



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

LORI GRIFA
Commissioner

FINAL DECISION

September 27, 2011 Government Records Council Meeting

John Paff
Complainant

Complaint No. 2007-209

v.

Borough of Lavallette (Ocean)
Custodian of Record

At the September 27, 2011 public meeting, the Government Records Council (“Council”) considered the August 23, 2011 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 The Council, therefore, dismisses this matter with since it has been withdrawn pursuant to a settlement between the parties dated June 8, 2011.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk’s Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the
Government Records Council
On The 27th Day of September, 2011

Robin Berg Tabakin, 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: October 3, 2011



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
September 27, 2011 Council Meeting**

**John Paff¹
Complainant**

GRC Complaint No. 2007-209

v.

**Borough of Lavallette (Ocean)²
Custodian of Records**

Records Relevant to Complaint:³

1. Minutes of Council's April 23, 2007 executive session
2. Minutes of Council's May 21, 2007 executive session
3. Minutes of Council's June 4, 2007 executive session
4. Minutes of Council's July 2, 2007 executive session
5. Minutes of Council's July 16, 2007 executive session

Request Made: July 31, 2007

Response Made: August 7, 2007

Custodian: Christopher F. Parlow

GRC Complaint Filed: September 12, 2007

Background

May 24, 2011

Government Records Council's ("Council") Interim Order. At its May 24, 2011 public meeting, the Council considered the May 17, 2011 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. Because the Custodian improperly redacted three (3) items, failed to redact two (2) sentences, and failed to submit certified confirmation of compliance, the Custodian has not complied with the Council's December 18, 2008 Interim Order.
2. Although the Custodian's response to the Complainant's July 31, 2007 OPRA request was legally insufficient under OPRA because he failed to provide a written response setting forth a detailed and lawful basis for each redaction made to the records which were disclosed, and although the Custodian did not properly comply with the Council's June 25, 2008

¹ Represented by Walter M. Luers, Esq., of the Law Offices of Walter M. Luers, LLC (Oxford, NJ).

² Represented by Philip G. George, Esq., of Eric M. Bernstein & Associates, LLC (Warren, NJ).

³ Complainant requested additional records that are not relevant to this complaint.

Interim Order by failing to provide the stated number of copies of records to the Council for the *in camera* inspection and a legal certification that the documents provided were the documents requested by the Council for the *in camera* inspection, as well as the Custodian's failure to comply with the Council's December 18, 2008 Interim Order by improperly redacting the requested records as directed by the Council and failing to submit certified confirmation of compliance to the Executive Director, the Custodian's denial of access does not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate.

3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

May 25, 2011

Council's Interim Order distributed to the parties.

June 3, 2011

Motion for Reconsideration from the Custodian's Counsel.

June 13, 2011

Letter to the GRC from the Custodian's Counsel. Counsel states that the matter has been settled and therefore the Motion for Reconsideration is withdrawn.

June 20, 2011⁴

Stipulation of Dismissal from the Custodian's Counsel dated June 8, 2011. Counsel states that the matter has been amicably adjusted by and between the parties and is stipulated and agreed that the same be dismissed with prejudice and without costs against all parties.

⁴ The Stipulation of Dismissal is dated June 8, 2011 and signed by both the Custodian's and Complainant's Counsels. The GRC received same on June 20, 2011.

Analysis

No analysis necessary.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council dismiss this matter with since it has been withdrawn pursuant to a settlement between the parties dated June 8, 2011.

Approved By: Catherine Starghill, Esq.
Executive Director

August 23, 2011



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

LORI GRIFA
Commissioner

INTERIM ORDER

May 24, 2011 Government Records Council Meeting

John Paff
Complainant

Complaint No. 2007-209

v.

Borough of Lavallette (Ocean)
Custodian of Record

At the May 24, 2011 public meeting, the Government Records Council (“Council”) considered the May 17, 2011 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. Because the Custodian improperly redacted three (3) items, failed to redact two (2) sentences, and failed to submit certified confirmation of compliance, the Custodian has not complied with the Council’s December 18, 2008 Interim Order.
2. Although the Custodian’s response to the Complainant’s July 31, 2007 OPRA request was legally insufficient under OPRA because he failed to provide a written response setting forth a detailed and lawful basis for each redaction made to the records which were disclosed, and although the Custodian did not properly comply with the Council’s June 25, 2008 Interim Order by failing to provide the stated number of copies of records to the Council for the *in camera* inspection and a legal certification that the documents provided were the documents requested by the Council for the *in camera* inspection, as well as the Custodian’s failure to comply with the Council’s December 18, 2008 Interim Order by improperly redacting the requested records as directed by the Council and failing to submit certified confirmation of compliance to the Executive Director, the Custodian’s denial of access does not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the



Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

Interim Order Rendered by the
Government Records Council
On The 24th Day of May, 2011

Robin Berg Tabakin, Chair
Government Records Council

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

Charles A. Richman, Secretary
Government Records Council

Decision Distribution Date: May 25, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
May 24, 2011 Council Meeting**

**John Paff¹
Complainant**

GRC Complaint No. 2007-209

v.

**Borough of Lavallette (Ocean)²
Custodian of Records**

Records Relevant to Complaint:³

1. Minutes of Council's April 23, 2007 executive session
2. Minutes of Council's May 21, 2007 executive session
3. Minutes of Council's June 4, 2007 executive session
4. Minutes of Council's July 2, 2007 executive session
5. Minutes of Council's July 16, 2007 executive session

Request Made: July 31, 2007

Response Made: August 7, 2007

Custodian: Christopher F. Parlow

GRC Complaint Filed: September 12, 2007

Background

December 18, 2008

Government Records Council's ("Council") Interim Order. At its December 18, 2008 public meeting, the Council considered the December 10, 2008 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. Because the Custodian failed to provide nine (9) copies of the redacted and unredacted documents and a legal certification that the documents provided are the documents requested by the Council for the *in camera* inspection, the Custodian has not complied with the Council's June 25, 2008 Interim Order.
2. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the below table within five (5) business days from receipt of this Order and provide certified confirmation of**

¹ Represented by Walter M. Luers, Esq., of the Law Offices of Walter M. Luers, LLC (Oxford, NJ).

