

BRIAN KUBIEL, Plaintiff-Respondent, v. JESSE SIPE, Defendant-Appellant, and TOMS RIVER BOARD OF FIRE COMMISSIONERS, FIRE DISTRICT NO. 1, Defendant-Respondent.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION CIVIL ACTION On appeal from a final judgment of the Law Division Dated: February 9, 2022 A-3464-22 OCN-L-1639-21 SAT BELOW: HON. ROBERT E. BRENNER, J.S.C.
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BRIEF OF OF DEFENDANT-APPELLANT JESSE SIPE

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PRELIMINARY STATEMENT

This appeal, and its related appeal pending under docket number A-003458-22, presents (among other issues) an opportunity for this Court to hold that a former public official cannot be subjected 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 an action to enforce an agency decision. Plaintiff-Respondent Brian Kubiels (“Plaintiff” or “Mr. Kubiels”) filed a verified complaint and order to show cause to enforce certain orders issued by the Government Records Council (“GRC”) against Defendant-Appellant Jesse Sipe (“Mr. Sipe”). This appeal raises issues and arguments that overlap with Brian Kubiels v. Toms River District No. 1 Board of Fire Commissioners (Ocean), A-003458-22, which we have previously identified as a related appeal.

Through this appeal, we ask that the Court hold that because Mr. Sipe was not a party to the GRC Complaint, was not noticed of any proceedings before the GRC, and was not provided with any opportunity to participate in the proceedings GRC, he was denied his due process rights when the GRC entered orders which imposed affirmative obligations on him and then held him in contempt for failing to meet those obligations.

Second, we ask that the Court hold that the Fire District is bound to

indemnify Mr. Sipe for his legal fees incurred in connection with the GRC Complaint filed by Mr. Kubiel and all related proceedings, including appeals. Because the proceedings before the GRC were neither criminal proceedings nor disciplinary proceedings, Mr. Sipe was entitled to the appointment of counsel or indemnification for legal costs pursuant to the plain language of the bylaws adopted by Defendant-Respondent Toms River Board of Fire Commissioners Fire District No. 1 (“Fire District”).

Third, Mr. Kubiel’s initial request for records under the Open Public Records Act, N.J.S.A. 47:1A-1 to -13 (“OPRA”), was overbroad, vague, and therefore unenforceable, and it was error for the Trial Court to enforce the orders of the GRC relating to that request.

Fourth, alternatively, the Court should hold that Plaintiff’s original OPRA request was invalid because it was overbroad, and that Plaintiff’s Verified Complaint should have been dismissed on that basis.

As more fully discussed below, the order of the Trial Court must be reversed, and this Court should (1) dismiss Plaintiff’s complaint with prejudice; (2) vacate the Trial Court’s order granting relief to the Plaintiff; and (3) hold that Defendant is entitled to indemnification of his reasonable counsel fees and costs incurred for all the work performed by Mr. Sipe’s counsel in an amount to be determined on remand.

STATEMENT OF FACTS AND PROCEDURAL HISTORY¹

From approximately November 2013 to March 2020, Mr. Sipe served as a member of Board of Fire Commissioners for the Fire District. (Da80).

Pursuant to the Fire District's Bylaws,

The Board of Fire Commissioners shall provide a member or officer of the Fire Company who is a defendant in any action or legal proceeding arising out of or incidental to the performance of his duties . . . **with counsel and costs incidental to such representation for the defense of such action or proceeding.**

(Da159) (emphasis added).²

In March 2020, Mr. Sipe was not reelected to his position as Commissioner of the Fire District. (Da80).

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

On July 3, 2019, Mr. Kubiel³ sent an OPRA request seeking, *inter alia*, emails⁴ sent to and from Mr. Sipe's personal email address, and text messages

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

² This indemnification clause contains an exception for disciplinary proceedings initiated by the Board of Fire Commissioners or for criminal proceedings, which exception does not apply here.

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 At some point during the negotiations leading up to the GRC complaint or

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.” (Da21).

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.” (Da18). 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. (Da18). Thereafter, though Mr. Kubiel and the Fire District communicated regarding the reasonableness of the special service charge, they were unable to reach a consensus. (Da18-20).

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. (Da9-15). The main issue initially raised in the GRC Complaint was the reasonableness of the special service charge. (Da12). (This is the GRC Complaint that is the subject of the Second Appeal).

it the GRC complaint itself, it appears that the only records being discussed were text messages.

After the GRC Complaint was filed, Defendant Sipe was not re-elected as one of the District Fire Commissioners and in March 2020, his term ended. (Da80).

On January 19, 2021, the Executive Director entered Findings and Recommendations to the GRC. (Da16-25). The GRC unanimously voted to accept the Findings and Recommendations, and on January 26, 2021, the GRC entered an 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.” (Da26-28). The Fire District was to provide the recalculated special service charge to Mr. Kubiell within five business days of receipt of the Interim Order. (Da27). Mr. Kubiell 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. Kubiell. (Da27-28). The question of prevailing party counsel fees was deferred pending the Fire District’s compliance with the Interim Order. (Da28).

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, instructed him to “forward all text messages from [his] personal or business device concerning fire Commissioner business during the relevant time period.” (Da34). 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.” (Da34). Mr. Minkler did not provide Mr. Sipe with a copy of the OPRA request or the referenced GRC order at that time. (Da33).

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. (Da91).

On February 18, 2021, Mr. Sipe informed the Fire District that there were over 45,000 potentially responsive records, and that it would take an estimated 80 hours to review and retrieve the records at Mr. Sipe’s hourly rate of \$300. (Da96). Mr. Sipe also requested that the Fire District provide him with legal representation related to the GRC Complaint. (Da83).

On February 18, 2021, the Fire District refused to pay Mr. Sipe the requested hourly rate. (Da102-103). The Fire District ignored Mr. Sipe’s request for legal representation. (Ibid.).

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. (Da101).

On February 23, 2021, in response to a query from Mr. Kubiel’s counsel,

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.” (Da214). Then 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[.]” (Da215; Da219). Mr. Sipe was not copied on any of these communications. (Da214; Da215; Da219).

On March 23, 2021, the Executive Director entered Findings and Recommendations to the GRC. (Da142-148). The GRC unanimously voted to accept the Findings and Recommendations, and on March 30, 2021, the GRC entered an 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. (Da140). Mr. Sipe was required to produce the estimated 45,000 documents within five days of receiving the Interim Order and was further required to create a privilege log to accompany the production. (Ibid.). The question of whether Mr. Sipe had willfully denied access to records under OPRA, and the attendant question of prevailing party counsel fees, was deferred pending Mr. Sipe’s compliance with the Interim Order. (Da141). Mr. Sipe had not been provided with notice of the proceedings or hearing leading up to the issuance of the March 30, 2021 Interim Order, and

was not provided with an opportunity to be heard. (Da84).

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. (Da84). 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. (Da85-86; Da117; Da119; Da122).

Ultimately, the Fire District stated that Mr. Sipe was free to hire his own attorney and declined to provide him with representation. (Da126). 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 "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, a staff attorney for the GRC informed the Fire District,

with a copy to Mr. Sipe, that the GRC Complaint were scheduled for adjudication on May 18, 2021 at 1:30 PM. (Da132-133). (This was the first time that the GRC directly transmitted any cp This email stated that “the GRC will not accept any additional submissions beyond this notice.” (Ibid.). This email correspondence was the **first sent directly from the GRC to Mr. Sipe.** (Da132). Also on May 11, 2021, the Executive Director entered Findings and Recommendations to the GRC. (Da152-156). Mr. Sipe was not provided with these Findings and Recommendations. (Da132-133).

