



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

June 26, 2012 Government Records Council Meeting

George F. Burdick, Jr.
Complainant

Complaint No. 2010-99

v.

Township of Franklin (Hunterdon)
Custodian of Record

At the June 26, 2012 public meeting, the Government Records Council ("Council") considered the June 19, 2012 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian provided the GRC with a legal certification, the unredacted records requested for the in camera inspection and a redaction index on April 18, 2012, ten (10) days after receipt of the Council's March 27, 2012 Interim Order. Therefore, the Custodian did not timely comply with the Council's March 27, 2012 Interim Order.
2. This complaint should be referred to the Office of Administrative Law for a full hearing to determine whether the Custodian unlawfully denied access to the requested records, including the applicability of any privileges to the records at issue herein and whether the Custodian waived any privileges applicable to the records herein. The Administrative Law Judge should also determine whether the Custodian's actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances, as well as the applicability of prevailing party attorney fees.

Interim Order Rendered by the
Government Records Council
On The 26th Day of June, 2012

Steven F. Ritardi, Esq., Acting Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: June 27, 2012



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
June 26, 2012 Council Meeting**

**George F. Burdick, Jr.¹
Complainant**

GRC Complaint No. 2010-99

v.

**Township of Franklin (Hunterdon)²
Custodian of Records**

Records Relevant to Complaint:

November 19, 2009 OPRA request: Copies of all invoices from Nicholas Susalis, Esq., and William Palleria, Esq., of N. Susalis & Associates, Inc. (“Susalis”) to the Township of Franklin (“Township”) for the period January 1, 2008 through November 18, 2009.³

December 4, 2009 OPRA request: Copies of the following invoices from Susalis:

1. Invoice No. 2923 dated August 24, 2009 in the amount of \$8,086.67.
2. Invoice No. 2938 dated September 1, 2009 in the amount of \$7,461.83.

Request Made: November 19, 2009 and December 4, 2009

Response Made: December 1, 2009 and December 8, 2009

Custodian: Ursula V. Stryker

GRC Complaint Filed: May 17, 2010⁴

Background

March 27, 2012

Government Records Council’s Interim Order. At the March 27, 2012 public meeting, the Government Records Council (“Council”) considered the March 20, 2012 Executive Director’s Findings and Recommendations and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council therefore found that:

1. Because the Custodian failed to immediately grant or deny access to the requested invoice, request additional time to respond or request clarification of the request, the Custodian has violated N.J.S.A. 47:1A-5.e. pursuant to Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February

¹ No legal representation listed on record.

² Represented by Michael S. Selvaggi, Esq., of Courter, Kobert & Cohen, P.C. (Hackettstown, NJ). Mr. Selvaggi was substituted for Anthony E. Koester, Esq., of Dilts & Koester (Flemington, NJ) in 2012.

³ The Complainant requested additional records that are not at issue in this complaint.

⁴ The GRC received the Denial of Access Complaint on said date.

2007). *See also* Ghana v. New Jersey Department of Corrections, GRC Complaint No. 2008-154 (June 2009).

2. Because the Township contracted with special counsel, Day, Pitney, to represent the Township in a personnel matter; the evidence is also clear that Day, Pitney contracted with Susalis to perform certain work associated with that representation, and because the Township was aware of Susalis as a subcontractor of Day, Pitney because the Day, Pitney invoice which the Custodian provided to the Complainant contained references to Susalis' services and also referenced certain additional invoices submitted by Susalis to Day, Pitney, the Custodian unlawfully denied access to the records responsive to the Complainant's two (2) OPRA requests which were maintained on file by Day, Pitney, pursuant to Schuler v. Borough of Bloomsbury (Hunterdon), GRC Complaint No. 2007-151 (Interim Order dated December 19, 2007), Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005-127 (May 2006) and Beck v. O'Hare, Docket No. MER-L-2411-07 (Law Div. 2007), because the Custodian mistakenly informed the Complainant that no records responsive exist to the two (2) OPRA requests due to her insufficient search. N.J.S.A. 47:1A-6; *see* Schneble v. New Jersey Department of Environmental Protection, GRC Complaint No. 2007-220 (April 2008), Oskay v. New Jersey State Parole Board, GRC Complaint No. 2008-53 (March 2009); Schiano v. Township of Lower (Cape May), GRC Complaint No. 2008-90 (June 2009).
3. Because the evidence of record indicates that the Custodian provided the responsive Susalis invoices (with redactions) to the Complainant on May 6, 2010, the Council declines to order disclosure of the Susalis invoices.
4. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the responsive redacted Susalis invoices (Invoice Nos. 2923 and 2938) to determine the validity of the Custodian's assertion that the records contain attorney-client privileged material and personnel information which is exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-1.1. and N.J.S.A. 47:1A-10.
5. **The Custodian must deliver⁵ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 4 above), a document or redaction index,⁶ as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,⁷ that the records provided are the records requested by the Council for the *in camera* inspection. Such**

⁵ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

⁶ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

⁷ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.

6. Pursuant to N.J.S.A. 47:1A-7.b., the GRC does not have the authority to regulate how a Custodian utilizes its legal representative in its response to a Denial of Access Complaint. Hascup v. Waldwick Board of Education, 2005-192 (April 2007); Manahan v. Salem County, 2006-184 (Interim Order December 2007); Loigman v. Township of Middletown, GRC Complaint No. 2004-138 (March 2005). Moreover, the Appellate Division held that a public agency could consult with counsel and seek assistance of counsel to formulate its response to an OPRA request. Bart v. City of Paterson Housing Authority, 403 N.J. Super. 609, 619 (App. Div. 2008).
7. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

April 4, 2012

Council's Interim Order ("Order") distributed to the parties.

April 4, 2012

E-mail from the Custodian's Counsel to Mr. John O'Reilly, Esq. ("Mr. O'Reilly") of Day, Pitney. Counsel states that to recapitulate an earlier telephone message, the Township previously received an OPRA request for Susalis invoices related to Officer Hatem Wahba's ("Officer Wahba") disciplinary action. Counsel states that some time ago, Ms. Valerie Kimson, Esq. ("Ms. Kimson"), previous Custodian's Counsel, obtained the invoices from Mr. O'Reilly, redacted them and forwarded same to the Complainant. Counsel states that the Complainant subsequently filed a complaint with the GRC in which he argued that the redactions were excessive. Counsel states that the GRC, in its April 4, 2012 Order, ordered the Custodian to submit unredacted copies of the invoices for an *in camera* review within five (5) business days following receipt of said Order.

Counsel states that the Township was unable to locate unredacted copies of the invoices and asked Susalis to provide copies. Counsel states that Susalis indicated that Mr. O'Reilly must approve disclosure of the invoices to the Township. Counsel thus requests that Mr. O'Reilly authorize Susalis to release to Counsel Invoice Nos. 2923 and 2938. Counsel requests that Mr. O'Reilly authorize disclosure as soon as possible as the Township must comply with the Council's Order by April 12, 2012.

April 12, 2012

Letter from the Custodian's Counsel to the GRC attaching an e-mail from Counsel to Mr. O'Reilly dated April 4, 2012. Counsel states that she received the Council's Order on April 4, 2012 via e-mail ordering the Custodian to provide nine (9) unredacted copies of Invoice Nos. 2923 and 2938 within five (5) business days after receipt of said Order. Counsel states that the Township is not in possession of these records and has been unsuccessful in obtaining same from either Mr. O'Reilly or Susalis.

Counsel states that the invoices at issue are for work performed by Susalis in August and September of 2009. Counsel states that Susalis was hired by Mr. O'Reilly as part of an investigation of Officer Wahba's disciplinary action. Counsel states that Susalis submitted invoices to Mr. O'Reilly who included the charges in bills he submitted to the Township; the Township never received copies of the Susalis invoices. Counsel states that in response to the Complainant's OPRA request, Ms. Kimson obtained the invoices from Mr. O'Reilly and redacted same. Counsel states that Ms. Kimson then sent copies of the redacted invoices to the Township; thus, the Township was never in possession of unredacted copies of the invoices. Counsel states that the Township does not know what Ms. Kimson did with the unredacted invoices as they were not included in the files passed on to Counsel.

Counsel states that over the past few months, the Custodian attempted to obtain copies of the unredacted invoices in an effort to complete her file. Counsel further notes that the Custodian received an OPRA request for the same invoices in February, 2012. Counsel states that the Custodian attempted to fulfill the OPRA request by contacting Mr. O'Reilly, who refused to provide the invoices because litigation is still pending and the invoices are attorney-client privileged.

Counsel states that the Custodian received the Council's Order on April 4, 2012 and immediately contacted Susalis. Counsel states that Susalis stated that the invoices could not be turned over to the Township without permission from Mr. O'Reilly. Counsel states that because Mr. O'Reilly previously denied providing the records to the Custodian, she requested that Counsel contact Mr. O'Reilly and stress the importance of complying with the Council's Order. Counsel states that she contacted Mr. O'Reilly via e-mail and telephone on April 4, 2012. Counsel states that Mr. O'Reilly returned her call on April 5, 2012 and declined to release the invoices, again arguing that same were attorney-client privileged. Counsel states that she explained to Mr. O'Reilly that the records would be reviewed by the GRC *in camera* and that the privilege was the Township's and not Mr. O'Reilly's privilege. Counsel states that she also summarized (and subsequently provided to Mr. O'Reilly) the Council's holding in Schuler v. Borough of Bloomsbury (Hunterdon), GRC Complaint No. 2007-151 (February 2009). Counsel states that Mr. O'Reilly also noted that there was a dispute regarding one of the invoices; however, Counsel advised that the dispute was irrelevant. Counsel states that Mr. O'Reilly advised that he would attempt to pull the records prior to going on vacation; however, Counsel has not received the invoices to date.

