian could not comply with his duty to produce the requested records because of Sipe's request for compensation. (Da144-45). "Because there is no provision under OPRA permitting such a charge," the Council ordered that "Mr. Sipe shall provide responsive records to the current Custodian for review in accordance with the Council's January 26, 2021 Interim Order." (Da144). Again, Sipe did not move to intervene in the denial of access complaint.

On May 18, 2021, the Council issued a third Interim Order adopting the Supplemental Findings and Recommendations of the Executive Director that found Sipe had "failed to comply with the Council's March 30, 2021 Interim Order" and found him in contempt of the order. (Da169). The Council referred the matter to the Office of Administrative Law ("OAL") for a determination of whether Sipe "knowingly and willfully violated OPRA and unreasonably denied access" to public records and whether Kubiel was a prevailing party and thus entitled to attorney's fees. (Da169-70).

On June 23, 2021, Kubiel filed an order to show cause in Ocean County Superior Court to enforce the Council's May 18, 2021 Interim Order. (Da570). By order dated February 9, 2022, the Honorable Robert E. Brenner, J.S.C., granted Kubiel's application to enforce the Council's May 18, 2021 Interim Order, ordering Sipe to produce the requested records within twenty days, and acknowledging that the OAL would determine issues relating to prevailing party and legal fees and costs. (Da338-39).

On June 1, 2022, the matter was transmitted to the OAL as a contested case. (Da571). During the pendency of the contested case, the Board and Kubiel reached a settlement. (Da563). On April 20, 2023, Kubiel wrote to the OAL that he was withdrawing his denial of access complaint. (Da568). On May 4, 2023, the OAL returned the matter to the Council marked "WITHDRAWAL." Ibid. In a final administrative decision on May 30, 2023, the Council dismissed the denial of access complaint and found that "no further adjudication is required." (Da572-73).

On July 14, 2023, Sipe appealed the May 30, 2023 decision dismissing the complaint.

ARGUMENT

POINT I

SIPE'S REQUEST TO DECLARE THE UNDERLYING OPRA REQUEST OVERBROAD AND UNENFORCEABLE IS MOOT BECAUSE THE REQUESTOR WITHDREW THE DENIAL OF ACCESS COMPLAINT AND THE MATTER WAS CLOSED (Responding to Appellant's Point III).

Sipe's request that this Court declare Kubiel's original OPRA request overbroad and unenforceable should be dismissed because Kubiel withdrew the underlying denial of access complaint and this matter was closed by the Council. (Da570-571). In fact, since there is no longer an underlying OPRA request being adjudicated, no matter is being transmitted to the OAL about whether Sipe committed a knowingly and willful violation of OPRA, and there is no expectation that Sipe produce records, there is no need for this Court to evaluate the validity of the OPRA request and no relief this Court need provide in relation thereto.

A case becomes moot when the issues presented are no longer live or when the parties lack a legally cognizable interest in the outcome. Powell v. McCormack, 395 U.S. 486, 496 (1969). It is well-settled that controversies which have become moot or academic prior to judicial resolution ordinarily will be dismissed. Anderson v. Sills, 143 N.J. Super. 432, 437-38 (Ch. Div. 1976).

In Anderson, the court identified the two primary reasons for this doctrine as follows:

> First for reasons of judicial economy and restraint, courts will not decide cases in which the issue is hypothetical, a judgment cannot grant effective relief, or the parties do not have concrete adversity of interest. Second, it is a premise of the Anglo-American judicial system that a contest engendered by genuinely conflicting self-interests of the parties is best suited to developing all relevant material before the court.
>
> [Id. at 437].

In the present matter, there is no longer a denial of access complaint or a disputed OPRA request before the Council. (Da570-71). And since the Council found that no further adjudication is necessary, there is no active case in which the Council would expect Sipe to produce any records in response to the OPRA request or any of its Interim Orders. (Da572-73). The complaint that was transferred to the OAL was sent back and marked "WITHDRAWAL," which means that Sipe is no longer at risk of being found to have committed a knowing and willful violation of OPRA. (Da571). Had the OAL heard the matter and decided that Sipe had committed a knowing and willful violation, he could have been penalized up to $1,000. N.J.S.A. 47:1A-11. However, that is not what happened here. The complaint was withdrawn and the matter closed. (Da570-73).

As such, there is no longer a live controversy before the Court, and Sipe no longer has any interest in the court ruling on the OPRA request because any decision of this Court would not change the outcome for him as there is no extant order from the Council ordering him to do anything. Sipe does not have to participate in any adjudication before the Council, does not need to appear before the OAL, is not subject to any monetary penalty, and does not need to produce any records. As will be discussed below, Sipe's qualms with the scope of the OPRA request and the impact of the Interim Orders on him are now academic matters that this Court should decline to entertain in the interests of judicial economy and restraint.

Indeed, courts have entertained moot appeals only in cases where the issue is of public importance and "capable of repetition yet evade review." Matter of J.I.S. Indus. Serv. Co. Landfill, 110 N.J. 101, 104-05 (1988); see also State v. Gartland, 149 N.J. 456, 464 (1997); Matter of Commitment of C.M., 458 N.J. Super. 563, 568 (App. Div. 2019). In this case, there is no issue of public importance because the issue presented applies only to Sipe and the unique facts and circumstances that gave rise to the Council's Interim Orders that he, as a member or former member of the Board, produce government records to the custodian. In addition, there is nothing to suggest that there is a likelihood of recurrence without subsequent opportunity for review. Therefore, the Court

should not entertain Sipe's moot appeal on the merits of the underlying OPRA request.

POINT II

THE COUNCIL HAS JURISDICTION OVER FORMER OFFICIALS, OFFICERS, EMPLOYEES OR CUSTODIANS WHO STILL POSSESS GOVERNMENT RECORDS AND MAY DECLARE ANYONE IN CONTEMPT OF ITS ORDERS (Responding to Appellant's Point II).

With this issue, Sipe is again challenging the underlying Interim Orders that are now moot because the May 30, 2023 order on appeal dismissed the denial of access complaint. (Da570-73). Thus, as described above, the question in this matter as to whether the Council has jurisdiction over former government officials, officers, employees, or custodians is also moot because the denial of access complaint before the Council was withdrawn and the matter closed. Ibid. Since there is no active case or controversy in which the Council seeks to have Sipe, a former public employee, produce government records under OPRA, this is now merely an academic exercise unfit for the Court's consideration. Anderson, 143 N.J. Super. at 437-38.

Nevertheless, the Council does have the authority to determine whether a disputed record "must be made available for public access." N.J.S.A. 47:1A-7(e). The Council also has jurisdiction to levy penalties to a "public official,

officer, employee or custodian who knowingly and willfully violates" OPRA. N.J.S.A. 47:1A-11(a). However, the Council's jurisdiction expressly does not extend to "the Judicial or Legislative Branches of State Government or any agency, officer, or employee of those branches." N.J.S.A. 47:1A-7(g).

Sipe argues that the Council's jurisdiction does not extend to former employees who possess government records. (Db31-35). However, OPRA does not expressly exclude former officials, officers, employees, or custodians from the Council's jurisdiction, as it does with members of the judicial and legislative branches. N.J.S.A. 47:1A-7(g). And if the Council lacked authority to require former government officials or employees to produce government records held by them, then – as happened here – former government officials or employees could simply abscond with government records, thereby permanently removing them from public access. Such an outcome would be plainly inconsistent with the purpose of OPRA. See Rivera v. Union Cnty. Prosecutor's Off., 250 N.J. 124, 141 (2022) (OPRA's "core concern is to promote transparency in government."); Mason v. City of Hoboken, 196 N.J. 51, 65-66 (2008) ("OPRA's purpose 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.'") (quoting Asbury Park Press v. Ocean Cnty. Prosecutor's Off., 374 N.J. Super. 312, 329 (Law Div. 2004)).

Nevertheless, for the first time on appeal, Sipe requests that the Court take the unusual step of ordering the Council to adopt regulations pertaining to the due process rights of former public employees. (Db34-35). Such a request is improper. Sipe is effectively asking this Court to issue a writ of mandamus. Mandamus is an appropriate remedy only "(1) to compel specific action when the duty is ministerial and wholly free from doubt, and (2) to compel the exercise of discretion, but not in a specific manner." Loigman v. Twp. Comm. of Middletown, 297 N.J. Super. 287, 299 (App. Div. 1997) (emphasis added). A ministerial duty is defined as "so plain in point of law and so clear in matter of fact that no element of discretion is left as to the precise mode of their performance." New Gold Equities Corp. v. Jaffe Spindler Co., 453 N.J. Super. 358, 376 (App. Div. 2018) (quoting Switz v. Middletown, 23 N.J. 580, 588 (1957)) (additional citations omitted); see also Ivy Hill Park Apartments v. N.J. Prop. Liab. Ins. Guar. Ass'n, 221 N.J. Super. 131, 140 (App. Div. 1987) (A ministerial duty is one that "is absolutely certain and imperative, involving merely the execution of a set task, and when the law which imposes it prescribes and defines the time, mode and occasion of its performance with such certainty that nothing remains for judgment or discretion.") (quoting Case v. Daniel C. McGuire, Inc., 53 N.J. Super. 494, 498 (Ch. Div. 1959)).

Sipe has not pointed to any statute, regulation, or anything else with the

force of law that requires the Council to engage in the type of rulemaking he is seeking. Thus, a writ of mandamus would be inappropriate. Moreover, if Sipe wishes the Council to consider making rules as to former government employees, he can petition the Council to do so pursuant to N.J.A.C. 1:30-4.1. This Court should decline Sipe's invitation to order the Council to engage in any rulemaking.

Sipe's reliance on Slaughter v. Government Records Council, 413 N.J. Super. 544, 554-55 (App. Div. 2010), as support for his argument is misplaced. (Db35). In that case, the Appellate Division did not order the Council to engage in any rulemaking. Ibid. Instead, it reversed the Council and ordered disclosure of the requested record but stayed disclosure until the Department of Law and Public Safety, the custodian of record in that case, could decide whether to adopt an exemption for such records that it had previously considered but inexplicably failed to adopt. Ibid.