On Friday, May 14, 2021, Mr. Sipe responded to the GRC staff attorney requesting a stay so that he could present evidence on his behalf. (Da132). On Monday, May 17, 2021, Mr. Sipe again emailed the GRC staff attorney regarding his request for a stay of the proceedings. (Da131). 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. (Ibid.).

The GRC unanimously voted to accept the May 11, 2021 Findings and Recommendations, and on May 18, 2021, 2021, the GRC entered an 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. (Da150-151). 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. (Da150). Lastly, the GRC found that Mr. Sipe was in contempt of the March 30, 2021 Interim Order and that the complaint should be referred to the Office of Administrative Law (“OAL”)⁵ 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.).

The parties continued to litigate the GRC Complaint, and 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 proceedings pursuant to the GRC Complaint and in the 2021 Trial Court Proceedings, which are discussed in detail immediately below. (Da480).

B. The 2021 Trial Court Proceedings

On June 22, 2021, Mr. Kubiel filed a verified complaint and order to show cause pursuant to Rule 4:67-7 seeking enforcement of the March 30, 2021 Interim Order entered by the GRC. (Da1-60). 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. (Da6). Also

⁵ As of the date of the oral argument before the Trial Court, the OAL had not yet taken any action on the referral from the GRC.

named in Mr. Kubiel's verified complaint was the Fire District. (Da1-6).

On June 28, 2021, the Honorable Mark A. Troncone, J.S.C., entered the order to show cause requested by Mr. Kubiel, requiring Mr. Sipe to appear and show cause on August 6, 2021 why he should not be compelled to produce the requested records and pay Mr. Kubiel's attorneys' fees and costs. (Da61-64). Mr. Sipe was given until July 19, 2021 to file his opposition to the requested relief, and then Mr. Kubiel was to file any reply by July 28, 2021. (Da62).

On July 9, 2021, the undersigned firm appeared on behalf of Mr. Sipe in the Trial Court. (Da65).

On August 2, 2021, the Fire District filed an answer to the verified complaint. (Da66-71).

On August 2, 2021, Mr. Sipe filed an answer to the verified complaint. (Da72-78). In his answer, Mr. Sipe asserted 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." (Da74-75). Mr. Sipe also filed an affidavit in opposition, setting forth the history of the GRC Complaint which had led to the filing of the verified complaint. (Da79-129).

On October 4, 2021, Mr. Kubiel filed a reply in further support of his order

to show cause. (Da236-325). On October 4, 2021, the Fire District filed an amended answer to the verified complaint which included an answer denying any cross-claims asserted against it. (Da326-330).

Ultimately, after several adjournments, 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. (1T).

The Trial Court stated that it was "going to enforce the GRC interim order." (1T42:24-25). While the Trial Court acknowledged Mr. Sipe's arguments regarding the denial of due process he suffered in becoming the focus of the GRC orders, it stated outright "that that due process is not an issue before the Court, nor do I believe that due process rights were violated. The GRC did not just -- need to serve Sipe because it served his and his fellow board members' attorney at the time as well as the Board records custodian[.]" (1T51:11-16).

Furthermore, the Trial Court found that

At the time the Board responded to [Mr. Kubiel's] OPRA request in July of 2019, mediated a potential settlement in December of 2019, and filed all submissions, including the Statement of Information, which has been referred to as the SOI throughout, to the state agency, Sipe and the Board were represented by Mr. Robert Varady. And the Court has no idea of the communications between Mr. Varady and Mr. Sipe, nor is the Court interested in them, but nonetheless, he was represented through counsel for the Fire District.

(1T51:24-52:8). The Trial Court placed special weight on the fact that Mr. Sipe

had voted to appoint an attorney to represent “Board on matters involving the plaintiff, including the underlying GRC matter.” (1T52:14-15).

In the end, 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.”

(1T54:4-10). As a result, the Trial Court rejected Mr. Sipe’s arguments on the issue of due process violations. (1T54:11-23). The Trial Court also rejected Mr. Sipe’s arguments as to a conflict of interest. (1T54:24-56:4).

The Trial Court 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." (1T57:6-13).

Regarding indemnification, the Trial Court first agreed with Mr. Sipe that the sub-section of the bylaws that carved out “disciplinary actions and criminal proceedings” was “not relevant here.” (1T83:17-19). The Trial Court then stated that

the actual language of the bylaws talks about an officer who is a defendant, and . . . He's not a defendant in the GRC matter, even though they apparently don't use that title. He wasn't named at all, in any respect, until he failed to comply with an order that the Fire District turn

over the text messages requested in Mr. Kubiell's OPRA request.

(1T83:25-84:8). However, the Trial Court stated, "Mr. Sipe is the one who put himself in the position that he presently finds himself in, which is his refusal to produce the text messages." (1T85:16-19). Puzzlingly, the Trial Court also recognized that Mr. Sipe was willing to produce the text messages, as long as he was adequately compensated for the time spent retrieving and reviewing them. (1T85:22-25).

The Trial Court then found that Mr. Sipe "was represented through counsel appointed by the District at all times." (1T86:10-11). And while he had "the right to pursue an independent agenda, one which is still unclear to the Court, . . . in this Court's opinion, he's not entitled to indemnification for it." (1T88:8-11).

The Court then found that N.J.S.A 59:1-1, being permissive when it comes to providing indemnification for local public officials, imbued the Fire District with the discretion about whether or not to expend public funds on indemnifying Mr. Sipe. (1T:88-15-90:3). And that, based on Mr. Sipe's actions, the Fire District was not required to appoint a personal attorney for him to investigate whether or not he should comply with an order from a state agency. (1T90:12-14).

And lastly, the Trial Court deferred on any question of attorneys' fees

pending a determination by the OAL the existence of a prevailing party. (1T58:5-60:3).

The Court having issued an oral decision, the parties then were directed to submit an order either on consent or pursuant to the five-day rule which memorialized its findings. (1T62:8-15; Da331-332). On February 9, 2022, the Trial Court entered an order which granted Mr. Kubiel's order to show cause. (Da333-334).

On March 1, 2022, Mr. Sipe filed before the Trial Court for a stay of the February 9, 2022 Order. (Da335-356). Also on March 1, 2022, Mr. Sipe filed a motion for leave to file an interlocutory appeal from the February 9, 2022 Order. (Da389-390). On March 21, 2022, this Court denied Mr. Sipe's motion for leave to file an interlocutory appeal. (Ibid.). On March 14, 2022, after hearing oral argument, the Trial Court denied Mr. Sipe's motion to stay the February 9, 2022 Order. (Da391-392).

As 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 hundreds of different individuals. (Da393-479). Between April 18, 2022, and July 12, 2022, Mr. Sipe produced 73 pages of responsive documentation. (Ibid.).

However, while the February 9, 2022 Order was not stayed, neither was it a

final, appealable order, because the issue of counsel fees was not resolved by the Trial Court. (Da334).

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. (Da484). The GRC Complaint was transmitted to the OAL on June 1, 2022. (Da485).

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 2021 Trial Court Proceedings. (Da480). Thus, the issue of counsel fees in this case between Mr. Kubiel and the Fire District on which the Trial Court had essentially reserved pending the outcome of the GRC Complaint became moot. Pursuant to that settlement agreement, on April 20, 2023, Mr. Kubiel informed the OAL that he wished to withdraw the GRC Complaint. (Da480; Da484). The OAL returned the complaint to the GRC as withdrawn on May 4, 2023, and the GRC Complaint was dismissed on May 30, 2023.⁶ (Da485; Da486-487).