² Represented by Philip G. George, Esq., of Eric M. Bernstein & Associates, LLC (Warren, NJ).

³ Complainant requested additional records that are not relevant to this complaint.

compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.

The *in camera* inspection results were set forth in the following table:

Record or Redaction Number	Record Name/Date	Description of Record or Redaction	Custodian's Explanation/ Citation for Non-disclosure or Redactions	Findings of the <i>In Camera</i> Examination
1	Executive session minutes dated April 23, 2007.	Redacted to remove all references to discussions regarding pending litigation which is subject to attorney-client privilege and contract negotiations.	Pursuant to <u>N.J.S.A. 47:1A-1.1.</u> , "government records" do not include records within the attorney-client privilege. Discussions regarding pending litigation between the Borough and its attorney are privileged.	Disclose: Does not contain any information within the attorney-client privilege and does not contain information in connection with collective negotiations.
2	Executive session minutes dated May 21, 2007.	Redacted to remove all references to discussions regarding pending litigation which is subject to attorney-client privilege, personnel and contract negotiations.	Pursuant to <u>N.J.S.A. 47:1A-1.1.</u> , "government records" do not include records within the attorney-client privilege. Discussions regarding pending litigation between the Borough and its attorney are privileged. <u>Toscano v.</u>	<u>Michael Visco – Building Maintenance Proposal</u> . Paragraph 1: Redact sentences 2 through 5. This is ACD material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1.</u> Sentences 4 and 5 are also exempt because they constitute information generated in

			<p><u>Borough of Lavallette</u> is scheduled for trial commencing November 11, 2008. The Borough asserts continued privilege under <u>N.J.S.A. 47:1A-1.1.</u> and <u>N.J.S.A. 47:1A-10.</u></p>	<p>connection with collective negotiations pursuant to <u>N.J.S.A. 47:1A-1.1.</u> Redact sentences 6 through 8. This is attorney-client privileged material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1.</u> Redact balance of paragraph as ACD material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1.</u></p> <p><u>Toscano vs. Borough of Lavallette:</u> Paragraph 1: Redact. This is attorney-client privileged material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1.</u></p>
3	Executive session minutes dated June 4, 2007.	Redacted to remove all references to discussions regarding pending litigation which is subject to attorney-client privilege, personnel and contract	Pursuant to <u>N.J.S.A. 47:1A-1.1.</u> , “government records” do not include records within the attorney-client privilege. Discussions regarding pending	<u>Potential Litigation:</u> Paragraph 1: Redact sentences 4 and 6, which suggest potential litigation and are ACD material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-</u>

		<p>matters.</p>	<p>litigation between the Borough and its attorney are privileged. Threatened litigation is likely to be filed within three (3) months. Administrative action has been initiated and is still pending. Employee health and disability are in issue and the Borough asserts continued privilege under <u>N.J.S.A. 47:1A-1.1.</u>, <u>N.J.S.A. 47:1A-9</u> and <u>N.J.S.A. 47:1A-10</u>. The matter concerning Patrolman Ryan Tulko has been concluded but involves medical records and psychological matters which remain privileged under HIPAA and <u>N.J.S.A. 47:1A-1.1.</u>, <u>N.J.S.A. 47:1A-9</u> and <u>N.J.S.A. 47:1A-10</u>.</p>	<p>1.1.</p> <p><u>Personnel – Patrolman Ryan Tulko</u>: Paragraph 1: Redact the following sentences as ACD material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1.</u>: Sentences 2, 6, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 20. Sentences 7, 8, 12, 13, 14, 16, 20 and 21 are also exempt from disclosure because they constitute personnel records in the possession of a public agency and are exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-10</u>. Sentence 14 is also exempt from disclosure pursuant to Executive Order 26 (McGreevey) applicable to OPRA by operation of <u>N.J.S.A. 47:1A-9.a.</u></p> <p><u>PBA Employment Contract</u>: Paragraph 1: Redact. Contains information in connection with collective</p>
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				negotiations exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1.</u>
4	Executive session minutes dated July 2, 2007.	Redacted to remove all references to discussions regarding pending litigation which is subject to attorney-client privilege, personnel and contract matters.	Pursuant to <u>N.J.S.A. 47:1A-1.1.</u> , “government records” do not include records within the attorney-client privilege. Discussions regarding pending litigation between the Borough and its attorney are privileged. The <u>Anticipated Litigation</u> paragraph refers to litigation that is still pending.	<p><u>Anticipated Litigation:</u> Paragraph 1: Redact. This is ACD material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1.</u> Sentences 4 through 6 are also attorney-client privileged, exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1.</u></p> <p><u>Verizon Wireless Contract:</u> Paragraph 1: Redact. This is ACD material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1.</u> Also, sentence 2, if disclosed, would give an advantage to competitors or bidders and is therefore exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u></p> <p><u>Dispatchers/ Record Clerks</u></p>