Lastly, Sipe overemphasizes the Council's use of the word "contempt" in its May 18, 2021 Interim Order and, as will be addressed in the next issue, takes issue with the finding of contempt without providing him with notice and an opportunity to be heard. (Db35-37). There is no cavil that Sipe possesses records responsive to the OPRA request (Da82; Da220-21), or that the Council has the authority and power to order the production of government records.

N.J.S.A. 47:1A-7(c). To that end, the Council ordered Sipe to produce responsive records that it found he had improperly withheld from the custodian. (Da137-45). When Sipe failed to comply, the Council declared that he was in contempt of its Interim Order. (Da164-70).

But the Council's referral to the OAL of whether Sipe knowingly and willfully violated OPRA and would thus be subject to penalties was not based merely on its invocation of the word "contempt." Rather, it was based on the plain language of OPRA, which permits penalties for those who knowingly and willfully violate OPRA and unlawfully deny access to government records. (Da166-67) (citing to N.J.S.A. 47:1A-11 and 47:1A-7(e)). As such, the Council's actions were authorized by and in conformity with OPRA.

POINT III

SIPE'S DUE PROCESS CLAIM SHOULD BE REJECTED BECAUSE HE FAILED TO RAISE IT BELOW AND, NOTWITHSTANDING, ANY DUE PROCESS CONCERNS WERE ALLEVIATED BY THE LAW DIVISION ACTION TO ENFORCE THE COUNCIL'S INTERIM ORDER (Responding to Appellant's Point I).

Sipe readily concedes that his due process claim was not raised below before the Council. (Db20). It is well-settled that appellate courts will ordinarily decline to consider questions or issues that were not properly

presented and adjudicated below. Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234-35 (1973); State v. Robinson, 200 N.J. 1, 19 (2009) ("Appellate review is not limitless. The jurisdiction of appellate courts rightly is bounded by the proofs and objections critically explored on the record before the trial court by the parties themselves."). As will be discussed in more detail below, Sipe had the opportunity to raise his due process claims below by intervening in the denial of access complaint before the Council but he failed to do so. Our courts will consider issues not raised below only where "the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest." Nieder, 62 N.J. at 234 (quoting Reynolds Offset Co., Inc. v. Summer, 58 N.J. Super. 542, 548 (App. Div. 1959)). There can be no jurisdictional concerns here since Sipe admittedly was a member of the Board and had records responsive to the OPRA request. (Da82; Da218; Da220-21; Da234). And Sipe has not demonstrated any great public interest in the Court's consideration of his due process claim beyond his own personal interest. Therefore, his claim of a due process violation should be dismissed.

Notwithstanding Sipe's failure to raise the due process issue below, any due process concerns about the Council's Interim Orders were alleviated by Kubiel's Order to Show Cause and Verified Complaint filed in the Law Division of the Superior Court – Ocean Vicinage – to enforce the Council's May 2021

Interim Order. (Da174-338). And Sipe failed to appeal that decision and instead appealed the Council's final decision dismissing the denial of access complaint after the request was withdrawn. (Da574).

Kubiel's Verified Complaint sought to "[c]ompel[] Defendant Sipe, upon conclusion of being held in contempt of Court, to produce to Plaintiff Brian Kubiel by June 30, 2021, the text messages and emails the Government Records Council has ordered Jesse Sipe to produce." (Da180). In response to the Verified Complaint, Sipe raised the alleged lack of due process in the Council's denial of access complaint. (Da217-27). However, the trial court soundly rejected Sipe's due process arguments and granted the application to enforce the Council's May 18, 2021 Interim Order and ordered Sipe to produce the requested documents. (Da338-39; Da458-60; Da486-87). This Court then denied Sipe's motion for leave to file an interlocutory appeal as to the enforcement order. (Da341-42).

Following the Council's May 30, 2023 final decision, Sipe appealed only the Council's May 30, 2023 final decision and not the Law Division decision or the Council's prior Interim Orders that found Sipe in contempt and ordered him to produce the requested records. (Da574). Given that Sipe appealed only the Council decision closing the denial of access complaint rather than the Law Division action, there is no relief for this Court to provide as to Sipe's due

process claims. Those claims were heard and rejected by the Law Division.

Moreover, in August 2019, when the denial of access complaint was filed, Sipe was a member of the Board, which was the respondent in the denial of access complaint. There has been no allegation that the Council in any way failed to provide the Board with notice and an opportunity to be heard on the denial of access complaint. While Sipe left the Board in March 2020, the record does not reflect that anyone – neither the Board nor Sipe – ever informed the Council that Sipe was no longer affiliated with the Board.

Indeed, Sipe admits he learned of the denial of access complaint on February 8, 2021. (Da218-19; Da234). He could have moved to intervene in the denial of access complaint pursuant to N.J.A.C. 1:1-16.1(a), -16.3. See Gill v. N.J. Dept. of Banking and Ins., 404 N.J. Super. 1, 10-11 (App. Div. 2008) (setting forth the intervention application process for "[a]ny person or entity not initially a party, who has a statutory right to intervene or who will be substantially, specifically and directly affected by the outcome of a contested case").[3] He could have moved to intervene, arguing that he would be "substantially, specifically and directly affected by the outcome" of the denial of access complaint. N.J.A.C. 1:1-16.1(a). However, he did not do so. Nor did

[3] The Council has since codified regulations pertaining to motions to intervene in denial of access complaints. See N.J.A.C. 5:105-2.2(b).

he do so after the Council's March 2021 Interim Order. Not even after the Council's May 2021 Interim Order finding him in contempt of the Council's March 2021 Interim Order did Sipe move to intervene, despite having known about the matter since February 8, 2021.[4] On this record, Sipe's claims that he was denied due process is unavailing.

This Court should reject Sipe's due process argument because he admits that he failed to raise it below before the Council. But even if the Court entertains his arguments here, any due process infirmities were caused or exacerbated by Sipe's refusal to produce government records unless he was paid an unreasonably exorbitant sum of money and by his failure to even attempt to intervene in the denial of access complaint. Moreover, Sipe had ample opportunity to argue his due process claim before the Law Division and the court there soundly rejected his arguments. This Court should do the same.

[4] In fact, in the trial court, Judge Brenner specifically found that Sipe was at fault, stating "in regards to your due process argument, he's created this situation. He's arguing that there's conflict of interest, that there's no due process for a situation he single-handedly created." (Da460).

CONCLUSION

For these reasons, the Court should affirm the Council's actions.

Respectfully submitted,

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July 26, 2024

VIA ECOURTS
Superior Court, Appellate Division
P.O. Box 006
Trenton, New Jersey 08625

Re: ***Brian Kubiel v. Toms River Board of Fire Commissioners (Ocean)***

Superior Court – Appellate Division
Civil Action, On Appeal from a Final Agency Decision of the New Jersey Government Records Council

GRC Complaint No. 2019-163

Our File No. 40845-4 **Submitted: July 17, 2024**
Docket No. A-3458-22 **Amended: July 26, 2024**

Dear Honorable Judges of the Appellate Division:

We represent the Appellant Jesse Sipe ("Mr. Sipe") in the above-referenced appeal and we submit this letter brief in lieu of a formal brief in reply to the brief filed by Respondent Government Records Council ("GRC" or "Council").

The decision below should be reversed, and the Court should vacate or void all the orders entered by the GRC, dismiss Mr. Kubiel's GRC Complaint, and direct the GRC to adopt formal rules for notice and an opportunity to be heard in those

circumstances when the GRC issues orders that affect the rights and obligations of current and former public employees.

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STATEMENT OF FACTS AND PROCEDURAL HISTORY

Appellant incorporates by reference and relies upon the procedural history set forth in his opening brief.

LEGAL ARGUMENT

POINT I

THE RELIEF SOUGHT BY APPELLANT IS NOT MOOT

(Raised Below at Da082 to Da083; Da088).

The Council asserts that Mr. Sipe's request to have the underlying Open Public Records Act ("OPRA") request declared overbroad is moot because the GRC complaint was withdrawn, and therefore that it should be dismissed by this Court. However, because the GRC never properly had jurisdiction over the OPRA request in the first place, none of the Interim or Final Orders should have been entered at all, let alone the ones which impacted Mr. Sipe.

As set forth in Mr. Sipe's opening brief, the original OPRA request was invalid because it was overbroad and did not sufficiently specify the requested documents. (Da29; Da467, 28:14-21). The GRC acknowledged the invalidity of Mr. Kubiel's

requests when it held that the requests "are invalid on their face because they failed to meet the necessary criteria for a valid request for test [sic] messages." (Da88). As such, the GRC should have dismissed Mr. Kubiel's complaint as an invalid request because it did not seek a "sufficiently identifiable government record" and was not "confined to a discrete and limited subject matter." See Walsh v. N.J. Office of the Governor, GRC Complaint No. 2019-26 (Feb. 26, 2021) (DRa6-13)[1]; Tarnow v. NJ Motor Vehicle Commission, GRC Complaint No. 2018-296 (April 28, 2020) (DRa14-19); Herron v. Paterson Board of Education, GRC Complaint No. 2018-188 (May 19, 2020) (DRa20-25); MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Burke v. Brandes, 429 N.J. Super. 169, 176-78 (App. Div. 2012) (establishing that requests for correspondence must identify the individuals or accounts to be searched and be confined to a discrete and limited subject matter).

Particularly analogous to this matter, in Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2009-124 (April 2010), the complainant's

[1] For the purposes of this brief, "DRa" refers to the documents attached to Mr. Sipe's Reply Appendix.

OPRA request sought all e-mails and all AOL Instant Messenger messages to and from a particular email account for a specific time period. The GRC held that the complainant's request was invalid (and therefore lawfully denied by the custodian) because it did not include a subject or content. Id. at 7. Furthermore, in Walsh v. N.J. Office of the Governor, GRC Complaint No. 2019-26 (Feb. 26, 2021) (DRa6-13), the complainant made seven requests for "all emails and text messages" between various people for approximately the span of a year. The GRC found that the request was invalid (and therefore lawfully denied by the custodian) because the complainant did not "identify the subject matter of the e-mails and texts." Id. at 5.