This appeal followed. (Da488-491).

⁶ Certain orders of the GRC are the subject of a separate appeal filed by Mr. Sipe involving the same parties entitled Brian Kubiel v. Toms River District No. 1 Board of Fire Commissioners (Ocean), under Docket No. A-3458-22.

LEGAL ARGUMENT

POINT I

STANDARD OF REVIEW

The standard of review in this case is 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).

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).

POINT II

BECAUSE THE ACTION BELOW, THE GRC COMPLAINT AND THE SUBSEQUENT APPEALS AROSE OUT OF OR WAS INCIDENTAL TO THE PERFORMANCE OF APPELLANT’S DUTIES AS A FIRE COMMISSIONER, HE IS ENTITLED TO INDEMNIFICATION UNDER THE FIRE DISTRICT’S BYLAWS

(Raised Below at Da72-77 and 1T62:22-77:20)

The Trial Court erred when it declined to enforce the Fire District’s unambiguous indemnification provision. As a Fire District Commissioner and a member of a fire company within the District, Mr. Sipe was entitled to a defense.

There is no dispute that Mr. Sipe, as a former District fire commissioner with the Fire District, timely sought indemnification from the Fire District regarding both the action below and the GRC Complaint filed by Mr. Kubiel against the Fire District that was styled GRC Complaint No. 2019-163.

The basis for Sipe’s claims for indemnification is the District’s Bylaws. Article I, Section 6 of the bylaws, titled “Defense Representation and Costs,” is the only reference to defense or indemnification in the bylaws. (Da159). It states that

The Board of Fire Commissioners **shall provide** a member or officer of the Fire Company who is a defendant in any action or legal proceeding arising out of or incidental to the performance of his [sic] duties, subject to the exception in (B), with counsel and costs incidental to such representation for the defense of such action or proceeding.”

(Ibid.). Sub-section (B) contains two carve-outs, which are for representation

“for a member or officer’s defense in a disciplinary proceeding instituted against him by the Board of Fire Commissioners or in a criminal proceeding instituted as a result of a complaint on behalf of the Board of Fire Commissioners.” (Da159-160).

These two carve-outs do not apply here, as the GRC Complaint was neither a criminal proceeding nor a disciplinary proceeding. It was an administrative law proceeding filed with the GRC that was terminated as part of a settlement between Mr. Kubiel and the Fire District. Mr. Sipe was not a party to that settlement. However, because Mr. Kubiel withdrew his GRC Complaint as part of his settlement, the proceedings related to the GRC Complaint were terminated.

We have merits arguments regarding why those GRC orders were unlawful, and those merits arguments will be presented to this Court in our related appeal. However, even if the GRC’s decision to hold Sipe “in contempt” is affirmed, Sipe nonetheless is entitled to indemnification under the Fire District’s bylaws. Sipe’s conduct was the subject of an administrative proceeding and trial court proceeding, not a disciplinary proceeding or a criminal proceeding. Thus, the Fire District should have provided him with a defense in both the GRC case and in the case below.

The Trial Court agreed with Sipe that the sub-section of the bylaws that

carved out “disciplinary actions and criminal proceedings” was “not relevant here.” (1T83:17-83:19). The Court observed that Sipe was not a “defendant” in the GRC case and that he “wasn’t named at all, in any respect, until he failed to comply with an order that the Fire District turn over the text messages requested in Mr. Kubiel’s OPRA request.” (1T84:3-84:8). The Trial Court observed that “I haven’t received a certification from anyone from the Fire District in support of its argument that the reason for rejecting Mr. Sipe’s multiple demands for indemnification . . . I still find for the reasons to follow that the Fire District does not owe indemnification to Mr. Sipe.” (1T85:6-85:12). The Trial Court also held that Mr. Sipe was “at some point, defended by current Board counsel.” (1T86:9-86:15). The Trial Court also felt it was important that Sipe, when he was a commissioner, voted in favor of retaining prior Fire District counsel. (1T87:1-87:6). The Trial Court also acknowledged an email from the Fire District’s defense counsel to Sipe in which Fire District counsel conceded that both current Fire District counsel and prior counsel worked “for the Fire District and not for members of the Board personally, such as Mr. Sipe.” (1T84:20-84:25).

Notwithstanding, the Trial Court refused to order indemnification because Sipe “only became a part of this, no matter what you identify him as, a defendant or otherwise, because of his refusal to turn over the text messages.” (1T87:24-

88:2).

However, Mr. Sipe asked for indemnification before the GRC held him “in contempt of” the GRC. Mr. Sipe became a party to the GRC Complaint at that moment when the GRC began ordering Mr. Sipe to take certain actions. It was when the GRC began ordering Mr. Sipe to take certain actions that the obligation to indemnify Mr. Sipe began. That the GRC subsequently held Mr. Sipe “in contempt” is irrelevant because that order was made without any notice to Mr. Sipe or opportunity to be heard. Although the matter was referred to OAL as a contested case for such a hearing, Mr. Kubiel withdrew his complaint, and the GRC case was terminated.

Mr. Sipe did not willfully violate any orders of the GRC, and Kubiel dismissed the GRC Complaint before the OAL could hold a hearing regarding whether Sipe should be penalized.⁷ To the contrary, he was willing to produce the requested records as long as he was compensated for his time in doing so. At the time he was subjected to the orders of the GRC, Mr. Sipe was no longer a public employee, but was a private citizen who was being instructed to take approximately two weeks off from his job, without any reasonable compensation, in order to produce the records. To the extent that any fault needs

⁷ In yet another arbitrary quirk of GRC procedure, a GRC complainant may withdraw complaints at any time, without the consent of any of the respondents.

to be laid, it must be with the Fire District, which should have obtained the records from Mr. Sipe when he was a Commissioner and held them pending further orders of the GRC.

The decision not to indemnify Mr. Sipe in the Trial Court cannot be bootstrapped by a subsequent adverse finding against Mr. Sipe in the GRC that was made without affording him any advance notice of that finding. The Fire District's decision not to indemnify Mr. Sipe was wrong when they made it, and it was reversible error of the Trial Court to refuse to order indemnification.

The Trial Court's decision to refuse to order the Fire District to indemnify Mr. Sipe was especially confounding in light of the Trial Court's acknowledgment "I haven't received a certification from anyone from the Fire District in support of its argument that the reason for rejecting Mr. Sipe's multiple demands for indemnification[.]" (1T85:6-85:12). Also, the Trial Court's finding that Mr. Sipe was "at some point, defended by current Board counsel[.]" (1T86:9-86:15), was simply wrong and contradicted an email, sent by the Fire District's counsel to Mr. Sipe on April 30, 2021, that Fire District counsel did not represent Sipe personally. (Da126). Indeed, even though the Trial Court found that Fire District counsel conceded that both current Fire District counsel and prior counsel worked "for the Fire District and not for members of the Board personally, such as Mr. Sipe[.]" 1T84:20-84:25, the Trial

Court nonetheless held that Fire District counsel did represent Mr. Sipe, which was simply untrue and not supported by any evidence in the record.

When the Trial Court commented on the fact that when Mr. Sipe was a commissioner he voted in favor of retaining prior Fire District counsel, (1T87:1-87:6), the Trial Court seemed to hold that Mr. Sipe's vote in favor of the appointment of Fire District counsel somehow implicated Mr. Sipe's right to his own counsel that owed a fiduciary duty to Mr. Sipe, rather than to the Fire District. Indeed, the Trial Court was implying that because Mr. Sipe voted in favor of retaining a specific law firm, which was subsequently replaced, he had some kind of inside track on being defended when, in reality, the opposite was true.