				<p><u>Contract:</u> Paragraph 1: Redact. This material is exempt from disclosure because it constitutes information generated in connection with collective negotiations pursuant to <u>N.J.S.A. 47:1A-1.1.</u> This paragraph also contains ACD material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1.</u></p> <p><u>Public Works</u> <u>Contract:</u> Paragraph 1: Redact. This material is exempt from disclosure because it constitutes information generated in connection with collective negotiations pursuant to <u>N.J.S.A. 47:1A-1.1.</u> This paragraph also contains ACD material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1.</u></p>
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				<p><u>PBA Grievance:</u> Paragraph 1, redact sentences 2 through 6. These sentences contain information in connection with any grievance filed by or against an individual and is exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1.</u></p>
5	Executive session minutes dated July 16, 2007.	Redacted to remove all references to discussions regarding pending litigation which is subject to attorney-client privilege, personnel and contract matters.	<p>Pursuant to <u>N.J.S.A. 47:1A-1.1.</u>, “government records” do not include records within the attorney-client privilege. Discussions regarding pending litigation between the Borough and its attorney are privileged. <u>Anticipated Litigation</u> section refers to a Notice of Violation from the Department of Environmental Protection which has been appealed and is still in litigation in the Office of Administrative Law and</p>	<p><u>Verizon Wireless Agreement:</u> Paragraph 1: Redact everything after first sentence as ACD material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1.</u></p> <p><u>Dispatchers and Records Clerks Agreement:</u> Paragraph 1: Redact. This material is exempt from disclosure because it constitutes information generated in connection with collective negotiations pursuant to <u>N.J.S.A. 47:1A-1.1.</u> Also, this paragraph is exempt because it</p>

			<p>remains privileged under <u>N.J.S.A. 47:1A-1</u>.</p>	<p>constitutes ACD material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u>.</p> <p><u>Anticipated Litigation:</u> Paragraph 2: Redact sentence 2 and sentence 3 as attorney-client privileged material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u>. It also constitutes ACD material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u>.</p> <p><u>Place to Place Transfer Application – Lenny’s Pizzeria and Restaurant:</u> Redact sentences 2 through 4 as attorney-client privileged material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u>.</p> <p><u>Personnel:</u> This section of the record has already been disclosed to the Complainant in unredacted form.</p>
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December 19, 2008

Council's Interim Order distributed to the parties.

December 30, 2008

Custodian's response to the Council's Interim Order. The Custodian's Counsel provides one original and nine (9) copies of the redacted meeting minutes. The Custodian improperly redacted one (1) sentence in the June 4, 2007 minutes, one (1) paragraph in the July 2, 2007 minutes and one (1) sentence in the July 16, 2007 meeting minutes. Further, the Custodian failed to redact one (1) sentence in the June 4, 2007 minutes and one (1) sentence in the July 2, 2007 minutes. The Custodian also failed to submit certified confirmation of compliance with the December 18, 2008 Interim Order to the Executive Director.

In response to the Council's finding in the December 18, 2008 Interim Order that the Custodian did not comply with the Council's June 25, 2008 Interim Order because he failed to provide nine (9) copies of the redacted and unredacted documents, Counsel acknowledges that he only provided one (1) hard copy of the redacted and unredacted documents required by the Council's June 25, 2008 Interim Order. Counsel contends that he also sent the documents by e-mail and therefore believed that the required number of documents had been provided. Counsel also states that the mistake of failing to submit nine (9) copies was made by his office and not by the Custodian.

Analysis

Whether the Custodian complied with the Council's December 18, 2008 Interim Order?

The Council's December 18, 2008 Interim Order directed the Custodian to deliver certain records and documentation to the Council within five (5) business days from receipt of said Interim Order. The Interim Order was received by the Custodian on December 22, 2008; therefore the Custodian was required to comply with the terms of the Interim Order no later than December 30, 2008.

The Custodian's Counsel submitted to the GRC the redacted executive session meeting minutes on the fifth (5th) business day following dissemination of the Council's Interim Order.⁴ Upon review of the redacted minutes, however, the GRC notes that the Custodian improperly redacted the following three (3) items:

1. June 4, 2007 executive session minutes - Personnel-Patrolman Ryan Tulko: Paragraph 1: Sentence 19.
2. July 2, 2007 executive session minutes - Dispatchers/Record Clerks Contract: Paragraph 2.

⁴ The Council's December 18, 2008 Interim Order directed the Custodian to provide the redacted records to the Complainant, not the GRC.

3. July 16, 2007 executive session minutes - Verizon Wireless Agreement: Paragraph 1: Sentence 1.⁵

In addition, the Custodian failed to redact the following two (2) sentences:

1. June 4, 2007 executive session minutes - Personnel-Patrolman Ryan Tulko: Paragraph 1: Sentence 2.
2. July 2, 2007 executive session minutes - PBA Grievance: Paragraph 1: Sentence 2.

The Custodian also failed to submit certified confirmation of compliance with the Interim Order to the Executive Director.

Because the Custodian improperly redacted three (3) items as listed above, failed to redact and disclosed two (2) sentences as listed above, and failed to submit certified confirmation of compliance, the Custodian has not complied with the Council's December 18, 2008 Interim Order.

Whether the Custodian's delay in access to the requested records rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

OPRA states that:

"[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty ..." N.J.S.A. 47:1A-11.a.

OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically, OPRA states:

"... If the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA]..." N.J.S.A. 47:1A-7.e.

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a "knowing and willful" violation of OPRA. The following statements must be true for a determination that the Custodian "knowingly and willfully" violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170 at 185 (2001); the Custodian must have had some knowledge that his actions were wrongful (Fielder v.

⁵ This sentence was provided to the Complainant when the Custodian originally responded to the OPRA request on August 7, 2007.

Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J.Super. 86 (App. Div. 1996) at 107).