Contrary to the urging of the GRC, this Court should not disregard Mr. Sipe's appeal on the merits of the underlying OPRA request simply because Mr. Kubiel voluntarily withdrew his complaint. The proceedings below, where Mr. Sipe was subjected to the whims of the GRC without being provided with due process, all because the GRC chose to proceed with the merits of the underlying complaint even though it had found it to be invalid, demonstrate that this fact

pattern is "of substantial importance and are capable of repetition yet evade review." See, e.g., In re J.I.S. Indus. Serv. Co. Landfill, 110 N.J. 101, 104 (1988). This is not a situation where Mr. Sipe suffered no harm. As a direct result of the orders entered by the GRC, Mr. Kubiel brought a Law Division action (OCN-L-001639-21) against Mr. Sipe, which he was forced to defend against at great cost.

As such, Mr. Sipe respectfully submits that this Court should hold that the GRC should have ended its inquiry after having found that the original OPRA request was invalid because it was overbroad.

POINT II

THE GOVERNMENT RECORDS COUNCIL DOES NOT HAVE JURISDICTION OVER FORMER OFFICIALS, EMPLOYEES, OR CUSTODIANS

(Not Raised Below).

The GRC asserts that Mr. Sipe was properly within the jurisdiction of the GRC based on his status as a former employee of a public agency. Furthermore, the GRC states that, as Mr. Kubiel voluntarily withdrew his GRC complaint, the question posed by Mr. Sipe is moot and should be disregarded by this Court.

As an initial matter, this question is not moot. The question of whether a former public employee should be subjected to the jurisdiction of the GRC is clearly "of substantial importance and are capable of repetition yet evade review," when the proceedings are entirely controlled by parties other than the former employee. See, e.g., In re J.I.S. Indus. Serv. Co. Landfill, 110 N.J. 101, 104 (1988). For instance, here, Mr. Sipe had no control over whether Mr. Kubiel brought the GRC complaint in the first place, was denied due process and prohibited from participating, and then had no control over whether Mr. Kubiel withdrew the complaint.

Under the procedural rules governing matters before the Office of Administrative Law, where this matter was pending as a contested case, a "party may withdraw a request for a hearing or a defense raised by notifying the judge and all parties." N.J.A.C. 1:1-192. "Upon receipt of such notification, the judge **shall discontinue** all proceedings and return the case file to the Clerk." Ibid. (emphasis added). The GRC's administrative rules, located at N.J.A.C. 5:105-1.1., et seq., are silent regarding the withdrawal of complaints, therefore the OAL's

procedural rules apple. N.J.A.C. 5:105-1.1(b) ("Any aspect of the adjudicatory process for denial of access complaints not covered by this chapter shall be governed by the . . . Uniform Administrative Procedure Rules, N.J.A.C. 1:1."). Thus, at any time, Mr. Sipe could have been, and in fact was, deprived of his ability to raise issues with the GRC because the main antagonists (Mr. Kubiel and the Fire District) reached a settlement.

As stated previously, this is not a situation where Mr. Sipe suffered no harm. This fact pattern is clearly capable of repetition and is appropriately before this Court. Indeed, the GRC's position in this case emphasizes the gravity of our concerns: apparently, the GRC believes it has jurisdiction over any person who has **ever been employed** by a public entity that is subject to OPRA if they have some relationship to the case. And it believes it may do so without any specific procedure for providing notice and an opportunity to be heard.

The Council provides no support for its statement that the GRC has jurisdiction over former public employees and "may declare anyone in contempt[2] of its orders." (Rb10).[3] Instead, the implications of the Council's argument would have this Court turn the cannon of statutory construction *inclusio unius est exclusio alterius* on its head. Specifically, the GRC would have this Court hold that the fact that OPRA failed to exclude former employees while specifically stating that it governs current public officials, employees, or custodians, means that the legislature clearly meant to govern former employees. N.J.S.A. 47:1A-11(a).

This argument should be rejected and the cannon of statutory construction should be strictly applied. OPRA states repeatedly that its provisions govern "official[s], officer[s], employee[s], or custodian [s]" (Db35-36), when the legislature

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[2] At the same time, the Council encourages the Court to disregard its own use of the word "contempt" in the orders it issued against Mr. Sipe without due process. (Rb14). The Council is clearly missing the point. If the Court agrees with Mr. Sipe that the GRC did not have any jurisdiction over him at all, then whether or not the orders invoked the word "contempt" or not is irrelevant.

[3] Because in this appeal of an administrative agency decision the GRC is a Respondent, we use "Rb" to indicate references to the GRC's brief. Of the other two respondents, one filed a letter of non-participation and the other has not filed anything in this appeal.

could just have easily included a provision which allowed for jurisdiction over former public employees. In re Estate of Santolino, 384 N.J. Super. 567, 581 (Super. Ct. 2005) (recognizing that the cannon "is a rule of negative implication. If the drafter of a statute mentions one circumstance specifically, the implication is that the other circumstances, which just as logically could have been mentioned, were intentionally omitted.").

Next, the GRC argues that exempting former employees from the strictures and requirements of OPRA would encourage former employees to "abscond with records." Considering that the issues here are of due process and jurisdiction, which should not be lightly disregarded, the burden (to the extent it is necessary) is properly placed on the governmental entity to ensure that all records are properly preserved at the conclusion of the employee's tenure, not on the former employee to be forever on their guard lest they be named in a GRC proceeding.

Mr. Sipe is not requesting the Court to enter a writ of mandamus, but instead is suggesting that the Court adopt the procedure followed in Slaughter v. Government Records Council, 413 N.J. Super. 544, 554-55 (App. Div. 2010). In

that case, the Court held that the Department of Law and Public Safety had failed to adopt a regulation which would have set forth the records that agency would thereafter exempt from disclosure pursuant to OPRA, having relied upon an Executive Order issued eight years prior. Id. at 550. After finding that the Executive Order had "long since expired," the Court determined that the agency should be given the chance to consider whether it was appropriate to adopt a regulation setting forth an exemption which would govern the documents at issue. Id. at 555.

This would not be the first time this Court has had to "nudge" the GRC to adopt regulations to make their procedures consistent with due process. In Serrano v. South Brunswick Township, the Appellate Division considered, inter alia, whether it was proper for the GRC to enter an order requiring a county the prosecutor, who was not a party to the GRC proceedings, to produce an audio tape of a 911 call. 358 N.J. Super. 352, 357-58 (App. Div. 2003). Though the Appellate Division concluded that GRC correctly found that the tape should be produced, id. at 362, it noted concern over "potential procedural issues presented by GRC's

operations regarding this matter," including "whether proper notice and other procedural protections, such as an adequate opportunity to be heard in connection with the results of the protective order proceeding in the Law Division, were accorded the prosecutor as a clearly interested party." Id. at 370. There, the Court declined to address the prosecutor's concerns because "the parties' ultimate positions were developed" but also

> because, based on representations to us by GRC's counsel at oral argument, we anticipate that the GRC will take prompt measures, **including the adoption of appropriate regulations,** designed to avoid a rush to judgment that might result in the unfortunate erroneous release of criminal investigatory records truly inimical to the public interest, and designed to provide an orderly and fair procedural setting for presentations to the GRC and for the consideration and review of the GRC's actions.
>
> [Ibid. (emphasis added).]

Next was Gill v. Government Employees Insurance Company, 404 N.J. Super. 1 (App. Div. 2008). In Gill, the Court considered a situation where a third party sought disclosure, through OPRA, of information GEICO provided to the New Jersey Department of Banking and Insurance (the DOBI). Id. at 4. The GRC

denied GEICO's motion to intervene to try to "object to the release of its confidential, proprietary information," and the Appellate Division reversed. Ibid.

The Appellate Division found that "due process due process requires that GEICO be permitted to intervene in the GRC proceeding." Id. at 12-13. The Court noted that while, since its decision in Serrano, the GRC had "adopted the Complaint Adjudication and Open Public Records Act Information Inquiry Procedures as new rules . . . to govern the adjudication of denial of access complaints" the rules did "not include 'orderly and fair procedural settings' to allow interested non-parties whose confidential or proprietary information may be subject to disclosure an opportunity to participate in the GRC's decision-making process." Id. at 14. Noting that its "decision here is intended to help accomplish that goal," the Appellate Division remanded to the GRC for further proceedings. Ibid.

Here, Mr. Sipe is requesting a similar outcome, in that he requests that this Court first find that former employees are not subject to the jurisdiction of the GRC, and then provide the GRC with the opportunity to issue and adopt a rule that

addresses specifically how public employees other than records custodians, especially former employees, shall be given notice and an opportunity to be heard regarding potentially adverse agency actions.

POINT III

APPELLANT HAS NOT WAIVED HIS CLAIMS, AND HIS DUE PROCESS CLAIMS WERE NOT ADDRESSED

(Not Raised Below).

The GRC asserts that Mr. Sipe waived his claims of due process by failing to bring them before the GRC, and alternatively, that his claims of due process were fully addressed in the Superior Court action, Docket No. OCN-L-001639-21.

First, to the extent that the GRC has argued that Mr. Sipe did not appeal from the order and decision of the Law Division, this is false. Mr. Sipe's Case Information Statement clearly noted a related appeal from Docket Number OCN-L-001639-21. (Dra1-5).