Counsel asserts that the Township has made every attempt to obtain Invoice Nos. 2923 and 2938 without success. Counsel asserts that as an alternative, the GRC may be able to obtain the records through a subpoena. Counsel asserts that the Township would assist the GRC in obtaining the invoices. Counsel further requests that the GRC not penalize the Township for failing to comply with the Council's Order because the Custodian has never possessed unredacted copies of the invoices and has made numerous attempts to obtain same without success.

April 12, 2012

E-mail from the Complainant to the Custodian's Counsel with the following attachments:

- Township meeting minutes dated April 9, 2009.
- Susalis Invoice No. 2898 dated August 1, 2009.
- Township’s Special meeting minutes dated October 6, 2009.
- “In Re: Professional Services Agreement” dated October 6, 2009.

The Complainant states that he is in receipt of the Counsel’s April 12, 2012 letter and disputes some of the statements made by Counsel.

The Complainant disputes that the Township was never in possession of unredacted copies of Susalis invoices. The Complainant states that the Custodian provided to him Invoice No. 2898 without redactions in response to the second (2nd) OPRA request; thus, the Township did receive at least one (1) unredacted Susalis invoice.

The Complainant further contends that it is pure conjecture that Susalis was hired by Mr. O’Reilly. The Complainant states that the Township memorialized a motion to hire a law firm for the retention of a private investigator on April 9, 2009 but entered into an agreement with Mr. O’Reilly on October 6, 2009. The Complainant further states that there is no mention of Mr. O’Reilly hiring Susalis in the agreement. The Complainant further asserts that Invoice No. 2898 indicates that Susalis performed multiple services for the Township starting on July 24, 2009, or 17 days before Mr. O’Reilly made his appearance in the Wahba matter.

The Complainant requests that Counsel forward the GRC’s decision in Johnson v. Borough of Oceanport (Monmouth), GRC Complaint No. 2007-107 (Interim Order dated February 25, 2009).

April 13, 2012

E-mail from the Custodian’s Counsel to the Complainant. Counsel states that to clarify, the Township did not assert that it never received “any” Susalis invoices. Counsel states that the Township never received the two (2) invoices at issue. Counsel further notes that it is unclear why the Township received some invoices and not others.

Counsel further disputes that Complainant’s remaining comments and notes that the Township is willing to provide the invoices to the GRC for an *in camera* review. Counsel contends that the Township is not disputing whether the records should be turned over or whether the attorney-client privilege exemption applies to same. Counsel states that her April 12, 2012 letter was meant to inform the GRC of the Township’s efforts to obtain the invoices from Mr. O’Reilly and Susalis. Counsel asserts that the Township was unable to comply with the Council’s Order because Mr. O’Reilly and Susalis refused to release the invoices to the Township. Counsel further asserts that regarding Mr. O’Reilly’s hiring of Susalis, she was restating what the Custodian was told by Susalis.

Counsel states that if she is able to obtain the invoices in the future, she will submit same to the GRC.

April 13, 2012

E-mail from the Complainant to the Custodian's Counsel. The Complainant contends that he will no longer dispute whether the Township ever received unredacted invoices if Counsel modifies her position in writing to the GRC as follows:

1. The Township possessed and still possesses Invoice No. 2898 and was provided to the Complainant without redactions on December 8, 2009 in response to the Complainant's second (2nd) OPRA request.
2. The Township is not in possession of Invoice Nos. 2923 and 2938.

The Complainant further disputes that the Township is not arguing whether the records are exempt as attorney-client privileged material. The Complainant asserts that Ms. Kimson made this exact argument in a letter to the GRC dated June 9, 2010. The Complainant asks whether the Township is now abandoning this argument.

The Complainant further disputes that the remainder of his April 12, 2012 e-mail is irrelevant. The Complainant asserts that if the relationship between Mr. O'Reilly and Susalis is not relevant, then half of Ms. Kimson's June 9, 2010 letter describing this relationship in depth is also not relevant.

April 13, 2012

E-mail from the Custodian's Counsel to the Complainant. Counsel states that her April 12, 2012 letter refers to the two (2) invoices that the GRC specifically requested for an *in camera* review; thus, her use of the term "invoices" refers solely to Invoice Nos. 2923 and 2938.

Counsel further asserts that the Township is not abandoning its defense of the redactions as attorney-client privileged material. Counsel asserts that her position is that the attorney-client privilege exemption does not exempt the Township from complying with the Council's Order.

Counsel reiterates that the Township is not debating the merits of the Council's Order; rather, she is attempting to comply with the Order.

April 18, 2012

Letter from the Custodian's Counsel to the GRC. Counsel states that Mr. O'Reilly hand-delivered on this day unredacted copies of Invoice No. 2923 and No. 2938. Counsel thus requests that the GRC not submit the matter to the Office of Administrative Law ("OAL"), as was discussed in a telephone conversation with the GRC on April 17, 2012, but instead allow Counsel to submit the invoices for an *in camera* review.

April 18, 2012

E-mail from the GRC to the Custodian's Counsel. The GRC states that Counsel may submit the invoices and redaction index for an *in camera* review as soon as possible.

April 18, 2012

E-mail from the Complainant to the GRC. The Complainant requests that the GRC summarize the brief telephone conversation that took place with Custodian's Counsel on April 17, 2012.

April 18, 2012

E-mail from the GRC to the Complainant. The GRC states that it informed the Custodian's Counsel that despite the Township's reason for not obtaining the records from a third (3rd) party vendor, previous case law supports a custodian's obligation to produce same. The GRC states that it thus would likely have to refer the matter to OAL so that an Administrative Law Judge ("ALJ") may enforce the law through an Initial Decision.

April 18, 2012

Certification of the Custodian in response to the Council's Interim Order with the following attachments:

- Susalis Invoice No. 2923 dated August 24, 2009 (without redactions).
- Susalis Invoice No. 2923 dated August 24, 2009 (with redactions).
- Redaction index for Invoice No. 2923.
- Susalis Invoice No. 2938 dated September 1, 2009 (without redactions).
- Susalis Invoice No. 2938 dated September 1, 2009 (with redactions).
- Redaction index for Invoice No. 2938.
- Custodian's legal certification.

The Custodian certifies that attached are copies of the records ordered to be provided to the GRC for an *in camera* review. The Custodian certifies that these records were provided to her by Mr. O'Reilly.

April 19, 2012

E-mail from the Complainant to the GRC. The Complainant states that he is in receipt of the cover letter of the Township's April 18, 2012 submission; however, the Complainant believes he is entitled to copies of the redaction indexes. The Complainant further notes that he was not provided with a redaction index at the time the Township provided him with the invoices on May 6, 2010.

The Complainant states that in Fisher v. NJ Division of Law, 400 N.J. Super. 61, 76 (App. Div. 2008), the Appellate Division held that:

“[t]he purpose of a Vaughn index is not only to facilitate the decision-maker's review of governmental records to determine whether they contain privileged material but also to provide the party seeking disclosure with as much information as possible to use in presenting his case. Halpern v. FBI, 181 F.3d 279, 291 (2d Cir.1999). A decision-maker's *in camera* review of the withheld documents is not ordinarily an adequate substitute for production of a proper Vaughn index because it does not

afford the party seeking disclosure the opportunity to effectively advocate its position. Wiener v. FBI, 943 F.2d 972, 979 (9th Cir.1991).” *Id.*

The Complainant states that in Star Ledger v. New Jersey Sports & Exposition Authority, 423 N.J. Super. 140, 162 (App. Div. 2011), the Appellate Division also held that:

Furthermore, when a request for government records is made, OPRA ‘generally places the burden upon the custodian of a public record to state the ‘specific basis’ for the denial of access[.]’ Gannett N.J. Partners, LP v. Cnty. of Middlesex, 379 N.J. Super. 205, 215, 877 A.2d 330 (App.Div.2005) (quoting N.J.S.A. 47:1A-5(g)). *See also* N.J.S.A. 47:1A-6 (stating ‘[t]he public agency shall have the burden of proving that the denial of access is authorized by law’). In so doing, the reasons for withholding documents must be specific. Courts will “simply no longer accept conclusory and generalized allegations of exemptions ... but will require a relatively detailed analysis in manageable segments.” Loigman v. Kimmelman, 102 N.J. 98, 110, 505 A.2d 958 (1986)(quoting Vaughn v. Rosen, 484 F.2d 820, 826, 157 U.S. App. D.C. 340, (D.C.Cir.1973), *cert. denied*, 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed. 2d 873 (1974)).” *Id.*

The Complainant finally states that a Vaughn index prepared by a custodian must have the specificity required by the Court’s holding in Paff v. NJ Department of Labor, 392 NJ Super. 334, 341 (App. Div. 2007).

The Complainant reiterates his request to receive the two (2) redactions indexes and further requests that the GRC compare the redacted invoices submitted with the redacted invoices submitted as part of the original Denial of Access Complaint.

April 20, 2012

E-mail from the Custodian’s Counsel to the GRC. Counsel states that she has no objection to providing the Complainant with copies of the redaction indexes as well as copies of the redacted invoices.

April 20, 2012

E-mail from the Complainant to the GRC with the following attachments:

- Susalis Invoice No. 2979 dated October 1, 2009 (with redactions).
- Letter from the Custodian to the Complainant dated May 6, 2010.