Although the Custodian's response to the Complainant's July 31, 2007 OPRA request was legally insufficient under OPRA because he failed to provide a written response setting forth a detailed and lawful basis for each redaction made to the records which were disclosed, and although the Custodian did not properly comply with the Council's June 25, 2008 Interim Order by failing to provide the stated number of copies of records to the Council for the *in camera* inspection and a legal certification that the documents provided were the documents requested by the Council for the *in camera* inspection, as well as the Custodian's failure to comply with the Council's December 18, 2008 Interim Order by improperly redacting the requested records as directed by the Council and failing to submit certified confirmation of compliance to the Executive Director, the Custodian's denial of access does not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate.

Whether the Complainant is a “prevailing party” pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney's fees?

OPRA provides that:

“[a] person who is denied access to a government record by the custodian of the record, at the option of the requestor, may:

- institute a proceeding to challenge the custodian's decision by filing an action in Superior Court...; or
- in lieu of filing an action in Superior Court, file a complaint with the Government Records Council...

A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.” N.J.S.A. 47:1A-6.

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

In Teeters, the complainant appealed from a final decision of the Government Records Council which denied an award for attorney's fees incurred in seeking access to certain public records via two complaints she filed under the Open Public Records Act (OPRA), N.J.S.A. 47:1A-6 and N.J.S.A. 47:1A-7.f. against the Division of Youth and Family Services ("DYFS"). The records sought involved an adoption agency which falsely advertised that it was licensed in New Jersey. DYFS eventually determined that the adoption agency violated state licensing rules and reported the results of its investigation to the Complainant. The Complainant received the records she requested upon entering into a settlement with DYFS. The court found that the complainant engaged in reasonable efforts to pursue her access rights to the records in question and sought attorney assistance only after her self-filed complaints and personal efforts were unavailing. *Id.* at 432. With that assistance, she achieved a favorable result that reflected an alteration of position and behavior on DYFS's part. *Id.* As a result, the complainant was a prevailing party entitled to an award of a reasonable attorney's fee. Accordingly, the Court remanded the determination of reasonable attorney's fees to the GRC for adjudication.

Additionally, the New Jersey Supreme Court has ruled on the issue of "prevailing party" attorney's fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the court discussed the catalyst theory, "which posits that a plaintiff is a 'prevailing party' if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." Mason, supra, at 71, (quoting Buckhannon Board & Care Home v. West Virginia Department of Health & Human Resources, 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). The court in Buckhannon stated that the phrase "prevailing party" is a legal term of art that refers to a "party in whose favor a judgment is rendered." (quoting Black's Law Dictionary 1145 (7th ed. 1999)). The court in Mason, supra, at 76, held that "requestors are entitled to attorney's fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) 'a factual causal nexus between plaintiff's litigation and the relief ultimately achieved'; and (2) 'that the relief ultimately secured by plaintiffs had a basis in law.' Singer v. State, 95 N.J. 487, 495, cert denied (1984)."

In the complaint now before the Council, the Custodian was ordered to disclose some portions of records which were previously redacted within five (5) business days of receipt of the Council's December 18, 2008 Interim Order, and the Custodian did in fact disclose portions of records which were previously redacted.

Pursuant to Teeters, supra, and the Council's December 18, 2008 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason, supra, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee under N.J.S.A. 47:1A-6, Teeters, supra, and Mason, supra. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian improperly redacted three (3) items, failed to redact two (2) sentences, and failed to submit certified confirmation of compliance, the Custodian has not complied with the Council's December 18, 2008 Interim Order.
2. Although the Custodian's response to the Complainant's July 31, 2007 OPRA request was legally insufficient under OPRA because he failed to provide a written response setting forth a detailed and lawful basis for each redaction made to the records which were disclosed, and although the Custodian did not properly comply with the Council's June 25, 2008 Interim Order by failing to provide the stated number of copies of records to the Council for the *in camera* inspection and a legal certification that the documents provided were the documents requested by the Council for the *in camera* inspection, as well as the Custodian's failure to comply with the Council's December 18, 2008 Interim Order by improperly redacting the requested records as directed by the Council and failing to submit certified confirmation of compliance to the Executive Director, the Custodian's denial of access does not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual casual nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

Approved By: Catherine Starghill, Esq.
Executive Director

May 17, 2011⁶

⁶ This complaint was prepared for adjudication on August 4, 2009; however, said complaint was not adjudicated due to the Council's lack of quorum.



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CATHERINE STARGHILL Esq., Executive Director

INTERIM ORDER

December 18, 2008 Government Records Council Meeting

John Paff
Complainant

Complaint No. 2007-209

v.

Borough of Lavallette (Ocean)
Custodian of Record

At the December 18, 2008 public meeting, the Government Records Council ("Council") considered the December 10, 2008 *In Camera* Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. By a majority vote, the Council adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Custodian failed to provide nine (9) copies of the redacted and unredacted documents and a legal certification that the documents provided are the documents requested by the Council for the *in camera* inspection, the Custodian has not complied with the Council's June 25, 2008 Interim Order.
2. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the below table within five (5) business days from receipt of this Order and provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.**



Record or Redaction Number	Record Name/Date	Description of Record or Redaction	Custodian's Explanation/ Citation for Non-disclosure or Redactions	Findings of the <i>In Camera</i> Examination ¹
1	Executive session minutes dated April 23, 2007.	Redacted to remove all references to discussions regarding pending litigation which is subject to attorney-client privilege and contract negotiations.	Pursuant to <u>N.J.S.A. 47:1A-1.1.</u> , "government records" do not include records within the attorney-client privilege. Discussions regarding pending litigation between the Borough and its attorney are privileged.	Disclose: Does not contain any information within the attorney-client privilege and does not contain information in connection with collective negotiations.
2	Executive session minutes dated May 21, 2007.	Redacted to remove all references to discussions regarding pending litigation which is subject to attorney-client privilege,	Pursuant to <u>N.J.S.A. 47:1A-1.1.</u> , "government records" do not include records within the attorney-client privilege. Discussions	<u>Michael Visco – Building Maintenance Proposal.</u> Paragraph 1: Redact sentences 2 through 5. This is ACD material exempt from disclosure