Furthermore, the GRC also incorrectly asserts that Mr. Sipe limited the instant appeal to the May 30, 2023 Final Decision and Order entered by the GRC. Again, Mr. Sipe's Notice of Appeal and Case Information Statement clearly note

that the January 26, 2021, March 30, 2021, and May 18, 2021 Interim Orders are also at issue. (Da577; DRa4)

The remainder of the GRC's arguments must be rejected because they are fatally circular. The GRC argues that Mr. Sipe waived any due process claims because he did not intervene in the GRC proceedings below. But, as fully set forth in our prior brief, Mr. Sipe was specifically denied the right to intervene by the GRC, and so any ability he might have had to assert his claims of due process violations was thwarted. (Da161). The arguments that Mr. Sipe was on sufficient notice of the nature and extent of the GRC proceedings as early as February 8, 2021 are specious and should be disregarded. (Rb17). Mr. Sipe stated clearly that he received an email from the Fire District Commissioner (not from the GRC itself requesting that he provide a Statement of Information or providing him with any meaningful opportunity to participate), which did not serve him with any order or provide him with any substantive information. (Da218-219).

As such, it is still clear that the proceedings conducted by the GRC denied Mr. Sipe his constitutional right to due process, since he was not afforded adequate notice

and a fair and meaningful opportunity to be heard. See Gill, 404 N.J. Super. at 12 ("Although courts normally defer to the procedure chosen by an administrative agency in discharging its statutory duty, that procedure remains subject to the strictures of due process."). Consequently, Mr. Sipe respectfully requests that this Court find that the Interim and Final Orders issued by the GRC are null and void.

CONCLUSION

For the foregoing reasons, and for those set forth in Mr. Sipe's appellant brief, the decision of the GRC below should be reversed, and the Court should vacate or void all of the orders entered by the GRC, dismiss Mr. Kubiel's GRC Complaint, and direct the GRC to consider whether it should adopt formal rules for notice and an opportunity to be heard in those circumstances when the GRC issues orders that affect the rights and obligations of current and former employees.

Respectfully submitted,

COHN LIFLAND PEARLMAN
HERRMANN & KNOPF LLP
Attorneys for the Defendant-Appellant, Jesse Sipe

/s/ Christina N. Stripp
Christina N. Stripp

July 26, 2024

New Jersey Judiciary
Superior Court - Appellate Division

Civil Case Information Statement

Please type or clearly print all information.

Title in Full	Trial Court or Agency Docket Number
BRIAN KUBIEL **V.** **TOMS RIVER DISTRICT NO. 1 BOARD OF FIRE COMMISSIONERS (OCEAN)**	**GRC COMPLAINT NO. 2019-163 (*)**

• Attach additional sheets as necessary for any information below.

Appellant's Attorney Email Address: **wml@njlawfirm.com**
ez@njlawfirm.com

☐ Plaintiff ☐ Defendant ■ Other (Specify) **3RD PARTY DEFENDANT**

Name	Client
WALTER MICHAEL LUERS, Esq.	**JESSE SIPE**

Street Address	City	State	Zip	Telephone Number
PARK 80 WEST - PLAZA ONE 250 PEHLE AVE STE 401	**SADDLE BROOK**	**NJ**	**07663**	**201-845-9600**

Respondent's Attorney * Email Address: **dol.appeals@law.njoag.gov**
DOLAPPEALS@LPS.STATE.NJ.US

☐ Plaintiff ☐ Defendant ■ Other (Specify) **STATE AGENCY**

Name	Client
MELISSA H RAKSA, Esq.	**GOVERNMENT RECORDS COUNCIL**

Street Address	City	State	Zip	Telephone Number
25 MARKET ST PO BOX 112	**TRENTON**	**NJ**	**08625**	**609-984-3900**

Give Date and Summary of Judgment, Order, or Decision Being Appealed and Attach a Copy:
On May 30, 2023, the Government Records Council ("GRC") dismissed the GRC complaint filed by Brian Kubiel ("Kubiel") against the Toms River District No. 1 Board of Fire Commissioners ("District"). That complaint alleged violations of OPRA. On January 26, 2021, the GRC ordered the District's records custodian to calculate a special service charge for access to records. On March 30, 2021, the GRC ordered Jesse Sipe, who was previously a Fire District commissioner but whose term ended on March 2020, a year earlier, to produce certain records to the District's records custodian for review. On May 18, 2021, the GRC held Sipe "in contempt of the Council's March 30, 2021 Interim Order" because he did not produce records to the District's records custodian. Although the GRC held Sipe in contempt, there is no provision in the GRC's regulations or OPRA that authorizes the GRC to hold anyone in "contempt." The GRC also referred the matter to the Office of Administrative Law as a contested case. Thereafter, on May 30, 2023, the GRC dismissed the complaint because, pursuant to a settlement agreement between Kubiel and the District, Kubiel had withdrawn the GRC complaint.

Have all the issues as to all the parties in this action, before the trial court or agency, been disposed? (There may not be any claims against any party in the trial court or agency, either in this or a consolidated action, which have not been disposed. These claims may include counterclaims, cross-claims, third-party claims, and applications for counsel fees.) ■ Yes ☐ No

If outstanding claims remain open, has the order been properly certified as final pursuant to R. 4:42-2? ☐ Yes ☐ No ■ N/A

A) If the order has been properly certified, attach copies of the order and the complaint and any other relevant pleadings to the order being appealed. Attach a brief explanation as to why the order qualified for certification pursuant to R. 4:42-2.

(*) truncated due to space limit. Please find full information in the additional pages of the form.

B) If the order has not been certified or has been improperly certified, leave to appeal must be sought. (See R. 2:2-4; 2:5-6.) Please note that an improperly certified order is not binding on the Appellate Division.

If claims remain open and/or the order has not been properly certified, you may want to consider filing a motion for leave to appeal or submitting an explanation as to why you believe the matter is final and appealable as of right.

Were any claims dismissed without prejudice? ☐ Yes ■ No

If so, explain and indicate any agreement between the parties concerning future disposition of those claims.

Is the validity of a statute, regulation, executive order, franchise or constitutional provision of this State being questioned? (*R.* 2:5-1(g)) ☐ Yes ■ No

Give a Brief Statement of the Facts and Procedural History:

On August 13, 2019, Brian Kubiel ("Kubiel") filed a denial of access complaint with the Government Records Council ("GRC") against Toms River District No. 1 Board of Fire Commissioners ("District") in which he alleged that the District attempted to charge Kubiel an unreasonable special service charge for copies of emails and text messages. On January 26, 2021, the GRC issued an interim order that held that a special service charge was warranted, but held that the amount demanded was unreasonably high and ordered the District to recalculate the charge. On March 30, 2021, the GRC issued a second interim order in which the GRC held that the District had complied with the GRC's January 26, 2021 order that required the District to recalculate a lower special service charge. The GRC also held that Jesse Sipe, a former Fire District Commissioner, refused to provide responsive records and ordered Sipe to provide those records within five business days after receipt of the GRC's order. On May 18, 2021, the GRC held Sipe "in contempt" of the GRC and referred the matter as a contested case to the Office of Administrative Law to determine whether the GRC should impose a $1,000 civil penalty. Thereafter, on May 30, 2023, the matter was referred back to the GRC because Kubiel and the District had reached a settlement and Kubiel agreed to withdraw his GRC complaint, which the GRC formally dismissed on May 30, 2023.

To the extent possible, list the proposed issues to be raised on the appeal as they will be described in appropriate point headings pursuant to *R.* 2:6-2(a)(6). (Appellant or cross-appellant only.):

Point I: The GRC's Interim Orders Are Void Because the GRC Has No Procedure for Asserting Jurisdiction Over Former Public Employees

Point II: Alternatively, the GRC's Interim Orders Are Void Because Sipe Was Never Given Notice and an Opportunity to be Heard Prior to the Entry of Interim Orders that Were Adverse to Him, Especially the Interim Order that Held Him in Contempt

Point III: In the Second Alternative, the GRC Never Provided Notice and an Opportunity to Sipe to File a Statement of Information or Other Responsive Pleading Prior to Making Adverse Findings Against Him

Point IV: Even If Sipe was Properly Noticed and Given an Opportunity to be Heard, the GRC Has No Authority Under OPRA or the GRC's Regulations to Hold Any Person "In Contempt"

Point V: The Original OPRA Request Was Invalid and Unenforceable

If you are appealing from a judgment entered by a trial judge sitting without a jury or from an order of the trial court, complete the following:

1. Did the trial judge issue oral findings or an opinion? If so, on what date? _____ ☐ Yes ■ No
2. Did the trial judge issue written findings or an opinion? If so, on what date? **05/30/2023** ■ Yes ☐ No

(*) truncated due to space limit. Please find full information in the additional pages of the form.

3. Will the trial judge be filing a statement or an opinion pursuant to *R.* 2:5-1(b)? ☐ Yes ■ No ☐ Unknown

Caution: Before you indicate that there was neither findings nor an opinion, you should inquire of the trial judge to determine whether findings or an opinion was placed on the record out of counsel's presence or whether the judge will be filing a statement or opinion pursuant to *R.* 2:5-1(b).

Date of Your Inquiry:

1. Is there any appeal now pending or about to be brought before this court which:

(A) Arises from substantially the same case or controversy as this appeal? ■ Yes ☐ No

(B) Involves an issue that is substantially the same, similar or related to an issue in this appeal? ■ Yes ☐ No

If the answer to the question above is Yes, state:

Case Title	Trial Court Docket#	Party Name
Kubiel v. Sipe	**OCN-L-001639-21**	**Jesse Sipe**

2. Was there any prior appeal involving this case or controversy? ■ Yes ☐ No

If the answer to question above is Yes, state:

Case Name and Type (direct, 1st PCR, other, etc.)	Appellate Division Docket Number
BRIAN KUBIEL V. JESSE SIPE AND TOMS RIVER BOARD OF FIRE COMMISSIONERS, FIRE DISTRICT NO. 1	**AM-000381-21**

Civil appeals are screened for submission to the Civil Appeals Settlement Program (CASP) to determine their potential for settlement or, in the alternative, a simplification of the issues and any other matters that may aid in the disposition or handling of the appeal. Please consider these when responding to the following question. A negative response will not necessarily rule out the scheduling of a preargument conference.