The Complainant states that he is in receipt of the redacted invoices and redaction indexes. The Complainant contends that the redacted invoices that the Custodian provided are different from those he received on May 6, 2010. The Complainant notes that he previously asked the GRC to ensure that the redacted invoices provided matched those included in the Denial of Access Complaint.

The Complainant asserts that the invoices Ms. Kimson provided to him on May 6, 2010 included redactions for the service date; however, the invoices provided by Counsel do not include this redaction. The Complainant asserts that he is disappointed that

Counsel would provide the GRC with records that are inconsistent with what was previously provided to the Complainant. The Complainant asserts that it is now clear that the Township could not defend redacting the service date based on the attorney-client privilege exemption; thus, Counsel appears to be waiving this portion of the Township's argument. The Complainant further notes that it is also clear that the Township has allowed multiple parties to perform redactions.

April 21, 2012

E-mail from the Complainant to the GRC with the following attachments:

- Letter from the Custodian to Mr. Martin Bercaw ("Mr. Bercaw") dated February 23, 2012.
- Susalis Invoice No. 2923 dated August 24, 2009 (with redactions).
- Susalis Invoice No. 2938 dated September 1, 2009 (with redactions).

The Complainant states that the Custodian's Counsel noted in her April 12, 2012 letter that the Custodian received an OPRA request in February 2012 requesting the same invoices. The Complainant states that he received written permission from Mr. Bercaw to forward the Custodian's response. The Complainant states that the invoices provided are further evidence that the Township previously disclosed the invoices with the service dates redacted. The Complainant states that there are now clearly two (2) forms of the redacted invoices. The Complainant asserts that the Township has provided to the GRC redacted invoices that are easier to defend.

April 21, 2012

E-mail from the Custodian's Counsel to the GRC. Counsel states that if the GRC wishes to consider the Complainant's arguments regarding the redaction discrepancy of the invoices, she would like to opportunity to respond.

April 22, 2012

E-mail from the Complainant to the GRC. The Complainant contends that the Custodian and Custodian's Counsel submitted records to the GRC that contain factual discrepancies and are further inconsistent with the Custodian's certified confirmation of compliance.

The Complainant contends that the Township has now provided him with invoices in three (3) different ways: (1) without redactions from William J. Caldwell, Esq. ("Mr. Caldwell"),⁸ (2) with significant redactions including service dates from Ms. Kimson, and (3) with significant redactions not including service dates and Mr. O'Reilly's name not redacted from Counsel. The Complainant contends that the evidence of record also shows that the records provided to Mr. Bercaw were provided during Counsel's tenure and not Ms. Kimson's tenure.

The Complainant questions how different attorneys have apparently interpreted OPRA differently. The Complainant asserts that the GRC must now determine which

⁸ William J. Caldwell Esq., of Carter, Van Rensselaer & Caldwell, P.C. (Clinton, NJ) was the municipal attorney prior to the filing of this complaint.
George F. Burdick, Jr. v. Township of Franklin (Hunterdon), 2010-99 – Supplemental Findings and Recommendations of the Executive Director 9

interpretation is consistent with OPRA and whether the Township waived attorney-client privilege in December 2009 and again in the past few days.

Analysis

Whether the Custodian complied with the Council's March 27, 2012 Interim Order?

At its March 27, 2012 public meeting, the Council determined that pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the responsive redacted Susalis invoices (Invoice Nos. 2923 and 2938) to determine the validity of the Custodian's assertion that the records contain attorney-client privileged material and personnel information which is exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-1.1 and N.J.S.A. 47:1A-10.

The Council therefore ordered the Custodian to deliver to the Council in a sealed envelope nine (9) copies of the requested unredacted records, a document or redaction index, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery was to be received by the GRC within five (5) business days from receipt of the Council's Interim Order or by April 10, 2012.

The evidence of record indicates that the Custodian attempted to obtain the records at issue on several occasions without success. Nevertheless, the Custodian could have requested an extension of time to comply with the Council's Interim Order or a stay of the Council's Interim Order pursuant to *N.J.A.C. 5:105-2.12*; however, she failed to do so.

The Custodian provided the GRC with a legal certification, the unredacted records requested for the *in camera* inspection and a redaction index on April 18, 2012, ten (10) days after receipt of the Council's March 27, 2012 Interim Order. Therefore, the Custodian did not timely comply with the Council's March 27, 2012 Interim Order.

Whether the Custodian unlawfully denied the Complainant access to the requested records?

The Custodian asserted that she lawfully redacted the requested records because they contain attorney client privileged material that is exempt from disclosure under OPRA. However, the Complainant contends that the redacted invoices that the Custodian provided are different from those she received on May 6, 2010. The Complainant asserts that the invoices Ms. Kimson provided to him on May 6, 2010 included redactions for the service date; however, the invoices provided by Counsel do not include this redaction. The Complainant asserts that the Township could not defend redacting the service date based on the attorney-client privilege exemption; thus, Counsel appears to be waiving this portion of the Township's argument. The Complainant further notes that it is also clear that the Township has allowed multiple parties to perform redactions. The Complainant notes that he previously asked the GRC to ensure that the redacted invoices provided matched those included in the Denial of Access Complaint.

The evidence of record indicates that this complaint is contested regarding whether the records at issue in this matter contain attorney client privileged material exempt from disclosure under OPRA, whether the records provided to the GRC for its *in camera* review are the same records provided to the Complainant on May 6, 2010, and whether the Custodian has waived any privileges to which the records at issue are subject.

OPRA states that if the GRC is unable to make a determination as to a record's accessibility based upon the complaint and the custodian's response thereto, the [GRC] shall conduct a hearing on the matter in conformity with the rules and regulations provided for hearings by a state agency in contested cases under the Administrative Procedures Act [APA]. N.J.S.A. 47:1A-7.e.

The APA further provides that the Office of Administrative Law “shall acquire jurisdiction over a matter only after it has been determined to be a contested case by an agency head and has been filed with the Office of Administrative Law...” N.J.A.C. 1:1-3.2(a).

As such, this complaint should be referred to the Office of Administrative Law for a full hearing to determine whether the Custodian unlawfully denied access to the requested records, including the applicability of any privileges to the records at issue herein and whether the Custodian waived any privileges applicable to the records herein. The Administrative Law Judge should also determine whether the Custodian's actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances, as well as the applicability of prevailing party attorney fees.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian provided the GRC with a legal certification, the unredacted records requested for the in camera inspection and a redaction index on April 18, 2012, ten (10) days after receipt of the Council's March 27, 2012 Interim Order. Therefore, the Custodian did not timely comply with the Council's March 27, 2012 Interim Order.
2. This complaint should be referred to the Office of Administrative Law for a full hearing to determine whether the Custodian unlawfully denied access to the requested records, including the applicability of any privileges to the records at issue herein and whether the Custodian waived any privileges applicable to the records herein. The Administrative Law Judge should also determine whether the Custodian's actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances, as well as the applicability of prevailing party attorney fees.

Prepared and
Approved By: Karyn Gordon, Esq.
Acting Executive Director

June 19, 2012



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Acting Commissioner

INTERIM ORDER

March 27, 2012 Government Records Council Meeting

George Burdick, Jr.
Complainant

Complaint No. 2010-99

v.

Township of Franklin (Hunterdon)
Custodian of Record

At the March 27, 2012 public meeting, the Government Records Council (“Council”) considered the March 20, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Custodian failed to immediately grant or deny access to the requested invoice, request additional time to respond or request clarification of the request, the Custodian has violated N.J.S.A. 47:1A-5.e. pursuant to Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007). *See also* Ghana v. New Jersey Department of Corrections, GRC Complaint No. 2008-154 (June 2009).
2. Because the Township contracted with special counsel, Day, Pitney, to represent the Township in a personnel matter; the evidence is also clear that Day, Pitney contracted with Susalis to perform certain work associated with that representation, and because the Township was aware of Susalis as a subcontractor of Day, Pitney because the Day, Pitney invoice which the Custodian provided to the Complainant contained references to Susalis’ services and also referenced certain additional invoices submitted by Susalis to Day, Pitney, the Custodian unlawfully denied access to the records responsive to the Complainant’s two (2) OPRA requests which were maintained on file by Day, Pitney, pursuant to Schuler v. Borough of Bloomsbury (Hunterdon), GRC Complaint No. 2007-151 (Interim Order dated December 19, 2007), Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005-127 (May 2006) and Beck v. O’Hare, Docket No. MER-L-2411-07 (Law Div. 2007), because the Custodian mistakenly informed the Complainant that no records responsive exist to the two (2) OPRA requests due to her insufficient search. N.J.S.A. 47:1A-6; *see* Schneble v. New Jersey Department of Environmental Protection, GRC Complaint No. 2007-220 (April 2008), Oskay v. New Jersey State Parole Board, GRC Complaint No. 2008-53 (March 2009); Schiano v. Township of Lower (Cape May), GRC Complaint No. 2008-90 (June 2009).
3. Because the evidence of record indicates that the Custodian provided the responsive Susalis invoices (with redactions) to the Complainant on May 6, 2010, the Council declines to order disclosure of the Susalis invoices.



4. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the responsive redacted Susalis invoices (Invoice Nos. 2923 and 2938) to determine the validity of the Custodian's assertion that the records contain attorney-client privileged material and personnel information which is exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-1.1. and N.J.S.A. 47:1A-10.
5. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 4 above), a document or redaction index,² as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,³ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
6. Pursuant to N.J.S.A. 47:1A-7.b., the GRC does not have the authority to regulate how a Custodian utilizes its legal representative in its response to a Denial of Access Complaint. Hascup v. Waldwick Board of Education, 2005-192 (April 2007); Manahan v. Salem County, 2006-184 (Interim Order December 2007); Loigman v. Township of Middletown, GRC Complaint No. 2004-138 (March 2005). Moreover, the Appellate Division held that a public agency could consult with counsel and seek assistance of counsel to formulate its response to an OPRA request. Bart v. City of Paterson Housing Authority, 403 N.J. Super. 609, 619 (App. Div. 2008).
7. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 27th Day of March, 2012

Robin Berg Tabakin, Chair
Government Records Council

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

Catherine Starghill, Executive Director
Government Records Council

Decision Distribution Date: April 4, 2012

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

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

³ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
March 27, 2012 Council Meeting**

**George F. Burdick, Jr.¹
Complainant**

GRC Complaint No. 2010-99

v.

**Township of Franklin (Hunterdon)²
Custodian of Records**

Records Relevant to Complaint:

November 19, 2009 OPRA request: Copies of all invoices from Nicholas Susalis, Esq., and William Palleria, Esq., of N. Susalis & Associates, Inc. (“Susalis”) to the Township of Franklin (“Township”) for the period January 1, 2008 through November 18, 2009.³

December 4, 2009 OPRA request: Copies of the following invoices from Susalis:

1. Invoice No. 2923 dated August 24, 2009 in the amount of \$8,086.67.
2. Invoice No. 2938 dated September 1, 2009 in the amount of \$7,461.83.

Request Made: November 19, 2009 and December 4, 2009

Response Made: December 1, 2009 and December 8, 2009

Custodian: Ursula V. Stryker

GRC Complaint Filed: May 17, 2010⁴

Background

November 19, 2009

Complainant’s first (1st) Open Public Records Act (“OPRA”) request. The Complainant requests the records relevant to this complaint listed above in a letter attached to an official OPRA request form.

December 1, 2009

Custodian’s response to the first (1st) OPRA request. The Custodian responds in writing via letter to the Complainant’s OPRA request on the sixth (6th) business day following receipt of such request. The Custodian states that she has forwarded the Complainant’s OPRA request to the Chief Financial Officer (“CFO”). The Custodian states that she does not believe the requested invoices will be available until December

¹ No legal representation listed on record.

² Represented by Michael S. Selvaggi, Esq., of Courter, Kobert & Cohen, P.C. (Hackettstown, NJ). Mr. Selvaggi was substituted in for Anthony E. Koester, Esq., of Dilts & Koester (Flemington, NJ) in 2012.

³ The Complainant requested additional records that are not at issue in this complaint.

⁴ The GRC received the Denial of Access Complaint on said date.

15, 2009 because the CFO is a part time position. The Custodian states that she will contact the Complainant as soon as possible if any there is any further delay.

December 3, 2009

Letter from the Custodian to the Complainant, attaching a copy of the Complainant's OPRA request with the Custodian's notations thereon indicating that no records responsive exist.

December 4, 2009

Complainant's second (2nd) OPRA request attaching the first page of Invoice No. 2898 dated August 1, 2009. The Complainant requests the records relevant to this complaint listed above in a letter attached to an official OPRA request form. The Complainant notes that the Township paid for Susalis's services through Day, Pitney.

December 8, 2009

Custodian's response to the second (2nd) OPRA.⁵ The Custodian responds in writing via letter to the Complainant's OPRA request on the second (2nd) business day following receipt of such request. The Custodian states that the Township is not in possession of Invoice No. 2923 and Invoice No. 2938.

December 10, 2009

Letter from the Complainant to the Custodian. The Complainant states that he is in receipt of the Custodian's December 8, 2009 letter denying access to Invoice No. 2923 and Invoice No. 2938. The Complainant states that in Shuler v. Borough of Bloomsbury (Hunterdon), GRC Complaint No. 2007-151 (Interim Order dated December 19, 2007), the Council held that:

"Because the work done by the Borough Engineer ... is directly related to and arises from business done by him on behalf of the Borough of Bloomsbury (even if the Borough Engineer is not an actual employee of the Borough, he maintains a contractual relationship with the Borough), the requested records maintained on file by the Borough Engineer are considered government records pursuant to N.J.S.A. 47:1A-1.1 and are subject to public access. As such, the Custodian unlawfully denied access to the records responsive to item # 1 ... which are maintained on file by the Borough Engineer pursuant to Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005-127 (May 2006) and Beck v. O'Hare, Docket No. MER-L-2411-07 (Law Div. 2007) and the Custodian should provide the requested records from the Borough Engineer's files to the Complainant." *Id.* at pg. 8.

The Complainant states that the Custodian should attempt to obtain copies of the responsive invoices from Day, Pitney pursuant to the Council's holding in Schuler.

⁵ The Complainant's second (2nd) OPRA request also sought a complete copy of Invoice No. 2898. The Custodian provided an unredacted copy of Invoice No. 2898 as part of her response. George F. Burdick, Jr. v. Township of Franklin (Hunterdon), 2010-99 – Findings and Recommendations of the Executive Director 2

The Complainant requests that the Custodian advise by no later than December 22, 2009 whether she plans to obtain the responsive invoices.

April 9, 2010

E-mail from the Complainant to Ms. Valerie Kimson, Esq. (“Ms. Kimson”), previous Custodian’s Counsel,⁶ with the following attachments:

- Copy of Invoice No. 2898.
- Copy of Invoice from Day, Pitney dated October 16, 2009.
- Complainant’s second (2nd) OPRA request dated December 4, 2009.
- Letter from the Custodian to the Complainant dated December 8, 2009.
- Letter from the Complainant to the Custodian dated December 10, 2009.

The Complainant states that he is providing Ms. Kimson with the attached documents pursuant to a discussion held on April 8, 2010. The Complainant notes that the Custodian provided him with Invoice No. 2898 on December 8, 2009. Additionally, the Complainant notes that the Day, Pitney invoice specifically references two (2) Susalis invoices that the Complainant specifically referenced in his second (2nd) OPRA request. The Complainant states that he cannot understand why the Township has not contacted Day, Pitney to obtain Invoice No. 2923 and Invoice No. 2938. The Complainant notes that in a letter to the Custodian on December 10, 2009, he advised the Custodian of her obligation to obtain the responsive invoices from a third party vendor and cited supporting case law.

April 9, 2010

E-mail from Ms. Kimson to the Complainant. Counsel acknowledges receipt of the Complainant’s April 9, 2010 e-mail and all attachments.

April 21, 2010

E-mail from the Complainant to Ms. Kimson. The Complainant states that twelve (12) days have elapsed since his April 9, 2010 e-mail to Ms. Kimson and he has received no response.

The Complainant states that pursuant to N.J.S.A. 47:1A-5.e., “immediate access ordinarily shall be granted to budgets, bills, vouchers ...” *Id.* The Complainant states that if he does not receive Invoice No. 2923 and Invoice No. 2938 by April 23, 2010, he will assume that the Township has denied access to same and he will file a complaint with the GRC. The Complainant states that he believes he has been more than patient and now assumes that the Township is deliberately withholding public records.

April 23, 2010

Letter from the Custodian to the Complainant. The Custodian states that the Township is in receipt of the Complainant’s request for invoices from Susalis. The Custodian states that the Township does not physically possess the responsive records.

⁶ Ms. Valerie Kimson, Esq., (Monmouth Junction, NJ), represented the Township from March 2010 until July 13, 2010.
George F. Burdick, Jr. v. Township of Franklin (Hunterdon), 2010-99 – Findings and Recommendations of the Executive Director 3

The Custodian states that the Township will request the responsive records from the vendor and upon receipt will provide same to the Complainant. The Custodian states that she expects that the Township will need seven (7) business days to obtain the records.

May 5, 2010

Letter from the Complainant to the Custodian. The Complainant states that seven (7) business days expired on May 4, 2010 without a response from the Custodian. The Complainant states that under OPRA, the Custodian's failure to respond within the extended deadline results in a "deemed" denial. N.J.S.A. 47:1a-5.i. The Complainant states that if he does not receive the responsive records by May 6, 2010, he will file a complaint with the GRC. The Complainant notes that he will not offer any further extension of time.

May 6, 2010

Letter from the Custodian to the Complainant with the following attachments:

- Invoice No. 2923 (with redactions).
- Invoice No. 2938 (with redactions).⁷

The Custodian states that enclosed are copies of the responsive Susalis invoices. The Custodian states that the invoices have been redacted for attorney-client privileged and personnel information determined to be exempt under OPRA. N.J.S.A. 47:1A-1.1. and N.J.S.A. 47:1A-10. The Custodian further states she also redacted the EIN number on each invoice.

May 17, 2010

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

- Complainant's first (1st) OPRA request dated November 19, 2009.
- Letter from the Custodian to the Complainant dated December 1, 2009.
- Letter from the Custodian to the Complainant dated December 3, 2009.
- Complainant first (1st) OPRA request dated November 19, 2010 (with attachments) with the Custodian's notes thereon.
- Complainant's second (2nd) OPRA request dated December 4, 2009 attaching the first page of Invoice No. 2898.
- Letter from the Custodian to the Complainant dated December 8, 2009.
- E-mail from the Complainant to Ms. Kimson dated April 9, 2010 (with attachments).
- E-mail from Ms. Kimson to the Complainant dated April 9, 2010.
- E-mail from the Complainant to Ms. Kimson dated April 21, 2010.
- Letter from the Custodian to the Complainant dated April 23, 2010.
- Letter from the Complainant to the Custodian dated May 5, 2010.