POINT III

**THE GRC ORDERS THAT WERE THE BASIS FOR
MR. KUBIEL'S AGENCY ENFORCEMENT ACTION WERE NULL
AND VOID BECAUSE THE GRC VIOLATED MR. SIPE'S
PROCEDURAL DUE PROCESS RIGHTS TO NOTICE AND
AN OPPORTUNITY TO BE HEARD**

(Raised Below at Da74-75 and 1T54:11-23)).

Mr. Sipe was deprived of due process when the GRC never provided him with notice and an opportunity to be heard regarding any of the GRC's adjudications or interim orders in this case. Therefore, the Trial Court lacked subject matter jurisdiction over Mr. Sipe because he was deprived of due process.

Mr. Kubiel did not name Mr. Sipe as a respondent in the GRC Complaint, since he was not the Custodian of Records of the Fire District. (Da9-15). 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 26, 2021 Interim Order, the March 30, 2021 Interim Order, and the May 18, 2021 Interim Order, at and subsequent to public meetings held by the GRC. The first Interim Order directed Mr. Sipe to produce certain documents, whereas the second Interim Order held him in contempt for failing to produce these documents pursuant thereto.⁸ (Da26-28; Da140-141). 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

⁸ 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 did so. 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.

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).

In connection with the foregoing, the courts in New Jersey have repeatedly and consistently declared that administrative proceedings and agencies must guarantee, protect, and afford rights of due process 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).

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. 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.” 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. Surely 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 forms 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 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 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 Plaintiff, counsel for the Records Custodian, and the Records Custodian himself, that Mr. Kubiel's GRC Complaint would be adjudicated on May 18, 2021. (Da132-133). Plaintiff had never received any advance notice of any of the prior GRC proceedings, including the GRC's adjudication that resulted in the January 26, 2021 Interim Order, and the GRC's adjudication that resulted in the March 30, 2021 Interim Order. (Da132).

Any argument that the May 11, 2021 email provided Mr. Sipe with adequate notice of the May 18, 2021 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." (Da132). When Mr. Sipe, in response, requested a stay so he could make a submission, GRC Staff Attorney Rosado denied that request. (Da131). 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. (Da131-133). 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 denial of access complaint, Mr. Kubieli 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." (Da12).

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." (Da189-190). 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. (Da12; Da 189-190).

Although Mr. Kubieli 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. 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 26, 2021 Interim Order, it did not address the issue of whether a special service charge should be assessed against the Plaintiff for his time in reviewing and retrieving records and at what rate. (Da27-28).

This prejudice was compounded when, without notice from the GRC to Mr. Sipe, the GRC issued a second Interim Order on March 30, 2021 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." (Da140-141). 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 30, 2021 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.

(Da150-151). Then when Mr. Sipe requested an opportunity to be heard, he was denied by GRC Staff Attorney Rosado. (Da131-132).

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. (Da224; Da226; Da229). When he asked for such an opportunity to be heard and a stay of proceedings, the GRC denied him that one opportunity. (Da131-132).

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), a straightforward application of the Trial Court's reasoning would produce an absurd result. 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.

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 those orders are null and void, and that the February 9, 2022 Order entered by the Trial Court enforcing the GRC orders be reversed and remanded for further proceedings.

POINT IV

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

(Raised Below at 1T28:14-21; 1T73:10-24).

The original OPRA request was invalid because it was overbroad. (Da201; 1T28:14-21). 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.

(Da201).

“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, A-3794-13T1, 2015 WL 10352982 (App. Div. Sept. 1, 2015) (Da203-209), 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. Id. “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. Kubielski's OPRA requests were for all text messages regarding "fire commissioner business, discussions, etc." (Da201). 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. Kubielski'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 text [sic] messages." (Da21).

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. (Da27-28). 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 v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 549 (App. Div. 2005).

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." (Da21). 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 Defendant'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, the OPRA requests contain no specific subject matter. Plaintiff did not identify a subject matter in his OPRA requests. 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 plaintiff'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, Mr. Sipe estimated that he had at least 45,000 potentially responsive text messages, which would take at least eighty hours to review. (Da101). 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 would be to ask him to step away from his employment and his business for an estimated eighty hours without reasonable compensation. (Da140). In the end, Mr. Sipe was in possession of 73 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 (Da393-479).

CONCLUSION

For the foregoing reasons, the order of the Trial Court must be reversed, and this Court should (1) dismiss Plaintiff's complaint with prejudice; (2) vacate the Trial Court's order granting relief to the Plaintiff; and (3) hold that Defendant is entitled to indemnification of his reasonable counsel fees and costs incurred for all the work performed by Mr. Sipe's counsel in an amount to be determined on remand.

Respectfully submitted,

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/s/ Christina N. Stripp
Christina N. Stripp

November 30, 2023

BRIAN KUBIEL
Plaintiff-Respondent

v.

JESSE SIPE,
Defendant-Appellant

And

**TOMS RIVER BOARD OF FIRE
COMMISSIONERS, FIRE DISTRICT
NO. 1**
Defendant-Respondent

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

CIVIL ACTION

DOCKET NOS: A-003464-22

ON APPEAL FROM SUPERIOR COURT
LAW DIVISION, DOCKET NO:
OCN-L-1639-21

SAT BELOW:
HON. ROBERT E. BRENNER

**BRIEF AND APPENDIX OF RESPONDENT,
TOMS RIVER BOARD OF FIRE COMMISSIONERS, FIRE DISTRICT NO. 1**

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Dated: January 2, 2024

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PRELIMINARY STATEMENT

Appellant has single-handedly converted a simple, straightforward OPRA denial of access complaint into a multi-jurisdictional spanning litigation solely based on his obstinacy and intransigence. Sipe conceded that his personal text messages that relate to Fire District business from his tenure as a Commissioner for Toms River Fire District No. 1 are public records. However, despite being assured by counsel for the Fire District innumerable times that the messages would be reviewed before release he has held them hostage, refusing to turn them over unless either the requestor or the district pays him an arbitrary \$300 per hour for 80 hours to review his exponentially inflated estimate of 45,000 text messages, more than four times the cost of the original estimated special service charge assessed by the District.

A special service charge is permitted under the law for unduly burdensome requests, but it is calculated based on the salary of the lowest paid employee of an agency qualified to perform the search to recuperate the cost of compliance by a public agency, not to compensate a former elected official to produce public documents in his possession.

Sipe has dragged the District into his personal vendetta against the requestor which has already resulted in tens of thousands of taxpayer dollars spent on attorney's fees that would have been completely avoided had he just

produced the documents. Yet Sipe seeks the further expenditure of taxpayer dollars to fund his crusade against the Government Records Council. He became a defendant in a proceeding through his own sheer unreasonableness, all over 73 pages of documents. Sipe is not entitled to indemnification to fund his personal agenda.

The remaining claims against the GRC regarding due process and the validity of the underlying request do not belong in this appeal as the GRC is not a party and the underlying court declined to address them. These issues belong in the related appeal to be addressed by the Government Records Council.