State whether you think this case may benefit from a CASP conference. ■ Yes ☐ No

Explain your answer:

OPRA and the GRC's regulations set forth no procedure for impleading former employees of a public agency into a GRC case. The GRC's practice is to exercise jurisdiction over former public employees without providing them with prior notice or the opportunity to be heard. This is an obvious violation of due process. What the GRC should do is, in this case, vacate and void all of the orders they entered in this case and agree to issue emergency or interim regulations that set forth a specific procedure for impleading former public employees into GRC cases. Such a procedure exists for intervenors, but no such procedure exists for former public employees.

Whether or not an opinion is approved for publication in the official court report books, the Judiciary posts all Appellate Division opinions on the Internet.

I certify that confidential personal identifiers have been redacted from documents now submitted to the court, and will be redacted from all documents submitted in the future in accordance with Rule 1:38-7(b).

JESSE SIPE Name of Appellant or Respondent	**WALTER MICHAEL LUERS, Esq.** Name of Counsel of Record (or your name if not represented by counsel)
07/14/2023 Date	s/ **WALTER MICHAEL LUERS, Esq.** Signature of Counsel of Record (or your signature if not represented by counsel)
034041999 Bar #	**wml@njlawfirm.com; ez@njlawfirm.com** Email Address

(*) truncated due to space limit. Please find full information in the additional pages of the form.

New Jersey Judiciary
Superior Court - Appellate Division

CIVIL Case Information Statement
ADDITIONAL TRIAL COURT INFORMATION

Trial Court Docket #	Disposition Date	Trial Court County	Trial Court Judge
GRC COMPLAINT NO. 2019-163	05/18/2021		
GRC COMPLAINT NO. 2019-163	03/30/2021		
GRC COMPLAINT NO. 2019-163	01/26/2021		

New Jersey Judiciary
Superior Court - Appellate Division
CIVIL Case Information Statement

Additional appellants continued below

Additional respondents continued below

Respondent's Attorney Email Address: **jcohen@pclawnj.com; jplosia@pclawnj.com; conor@pclawnj.com**

■ Plaintiff ☐ Defendant ☐ Other (Specify)

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☐ Plaintiff ■ Defendant ☐ Other (Specify)

Name	Client
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DEPARTMENT OF COMMUNITY AFFAIRS
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TRENTON, NJ 08625-0819

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

February 23, 2021 Government Records Council Meeting

Shane P. Walsh
Complainant
v.
NJ Office of the Governor
Custodian of Record

Complaint No. 2019-26

At the February 23, 2021 public meeting, the Government Records Council ("Council") considered the February 16, 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. The Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

2. The Complainant's OPRA request is invalid because it fails to seek identifiable government records. MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Ass'n. v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order dated May 24, 2011); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). See also Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2009-124 (April 2010). Thus, the Custodian lawfully denied access to the Complainant's request. N.J.S.A. 47:1A-6.

3. Although the Custodian failed to respond to the Complainant's request in the statutorily-mandated time period, thereby violating N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and an 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 23rd Day of February 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: February 25, 2021

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Findings and Recommendations of the Executive Director
February 23, 2021 Council Meeting

Shane P. Walsh[1]
Complainant

GRC Complaint Nos. 2019-26

v.

New Jersey Office of the Governor[2]
Custodial Agency

Records Relevant to Complaint: Copies via e-mail of:

1. Scanned copies of all emails and text messages between Deborah Cornavaca and Ginger Gold-Schnitzer from the date of hire for Ms. Cornavaca to [December 26, 2018], regarding executive branch staff resume referrals, hiring practices, and staffing decisions;
2. Scanned copies of all emails and text messages between Deborah Cornavaca and Governor Phil Murphy from January 16, 2018 to [December 26, 2018];
3. Scanned copies of all emails and text messages between Deborah Cornavaca and Tammy Murphy from January 16, 2018 to [December 26, 2018];
4. Scanned copies of all emails and text messages between Deborah Cornavaca and Michael DeLamater from January 16, 2018 to [December 26, 2018];
5. Scanned copies of all emails and text messages between Deborah Cornavaca and Marie Blistan from January 16, 2018 to [December 26, 2018];
6. Scanned copies of all emails and text messages between Deborah Cornavaca and Sean Spiller from January 16, 2018 to [December 26, 2018];
7. Scanned copies of all emails and text messages between Deborah Cornavaca and Analilia Mejia from January 16, 2018 to [December 26, 2018].[3]

Custodian of Record: Heather Taylor
Request Received by Custodian: December 26, 2018
Response Made by Custodian: January 14, 2019
GRC Complaint Received: February 6, 2019

[1] No legal representation listed on record.
[2] Represented by Deputy Attorney General Kerry Soranno. Previously represented by DAG Kathryn E. Duran.
[3] There were other records requested that are not relevant to this complaint.

Background[4]

Request and Response:

On December 26, 2018, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On January 14, 2019, the twelfth (12th) business day following receipt of said request, the Custodian responded in writing informing the Complainant that the request was overbroad and invalid under OPRA.

Denial of Access Complaint:

On February 6, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant recited the first five (5) paragraphs of Question #28 in the Frequently Asked Questions ("FAQ") section on the GRC's website.[5] Thereafter, the Complainant asserted that his request complied with the example provided in the FAQ section because he identified the type of record sought, the individuals who wrote and received the e-mails and texts, the subject matter of the e-mails and texts, and the time period that the e-mails and texts were sent and received. The Complainant stated that the only reason given by the Custodian for denial of access is that the request was overbroad and thus invalid under OPRA.

Statement of Information:

On March 5, 2019, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on December 26, 2018, and responded in writing on January 14, 2019. The Custodian certified that the Complainant's request was overbroad because the request, seeking scanned copies of e-mails and text messages, failed to identify the subject matter. As such, the Custodian certified that the request was invalid under OPRA.

The Custodian cited Burke v. Brandes, 429 N.J. Super. 169, 176-78 (App. Div. 2012) as providing that requests for correspondence must identify the individuals or accounts to be searched and be confined to a discrete and limited subject matter. Otherwise, the Custodian certified, the request is overly broad under MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 549 (App. Div. 2005); Gannett N.J. Partners, LP v. Cty. of Middlesex, 379 N.J. Super. 205, 212 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 36-37 (App. Div. 2005); and N.J. Builders Ass'n. v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 178-79 (App. Div. 2007).

The Custodian certified that the GRC previously held that a valid OPRA request for e-mail correspondence, in accord with MAG, 375 N.J. Super. 53, requires that the request contain (1) the content and/or subject of the e-mail, (2) the specific date or range of dates during which

[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.
[5] See https://www.nj.gov/grc/public/faqs/#28.

the e-mail or e-mails were transmitted, and (3) the identity of the sender and/or the recipient thereof. The Custodian certified that in the Complainant's request for e-mails and text messages, he included a sender, recipient, and timeframe but failed to identify a subject area. The Custodian certified that, as such, the Complainant's request is overbroad and invalid under OPRA.

Analysis

Timeliness

Unless a shorter time period is otherwise provided, a custodian must grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian's failure to respond accordingly results in a "deemed" denial. Id. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).[6] Thus, a custodian's failure to respond in writing to a complainant's OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

Here, the Custodian certified that she received the Complainant's OPRA request on December 26, 2018, and responded to the request on January 14, 2019, which was the twelfth (12th) business day following receipt of said request.

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11.

Validity of Request

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 New Jersey Appellate Division has held that:

> While OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful*

[6] A custodian's written response, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

> *information. Rather, OPRA simply operates to make identifiable government records "readily accessible for inspection, copying, or examination." N.J.S.A. 47:1A-1.*
>
> [MAG, 375 N.J. Super. at 546 (emphasis added).]

The Court reasoned that:

> Most significantly, the request failed to identify with any specificity or particularity the governmental records sought. *MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past.* Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted.
>
> [Id. at 549 (emphasis added).]

The Court further held that "[u]nder OPRA, *agencies are required to disclose only 'identifiable' government records* not otherwise exempt ... In short, OPRA does not countenance open-ended searches of an agency's files." Id. at 549 (emphasis added). See also Bent, 381 N.J. Super. at 37;[7] N.J. Builders Ass'n, 390 N.J. Super. at 180; Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

Moreover, in Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 8, 2010), the Council established criteria deemed necessary under OPRA to request an e-mail communication. For such requests to be valid, they must contain: (1) the content and/or subject of the e-mail(s), (2) the specific date or range of dates during which the e-mail(s) were transmitted, and (3) the identity of the sender and/or the recipient thereof. See also Sandoval v. N.J. State Parole Bd., GRC Complaint No. 2006-167 (Interim Order dated March 28, 2007). The Council has also applied the criteria set forth in Elcavage to other forms of correspondence, such as letters. See Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order dated May 24, 2011).

Similar to the instant complaint, in Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2009-124 (April 2010), the complainant's OPRA request sought all e-mails to or from a particular e-mail account for a specific time period. The Council held that the complainant's request was invalid under Elcavage, GRC 2009-07, because it did not include a subject or content. Id. at 7.

Here the Complainant asserted that he complied with all of the necessary criteria for a valid request of e-mail and text message communications, including "the subject matter of the e-

[7] Affirming Bent v. Stafford Police Dep't, GRC Case No. 2004-78 (October 2004).

mails and texts." However, contrary to the Complainant's assertion, he did not identify the subject matter of the e-mails and texts. As such, the Complainant's OPRA request failed to specifically identify a government record and is overly broad and invalid under MAG, 375 N.J. Super. 534, and its progeny.

Accordingly, the Complainant's OPRA request is invalid because it fails to seek identifiable government records. MAG, 375 N.J. Super. 534 at 546; Bent, 381 N.J. Super. 30 at 37; N.J. Builders Ass'n, 390 N.J. Super. 166 at 180; Armenti, GRC 2009-154; Schuler, GRC 2007-151. See also Verry, GRC 2009-124. Thus, the Custodian lawfully denied access to the Complainant's request. N.J.S.A. 47:1A-6.

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)).

Although the Custodian failed to respond to the Complainant's request in the statutorily-mandated time period, thereby violating N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

2. The Complainant's OPRA request is invalid because it fails to seek identifiable government records. MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Ass'n. v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order dated May 24, 2011); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). See also Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2009-124 (April 2010). Thus, the Custodian lawfully denied access to the Complainant's request. N.J.S.A. 47:1A-6.