⁷ The Custodian provided the Complainant with additional records that are not at issue in this complaint. George F. Burdick, Jr. v. Township of Franklin (Hunterdon), 2010-99 – Findings and Recommendations of the Executive Director 4

- Letter from the Custodian to the Complainant dated May 6, 2010 (with attachments).⁸

November 19, 2009 OPRA request:

The Complainant states that he submitted his first (1st) OPRA request to the Custodian on November 19, 2009. The Complainant states that the Custodian responded in writing on December 1, 2009 requesting an extension of time until December 15, 2009 to respond. The Complainant states that the Custodian subsequently responded on December 3, 2009 noting “None” on the OPRA request form in the margin next to the records requested.

The Complainant contends that he received no further response to his request.

December 4, 2009 OPRA request:

The Complainant states that he submitted his second (2nd) OPRA request seeking three (3) specific invoices to the Custodian on December 4, 2009. The Complainant states that the Custodian responded in writing to his OPRA request on December 8, 2010 providing access to one (1) invoice without redactions but denying access to the two (2) invoices at issue stating that same were not in the Township’s possession. The Complainant states that after several written and verbal interactions with the Custodian and Ms. Kimson, the Custodian finally provided access to heavily redacted copies of the invoices. The Complainant states that the Custodian cited to the exemption from disclosure under OPRA for attorney-client privileged material at N.J.S.A. 47:1A-1.1. but failed to provide a redaction index with the invoices.

The Complainant states that the Township was previously a defendant in a 1996 lawsuit in which the Court ruled that attorney-client privilege does not apply to attorney billing records. Hunterdon County PBA 188 v. Franklin Township, 286 N.J. Super. 389 (App. Div. 1996). The Complainant asserts that Hunterdon County supports his basis for disputing the redactions made to the invoices.

The Complainant further contends that the Custodian confirmed in a telephone conversation on May 7, 2010 that Ms. Kimson redacted the invoices. The Complainant contends that this is in violation of OPRA. N.J.S.A. 47:1A-5.g. and Courier Post v. Lenape Regional High School District, 360 N.J. Super. 191 (October 22, 2002).

The Complainant states that OPRA provides that certain records including bills and vouchers are considered immediate access records. N.J.S.A. 47:1A-5.e. The Complainant contends the Custodian failed to provide immediate access to the records responsive to either of his OPRA requests.

The Complainant does not agree to mediate this complaint.

⁸ The Custodian submitted additional documents that are not relevant to the instant complaint. George F. Burdick, Jr. v. Township of Franklin (Hunterdon), 2010-99 – Findings and Recommendations of the Executive Director

May 18, 2010

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

May 27, 2010

Letter from GRC to the Custodian. The GRC sends a letter to the Custodian indicating that the GRC provided the Custodian with a request for an SOI on May 18, 2010 and to date has not received a response. Further, the GRC states that if the SOI is not submitted within three (3) business days, the GRC will adjudicate this complaint based solely on the information provided by the Complainant.

June 3, 2010

E-mail from the GRC to Ms. Kimson. The GRC states that pursuant to an earlier telephone conversation, it is granting Ms. Kimson an extension of time until June 9, 2010 to submit the requested SOI.

June 8, 2010

Custodian’s SOI with the following attachments:

- Complainant’s first (1st) OPRA request dated November 19, 2009.
- Letter from the Custodian to the Complainant dated December 1, 2009.
 - Day, Pitney Invoice dated October 16, 2009.
- Complainant’s second (2nd) OPRA request dated December 4, 2009.
- Letter from the Custodian to the Complainant dated December 8, 2009.
- Letter from the Complainant to the Custodian dated December 10, 2009.
- Letter from the Custodian to the Complainant dated April 23, 2010.
- Letter from the Complainant to the Custodian dated May 5, 2010.
- Letter from the Custodian to the Complainant dated May 6, 2010 (with attachments).
- Resolution No. 2009-75 dated September 24, 2009.
- Resolution dated April 29, 2010.⁹

November 19, 2009 OPRA request:

The Custodian certifies that her search for the requested records included sending the Complainant’s first (1st) OPRA request to the CFO and searching the Township’s records for responsive invoices.¹⁰

The Custodian certifies that she received the Complainant’s first (1st) OPRA request seeking invoices from Day, Pitney on November 19, 2009. The Custodian certifies that the Township possessed an invoice from Day, Pitney dated October 16, 2009 that included line items for Susalis time charged for investigation of a personnel matter. The Custodian certifies that she provided the Complainant with the Day, Pitney

⁹ The Custodian submitted additional documents that are not relevant to the instant complaint.

¹⁰ The Custodian did not certify to whether any records responsive to the Complainant’s OPRA request were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management as is required pursuant to Paff v. NJ Department of Labor, 392 N.J. Super. 334 (App. Div. 2007).

invoice that included fees for Susalis and referenced specific invoices. The Custodian certifies that the Complainant acknowledged receipt of the Day, Pitney invoice in a letter to the Custodian dated December 4, 2009.

December 4, 2009 OPRA request:

The Custodian certifies that she received the Complainant's second (2nd) OPRA request on December 4, 2009.

The Custodian certifies that the responsive invoices stem from a disciplinary action regarding a police officer employed by the Township, Officer Hatem Wahba ("Officer Wahba"). The Custodian certifies that the Township retained the services of Mr. John O'Reilly Esq. ("Mr. O'Reilly") of Day, Pitney as special counsel to represent the Township in connection with the Wahba matter. The Custodian certifies that Mr. O'Reilly retained the services of Susalis to investigate the circumstances surrounding the Wahba matter.

The Custodian certifies that the Township conducted a hearing over the course of several dates, all of which were not open to the public but rather were confined to the parties and treated confidentially because said hearings pertained to a personnel matter.¹¹ The Custodian certifies that the Township ultimately adopted a resolution to terminate Officer Wahba's employment.¹² The Custodian certifies that Officer Wahba appealed his termination to the Superior Court on or about May 11, 2010. *See* Wahba v. Township of Franklin (Hunterdon County), Superior Court, Law Division, Docket No. L-287-10. The Custodian further certifies that on or about March 12, 2009 Officer Wahba filed a complaint against the Township in Superior Court entitled Wahba v. Township of Franklin, Dominick L. Zeveney, Kenneth Mandoli, Former Mayor Lawrence Remaly, Mayor Robert Shockley (Hunterdon County), Superior Court, Law Division, Docket No. L-152-09.

The Custodian certifies that the requested invoices were billed to Day, Pitney because Susalis performed the investigation at the request of Day, Pitney. The Custodian certifies that the Township did not contract directly with Susalis, thus the Township never directly received the responsive invoices. The Custodian certifies that after not locating the responsive invoices, William J. Caldwell, Esq. ("Mr. Caldwell"),¹³ directed the Custodian to inform the Complainant that the Township was not in possession of the two (2) invoices at issue herein. The Custodian certifies that she responded in writing to the Complainant on December 8, 2009 advising that the Township was not in possession of the invoices. The Custodian certifies that the Complainant sent a letter to the Township on December 10, 2009 that the Custodian forwarded to Mr. Caldwell. The Custodian certifies that because Mr. Caldwell was also responding to the Complainant on portions of his two (2) OPRA requests, the Custodian believed that she appropriately addressed the Susalis invoices issue in her December 8, 2009 response. The Custodian also certifies

¹¹ *See* Resolution No. 2009-75 dated September 24, 2009.

¹² *See* Resolution dated April 29, 2010.

¹³ William J. Caldwell Esq., of Carter, Van Rensselaer & Caldwell, P.C. (Clinton, NJ) was the municipal attorney prior to the filing of this complaint.

that Mr. Caldwell did not advise her to provide any additional responses to the Complainant.

The Custodian certifies that the Complainant verbally asked for copies of the Susalis invoices at a Township meeting in April 2010. The Custodian certifies that she sent a letter to the Complainant on April 23, 2010 advising that she would obtain the responsive invoices from Mr. O'Reilly. The Custodian certifies that the Township received the invoices from Day, Pitney in May 2010. The Custodian certifies that she sought advice from Ms. Kimson, who was retained as municipal attorney in 2010, because the Susalis invoices were in connection with the Day, Pitney legal representation in the Wahba matter. The Custodian certifies that she provided the Complainant with Invoice No. 2923 and Invoice No. 2938 on May 6, 2010. The Custodian certifies that she informed the Complainant of the lawful basis for redacting the responsive invoices: removing EIN numbers, as well as information regarding a personnel matter pursuant to N.J.S.A. 47-1A-10, and information protected under the attorney-client privilege exemption pursuant to N.J.S.A. 47: 1A-1.1.

The Custodian contends that the Complainant consented to an extension of time until May 6, 2010 for the Township to produce the requested invoices. The Custodian contends that the May 6, 2010 delivery date was within the time period consented to by the Complainant. The Custodian contends that the Complainant cannot dispute that he received the Susalis invoices within the extended time frame. The Custodian thus contends that timeliness of her response is not at issue in this complaint. The Custodian asserts that she properly responded to and provided all responsive records in her possession to the Complainant.

Ms. Kimson submits a letter brief in support of the Township's position. Ms. Kimson recapitulates the facts of the complaint to include a background of the Wahba matter and the Complainant's subsequent OPRA requests to the Township. Ms. Kimson asserts that it is undisputed that the invoices were provided within the time period agreed to by the Complainant. Ms. Kimson notes that she does not address timeliness because she believes it is not at issue; however, she would file a supplemental brief if the GRC determines timeliness to be at issue.