¹ **Unless expressly identified for redaction, everything in the record shall be disclosed.** For purposes of identifying redactions, unless otherwise noted a paragraph/new paragraph begins whenever there is an indentation and/or a skipped space(s). The paragraphs are to be counted starting with the first whole paragraph in each record and continuing sequentially through the end of the record. If a record is subdivided with topic headings, renumbering of paragraphs will commence under each new topic heading. Sentences are to be counted in sequential order throughout each paragraph in each record. Each new paragraph will begin with a new sentence number. If only a portion of a sentence is to be redacted, the word in the sentence which the redaction follows or precedes, as the case may be, will be identified and set off in quotation marks. If there is any question as to the location and/or extent of the redaction, the GRC should be contacted for clarification before the record is redacted. The GRC recommends the redactor make a paper copy of the original record and manually "black out" the information on the copy with a dark colored marker, then provide a copy of the blacked-out record to the requester.

		personnel and contract negotiations.	regarding pending litigation between the Borough and its attorney are privileged. <u>Toscano v. Borough of Lavallette</u> is scheduled for trial commencing November 11, 2008. The Borough asserts continued privilege under <u>N.J.S.A. 47:1A-1.1.</u> and <u>N.J.S.A. 47:1A-10.</u>	<p>pursuant to <u>N.J.S.A. 47:1A-1.1.</u> Sentences 4 and 5 are also exempt because they constitute information generated in connection with collective negotiations pursuant to <u>N.J.S.A. 47:1A-1.1.</u> Redact sentences 6 through 8. This is attorney-client privileged material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1.</u> Redact balance of paragraph as ACD material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1.</u></p> <p><u>Toscano vs. Borough of Lavallette:</u> Paragraph 1: Redact. This is attorney-client privileged material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1.</u></p>
3	Executive session minutes	Redacted to remove all	Pursuant to <u>N.J.S.A.</u>	<u>Potential Litigation:</u>

	<p>dated June 4, 2007.</p>	<p>references to discussions regarding pending litigation which is subject to attorney-client privilege, personnel and contract matters.</p>	<p>47:1A-1.1., “government records” do not include records within the attorney-client privilege. Discussions regarding pending litigation between the Borough and its attorney are privileged. Threatened litigation is likely to be filed within three (3) months. Administrative action has been initiated and is still pending. Employee health and disability are in issue and the Borough asserts continued privilege under <u>N.J.S.A. 47:1A-1.1.</u>, <u>N.J.S.A. 47:1A-9</u> and <u>N.J.S.A. 47:1A-10</u>. The matter concerning Patrolman Ryan Tulko has been concluded but involves medical records and</p>	<p>Paragraph 1: Redact sentences 4 and 6, which suggest potential litigation and are ACD material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1.</u></p> <p><u>Personnel – Patrolman Ryan Tulko</u>: Paragraph 1: Redact the following sentences as ACD material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1.</u>: Sentences 2, 6, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 20. Sentences 7, 8, 12, 13, 14, 16, 20 and 21 are also exempt from disclosure because they constitute personnel records in the possession of a public agency and are exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-10</u>.</p> <p>Sentence 14 is also exempt from disclosure pursuant to Executive Order 26 (McGreevey) applicable to</p>
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			psychological matters which remain privileged under HIPAA and <u>N.J.S.A. 47:1A-1.1.</u> , <u>N.J.S.A. 47:1A-9</u> and <u>N.J.S.A. 47:1A-10.</u>	OPRA by operation of <u>N.J.S.A. 47:1A-9.a.</u> <u>PBA Employment Contract:</u> Paragraph 1: Redact. Contains information in connection with collective negotiations exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1.</u>
4	Executive session minutes dated July 2, 2007.	Redacted to remove all references to discussions regarding pending litigation which is subject to attorney-client privilege, personnel and contract matters.	Pursuant to <u>N.J.S.A. 47:1A-1.1.</u> , "government records" do not include records within the attorney-client privilege. Discussions regarding pending litigation between the Borough and its attorney are privileged. The <u>Anticipated Litigation</u> paragraph refers to litigation that is still pending.	<u>Anticipated Litigation:</u> Paragraph 1: Redact. This is ACD material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1.</u> Sentences 4 through 6 are also attorney-client privileged, exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1.</u> <u>Verizon Wireless Contract:</u> Paragraph 1: Redact. This is ACD material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-</u>

				<p>1.1. Also, sentence 2, if disclosed, would give an advantage to competitors or bidders and is therefore exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u></p> <p><u>Dispatchers/ Record Clerks Contract:</u> Paragraph 1: Redact. This material is exempt from disclosure because it constitutes information generated in connection with collective negotiations pursuant to <u>N.J.S.A. 47:1A-1.1</u>.</p> <p>This paragraph also contains ACD material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u>.</p> <p><u>Public Works Contract:</u> Paragraph 1: Redact. This material is exempt from disclosure because it constitutes</p>
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				<p>information generated in connection with collective negotiations pursuant to <u>N.J.S.A. 47:1A-1.1.</u></p> <p>This paragraph also contains ACD material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1.</u></p> <p><u>PBA Grievance:</u> Paragraph 1, redact sentences 2 through 6. These sentences contain information in connection with any grievance filed by or against an individual and is exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1.</u></p>
5	Executive session minutes dated July 16, 2007.	Redacted to remove all references to discussions regarding pending litigation which is subject to attorney-client privilege, personnel and contract matters.	Pursuant to <u>N.J.S.A. 47:1A-1.1.</u> , "government records" do not include records within the attorney-client privilege. Discussions regarding pending litigation between the	<p><u>Verizon Wireless Agreement:</u> Paragraph 1: Redact everything after first sentence as ACD material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1.</u></p> <p><u>Dispatchers and Records Clerks</u></p>