3. Although the Custodian failed to respond to the Complainant's request in the statutorily-mandated time period, thereby violating N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.

Prepared By: John E. Stewart
Staff Attorney

February 16, 2021

State of New Jersey
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

April 28, 2020 Government Records Council Meeting

Eugen Tarnow
Complainant
v.
NJ Motor Vehicle Commission
Custodian of Record

Complaint No. 2018-296

At the April 28, 2020 public meeting, the Government Records Council ("Council") considered the April 21, 2020 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that the Complainant's request is an invalid request that asks multiple questions and fails to seek identifiable government records. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury (Hunterdon), GRC Complaint No. 2007-151 (February 2009). Thus, the Custodian did not unlawfully deny access to the Complainant's request. LaMantia v. Jamesburg Pub. Library (Middlesex), GRC Complaint No. 2008-140 (February 2009); Watt v. Borough of N. Plainfield (Somerset), GRC Complaint No. 2007-246 (September 2009).

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 28th Day of April 2020

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: April 30, 2020

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Findings and Recommendations of the Executive Director
April 28, 2020 Council Meeting

Eugen Tarnow[1]
Complainant

GRC Complaint No. 2018-296

v.

NJ Motor Vehicle Commission[2]
Custodial Agency

Records Relevant to Complaint:

1. How many registrations renewal bills are sent out every month?
2. How many of those registration renewal bills are paid before the current registration expires?
3. How many of those registration renewal bills are paid after the current registration expired?
4. Do you have any estimate, more[] or less[] accurate, of how many people never received the registration renewal bills that are sent out?
5. Did you ever send out reminder[s]? If so, when did this happen and why did it stop?
6. What is the logistics of the sending out of the registration bills? How do they get to the post office? What is the postage paid for each one? What percent of them do the post office guarantee will arrive with the customer?
7. How many of the registration bills are returned by the post office? What do you do with a returned registration bill?
8. What results from use of the Automatic License Plate Reader ("ALPR") do you track? Can you please send me a table of the offenses found and the number of each offense in the last year? How many of these were criminal?
9. Are the rate of accidents involving police cars with ALPR higher or lower than accidents involving police cars without ALPR?
10. What databases are used by the ALPR systems?

Custodian of Record: Joseph Bruno
Request Received by Custodian: October 30, 2018
Response Made by Custodian: November 1, 2018
GRC Complaint Received: November 29, 2018

[1] No legal representation listed on record.
[2] Represented by Deputy Attorney General Vivek N. Mehta.

Background[3]

Request and Response:

On October 30, 2018, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On November 1, 2018, the Custodian responded in writing advising the Complainant his request was denied. The Custodian cited Gannett N.J. Partners, L.P. v. Cnty. of Middlesex, 379 N.J. Super. 205, 212 (App. Div. 2005); MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 549 (App. Div. 2005), and Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 36-37 (App. Div. 2005) informing the Complainant that his request sought information rather than specific government records.

Denial of Access Complaint:

On November 29, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant did not submit any argument supporting his claim of an unlawful denial.

Statement of Information:

On February 8, 2019, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on October 30, 2018. The Custodian certified that he responded in writing on November 1, 2018 informing the Complainant his request was denied because it sought information rather than specific records. Gannett, 379 N.J. Super. at 212; MAG, 375 N.J. Super at 549; Bent, 381 N.J. Super. at 37.

The Custodian contended that the Complainant's request sought only information in response the above-mentioned questions. The Custodian contended that the Complainant's request required research to "self-identify" responsive documents and correlate the information or data to respond. The Custodian asserted that the Complainant's request was properly denied as an invalid.

Additional Submissions:

On February 8, 2019, the Complainant e-mailed correspondence in response to the Custodian's SOI. The Complainant asserted that he felt he was in a "Catch 22" because the answers sought in his request must exist in a record, but he was not able to ask what records contained the information requested.

[3] 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.

Analysis

Validity of Request

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 New Jersey Superior Court has held that:

> While OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records 'readily accessible for inspection, copying, or examination. N.J.S.A. 47:1A-1.
>
> [MAG, 375 N.J. Super. 534, 546 (App. Div. 2005) (emphasis added).]

The Court further held that "[u]nder OPRA, agencies are required to disclose only 'identifiable' government records not otherwise exempt . . . In short, OPRA does not countenance open-ended searches of an agency's files." Id. (emphasis added). See also Bent, 381 N.J. Super. at 37, N.J. Builders Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury (Hunterdon), GRC Complaint No. 2007-151 (February 2009).

In LaMantia v. Jamesburg Pub. Library (Middlesex), GRC Complaint No. 2008-140 (February 2009), the complainant requested the number of Jamesburg residents that hold library cards. The GRC deemed that the complainant's request was a request for information, holding that ". . . because request Item No. 2 of the Complainant's June 25, 2008 OPRA request seeks information rather than an identifiable government record, the request is invalid pursuant to [MAG, supra] . . ." Id. at 6. See also Ohlson v. Twp. of Edison (Middlesex), GRC Complaint No. 2007-233 (August 2009). Additionally, in Watt v. Borough of N. Plainfield (Somerset), GRC Complaint No. 2007-246 (September 2009), the complainant's September 13, 2007 OPRA request asked five (5) questions. The Council determined that the request was an invalid request failing to identify government records.

In the instant complaint, the Complainant's OPRA request is comprised entirely of questions. Similar to the requests at issue in LaMantia, GRC 2008-140 and Watt, GRC 2007-246, this request asks questions, as opposed to seeking identifiable government records. The Complainant's request would require the Custodian to conduct research to identify records, compile correlated information and manufacture a response. The Complainant failed to seek specific, identifiable government records bearing the information sought.

Therefore, the Complainant's request is an invalid request that asks multiple questions and fails to seek identifiable government records. MAG, 375 N.J. Super. at 546; Bent, 381 N.J. Super. at 37; N.J. Builders Ass'n, 390 N.J. Super. at 180; Schuler, GRC 2007-151. Thus, the Custodian did not unlawfully deny access to the Complainant's request. N.J.S.A. 47:1A-6; LaMantia, GRC 2008-140; Watt, GRC 2007-246.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Complainant's request is an invalid request that asks multiple questions and fails to seek identifiable government records. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury (Hunterdon), GRC Complaint No. 2007-151 (February 2009). Thus, the Custodian did not unlawfully deny access to the Complainant's request. LaMantia v. Jamesburg Pub. Library (Middlesex), GRC Complaint No. 2008-140 (February 2009); Watt v. Borough of N. Plainfield (Somerset), GRC Complaint No. 2007-246 (September 2009).

Prepared By: Brandon Garcia
Case Manager

April 21, 2020

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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

May 19, 2020 Government Records Council Meeting

David Herron
Complainant
v.
Paterson Board of Education (Passaic)
Custodian of Record

Complaint No. 2018-188

At the May 19, 2020 public meeting, the Government Records Council ("Council") considered the May 12, 2020 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 because the Complainant's request seeks information rather than a specifically identifiable government record, the request is invalid pursuant to MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury (Hunterdon), GRC Complaint No. 2007-151 (February 2009); Harris v. N.J. Dep't of Corr., GRC Complaint No. 2011-66 (August 2012); Lopez vs. N.J. Dep't of Corr., GRC Complaint No. 2008-250 (November 2009). Thus, the Custodian has lawfully denied access to Complainant's request. N.J.S.A. 47:1A-6. Further, because the request is invalid, the GRC declines to determine whether the asserted exemption applied.

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 19th Day of May 2020

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, 2020

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Findings and Recommendations of the Executive Director
May 19, 2020 Council Meeting

David Herron[1] **GRC Complaint No. 2018-188**
Complainant
v.

Paterson Board of Education (Passaic)[2]
Custodial Agency

Records Relevant to Complaint: Via e-mail, copies of the home addresses for the following members of the Board of Education ("BOE"):

1. Oshin Castillo
2. Nakima Redmon
3. Vincent Arrington
4. Emanuel Capers
5. Johnathan Hodges
6. Manuel Martinez
7. Joel Ramirez
8. Kenneth Simmons

Custodian of Record: Luis M. Rojas
Request Received by Custodian: July 31, 2018
Response Made by Custodian: August 14, 2018
GRC Complaint Received: August 20, 2018

Background[3]

Request and Response:

On July 31, 2018, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On August 14, 2018, the Custodian responded in writing denying the subject OPRA request. The Custodian asserted that the Complainant's request failed to identify a specific government record sought. The Custodian further asserted that the disclosure of the BOE members' home street addresses would violate their reasonable expectation of privacy. N.J.S.A. 47:1A-1. Scheeler v. N.J. Dep't of Educ., 2017 N.J.

[1] No legal representation listed on record.
[2] Represented by Robert E. Murray, Esq., of Robert E. Murray LLC. Law Offices, (Shrewsbury, NJ).
[3] 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.

Super. Unpub. LEXIS 119 (App. Div. 2017); Vargas o/b/o The Philadelphia Inquirer v. N.J. Dep't of Educ., GRC Complaint No. 2012-126 (April 2013).

Denial of Access Complaint:

On August 20, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that candidates in the Paterson school district must meet a residency requirement to run and serve on the school board. N.J.S.A. 18A:12-1. The Complainant cited Brennan v. Bergen Cnty. Prosecutor's Office, 230 N.J. 357 (2017), arguing that ". . . where residency is a requirement, the Brennan ruling held that public access to home addresses is important to enable the public to confirm residency." The Complainant further argued that ". . . when home addresses are redacted from records, the public cannot verify that residency requirements are actually satisfied . . . [t]herefore, the Custodian unlawfully denied access" to his OPRA request.