Ms. Kimson disputes the Complainant's argument that the records were improperly redacted. Ms. Kimson states that the Custodian responded to the Complainant clearly articulating the lawful basis for redacting the invoices. N.J.S.A. 47:1A-5.g. Ms. Kimson further asserts that the redactions were proper because the invoices dealt with personnel matters that are exempt under OPRA pursuant to N.J.S.A. 47:1A-10. Ms. Kimson notes that in Burnett v. County of Bergen, 198 N.J. 408 (2009), the Court held that the privacy clause in OPRA "imposes an obligation upon public entities to protect against disclosure of personal information which would run contrary to reasonable privacy interests." *Id.* Ms. Kimson thus argues that the Custodian redacted information that would lead to disclosure of the merits of the personnel matter.

Ms. Kimson further contends that information obtained by Susalis and conversations between Susalis and Mr. O'Reilly fall within the confidentiality of information. (Rules of Professional Conduct RPC 1.6). Ms. Kimson contends that this

confidentiality extends to the places Susalis traveled, persons interviewed, and the dates upon which Susalis performed the services. Ms. Kimson contends that information, whatever the source, relating to the representation of the Township is privileged and therefore the Custodian appropriately redacted the Susalis invoices to protect the attorney-client privilege, as required pursuant to N.J.S.A. 47:1A-1.1. Ms. Kimson asserts that it is the Township's position that the Custodian's actions were proper and that the GRC should dismiss this portion of the complaint.

Ms. Kimson disputes the Complainant's argument that the Custodian violated OPRA because the Custodian sought Ms. Kimson's advice in order to make redactions to the Susalis invoices. Ms. Kimson states that at the time of the Complainant's first (1st) OPRA request, not only was the Township named as a defendant in a civil suit instituted by Officer Wahba, but the Township was also involved in hearings for the Wahba personnel matter. Ms. Kimson further states that the Custodian was aware of the confidentiality of personnel matter; thus, the Custodian consulted with Ms. Kimson before producing the Susalis invoices to the Complainant.

Counsel states that N.J.S.A. 47:1A-5.g. requires a custodian to delete or excise those portions of documents which are exempt from public access, and it is reasonable for a custodian to consult with counsel on a subject matter possibly falling under OPRA's exemptions. Ms. Kimson states that the GRC has adjudicated multiple complaints in which redactions of attorney billing records were at issue and in no case did the GRC determine that a custodian improperly consulted counsel to aid in the redaction process. Ms. Kimson asserts that to the contrary, the issues in those complaints were the amount of redactions, or the cost of redactions. *See Fisher v. Township of Cedar Grove*, GRC Case number 2002-34 (July 2003) *and Fisher v. New Jersey Institute of Technology*, GRC Case number 2002-35 (June 2003).

Ms. Kimson contends that the two (2) cases cited by the Complainant, Hunterdon PBA and Courier Post, do not support his position in this complaint. Ms. Kimson states that Hunterdon PBA was decided in 1996 under the old Right To Know Law. Ms. Kimson notes that OPRA expanded on the definition of a government record and set forth specific exemptions, one of which provides that:

“A government record shall not include the following information which is deemed to be confidential for the purposes of OPRA ... any record within the attorney-client privilege. This paragraph shall not be construed as exempting from access attorney or consultant bills or invoices except that such bills or invoices may be redacted to remove any information protected by the attorney-client privilege ...” N.J.S.A. 47:1A-1.1.

Ms. Kimson contends that at the time Hunterdon PBA was decided, the law was not clear about the status of attorney billing statements as public records, and the Appellate Division found that said bills should have been produced. Ms. Kimson further notes that the Appellate Division also clarified that it is appropriate to review the bills first before release if there is a claim that the bills contain confidential material. Ms. Kimson contends that the enactment of OPRA subsequently settled the issue, and as stated above, the Township provided invoices but redacted same in accordance with OPRA.

Ms. Kimson states Courier Post was decided shortly after the enactment of OPRA. Ms. Kimson argues that the facts of Courier Post are inapposite to the facts of this complaint. Ms. Kimson states that the custodian in Courier Post sought assistance of counsel to interpret which materials were subject to attorney-client privilege, and there was no judicial prohibition to the custodian's request for legal assistance. Ms. Kimson states that the Court was tasked with determining whether the custodian could assess a "special service charge" to reimburse the cost of attorney review to redact the documents. Ms. Kimson states that the Court found that the "special service charge" provided for in OPRA was not a "model of clarity" and relied in part on Florida, Alabama and Georgia law to interpret the newly adopted New Jersey law. Ms. Kimson states that the Court held that because OPRA did not contain an attorney review clause (to allow for the assessment of attorney fees to OPRA requestors), OPRA did not contemplate that the custodian could charge attorney fees to plaintiff. Ms. Kimson states that in reviewing OPRA, the Court observed the language requiring the Custodian to redact and produce records and stated that if the Legislature had intended for assessment of a "special service charge" for attorney review, the Legislature would have included a provision requiring that requestors pay for attorney review.

Ms. Kimson thus contends that Courier Post does not prohibit custodians from relying upon counsel to assist with redactions, rather, it prohibited custodians from passing the cost of counsel's review onto a requestor. Ms. Kimson states that the Township did not charge the Complainant any fees for the production of invoices nor does the Complainant claim that the Township proposed a cost for provision of the responsive invoices. Ms. Kimson asserts that it is the Township's position that the Custodian acted properly in receiving advice from her to ensure proper redaction of the responsive invoices.

Ms. Kimson respectfully requests that the GRC dismiss this complaint as being unreasonable and without factual basis.

June 16, 2010

Letter from the Complainant to the GRC with the following attachments:

- Page No. 1 of the Township's public session minutes dated March 12, 2009.
- Page No. 5 of the Township's public session minutes dated March 26, 2009.
- Page No. 7 of the Township's public session minutes dated April 9, 2009.
- Page No. 1 of the Township's executive session minutes dated July 23, 2009.
- Page No. 4 of the Township's public session minutes dated September 24, 2009.
- Page No. 1 of the Township's special emergency meeting minutes dated October 6, 2009.
- Page No. 8 of the Township's public session minutes of the October 15, 2009.
- Complainant's OPRA requests No. GB-091119-01 and No. GB-091119-03 dated November 19, 2006.
- Letter from Mr. Caldwell to the Complainant dated November 30, 2009.
- Letter from the Custodian to the Complainant dated December 1, 2009.
- Letter from the Custodian to the Complainant dated December 2, 2009.
- Letter from the Complainant to Mr. Caldwell dated December 3, 2009.

- Letter from the Custodian to the Complainant dated December 3, 2009.
- Unredacted invoices from Day, Pitney as provided by the Custodian on December 3, 2009.
- Complainant's OPRA request No. GB-091204-06 dated December 4, 2009.
- Complainant's OPRA request No. GB-091207-07 dated December 7, 2009.
- Unredacted invoices from Susalis, as provided by the Custodian on December 8, 2009.
- Letter from the Custodian to the Complainant dated December 8, 2009.
- Letter from the Custodian to the Complainant dated December 8, 2009.
- Unredacted invoices from the law firm of Weiner, Lesniak, LLP, as provided by the Custodian on December 21, 2009.
- E-mail from Ms. Kimson to the Complainant dated April 9, 2010.
- Resolution dated April 29, 2010 terminating Officer Wahba.

The Complainant states that he wishes to provide new evidence and correct factual errors made by the Custodian in the SOI.

The Complainant states that the Township's position is that Invoice No. 2923 and Invoice No. 2938 are related to a personnel matter involving Officer Wahba. The Complainant states that the Township stated that it retained special counsel to investigate and represent the Township (Day, Pitney replaced Weiner, Lesniak, LLP, in the summer of 2009). The Complainant states that the Township further stated that Mr. O'Reilly retained Susalis to perform an investigation. The Complainant states that Ms. Kimson contended that the Custodian lawfully redacted the invoices pursuant to N.J.S.A. 47:1A-10 for personnel matters and N.J.S.A. 47:1A-1.1 for attorney-client privilege. The Complainant states that Ms. Kimson further asserted that the Custodian was aware of the confidentiality implications of the personnel matter.

The Complainant states that the Wahba matter commenced on April 9, 2009 and ended on April 29, 2010 with Officer Wahba's termination by adopted resolution. The Complainant states that he agrees that any information created between these two dates discussing the nature of the personnel matter should be redacted pursuant to N.J.S.A. 47:1A-1.1 and N.J.S.A. 47:1A-10.

The Complainant states that he received in response to his first (1st) OPRA request an unredacted Day, Pitney invoice and contends that the Custodian failed to respond to his first (1st) OPRA request for Susalis invoices. The Complainant states that as a result of receiving the unredacted Day, Pitney invoice, the Complainant submitted an OPRA request on December 4, 2009 for Invoice No. 2898,¹⁴ Invoice No. 2923 and Invoice No. 2938. The Complainant states that the Custodian responded on December 8, 2009 providing access to Invoice No. 2898 without redactions and denied access to the two (2) invoices at issue herein because the Township possessed no copies of same. The Complainant states that following the conclusion of the Wahba matter, the Custodian provided to the Complainant heavily redacted copies of Invoice No 2923 and Invoice No.

¹⁴ The Custodian provided the Complainant with Invoice No. 2898 without redactions on December 8, 2009. Therefore, this invoice is not at issue in the instant complaint.
George F. Burdick, Jr. v. Township of Franklin (Hunterdon), 2010-99 – Findings and Recommendations of the Executive Director 11

2938 and cited to N.J.S.A. 47:1A-1.1. and N.J.S.A. 47:1A-10 as the lawful basis for said redactions.