			<p>Borough and its attorney are privileged.</p> <p><u>Anticipated Litigation</u> section refers to a Notice of Violation from the Department of Environmental Protection which has been appealed and is still in litigation in the Office of Administrative Law and remains privileged under <u>N.J.S.A. 47:1A-1</u>.</p>	<p><u>Agreement:</u> Paragraph 1: Redact. This material is exempt from disclosure because it constitutes information generated in connection with collective negotiations pursuant to <u>N.J.S.A. 47:1A-1.1</u>. Also, this paragraph is exempt because it constitutes ACD material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u>.</p> <p><u>Anticipated Litigation:</u> Paragraph 2: Redact sentence 2 and sentence 3 as attorney-client privileged material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u>. It also constitutes ACD material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u>.</p> <p><u>Place to Place Transfer</u></p>
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				<p><u>Application – Lenny’s Pizzeria and Restaurant:</u> Redact sentences 2 through 4 as attorney-client privileged material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1.</u></p> <p><u>Personnel:</u> This section of the record has already been disclosed to the Complainant in unredacted form.</p>
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Interim Order Rendered by the
 Government Records Council
 On The 18th Day of December, 2008

Robin Berg Tabakin, Chairman
 Government Records Council

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

David Fleisher, Secretary
 Government Records Council

Decision Distribution Date: December 19, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
December 18, 2008 Council Meeting**

John Paff¹
Complainant

GRC Complaint No. 2007-209

v.

Borough of Lavallette (Ocean)²
Custodian of Records

Records Relevant to Complaint:³

1. Minutes of Council's April 23, 2007 executive session
2. Minutes of Council's May 21, 2007 executive session
3. Minutes of Council's June 4, 2007 executive session
4. Minutes of Council's July 2, 2007 executive session
5. Minutes of Council's July 16, 2007 executive session

Request Made: July 31, 2007

Response Made: August 7, 2007

Custodian: Christopher F. Parlow

GRC Complaint Filed: September 12, 2007

Background

June 25, 2008

Government Records Council's Interim Order. At the June 25, 2008 public meeting, the Government Records Council ("Council") considered the June 18, 2008 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. Although the Custodian responded to the Complainant's July 31, 2007 OPRA request by providing the redacted executive session minutes within the statutorily mandated seven (7) business days time frame required by N.J.S.A. 47:1A-5.i., the Custodian's response was legally insufficient under OPRA because he failed to provide a written response setting forth a detailed and lawful basis for each redaction. *See Paff v. Township of Plainsboro*, GRC Complaint No. 2005-29, (July 2005) (ordering the custodian to provide redacted executive session minutes with a detailed and lawful basis for each redacted part.). *See also Barbara Schwarz v. NJ Department of Human Services*, GRC Complaint No. 2004-60, (February

¹ Represented by Walter M. Luers, Esq., of Law Offices of Walter M. Luers, LLC (Oxford, NJ).

² Represented by Eric M. Bernstein, Esq., of Eric M. Bernstein & Associates, LLC (Warren, NJ).

³ Complainant requested additional records that are not relevant to this complaint.

2005)(setting forth the proposition that specific citations to the law that allows a denial of access are required at the time of the denial.). Therefore, the Custodian violated OPRA pursuant to N.J.S.A. 47:1A- 5.g. and has not borne his burden of proving the denial of access to the redacted portions was authorized by law pursuant to N.J.S.A. 47:1A-6.

2. Pursuant to Paff v. Department of Labor, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the requested executive session minutes to determine the validity of the Custodian's assertion that the redacted portions contain attorney-client privileged information which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
3. **The Custodian must deliver⁴ to the Council in a sealed envelope nine (9) copies of the requested unredacted documents, a document or redaction index⁵, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, that the documents provided are the documents 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.**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney's fees pending the Custodian's compliance with the Council's Interim Order.

July 1, 2008

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

July 1, 2008

Letter from the Custodian's Counsel to the GRC in response to the Council's Interim Order. The Custodian's Counsel forwarded to the GRC one (1) copy each of the records relevant to the complaint in redacted and unredacted form and a document/redaction index. Counsel failed to provide nine (9) copies of the unredacted documents and a legal certification from the Custodian that the documents provided are the documents requested by the Council for the *in camera* inspection as required by the Order.

⁴ The *in camera* documents 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.

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

Analysis

Whether the Custodian complied with the Council's Interim Order?

Paragraph 3 of the Council's June 25, 2008 Interim Order directed the Custodian to deliver certain records and documentation to the Council within five (5) business days from receipt of said Interim Order. The Interim Order was received by the Custodian on July 1, 2008; therefore the Custodian was required to comply with the terms of the Interim Order no later than July 9, 2008.

The Custodian's Counsel submitted to the GRC all required records on July 1, 2008; however, the Custodian failed to comply with the Council's June 25, 2008 Interim Order because, although the Custodian submitted the records to the GRC in a timely manner, the Custodian only submitted one (1) copy each of the records relevant to the complaint in redacted and unredacted form. Further, the Custodian failed to submit a legal certification that the documents provided are the documents requested by the Council for the *in camera* inspection.

Because the Custodian failed to provide nine (9) copies of the redacted and unredacted documents and a legal certification that the documents provided are the documents requested by the Council for the *in camera* inspection, the Custodian has not complied with the Council's June 25, 2008 Interim Order.

Whether the Custodian unlawfully denied access to the redacted portions of the executive session minutes?