Statement of Information:

On October 2, 2018, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on July 31, 2018. The Custodian certified that he responded in writing on August 14, 2018, advising the Complainant that his OPRA request failed to identify a specific government record sought. The Custodian asserted that the disclosure of BOE members' home street addresses would violate their reasonable expectation of privacy. N.J.S.A. 47:1A-1; Scheeler, 2017 N.J. Super. Unpub. LEXIS 119; Vargas, GRC 2012-126. The Custodian further asserted that there was not a sufficient public need for the BOE member's home street addresses.

The Custodian argued that in Scheeler, the complainant's OPRA request sought copies of the financial disclosure statement ("FDS") forms of members of the Woodbine BOE. The Custodian further argued that the custodian there disclosed the FDS forms with the members' home street addresses redacted, leaving the town, state and zip codes visible under the privacy exemption. N.J.S.A. 47:1A-1. The Custodian asserted that in the subsequent Denial of Access Complaint, the Council found in favor of non-disclosure. Scheeler v. N.J. Dep't of Educ., GRC Complaint No. 2014-125 (January 2015). The Custodian noted that the Council relied on its previous decision in Vargas, GRC 2012-126, holding that the BOE member's home street addresses were lawfully redacted. See also Wolosky v. Twp. of Harding (Morris), GRC Complaint No. 2010-221 (June 26, 2012).

The Custodian stated that on appeal, the Appellate Division applied the seven (7) factor balancing test established in Doe v. Poritz, 142 N.J. 1 (1995). The Custodian stated that the balancing test conducted by the Scheeler court weighed in favor of non-disclosure and the Council decision was thus affirmed. The Custodian further averred court agreed with the GRC that disclosure could lead to the harassment of BOE members and discouragement of those who wish to run or serve. The Custodian additionally stated that the court rejected the Complainant's argument that residency requirements warrant full disclosure of BOE members' home street addresses.

The Custodian argued that the facts in Scheeler and Vargas militated toward non-disclosure of the BOE members' home street addresses. The Custodian further argued that the fact that BOE members are no required under the School Ethics Act to disclose their home street addresses also supports non-disclosure. The Custodian asserted that after further review of previous GRC decisions, it appeared that the Council was more likely than the courts to uphold the privacy interest redactions.

Analysis

Validity of Request

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

The Court further held that "[u]nder OPRA, agencies are required to disclose only 'identifiable' government records not otherwise exempt ... In short, OPRA does not countenance open-ended searches of an agency's files. Id. at 549. (emphasis added).

The Court further held that "[u]nder OPRA, *agencies are required to disclose only 'identifiable' government records* not otherwise exempt . . . In short, OPRA does not countenance open-ended searches of an agency's files." Id. (emphasis added). See also Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005), N.J. Builders Ass'n. v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

In Harris v. N.J. Dep't of Corr., GRC Complaint No. 2011-66 (August 2012), the Complainant requested the home addresses for five (5) employees of the Department of Corrections. In that complaint, the Council held that her request was invalid under OPRA because it failed to specifically identify the government record sought pursuant to MAG, 375 N.J. Super. at 546; Bent, 381 N.J. Super. at 37; N.J. Builders Ass'n, 390 N.J. Super. 166.

Moreover, in Lopez vs. N.J. Dep't of Corr., GRC Complaint No. 2008-250 (November 2009), the complainant's OPRA request sought the current work address and any alternate address for a physician who previously worked at a prison. In that instance, the custodian responded to the

complainant, advising him that OPRA only requires a custodian to respond to a request for a specific government record and does not require a custodian to conduct research and correlate data from various records. The Council held that because the complainant's request sought information rather than a specific identifiable government record, the request was invalid pursuant to MAG, 375 N.J. Super. at 546.

Here, the Complainant's OPRA request sought information, the home addresses of eight (8) members of the Paterson BOE, rather than government records. The Custodian replied in writing advising the Complainant that his request was invalid because he did not name a specific responsive government record. The Custodian also asserted that BOE members are entitled to a reasonable expectation of privacy under N.J.S.A. 47:1A-1; Scheeler, 2017 N.J. Super. Unpub. 119; Vargas, GRC 2012-126. In the Denial of Access Complaint, the Complainant cited Brennan, 233 N.J. at 332 to assert that the more recent ruling meant that the home addresses should be disclosed to the public where residency requirements were at issue. In the SOI, the Custodian argued that the Scheeler and Vargas cases pertained to the disclosure of BOE member's home street addresses via their FDS forms. The Custodian further argued that the Court rejected the residency argument in Scheeler and in Vargas because the city, state, and zip codes were not redacted from the responsive records. It should be noted that the Custodian did not address the validity of the request in the SOI.

Notwithstanding, the Complainant's request here does not specify a "government record", as was the case in Harris and Lopez. Although the Complainant identified the individuals whose addresses he sought, he did not identify any specific government record that may contain said information. In contrast to Scheeler and Vargas, the Complainant requested home address information for eight (8) named BOE members, not their FDS forms on file. Thus, even if it could be assumed that the information was contained in FDS forms, the Custodian was not obligated to make such an assumption in the face of an invalid request for information.

Therefore, because the Complainant's request seeks information rather than a specifically identifiable government record, the request is invalid pursuant to MAG, 375 N.J. Super. at 546; Bent, 381 N.J. Super. at 37; N.J. Builders, 390 N.J. Super. at 180; Schuler, GRC 2007-151; Harris, GRC 2011-66; Lopez, GRC 2008-250. Thus, the Custodian has lawfully denied access to the Complainant's request. N.J.S.A. 47:1A-6. Further, because the request is invalid, the GRC declines to determine whether the asserted exemption applied.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because the Complainant's request seeks information rather than a specifically identifiable government record, the request is invalid pursuant to MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury (Hunterdon), GRC Complaint No. 2007-151 (February 2009); Harris v. N.J. Dep't of Corr., GRC Complaint No. 2011-66 (August 2012); Lopez vs. N.J. Dep't of Corr., GRC Complaint No. 2008-250 (November 2009). Thus, the Custodian has lawfully

denied access to Complainant's request. N.J.S.A. 47:1A-6. Further, because the request is invalid, the GRC declines to determine whether the asserted exemption applied.

Prepared By: Brandon Garcia
Case Manager

May 12, 2020

State of New Jersey
GOVERNMENT RECORDS COUNCIL
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Acting Commissioner

FINAL DECISION

April 28, 2010 Government Records Council Meeting

Robert A. Verry
Complainant
v.
Borough of South Bound Brook (Somerset)
Custodian of Record

Complaint No. 2009-124

At the April 28, 2010 public meeting, the Government Records Council ("Council") considered the April 21, 2010 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 because the Complainant's request for every e-mail and America Online Instant Messenger message sent to or sent from MayorSBB@aol.com during the week of July 24, 2005 fails to seek specific identifiable government records because no content and/or subject is included , the Complainant's request is overly broad and is therefore invalid under OPRA pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007), and the Council's decision in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). Accordingly, the Custodian has not unlawfully denied the Complainant access to said records. N.J.S.A. 47:1A-6. *See* Sandoval v. NJ State Parole Board, GRC Complaint No. 2006-167 (October 2008) *and* Elcavage v. West Milford Township (Passaic), GRC Complaint No. 2009-07 (March 2010).

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 28th Day of April, 2010

Robin Berg Tabakin, Chair
Government Records Council

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

Janice L. Kovach, Secretary
Government Records Council

Decision Distribution Date: April 30, 2010

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Findings and Recommendations of the Executive Director
April 28, 2010 Council Meeting

Robert A. Verry[1] **GRC Complaint No. 2009-124**
Complainant

v.

Borough of South Bound Brook (Somerset)[2]
Custodian of Records

Records Relevant to Complaint: On-site inspection of:
1. Every e-mail sent to or from MayorSBB@aol.com during the week of July 24, 2005.
2. Every America Online Instant Messenger ("AIM") message sent to or from MayorSBB@aol.com during the week of July 24, 2005.

Request Made: March 28, 2009
Response Made: April 1, 2009
Custodian: Donald E. Kazar
GRC Complaint Filed: April 17, 2009[3]

Background

March 28, 2009

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

April 1, 2009

Custodian Counsel's response to the OPRA request. On behalf of the Custodian, Counsel responds in writing to the Complainant's OPRA request on the second (2nd) business day following receipt of such request. Counsel states that the Borough is unable to comply with the Complainant's request because it fails to identify specific government records and is overly broad. Counsel states that OPRA does not allow for open-ended searches of a public agency's files.

Additionally, Counsel states that the e-mail account identified by the Complainant is a private e-mail account to which the Custodian has no access.

[1] Represented by Walter M. Luers, Esq., of Law Offices of Walter M. Luers, LLC (Oxford, NJ).
[2] Represented by William T. Cooper III, Esq. (Somerville, NJ).
[3] The GRC received the Denial of Access Complaint on said date.

April 17, 2009

Denial of Access Complaint filed with the Government Records Council ("GRC") with the following attachments:

- Complainant's OPRA request dated March 28, 2009.
- Letter from the Custodian's Counsel to the Complainant dated April 1, 2009.

The Complainant states that he submitted an OPRA request to the Custodian on March 28, 2009. The Complainant states the Custodian's Counsel responded in writing on April 1, 2009, stating that the Complainant's request is overly broad and fails to identify a specific government record. Moreover, the Complainant states that Counsel advised that the Custodian did not have access to the e-mail account identified in the Complainant's request because it is a private address.

The Complainant argues that his request was a valid OPRA request. The Complainant states that the GRC's OPRA Alert, Volume No. 1 (July 2008) states that "[i]f the requestor identifies a type of government record (i.e. resolutions or minutes) and states a specific time frame—such request [is] valid." The Complainant states that his OPRA request contained a specific type of government record (e-mails sent and received and AIM messages sent and received) during a specific time period (the week of July 24, 2005).