The Complainant states that Black's Law Dictionary defines the attorney-client privilege as "[t]he client's right to refuse to disclose and to prevent any other person from disclosing confidential *communications* between the client and the attorney." (Emphasis added.) The Complainant states that the Open Public Meetings Act ("OPMA") allows for public bodies to exclude the public from portions of public meetings at which discussions falling within the attorney-client privilege take place. N.J.S.A. 10:4-12(b)(7). The Complainant states that N.J.S.A. 2A:84A-20 set the scope of the attorney-client privilege, but provides that the privilege can be waived "if ... the holder thereof has (a) contracted with anyone not to claim the right or privilege or, (b) without coercion and with knowledge of his right..." *Id.* See Sicpa N. America Corp. v. Donaldson Enter. Inc., 179 N.J. Super. 56, 61-62 (App. Div. 1981); Kinsella v. Kinsella, 145 N.J. 369 (July 10, 1997); In Re: Grand Jury Subpoena Issued to Amato A. Galasso, Esq., 389 N.J. Super. 281, 913 (App. Div. 2006); Hunterdon PBA.

The Complainant contends that it is undisputed that he received without coercion unredacted copies of invoices of Day, Pitney and Susalis containing entries within the time period of April 9, 2009 through April 29, 2010. The Complainant contends that the Township's disclosure of these unredacted invoices effectively waives its right to assert the attorney-client privilege on the two invoices at issue. The Complainant further asserts that the privilege only extends to communications and not dates, locations, participants or discussion subjects, as Ms. Kimson asserts in the SOI. The Complainant further questions why the EIN number would be redacted from the two (2) invoices at issue when the Custodian did not redact it in Invoice No. 2898.

The Complainant asserts that it appears as though Ms. Kimson misunderstood the Complainant's argument regarding redactions and the appropriate personnel required to make same. The Complainant asserts that on May 7, 2010 he heard that Ms. Kimson made the redactions, which the Custodian confirmed later that same day. The Complainant contends that he cited to Hunterdon PBA and Courier Post to support his argument that the Custodian, and no other employee, official, etc., is specifically required to perform the redactions. The Complainant asserts that he understands that counsel may go as far as to point the redactions out over the custodian's shoulder, but that the custodian must make the actual redactions. The Complainant contends that this is not the case here by the Custodian's own admission. The Complainant thus contends that the Custodian knowingly and willfully violated OPRA under the totality of the circumstances based on her experience as Custodian of Record for the Township over the last ten (10) years.

June 21, 2010

Letter from Ms. Kimson to the GRC. Ms. Kimson requests that the GRC disregard the Complainant's June 16, 2010, submission because it fails to provide new evidence, does not correct any factual errors and is not accompanied by a legal certification. Ms. Kimson asserts that the Complainant merely supplemented his argument with additional records that were in the Complainant's possession at the time of

the filing of this complaint and thus does not meet the threshold of “newly discovered evidence.”

Ms. Kimson disputes the Complainant’s allegation that the Township waived any privilege to the redacted information on the responsive invoices. Ms. Kimson further argues that the Township has asserted its privilege by redacting the invoices and that the cases cited by the Complainant in his submission only address statutorily recognized privileges between parties in litigated matters. Ms. Kimson contends that each of the cited cases is factually different and not applicable to OPRA issues.

Ms. Kimson further contends that Courier Post does not support the Complainant’s argument that a custodian is the only person who is legally authorized to redact records. Mr. Kimson asserts that Courier Post stands for the simple proposition that a custodian cannot pass the cost of attorney redactions to the requestor.

Ms. Kimson contends that the GRC does not have the authority to pierce attorney-client privilege. *See Meakem v. Borough of Pompton Lakes*, GRC Complaint No. 2003-66 (February 2004). Ms. Kimson states that OPRA explicitly exempts from disclosure attorney-client privileged information on billing statements and personnel matters. N.J.S.A. 47:1A-1.1. and N.J.S.A. 47:1A-10. Ms. Kimson asserts that OPRA supports the redactions and this complaint should be dismissed accordingly. *See Muska v. Milburn Board of Education*, GRC Complaint No. 2004-41 (May 2004).¹⁵

February 4, 2011

E-mail from the GRC to the Custodian. The GRC states that it is in need of additional information. The GRC states that it is unclear whether the Custodian provided the Complainant with all records responsive to his November 19, 2009 and December 4, 2009 OPRA requests. The GRC requests that the Custodian legally certify to the following:

1. Whether the responsive records for each OPRA request were provided?

The GRC requests that the Custodian include the date the records were provided and whether said records were redacted.

The GRC requests that the Custodian submit the requested legal certification by close of business on February 9, 2011.

February 10, 2011

Custodian’s legal certification. The Custodian certifies that she provided the Complainant with all records responsive to his November 19, 2009 OPRA request on May 6, 2010 with redactions pursuant to N.J.S.A. 47:1A-1.1. and N.J.S.A. 47:1A-10. The Custodian certifies that these records are the same records responsive to the Complainant’s December 4, 2009 OPRA request.

¹⁵ Additional documentation raising arguments already presented, along with issues not relevant to the adjudication of this matter was also submitted.
George F. Burdick, Jr. v. Township of Franklin (Hunterdon), 2010-99 – Findings and Recommendations of the Executive Director 13

Analysis

Whether the Custodian responded to the Complainant's two (2) OPRA requests for invoices in a timely manner?

OPRA provides that:

“[i]mmediate access ordinarily shall be granted to budgets, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information.” (Emphasis added.) N.J.S.A. 47:1A-5.e.

The Complainant's first (1st) OPRA request sought copies of all Susalis invoices to the Township for the period January 1, 2008 through November 18, 2009. The Complainant's second (2nd) OPRA request sought copies of Invoice No. 2923 and 2938. The Custodian responded to the Complainant's two (2) OPRA requests on the sixth (6th) and second (2nd) business days after receipt of same respectively.

The invoices requested are specifically classified as “immediate access” records pursuant to N.J.S.A. 47:1A-5.e. In Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007), the GRC held that the “immediate access language of OPRA (N.J.S.A. 47:1A-5.e.) suggests that the Custodian was still obligated to immediately notify the Complainant...” Inasmuch as OPRA requires a custodian to respond within a statutorily required time frame, when immediate access records are requested, a custodian should respond to the request for those records immediately, granting or denying access, requesting additional time to respond or requesting clarification of the request.

The evidence of record herein indicates that although the Custodian responded within the statutorily mandated seven (7) business day time frame, the Custodian failed to respond immediately to the Complainant's two (2) OPRA requests seeking invoices either granting access, denying access, requesting an extension of time or seeking clarification of the said requests.

Therefore, because the Custodian failed to immediately grant or deny access to the requested invoice, request additional time to respond or request clarification of the request, the Custodian has violated N.J.S.A. 47:1A-5.e. pursuant to Herron, *supra*. See also Ghana v. New Jersey Department of Corrections, GRC Complaint No. 2008-154 (June 2009).

Whether the Custodian unlawfully denied access to the requested records in the Complainant's two (2) OPRA requests?

OPRA provides that:

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

Additionally, OPRA defines a government record as:

“... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file* ... or *that has been received* in the course of his or its official business ... A government record shall not include the following information which is deemed to be confidential ... any record within the attorney-client privilege. This paragraph shall not be construed as exempting from access attorney or consultant bills or invoices except that such bills or invoices may be redacted to remove any information protected by the attorney-client privilege;” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA also provides that:

“[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof ... If the custodian of a government record asserts that part of a particular record is exempt from public access pursuant to [OPRA] ... the custodian shall delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and shall promptly permit access to the remainder of the record.” N.J.S.A. 47:1A-5.g.

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

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

Additionally, OPRA provides that:

“... the personnel or pension records of any individual in the possession of a public agency, including but not limited to records relating to any grievance filed by or against an individual, shall not be considered a government record and shall not be made available for public access ...” N.J.S.A. 47:1A-10

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

In the matter before the Council, the Complainant asserted in the Denial of Access Complaint that the Custodian unlawfully denied access to the records sought in his first (1st) OPRA request, *i.e.*, copies of all invoices from Susalis to the Township from January 1, 2008 through November 18, 2009. Moreover, the Complainant contended that the Custodian initially denied access to the invoices responsive to his second (2nd) OPRA request before providing access to heavily redacted copies of same on May 6, 2010.

The Custodian certified in the SOI that after receiving the Complainant's first (1st) OPRA request, she conducted a search of the Township files to locate the requested invoices and spoke with the CFO. The Custodian certified in the SOI that after not locating any responsive records, she noted on the Complainant's OPRA request that no records responsive to the request existed and returned the request to the Complainant within the statutorily-mandated seven (7) business day response period.

The Custodian certified in the SOI that the Township possessed an invoice from Day, Pitney dated October 16, 2009 that included line items for Susalis time charged for investigation of a personnel matter. The Custodian certified in the SOI that the Township retained the services of Mr. O'Reilly of Day, Pitney as special counsel to represent the Township in connection with a personnel matter, and that Mr. O'Reilly retained the services of Susalis to investigate the circumstances surrounding that matter. The Custodian further certified in the SOI that the Susalis invoices were billed to Day, Pitney because Susalis performed the investigation at the request of Day, Pitney, and further certified that the Township did not contract directly with Susalis, thus, the Township never directly received the responsive invoices.