The Custodian contends that the majority of the records submitted for *in camera* examination contain material which was redacted because it constituted attorney-client privileged communications exempt from disclosure. OPRA excludes from the definition of a government record "any record within the attorney-client privilege." N.J.S.A. 47:1A-1.1.

In New Jersey, protecting confidentiality within the attorney-client relationship has long been recognized by the courts. *See, e.g. Matter of Grand Jury Subpoenas*, 241 N.J. Super. 18 (App. Div. 1989). In general, the attorney-client privilege renders as confidential communications between a lawyer and a client made in the course of that professional relationship. *See N.J.S.A. 2A: 84A-20* and *Fellerman v. Bradley*, 99 N.J. 493, 498-99 (1985). Rule 504 (1) of the New Jersey Rules of Evidence provides that communications between a lawyer and client, "in the course of that relationship and in professional confidence, are privileged..." Such communications as discussion of litigation strategy, evaluation of liability, potential monetary exposure and settlement recommendations are considered privileged. *The Press of Atlantic City v. Ocean County Joint Insurance Fund*, 337 N.J. Super. 480, 487 (Law Div. 2000). Also confidential are mental impressions, legal conclusions, and opinions or theories of attorneys. *In Re Environmental Ins. Actions*, 259 N.J. Super. 308, 317 (App. Div. 1992). However, "a fine line exists between an attorney who provides legal services or advice...and one who performs essentially non-legal duties. An attorney who is not providing legal services or providing legal advice in some form does not qualify as a "lawyer" for purposes of the

[attorney-client] privilege....” Payton v. New Jersey Turnpike Authority, 148 N.J. 524, 550-551 (1997), citing United Jersey Bank v. Wolosoff, 196 N.J. Super. 553, 563 (App. Div. 1984).

The privilege has been extended to any person who is or may be the agent of either the attorney or the client. See State v. Kociolek, 23 N.J. 400 (1957). It includes any “necessary intermediaries...through whom the communications are made.” *Id.* at 413. The attorney-client privilege has also been held to be “fully applicable to communications between a public body and an attorney retained to represent it.” Matter of Grand Jury, *supra*, 241 N.J. Super. at 28, citing In Re State Commission of Investigation, 226 N.J. Super. 461 (App. Div. 1988).

The attorney-client privilege is waived if privileged communications are shared with persons who are not representatives of the client or the attorney; however, to be effective, a waiver of the attorney-client privilege must have been made “with knowledge of [the] right or privilege.” State v. J.G., 261 N.J. Super. 409, 419-21 (App. Div. 1993), certif. denied, 133 N.J. 436 (1993). Inadvertent disclosure through mere negligence or misfortune does not abrogate the attorney-client privilege. Trilogy Communications, Inc. v. Excom Realty, Inc., 279 N.J. Super. 442, 445 (Law Div. 1994). See generally, State v. Davis, 116 N.J. 341, 362-63 (1989).

The Custodian also contends that several other records had information redacted because the information pertained to personnel and contract matters or contract negotiations and was legally exempt from disclosure.

OPRA provides:

“[a] government record shall not include...information generated by or on behalf of public employers or public employees in connection with any grievance filed by or against an individual or in connection with collective negotiations, including documents and statements of strategy or negotiating position...” N.J.S.A. 47:1A-1.1.

OPRA also provides:

“[t]he provisions of this act...shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to...regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor ...” N.J.S.A. 47:1A-9.a.

OPRA further provides:

“...the personnel...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, except that an individual’s name, title, position, salary, payroll record, length of service,

date of separation and the reason therefore, and the amount and type of pension received shall be a government record...” N.J.S.A. 47:1A-10.

Accordingly, a custodian may lawfully redact information from a government record in connection with collective negotiations. Also, with the exception of certain specific information set forth in OPRA, a custodian may also redact information relating to a grievance filed against a present or former employee.

The Custodian’s Counsel further asserts that the June 4, 2007 executive session minutes contained redacted information for medical records and psychological matters privileged under HIPAA and N.J.S.A. 47:1A-1.1., N.J.S.A. 47:1A-9 and N.J.S.A. 47:1A-10.⁶ Although it is unlikely the Borough of Lavallette is a covered entity under HIPAA, the GRC need not analyze the applicability of the privacy provisions of HIPAA because medical records are exempt from disclosure pursuant to Executive Order 26 (McGreevey). Executive Order 26, in § 4b.1, excludes information relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation from the definition of a government record as provided in OPRA. This Executive Order is applicable to OPRA by operation of N.J.S.A. 47:1A-9.a.

The GRC, upon *in camera* examination, determined that several portions of the records responsive to the Complainant’s request were exempt from disclosure because they contained inter-agency or intra-agency advisory, consultative or deliberative material.

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

The deliberative process privilege is a doctrine that permits government agencies to withhold documents that reflect advisory opinions, recommendations and deliberations submitted as part of a process by which governmental decisions and policies are formulated. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150, 95 S. Ct. 1504, 1516, 44 L. Ed. 2d 29, 47 (1975). This long-recognized privilege is rooted in the concept that the sovereign has an interest in protecting the integrity of its deliberations. The earliest federal case adopting the privilege is Kaiser Alum. & Chem. Corp. v. United States, 157 F. Supp. 939 (1958). Federal district courts and circuit courts of appeal subsequently adopted the privilege and its rationale. United States v. Farley, 11 F.3d 1385, 1389 (7th Cir.1993).