Further, the Complainant argues that e-mails and messages sent and received from MayorSBB@aol.com are government records. The Complainant again refers to the GRC's OPRA Alert, Volume No. 1 (July 2008):

> "[u]nder OPRA, a government record is any record that has been made, maintained, kept on file or received in the course of government business. This broad definition includes all the records in every government office, *including* e-mails on personal computers via personal e-mail accounts in which a government employee engages in government business. *See* Meyers v. Borough of Fairlawn, GRC Complaint No. 2005-127 (May 2006)…"

The Complainant contends that the Custodian knows that this is a proper request under OPRA. The Complainant asserts that based on the foregoing reasons, the Complainant believes the Custodian's response is a knowing and willful violation of OPRA.

The Complainant does not agree to mediate this complaint.

May 11, 2009

Request for the Statement of Information ("SOI") sent to the Custodian.

May 12, 2009

Letter from the Complainant's Counsel to the GRC.[4] Counsel argues that the Custodian's denial of the records requested by the Complainant is without any legal basis. Counsel asserts that the Complainant identified a specific category of records that are readily identifiable according to date and individual. Counsel avers that the GRC has previously held that requests for records that fall within a narrow date range are not "vague" or "overly broad." *See* O'Shea v. Township of Stillwater (Sussex), GRC Complaint No. 2007-253 (August 2009), Paff v. Borough of Roselle (Union), GRC Complaint No. 2007-255 (June 2008) *and* Donato v. Jersey City Police Department, GRC Complaint No. 2005-251 (April 2007).

Counsel asserts that based on the foregoing, the GRC should find in favor of the Complainant.[5]

May 18, 2009

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated March 28, 2009.
- Letter from the Custodian's Counsel to the Complainant dated April 1, 2009.

The Custodian certifies that the last date upon which records that may have been responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management ("DARM").[6]

The Custodian certifies that he received the Complainant's OPRA request on March 28, 2009. The Custodian certifies that Counsel responded in writing on the Custodian's behalf on April 1, 2009 denying access to the Complainant's request because the request was invalid under OPRA and stating that the Custodian had no access to the e-mail account identified by the Complainant.

Moreover, the Custodian's Counsel asserts that in addition to the Borough's position that it is only required to disclose identifiable government records, the Borough also is not required to respond to open ended, blanket requests. Counsel contends that the Complainant's request at issue in the instant complaint is therefore invalid under OPRA.

Further, Counsel argues that the request sought records from a private e-mail account to which the Custodian had no access. Counsel asserts that the Borough maintains no documents which are responsive to the Complainant's request.

[4] Counsel requests that the attached letter be considered an amendment to the Complainant's Denial of Access Complaint pursuant to *N.J.A.C.* 5:105-2.3(h)(1), which allows a complainant to amend a Denial of Access Complaint within thirty (30) days of filing of same.
[5] The Complainant's Counsel did not request prevailing party attorney's fees.
[6] The Custodian did not certify to the search undertaken to locate any records responsive the Complainant's request.

February 18, 2010

E-mail from the GRC to the Custodian. The GRC states that it needs additional information. The GRC states that the Custodian's Counsel asserts in the SOI that no records responsive to the Complainant's OPRA request for e-mails and AIM messages exist. The GRC requests that the Custodian certify to the following:

1. Specifically describe the search undertaken to locate any records responsive to the Complainant's request.
2. Whether any records responsive to the Complainant's request were located through this search?

The GRC requests that the Custodian submit the requested legal certification by February 19, 2010.

February 18, 2010

Custodian's legal certification. The Custodian certifies that upon review of the Complainant's request, he found that it identified a private e-mail account because the Borough does not use e-mail services from America Online ("AOL"). The Custodian certifies that the e-mail account was personally utilized by former mayor Jo-Anne Schubert ("Ms. Schubert"). The Custodian certifies that he was unable to obtain any records responsive to the Complainant's request because the e-mail account identified was not maintained by the Borough.

The Custodian certifies that he contacted Ms. Schubert and was advised that she no longer uses that account and believes it was cancelled some time in 2005, although Ms. Schubert admitted she was unsure exactly when the account was cancelled.

April 14, 2010

Letter from the Complainant's Counsel to the GRC attaching the Complainant's legal certification dated February 19, 2010.

The Complainant certifies that Ms. Schubert used MayorSBB@aol.com the week of July 24, 2005 for official Borough business. The Complainant certifies that on August 28, 2009, the screen name "mayorsbb" signed onto AIM on or about 8:30am. The Complainant certifies that based on the foregoing, the account in question was active about four (4) years after Ms. Schubert advised the Custodian that she believed the account was cancelled.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

> "…government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions*…" (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

> "… any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file* … or *that has been received* in the course of his or its official business …" (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

> "…[t]he public agency shall have the burden of proving that the denial of access is authorized by law…" N.J.S.A. 47:1A-6.

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 Complainant's request sought "[e]very e-mail sent and received the week of July 24, 2005 from MayorSBB@aol.com" and "[e]very America Online Instant Message ("AIM") sent and received the week of July 24, 2005 from MayorSBB@aol.com." The Custodian's Counsel responded in writing on behalf of the Custodian on April 1, 2009 stating that the Complainant's request does not identify any government records; rather, the request is overly broad and is therefore invalid under OPRA.

The New Jersey Superior Court has held that "[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records 'readily accessible for inspection, copying, or examination.' N.J.S.A. 47:1A-1.*" (Emphasis added.) MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005). The Court further held that "[u]nder OPRA, *agencies are required to disclose only 'identifiable' government records* not otherwise exempt ... In short, OPRA does not countenance open-ended searches of an agency's files." (Emphasis added.) *Id.* at 549.

Further, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),[7] the Superior Court references MAG in that the Court held that a requestor must specifically describe the document sought because OPRA operates to make identifiable government records "accessible." "As such, a proper request under OPRA must identify

[7] Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting all of an agency's documents."[8]

Additionally, in New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007) the court cited MAG by stating that "…when a request is 'complex' because it fails to specifically identify the documents sought, then that request is not 'encompassed' by OPRA…" The court also quoted N.J.S.A. 47:1A-5.g in that "'[i]f a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency.'" The court further stated that "…the Legislature would not expect or want courts to require more persuasive proof of the substantiality of a disruption to agency operations than the agency's need to…generate new records…"

Furthermore, in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009) the Council held that "[b]ecause the Complainant's OPRA requests # 2-5 are not requests for identifiable government records, the requests are invalid and the Custodian has not unlawfully denied access to the requested records pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005)."

The test under MAG then, is whether a requested record is a ***specifically identifiable*** government record. If so, the record is disclosable, barring any exemptions to disclosure contained in OPRA. The GRC established the criteria deemed necessary to specifically identify an e-mail communication in Sandoval v. NJ State Parole Board, GRC Complaint No. 2006-167 (October 2008). In Sandoval, the Complainant requested "e-mail…between [two individuals] from April 1, 2005 through June 23, 2006 [using seventeen (17) different keywords]." The Custodian denied the request, claiming that it was overly broad. The Council determined:

> "The Complainant in the complaint now before the GRC requested specific e-mails *by recipient, by date range and by content*. Based on that information, the Custodian has identified [numerous] e-mails which fit the specific recipient and date range criteria Complainant requested." (Emphasis added.) *Id.*

The GRC recently undertook the task of expanding on Sandoval in Elcavage v. West Milford Township (Passaic), GRC Complaint No. 2009-07 (March 2010). In that complaint, the Complainant requested electronic copies of all e-mails from Bettina Bieri's township account from January 1, 2008 to June 17, 2008. The GRC stated in its analysis that in expanding on Sandoval:

> "… an OPRA request for an e-mail or e-mails shall therefore focus upon the following four (4) characteristics:

[8] As stated in Bent, *supra*.

- Content and/or subject
- Specific date or range of dates
- Sender
- Recipient

> ***In accord with MAG, supra, and its progeny, in order to specifically identify an e-mail, OPRA requests must contain (1) the content and/or subject of the e-mail and (2) the specific date or range of dates during which the e-mail was transmitted or the e-mails were transmitted. Additionally, a valid e-mail request must identify the sender and/or the recipient thereof."***

The GRC found that, based on the above standard, the Complainant's request to be invalid because it failed to identify the content and/or subject of the e-mails sought.

In the matter currently before the Council, the Complainant identified the e-mails and AIM messages sought by date range as well as by sender and/or recipient. The Complainant failed, however, to specify the content and/or subject of the e-mails and AIM messages sought. As such, the Complainant's request failed to seek specifically identifiable e-mail and AIM message records. Without specific reference to the content and/or subject of the e-mails and AIM messages sought, the Custodian would be required to conduct research to identify records responsive to the request; custodians are not required to conduct research in order to respond to requests under OPRA. MAG, *supra.*

Accordingly, because the Complainant's request for every e-mail and AIM message sent to or sent from MayorSBB@aol.com during the week of July 24, 2005 fails to seek specific identifiable government records because no content and/or subject was included, the Complainant's request is overly broad and is therefore invalid under OPRA pursuant to MAG, *supra*, Bent, *supra*, New Jersey Builders, *supra*, and the Council's decision in Schuler, *supra*. Accordingly, the Custodian has not unlawfully denied the Complainant access to said records. N.J.S.A. 47:1A-6. *See* Sandoval, *supra*, *and* Elcavage, *supra*.[9]

The GRC notes that the Complainant submitted a certification dated February 19, 2010 to the GRC on April 14, 2010; however, the allegations therein are moot because the request herein is invalid under OPRA.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because the Complainant's request for every e-mail and America Online Instant Messenger message sent to or sent from MayorSBB@aol.com during the week of July 24, 2005 fails to seek specific identifiable government records because no content and/or subject is

[9] The GRC declines to address whether any records responsive to the Complainant's OPRA request exist because the request is not valid under OPRA.

included , the Complainant's request is overly broad and is therefore invalid under OPRA pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007), and the Council's decision in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). Accordingly, the Custodian has not unlawfully denied the Complainant access to said records. N.J.S.A. 47:1A-6. *See* Sandoval v. NJ State Parole Board, GRC Complaint No. 2006-167 (October 2008) *and* Elcavage v. West Milford Township (Passaic), GRC Complaint No. 2009-07 (March 2010).

Prepared By: Frank F. Caruso
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

April 21, 2010