STATEMENT OF FACTS AND PROCEDURAL HISTORY¹

On July 3, 2019, Brian Kubiell, Administrator of the Toms River Fire District No. 1, sent an OPRA request to the District seeking several categories of documentation including emails and text messages sent by Jesse Sipe from his private phone and email address which concerned “any fire Commissioner, former fire Commissioner, employee, Township employee or any other individual concerning fire Commissioner business.” (Da21)

At that time, Defendant Sipe was an elected Fire Commissioner for District No. 1 and was represented by both Peter Van Dyke, Esq., general counsel for the Board and Robert Varady, Esq. who had been appointed as special counsel for the handling of matters involving personnel and related issues, including, but not limited to any issues raised by or on behalf of any employee against the Board of Fire Commissioners or against any individual Commissioners. (Ra01).

The District advised the requestor that a special service charge would be required to fulfill the request, calculated at the hourly rate of the District’s Attorney of \$185 per hour. (Da019). Mr. Kubiell filed a complaint with the GRC, challenging the reasonableness of the special service charge. (Da012).

The District’s Counsel and Special Counsel handled the District’s

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

response to the complaint, in the form of the Statement of Information. All required GRC submissions and the District's legal response to the complaint were submitted prior to the fire district election on February 15, 2020, when Sipe was not re-elected to the Board of Commissioners. The only defense raised by the Board to the subject OPRA request was that it could not be fulfilled without an extraordinary expenditure of time and effort and would require the imposition of a Special Service Charge. The Board's attorneys failed to raise any other defense. They did not argue that the request was overly broad nor that the requestor had failed to specify the documents sought with specificity. (Da020)

In January of 2021, the GRC Complaint was adjudicated, with the GRC finding that the Special Service charge was appropriate, but it must be calculated using the rate of salary of the lowest paid employee qualified to perform the redactions. Although the GRC noted that the OPRA request was overly broad, it also determined that the Board had waived that argument. (Da021)

The Fire District recalculated the special service charge, Kubieli paid the fee, and the Custodian of Records endeavored to compile the documents for review and redaction, including obtaining documents from Sipe that were still in his possession.

All that was required of Jesse Sipe was that he turn over the responsive text messages which are government records subject to access under N.J.S.A. 47:1A-1.1. He was further advised by Counsel for the District that the documents would be reviewed and redacted prior to release on February 16, 2021. (Da037) and again on February 18, 2021. (Da042).

By correspondence dated February 8, 2021, the Custodian of records contacted Sipe and instructed him to “forward all text messages from [his] personal or business device concerning fire Commissioner business during the relevant time period” and that the records would be reviewed and redacted prior to release to ensure no confidential information would be released. (Da034). On February 16, 2021 Counsel for the Fire District again wrote to Sipe requesting that he provide the required documents as soon as possible, advising that the documents would be reviewed and redacted prior to release on February 16, 2021, (Da037) and again on February 18, 2021. (Da042).

Rather than comply with the Interim Order of the GRC, Sipe demanded a fee of \$300 per hour for his estimate of 80 hours to produce the documents, a total of \$24,000. (Da043). Sipe was informed that this payment was not permissible, and was asked to confirm that he had government records in his possession. (Da042). He responded “The inability of the Board to pass along the costs to produce these documents to Complainant Kubiell is

inconsequential to me.” (Da042).

Sipe did not request separate legal representation in these emails. He did on two occasions express his belief that he was entitled to representation, but that he declined same. In his correspondence on February 18, 2021 Sipe states “Please note that I am entitled to representation at the Board’s expense, but have elected not to do so in an effort to not burden the taxpayers.” (Da040) and that his donation of the \$24,000 he expected the requestor to pay for this efforts to specified fire stations would take place “pending legal consultation, as I am entitled to at the Board’s expense.” (Da043)

Due to Sipe’s willful defiance of the GRC Interim Order, despite his obligation as a public official to produce the government records in his possession, the District was unable to produce the requested records and informed the GRC of same via a Certification dated February 18, 2021. (Da030-031).

On March 23, 2021, the Executive Director entered Findings and Recommendations to the GRC. (Da142-148). The GRC unanimously voted to accept the Findings and Recommendations, and on March 30, 2021, the GRC entered an Interim Order which required Sipe to provide records pursuant to the January 26, 2021 Interim Order. (Da140). Sipe was required to produce the documents within five days of receiving the Interim Order and

was further required to create a privilege log to accompany the production. (Ibid.). The question of whether Sipe had willfully denied access to records under OPRA, and the question of prevailing party counsel fees, was deferred pending Sipe's compliance with the Interim Order. (Da141).

On April 7, 2021, Mr. Sipe attended a public meeting of the Fire District in which he inquired whether the Board recollected a resolution being passed relating to the GRC Complaint which stated that "any commissioner present or past would be represented by special counsel" and requesting the representation by this special counsel (Ra05). That resolution did not specifically name this Complaint, it appointed Robert F. Varady, Esq. a one year professional services appointment as "special legal counsel to handle matters involving personnel issues and related issues which have arisen and which must be addressed[.]" (Ra01)

On April 30, 2021, the Fire District's counsel informed Sipe that the appointment of outside counsel to pursue his private claims against the Government Records Counsel would not be funded by the District and had not been approved by its insurer. He was also informed that the production of the government records did not require representation by an attorney. He was also, again, informed that the messages would be reviewed prior to release. (Da126).

On May 14, 2021 Sipe contacted the GRC and explicitly stated that his interests diverged from those of the district. At that time, he requested a stay of the May 18, 2021 hearing in order for his private interests in the withholding of public documents could be advanced to the GRC. (Da132) This request was denied by the GRC because of Sipe's failure to timely request a stay pursuant to the GRC regulations, despite having had knowledge of the Interim Orders for a period of three months. (Da131).

On May 18, 2021, the GRC entered an Interim Order which found that Sipe had failed to comply with the March 30, 2021 Interim Order because he failed to provide the responsive records. (Da150-151). The GRC also found that the January 26 and March 30, 2021 Interim Orders were enforceable in the Superior Court, and held Sipe in contempt of the March 30, 2021 Interim Order and that the complaint should be referred to the Office of Administrative Law for a determination of whether his refusal to produce government records constituted a knowing and willful violation of the Open Public Records Act. (Da150-151)

On June 22, 2021, Kubieli filed a verified complaint and order to show cause pursuant to Rule 4:67-7 seeking enforcement of the March 30, 2021 Interim Order entered by the GRC. (Da001-060). Kubieli requested that the Trial Court hold Sipe in contempt for his failure to produce records, and

ordering Sipe to pay Kubiel's attorneys' fees and costs. (Da006).

On August 2, 2021, Sipe filed an answer asserting claims against the GRC including deprivation of due process and lack of jurisdiction as affirmative defenses, as well as 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 the July 3, 2019 OPRA request." (Da072-78).

On October 4, 2021, the Fire District filed an amended answer to the verified complaint which included an answer denying Sipe's crossclaims. (Da326-330).

Oral argument was held on January 28, 2022 (1T) in which the Trial Court held that the Due Process claim and the challenge to the validity of the OPRA request were not properly before the Trial Court, as an appeal of the GRC decision that must be made to the Appellate Division. The Trial Court also determined that, at all times relevant to the adjudication of the GRC complaint, Sipe was represented through counsel for the District:

At the time the Board responded to [Mr. Kubiel's] OPRA request in July of 2019, mediated a potential settlement in December of 2019, and filed all submissions, including the Statement of Information, which has been referred to as the SOI throughout, to the state agency, Sipe and the Board were represented by Mr. Robert Varady. And the

Court has no idea of the communications between Mr. Varady and Mr. Sipe, nor is the Court interested in them, but nonetheless, he was represented through counsel for the Fire District.

In the end, 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. (1T54:4-10)

As a result, the Trial Court rejected Mr. Sipe's arguments on the issue of due process violations (1T54:11-23) and alleging a conflict of interest. (1T54:24-56:4) of District counsel.