The Custodian certified that she provided the Complainant with the Day, Pitney invoice that included fees for Susalis and referenced specific invoices as part of her response to the Complainant's first (1st) OPRA request. The Custodian certifies that the Complainant acknowledged receipt of the Day, Pitney invoice in a letter to the Custodian dated December 4, 2009 and requested under OPRA the two (2) invoices at issue on the same day. The Custodian certified that after she could not locate such invoices, thus she noted "none" on the Complainant's OPRA request.

In Schuler v. Borough of Bloomsbury (Hunterdon), GRC Complaint No. 2007-151 (Interim Order dated December 19, 2007), the complainant sought maps and other records from the Borough Engineer's files. The Council held that:

"[b]ecause the work done by the Borough Engineer ... is directly related to and arises from business done by him on behalf of the Borough of Bloomsbury (even if the Borough Engineer is not an actual employee of the Borough, he maintains a contractual relationship with the Borough), the requested records maintained on file by the Borough Engineer are considered government records pursuant to N.J.S.A. 47:1A-1.1 and are subject to public access. As such, the Custodian unlawfully denied access to the records responsive to item # 1 ... which are maintained on file by the Borough Engineer pursuant to Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005-127 (May 2006) and Beck v. O'Hare, Docket No. MER-L-2411-07 (Law Div. 2007) and the Custodian should provide the

requested records from the Borough Engineer's files to the Complainant.”
Id. at pg. 8.

The evidence of record is clear that the Township contracted with special counsel, Day, Pitney, to represent the Township in a personnel matter; the evidence is also clear that Day, Pitney contracted with Susalis to perform certain work associated with that representation. The evidence further establishes that the Township was aware of Susalis as a subcontractor of Day, Pitney because the Day, Pitney invoice which the Custodian provided to the Complainant contained references to Susalis' services and also referenced certain additional invoices submitted by Susalis to Day, Pitney. As such, the Custodian unlawfully denied access to the records responsive to the Complainant's two (2) OPRA requests which were maintained on file by Day, Pitney, pursuant to Schuler, Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005-127 (May 2006) and Beck v. O'Hare, Docket No. MER-L-2411-07 (Law Div. 2007), because the Custodian mistakenly informed the Complainant that no records responsive exist to the two (2) OPRA requests due to her insufficient search. N.J.S.A. 47:1A-6; see Schneble v. New Jersey Department of Environmental Protection, GRC Complaint No. 2007-220 (April 2008), Oskay v. New Jersey State Parole Board, GRC Complaint No. 2008-53 (March 2009); Schiano v. Township of Lower (Cape May), GRC Complaint No. 2008-90 (June 2009).

However, because the evidence of record indicates that the Custodian provided the responsive Susalis invoices (with redactions) to the Complainant on May 6, 2010, the Council declines to order disclosure of the Susalis invoices.

The evidence of record is further clear that the Custodian informed the Complainant that the redactions to the responsive invoices provided to the Complainant on May 6, 2010 were made to protect attorney-client privileged material and personnel information. N.J.S.A. 47:1A-1.1. and N.J.S.A. 47:1A-10. The Complainant disputes the redactions made and also disputes the Township's use of counsel to perform the redactions.

In Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the Complainant appealed a final decision of the GRC¹⁶ in which the GRC dismissed the complaint by accepting the Custodian's legal conclusion for the denial of access without further review. The Court stated that:

“OPRA contemplates the GRC's meaningful review of the basis for an agency's decision to withhold government records...When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers.”

The Court also stated that:

“[t]he statute also contemplates the GRC's *in camera* review of the records that an agency asserts are protected when such review is necessary

¹⁶ Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005).
George F. Burdick, Jr. v. Township of Franklin (Hunterdon), 2010-99 – Findings and Recommendations of the Executive Director 17

to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the ‘Open Public Meetings Act,’ N.J.S.A. 10:4-6 to -21, it also provides that the GRC ‘may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.’ N.J.S.A. 47:1A-7f. This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.” *Id.*

Further, the Court stated that:

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

Therefore, pursuant to Paff, *supra*, the GRC must conduct an *in camera* review of the responsive redacted Susalis invoices (Invoice Nos. 2923 and 2938)¹⁷ to determine the validity of the Custodian’s assertion that the records contain attorney-client privileged material and personnel information which is exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-1.1. and N.J.S.A. 47:1A-10.

The GRC finally notes that the Complainant disputed that the Township’s use of Ms. Kimson to perform the redactions made to the Susalis invoices at issue herein and contented that this violates N.J.S.A. 47:1A-5.g., Hunterdon PBA and Courier Post. However, the Complainant’s assertions are not supported by the authorities cited.

Although N.J.S.A. 47:1A-5.g. states in pertinent part that “[i]f the custodian of a government record asserts that part of a particular record is exempt from public access pursuant to [OPRA] ... the custodian shall delete or excise from a copy of the record that portion which the custodian asserts is exempt...”, such provision does not prohibit a public agency’s use of an attorney to advise, supervise or even to perform such redactions.

Courier Post is inapposite to this case. There, the custodian sought the assistance of counsel to interpret which materials were subject to attorney-client privilege and sought to assess a special service charge pursuant to N.J.S.A. 47:1A-5.c. to reimburse the cost of attorney review to redact the documents. Although the Court determined that the plain language of OPRA required review and redaction be performed by the custodian of records, not the Borough attorney, and that no special service charge could be imposed since the matter involved no extraordinary expenditure of time and effort, this

¹⁷ Although the Custodian also provided Invoice No. 2979, No. 3030 and No. 3054 to the Complainant with redactions, the Complainant confirmed in an e-mail to the GRC on January 24, 2012 that only Invoice No. 2923 and 2938 are at issue herein.

determination was made in the context of the application for a special service charge rather than a determination as to whether an attorney's services could be utilized at all. *Id.* at 206.

The Council notes that the evidence of record establishes that the Township did not charge Complainant any fees for the production of invoices nor does Complainant claim that the Township proposed a cost for provision of the responsive invoices.

Pursuant to N.J.S.A. 47:1A-7.b., the GRC does not have the authority to regulate how a custodian utilizes its legal representative in its response to a Denial of Access Complaint. Hascup v. Waldwick Board of Education, 2005-192 (April 2007); Manahan v. Salem County, 2006-184 (Interim Order December 2007); Loigman v. Township of Middletown, GRC Complaint No. 2004-138 (March 2005). Moreover, the Appellate Division held that a public agency could consult with counsel and seek assistance of counsel to formulate its response to an OPRA request. Bart v. City of Paterson Housing Authority, 403 N.J. Super. 609, 619 (App. Div. 2008).

Whether the Custodian's actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian failed to immediately grant or deny access to the requested invoice, request additional time to respond or request clarification of the request, the Custodian has violated N.J.S.A. 47:1A-5.e. pursuant to Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007). *See also* Ghana v. New Jersey Department of Corrections, GRC Complaint No. 2008-154 (June 2009).
2. Because the Township contracted with special counsel, Day, Pitney, to represent the Township in a personnel matter; the evidence is also clear that Day, Pitney contracted with Susalis to perform certain work associated with that representation, and because the Township was aware of Susalis as a subcontractor of Day, Pitney because the Day, Pitney invoice which the Custodian provided to the Complainant contained references to Susalis' services and also referenced certain additional invoices submitted by Susalis to Day, Pitney, the Custodian unlawfully denied access to the records responsive to the Complainant's two (2) OPRA requests which were maintained on file by Day, Pitney, pursuant to Schuler v. Borough of Bloomsbury (Hunterdon), GRC Complaint No. 2007-151 (Interim Order dated December 19, 2007), Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005-127 (May 2006) and Beck v. O'Hare, Docket No. MER-L-2411-07

(Law Div. 2007), because the Custodian mistakenly informed the Complainant that no records responsive exist to the two (2) OPRA requests due to her insufficient search. N.J.S.A. 47:1A-6; *see* Schneble v. New Jersey Department of Environmental Protection, GRC Complaint No. 2007-220 (April 2008), Oskay v. New Jersey State Parole Board, GRC Complaint No. 2008-53 (March 2009); Schiano v. Township of Lower (Cape May), GRC Complaint No. 2008-90 (June 2009).

3. Because the evidence of record indicates that the Custodian provided the responsive Susalis invoices (with redactions) to the Complainant on May 6, 2010, the Council declines to order disclosure of the Susalis invoices.
4. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the responsive redacted Susalis invoices (Invoice Nos. 2923 and 2938) to determine the validity of the Custodian's assertion that the records contain attorney-client privileged material and personnel information which is exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-1.1 and N.J.S.A. 47:1A-10.
5. **The Custodian must deliver¹⁸ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 4 above), a document or redaction index,¹⁹ as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,²⁰ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
6. Pursuant to N.J.S.A. 47:1A-7.b., the GRC does not have the authority to regulate how a Custodian utilizes its legal representative in its response to a Denial of Access Complaint. Hascup v. Waldwick Board of Education, 2005-192 (April 2007); Manahan v. Salem County, 2006-184 (Interim Order December 2007); Loigman v. Township of Middletown, GRC Complaint No. 2004-138 (March 2005). Moreover, the Appellate Division held that a public agency could consult with counsel and seek assistance of counsel to formulate its response to an OPRA request. Bart v. City of Paterson Housing Authority, 403 N.J. Super. 609, 619 (App. Div. 2008).
7. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

¹⁸ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

¹⁹ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

²⁰ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

Prepared By: Karyn Gordon, Esq.
In House Counsel

Approved By: Catherine Starghill, Esq.
Executive Director

March 20, 2012