The Trial Court declined to consider 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." (1T57:6-13).

Regarding indemnification, the Trial Court stated that

the actual language of the bylaws talks about an officer who is a defendant, and . . . He's not a defendant in the GRC matter, even though they apparently don't use that title. He wasn't named at all, in any respect, until he failed to comply with an order that the Fire District turn over the text messages requested in Mr. Kubiel's OPRA request. (1T83:25-84:8)

The Trial Court held that Sipe created the situation he was in by refusing

to produce the text messages. (1T85:16-19). The court recognized that Sipe did not allege that the records were not government records subject to disclosure, his only argument was that he should be compensated for the time spent retrieving and reviewing them prior to turning them over to counsel. (1T85:22-25).

The Trial Court determined that Sipe was represented through counsel appointed by the District at all times,” (1T86:10-11) and that the District was not obligated to fund his “independent agenda, one which is still unclear to the Court.” (1T88:8-11). Due to Sipe’s actions in this matter, the Fire District was not required to appoint a personal attorney for him to investigate whether or not he should comply with an order from a state agency. (1T90:12- 14).

On February 9, 2022, the Trial Court entered an order granting the order to show cause. (Da333-334). On March 1, 2022, Sipe filed for a stay of the February 9, 2022 Order. (Da335-356) and for leave to file an interlocutory appeal from the February 9, 2022 Order. (Da389-390). On March 21, 2022, this Court denied the motion for leave to file an interlocutory appeal. (Ibid.). On March 14, 2022 the Trial Court denied Sipe’s motion to stay the February 9, 2022 Order. (Da391-392).

Sipe then produced the documents which, although he had alleged on numerous occasions numbered over 45,000, constituted a total of 73 pages of

responsive documents, substantially below his exaggerated estimate. (Da393-479).

The GRC Complaint was transmitted to the OAL on June 1, 2022 (Da485) for a determination of whether Sipe committed a knowing and willful violation of OPRA and the issue of attorney's fees. Kubiel and the Fire District reached an agreement regarding prevailing party counsel fees that resolved Kubiel's claims for counsel fees in the GRC Complaint and in the 2021 Trial Court Proceedings. (Da480). The OAL returned the complaint to the GRC as withdrawn on May 4, 2023, and the GRC Complaint was dismissed on May 30, 2023. (Da485; Da486-487). This appeal was filed on November 30, 2023. (Da488-491).

LEGAL ARGUMENT

1. STANDARD OF REVIEW

The Appellate Division reviews de novo trial court decisions on questions of law, including issues involving the interpretation of statutes, ordinances and contract terms. Int'l Union of Operating Eng'rs Local No. 68 Welfare Fund v Merck & Co., Inc., 192 N.J. 372, 386 (2007).

**2. SIPE IS NOT ENTITLED TO INDEMNIFICATION TO PURSUE
A PRIVATE AGENDA AGAINST THE GOVERNMENT
RECORDS COUNCIL**

Sipe was represented by Counsel for the Fire District at all times relevant to this matter. From the receipt of the subject OPRA request in July of 2019 through the Final Order of the Government Records Council in March of 2021, Counsel for the Fire District represented Sipe in connection with the response to the OPRA request and the defense of the GRC Complaint. When the District contacted Sipe regarding production of the documents following the January 2021 Interim Order from the GRC, he was advised that the documents would be reviewed prior to release. Legal counsel represented the interests of both Sipe and the Board because they were the same. Sipe's interest and obligation to produce government records was not altered by his defeat in the February 2020 election.

In order for Sipe to comply with the GRC's Orders, all that he was required to do was turn over the records. He was not required to expend money, take time off of work, enter a defense, or participate in the proceedings in any manner. Compliance with the Interim Order did not require separate legal representation and Sipe was advised of this. There were no arguments to be made at that time, the only required submissions were the documents. Sipe was advised on numerous occasions that nothing personal or confidential would be

released. He was advised that his privacy would be protected by the review, that nothing personal would be released, and that redaction of the documents would be made by an attorney for the Board at no cost to him.

While the New Jersey Tort Claims Act, N.J.S.A. 59:1-1 et seq. mandates indemnification for certain officials, it is permissive for non-State public entities:

Local public entities are hereby empowered to indemnify local public employees consistent with the provisions of this act. A local public entity may indemnify an employee of the local public entity for exemplary or punitive damages resulting from the employee's civil violation of State or federal law if, in the opinion of the governing body of the local public entity, the acts committed by the employee upon which the damages are based did not constitute actual fraud, actual malice, willful misconduct or an intentional wrong. N.J.S.A. 59:10-4.

When a public entity determines whether or not to appropriate funds, it is a legislative policy determination and an exercise of governmental discretion. The Appellate Division has held that, absent extraordinary circumstances, courts should defer to a governing body's discretionary decision whether or not to indemnify its employee:

The Legislature conferred plenary authority on the local public entity to determine whether indemnification of a punitive damage award is appropriate under the circumstances. The key statutory language is “in the opinion of.” We do not find the language chosen by the Legislature to be accidental, but rather, to reflect an acknowledgment that this decision, which implicates the appropriation of funds, should be insulated from examination absent extraordinary circumstances.

Loigman v. Board of Chosen Freeholders of County of Monmouth, 329 N.J. Super. 561, 565-66 (App. Div. 2000).

The Bylaws of the Board of Fire Commissioners provide that the Board shall provide a member of officer of a fire company with counsel “who is a defendant in any action or legal proceeding arising out of or incidental to the performance of his duties.” A defendant is a person who is sued in a civil proceeding or accused in a criminal proceeding, per Black’s Law Dictionary. When Sipe requested indemnification by the District, he was neither. Therefore, the determination of whether or not to provide Sipe with legal representation was a decision left to the Board. Sipe is a former public official being directed to release public records in his possession. He had no right to pursue an independent cause of action funded by the District, moreover at that time he was not liable for any fees or damages. The subsequent cause of action arose solely from his intransigence.

The Board was similarly not obligated to provide him with representation under a claim of common law indemnification. Although the application of common law indemnification to legal fees is discretionary, it is only authorized when the fees are incurred in “defending lawsuits brought against public officials who are executing the powers and duties of their office or carrying out a governmental obligation.” Palmentieri v. City of Atl. City, 231 N.J. Super. 422, 429 (Law. Div. 1988). Essentially, “[t]he officer must have been acting in a

matter in which the [municipal] corporation has an interest, he must have been acting in the discharge of a duty imposed or authorized by law and he must have acted in good faith.” Cobb v. City of Cape May, 113 N.J. Super. 598, 601 (Law Div.1971). Further, “[w]hether the authority to indemnify originates under the common law, the Tort Claims Act, or a specific statute ... the analysis initially focuses on what acts can be characterized as being ‘within the scope of employment.’ ” Palmentieri, *supra*, 231 N.J. Super. at 43.

In DiCosala v. Kay, 91 N.J. 159 (1982), the New Jersey Supreme Court said: “The scope of employment standard, while imprecise, is designed to delineate generally which unauthorized acts of the servant can be charged to the master.” Id. at 169. The Court defined acts within the scope of employment as those “which are so closely connected with what the servant is employed to do, and so fairly and reasonably incidental to it, that they may be regarded as methods, even though quite improper ones, of carrying out the objectives of the employment.”

The Trial Court agreed that indemnification in this case was not mandatory and was within the discretion of the Board, stating:

The Board, in denying his request, clearly exercised its discretion and determined not to expend public funds for the appointment of an attorney, particularly for a matter which arguably did not require a personal attorney.

At the time of his request for indemnification, he was not a defendant in any action or proceeding. The proceeding only came to be because for whatever his reasons, he did willfully ignore the advice of counsel of the District by defying the interim order of the GRC. Right or wrong, he made that choice. And the Court finds that one, he's not a named defendant, but that based on his actions, the Fire District was not required to appoint a personal attorney for him to investigate whether or not he should comply with an order of a state agency. (1T89:24 – 90:14)

Sipe was not engaged in the good faith execution of his duties imposed or authorized by law. At the time of Sipe's request for indemnification, he was not a defendant in any action or proceeding. There is no basis to compel the District to pay the sought after legal fees under these circumstances. The Board exercised its discretion and determined not to expend public funds for the appointment of an attorney, particularly for a matter which did not require a personal attorney or for an action that was contrary to and divergent from the District's interests. There are no extraordinary circumstances in this matter that would warrant the reversal of this determination. This proceeding only came to be because Sipe willfully ignored the advice of counsel by defying the Interim Order of the GRC, the bylaws do not require the Board to appoint Sipe a personal attorney to investigate whether or not he should comply with an order of a State Agency or to further his personal agenda.

Sipe's refusal to comply with multiple orders of the GRC and refusal to turn over public documents in his possession is a dereliction of duty of a public

official and a violation of the Open Public Records Act, N.J.S.A. 47:1A-11. Because his act was outside the scope of his official responsibilities, the Board has no obligation or authority to provide Sipe with counsel to pursue a nebulous heretofore unspecified claim against the Government Records Council.

3. THE COURT BELOW DECLINED TO DECIDE THE DUE PROCESS ISSUE AND THE VALIDITY OF THE OPRA REQUEST UNDER R. 4:67-6.

The trial court declined to determine the issues regarding the alleged due process violation and the validity of the underlying OPRA request under R. 4:67-6(c) which states “except as otherwise provided by subparagraph (c)(2) of this rule the validity of an agency order shall not be justiciable in an enforcement proceeding.”

The trial court declined to rule on the due process issue:

It’s this Court’s determination today that due process is not an issue before the Court, nor do I believe that due process rights were violated. The GRC did not just –need to serve Sipe because it served his and his fellow board members’ attorney at the time, as well as the Board records custodian, Richard Tutela. (1T:51-11 – 51:16)

Additionally, the trial court declined to review the merits of the GRC decision, stating:

[I]n regard to any of Sipe’s arguments concerning the merits of any of the GRC decisions, these arguments are not within

the jurisdiction of this Court in connection with the enforcement action. Rather, they belong in the Appellate Division.

Both the federal and state constitutions prohibit a state from depriving a person of its property without due process of law. In re Freshwater Wetlands Statewide Gen. Permits, 185 N.J. 452, 466, (2006) (citing U.S. Const. amend. XIV, § 1; N.J. Const., art. I, ¶ 1). Due process includes a right to be heard at a GRC proceeding.

In Gill v. N.J. Dept. of Banking and Ins., 404 N.J. Super. 1 (App. Div. 2008), this Court held that due process required that an insurer should be permitted to intervene in a GRC proceeding brought by a third party seeking disclosure of their documents which the insurer asserted contained confidential and proprietary trade secret information.

It is inappropriate to include a claim alleging error of GRC regulations in a matter in which the GRC is not represented. Sipe was at all times represented by Counsel first as a member of the respondent Fire District, then later as a former Commissioner of the respondent. Furthermore, Sipe has never alleged an independent interest in the confidentiality of the documents; he has never claimed that the records should not be released, only that the request itself is overly broad, or that he should be compensated to the tune of \$24,000 for the production of what amounted to 73 pages of text messages.

CONCLUSION

It is respectfully submitted based on the above that the decision of the Trial Court denying Appellant's request for indemnification should be upheld.

Respectfully Submitted,

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January 26, 2024

VIA eCOURTS

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

Re: *Brian Kubiel, Plaintiff-Respondent v. Jessie Sipe, Defendant-Appellant and Toms River Board of Fire Commissioners, Fire District No. 1, Defendant-Respondent*

**Superior Court – Appellate Division
Civil Action, On Appeal from a Final Judgment of the Law Division**

**Sat Below: Hon. Robert E. Brenner, J.S.C.
Docket No. Below: OCN-L-1639-21**

**Our File No. 40845-3
Docket No. A-3464-22**

Dear Honorable Judges of the Appellate Division:

We represent the Defendant-Appellant in the above-referenced appeal and we submit this letter brief in lieu of a formal brief in reply to the brief filed by Defendant-Respondent Toms River Board of Fire Commissioners, Fire District No. 1.

The decision below should be reversed, and this matter remanded to the trial court with instructions that the trial court calculate an amount to be paid to Defendant Jesse Sipe for his paid and accrued legal fees and costs.



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STATEMENT OF FACTS AND PROCEDURAL HISTORY

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

LEGAL ARGUMENT

POINT I

THE ACTION BELOW AND THE GRC PROCEEDING CONSTITUTED AN “ACTION” OR “LEGAL PROCEEDING” WITHIN THE MEANING OF THE FIRE DISTRICT’S BY-LAWS

(Da72-77 and 1T62:22-77:20).

A. The GRC Case Was a “Legal Proceeding” Within the Meaning of the Fire District’s Bylaws

Regarding indemnification, the issue is whether a former fire commissioner should be indemnified in a civil administrative proceeding (the GRC case and subsequent appeal) and a related civil matter in Superior Court (which is the action below and this appeal).

The answer is yes. The Fire District appears to focus on the use of the word “defendant” in the bylaws, Da159, but the action also refers to “any action or legal proceeding.” Certainly the GRC case is an “action or legal proceeding.” While



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the bylaws do use the word “defendant,” that word must be read in conjunction with the rest of the Section. While the section uses the word “defendant,” it also uses the phrase “action or legal proceeding.” (Da159). Certainly the GRC action is a “legal proceeding.”

In Castriotta v. Board of Education of Township of Roxbury, 427 N.J. Super. 592 (App. Div. 2012), the plaintiff sought indemnification from the defendant board of education after the plaintiff successfully defended herself against a censure resolution passed by the board of education. The Acting Commissioner of Education held that she was not entitled to indemnification because the disciplinary proceeding initiated by the board of education was not a “legal proceeding.”

On appeal, the Appellate Division reversed. The Appellate Division observed that before the board of education censured Castriotta, the Board had received testimony from Castriotta’s “accusers,” Castriotta herself, and ruled on her counsel’s objections. The Court held that the Board of Education performed “an adjudicatory act and function[ed] in a quasi-judicial capacity.” Id. at 594.



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Here, the GRC operates in a quasi-judicial or judicial capacity. In this case, the GRC held Defendant “in contempt” of the GRC’s prior orders. (Da156). The GRC referred the issue of whether Defendant should assess a civil penalty against Defendant. (Da156). The GRC ordered Defendant to disclose certain records to the Fire District within five business days. (Da140). The GRC also has the power to award counsel fees to prevailing requestors, N.J.S.A. 47:1A-6, and the authority to refer OPRA matters to the Office of Administrative Law as contested cases, Teeters v. Division of Youth and Family Services, 387 N.J. Super. 423, 427 (App. Div. 2006), which is exactly what the GRC did here. In this case, the GRC referred the administrative action to the Office of Administrative Law for a determination of whether Defendant “knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances,” and also referred the issue of whether the complainant (Brian Kubiel, who is not participating in this appeal) was the prevailing party entitled to an award of counsel fees. (Da150). If the GRC found that Defendant had knowingly and willfully violated OPRA, OPRA would



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have authorized the imposition of a \$1,000 civil penalty for the first offense.
(N.J.S.A. 47:1A-11).

For these reasons, the GRC complaint constituted a “legal proceeding” for which Defendant should have been indemnified.

Regarding the trial court proceeding below, Defendant was, in fact, a “defendant” in that case and even by the Fire District’s own tortured reasoning, Defendant Sipe was entitled to indemnification.

The Fire District here argues that Defendant Sipe should not be indemnified for a lawsuit he allegedly caused. This argument must be rejected. First, Defendant Sipe did not “cause” the lawsuit; the lawsuit was initiated by Plaintiff Brian Kubiel. Second, Sipe had good-faith arguments regarding why he was unable to comply with the GRC’s order, but the Fire District refused to make those arguments and refused to indemnify him. Third, and perhaps most importantly, the underlying GRC action never resulted in any final findings of misconduct against Defendant. The Plaintiff settled the GRC complaint with the Fire District



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before the Office of Administrative Law held a hearing regarding whether Defendant Sipe knowingly and willfully violated OPRA. (Da480).

For these reasons, Defendant should be indemnified for his costs and expenses accrued in the action below and on this appeal.

B. Defendant Sipe's Interests Were Never Aligned with the Fire District's Interest, and Defendant Sipe Specifically Requested Indemnification

Defendant's interests were never aligned with the Fire District's interests, and he should have been represented by separate counsel provided by the District to represent his own separate interests.

Sipe was told as much by the Fire District's attorney, when she stated outright to Mr. Sipe that neither prior counsel for the Fire District nor their firm represented him personally. (Da126). They told him that he was free to hire his own attorney and declined to provide him with representation. (Ibid.). His interests were not represented by the Fire District's counsel, and it was reasonable for Mr. Sipe to request indemnification and independent representation, given that he was being individually targeted by the GRC for sanctions. He was being asked to turn



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over his private communications to a public entity, and the Fire District would have this Court believe that it was unreasonable for Mr. Sipe to believe that his interests were not being protected and that he had to expend resources on his own behalf.

The Fire District claims that they intended to review Mr. Sipe's records, once out of his control, for redactions, and now asserts that their interests were aligned. On one hand, the Fire District now asserts that Mr. Sipe "was not required to expend money, take time off work, enter a defense, or participate in the proceedings in any manner." (Rb13). But at the time of the GRC proceedings, Mr. Sipe was explicitly told that he was not represented by special counsel, and 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.). The Fire District cannot have it both ways.

The Fire District quotes the Tort Claims Act to support its denial of indemnification based on its permissive language. Even assuming the question of indemnification under the Tort Claims Act applied here, it was an abuse of



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discretion for the Fire District to deny indemnification. Mr. Sipe has been dragged into this morass solely because the Fire District failed to obtain the records from Mr. Sipe when he was a Commissioner and held them pending further orders of the GRC.

Common law identification also applies here. As the Fire District stated, “[t]he officer must have been acting in a matter in which the [municipal] corporation has an interest, he must have been acting in the discharge of a duty imposed or authorized by law and he must have acted in good faith.” Cobb v. City of Cape May, 113 N.J. Super. 598, 601 (Law Div. 1971). The Fire District had an interest in the GRC proceedings, the GRC had imposed a duty on Mr. Sipe, and he was acting in good faith to ensure that his interests were adequately protected. And the production of records responsive to a public records request would have been within the scope of his former employment as a public servant.

The Fire District claims that Mr. Sipe was not entitled to common law indemnification because he was “not engaged in the good faith execution of his duties imposed or authorized by law.” (Rb17). Yet **in the very next paragraph,**



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the Fire District states that Mr. Sipe’s “refusal to comply with multiple orders of the GRC and refusal to turn over public documents in his possession is a dereliction of duty of a public official and a violation of the Open Public Records Act.” (Rb17-18). The Fire District’s argument is internally inconsistent. The Fire District cannot have it both ways. Either Mr. Sipe was engaged in public duties’ or he was not; their attempt to call his efforts at self-protection “bad faith” to absolve themselves of their obligations to Mr. Sipe do not carry the day.

Notwithstanding the foregoing, Mr. Sipe did not make a claim for indemnification under the Tort Claims Act or the common law, he made a claim under the contractual promise contained in the Fire District’s bylaws. First, for the Fire District to claim that Mr. Sipe was not a “defendant” under the terms of the Bylaw is a bad faith argument which places form over substance. The fact that he was not a named respondent in the GRC proceedings because of his former public office, was not given proper notice, yet was being subjected to sanctions only amplifies his need for independent representation. Mr. Sipe became a party to the



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GRC Complaint at that moment when the GRC began ordering Mr. Sipe to take certain actions and threatening sanctions against him if he failed to comply.

POINT II

THIS COURT CAN DETERMINE WHETHER THE GRC VIOLATED MR. SIPE'S DUE PROCESS RIGHTS BECAUSE THE TRIAL COURT LACKED JURISDICTION TO ENTER THE ORDERS ON APPEAL

(Da74-75 and 1T54:11-23).

The Fire District asserts that Mr. Sipe's claims of due process violation are not properly before this Court. However, because the Trial Court lacked subject matter jurisdiction over Mr. Sipe because he was deprived of due process, it was reversible error for it to enter the order currently on appeal.

It is perhaps ironic that the Fire District claims that "it is inappropriate to include a claim alleging error of GRC regulations in a matter in which the GRC is not represented," when that is exactly the argument supporting a violation of Mr. Sipe's due process rights. Mr. Sipe was not represented in the GRC proceedings, and Mr. Sipe was never given prior notice, or the opportunity to be heard, in connection with the GRC's issuance of multiple orders which imposed affirmative obligations on him. Mr. Sipe was not listed as a party to the complaint on any of the transmittal cover letters to



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the GRC's interim orders, even though two of them specifically ordered Mr. Sipe to take specific action and declared him in contempt. (Da224; Da226; Da229). When he asked for such an opportunity to be heard and a stay of proceedings, the GRC denied him that one opportunity. (Da131-132). When he sought leave to intervene in the GRC proceedings, the GRC denied him that one opportunity. (Ibid.).

The Fire District claims that Mr. Sipe never asserted "an independent interest in the confidentiality of the documents." However, a review of potentially responsive text messages was required considering the scope of the OPRA request. The OPRA request called for "all text messages relating to fire commissioner business, discussions, etc., that were sent to and from [Defendant's email address or cell phone] from 1/1/17 to [July 3, 2019] 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." (Da017). This overwhelmingly overbroad request potentially called for the production of many thousands of records. The Plaintiff asked for 30 months' of text messages. Those text messages



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would have had to have been (and in fact were) reviewed for privilege, responsiveness and other issues (such as privacy). No document should be produced under OPRA prior to it being reviewed for potential privilege by the records custodian. Here, the Fire District never explains why this case would have been any different.



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CONCLUSION

For the foregoing reasons, and for those set forth in Mr. Sipe's appellant brief, the trial court's judgment in favor of the Fire District must be reversed, and this Court should (1) dismiss Plaintiff's complaint with prejudice; (2) vacate the Trial Court's order granting relief to the Plaintiff; and (3) hold that Defendant is entitled to indemnification of his reasonable counsel fees and costs incurred for all the work performed by Mr. Sipe's counsel in an amount to be determined on remand.

Respectfully submitted,

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