The deliberative process privilege was discussed at length in In Re Liquidation of Integrity Insurance Co., 165 N.J. 75 (2000). There, the court addressed the question of whether the Commissioner of Insurance, acting in the capacity of Liquidator of a regulated entity, could protect certain records from disclosure which she claimed contained opinions, recommendations or advice regarding agency policy. *Id.* at 81. The court adopted a qualified deliberative process privilege based upon the holding of

⁶ HIPAA is an acronym for the Health Insurance Portability and Accountability Act of 1996. John Paff v. Borough of Lavallette, 2007-209– *In Camera* Findings and Recommendations of the Executive Director

McClain v. College Hospital, 99 N.J. 346 (1985), Liquidation of Integrity, supra, 165 N.J. at 88. In doing so, the court noted that:

“[a] document must meet two requirements for the deliberative process privilege to apply. First, it must have been generated before the adoption of an agency's policy or decision. In other words, it must be pre-decisional. ... Second, the document must be deliberative in nature, containing opinions, recommendations, or advice about agency policies. ... Purely factual material that does not reflect deliberative processes is not protected. ... Once the government demonstrates that the subject materials meet those threshold requirements, the privilege comes into play. In such circumstances, the government's interest in candor is the "preponderating policy" and, prior to considering specific questions of application, the balance is said to have been struck in favor of non-disclosure.” (Citations omitted.) *Id.* at 84-85.

The court further set out procedural guidelines based upon those discussed in McClain:

“[t]he initial burden falls on the state agency to show that the documents it seeks to shield are pre-decisional and deliberative in nature (containing opinions, recommendations, or advice about agency policies). Once the deliberative nature of the documents is established, there is a presumption against disclosure. The burden then falls on the party seeking discovery to show that his or her compelling or substantial need for the materials overrides the government's interest in non-disclosure. Among the considerations are the importance of the evidence to the movant, its availability from other sources, and the effect of disclosure on frank and independent discussion of contemplated government policies.” In Re Liquidation of Integrity, supra, 165 N.J. at 88, citing McClain, supra, 99 N.J. at 361-62, 492 A.2d 991.

Pursuant to the Council’s Order, an *in camera* examination was performed on the submitted records. The results of this examination are set forth in the following table:

Record or Redaction Number	Record Name/Date	Description of Record or Redaction	Custodian’s Explanation/ Citation for Non-disclosure or Redactions	Findings of the <i>In Camera</i> Examination⁷

⁷ **Unless expressly identified for redaction, everything in the record shall be disclosed.** For purposes of identifying redactions, unless otherwise noted a paragraph/new paragraph begins whenever there is an indentation and/or a skipped space(s). The paragraphs are to be counted starting with the first whole paragraph in each record and continuing sequentially through the end of the record. If a record is subdivided with topic headings, renumbering of paragraphs will commence under each new topic heading.
 John Paff v. Borough of Lavallette, 2007-209– *In Camera* Findings and Recommendations of the Executive Director

1	Executive session minutes dated April 23, 2007.	Redacted to remove all references to discussions regarding pending litigation which is subject to attorney-client privilege and contract negotiations.	Pursuant to <u>N.J.S.A. 47:1A-1.1.</u> , “government records” do not include records within the attorney-client privilege. Discussions regarding pending litigation between the Borough and its attorney are privileged.	Disclose: Does not contain any information within the attorney-client privilege and does not contain information in connection with collective negotiations.
2	Executive session minutes dated May 21, 2007.	Redacted to remove all references to discussions regarding pending litigation which is subject to attorney-client privilege, personnel and contract negotiations.	Pursuant to <u>N.J.S.A. 47:1A-1.1.</u> , “government records” do not include records within the attorney-client privilege. Discussions regarding pending litigation between the Borough and its attorney are privileged. <u>Toscano v. Borough of Lavallette</u> is scheduled for trial commencing November 11,	<u>Michael Visco – Building Maintenance Proposal .</u> Paragraph 1: Redact sentences 2 through 5. This is ACD material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1.</u> Sentences 4 and 5 are also exempt because they constitute information generated in connection with collective negotiations pursuant to <u>N.J.S.A. 47:1A-1.1.</u>

Sentences are to be counted in sequential order throughout each paragraph in each record. Each new paragraph will begin with a new sentence number. If only a portion of a sentence is to be redacted, the word in the sentence which the redaction follows or precedes, as the case may be, will be identified and set off in quotation marks. If there is any question as to the location and/or extent of the redaction, the GRC should be contacted for clarification before the record is redacted. The GRC recommends the redactor make a paper copy of the original record and manually "black out" the information on the copy with a dark colored marker, then provide a copy of the blacked-out record to the requester.

			<p>2008. The Borough asserts continued privilege under <u>N.J.S.A. 47:1A-1.1.</u> and <u>N.J.S.A. 47:1A-10.</u></p>	<p>Redact sentences 6 through 8. This is attorney-client privileged material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1.</u></p> <p>Redact balance of paragraph as ACD material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1.</u></p> <p><u>Toscano vs. Borough of Lavallette:</u> Paragraph 1: Redact. This is attorney-client privileged material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1.</u></p>
3	Executive session minutes dated June 4, 2007.	Redacted to remove all references to discussions regarding pending litigation which is subject to attorney-client privilege, personnel and contract matters.	<p>Pursuant to <u>N.J.S.A. 47:1A-1.1.</u>, “government records” do not include records within the attorney-client privilege. Discussions regarding pending litigation between the Borough and its attorney are privileged. Threatened</p>	<p><u>Potential Litigation:</u> Paragraph 1: Redact sentences 4 and 6, which suggest potential litigation and are ACD material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1.</u></p> <p><u>Personnel – Patrolman Ryan Tulko:</u> Paragraph 1: Redact the</p>

			<p>litigation is likely to be filed within three (3) months. Administrative action has been initiated and is still pending. Employee health and disability are in issue and the Borough asserts continued privilege under <u>N.J.S.A. 47:1A-1.1.</u>, <u>N.J.S.A. 47:1A-9</u> and <u>N.J.S.A. 47:1A-10</u>. The matter concerning Patrolman Ryan Tulko has been concluded but involves medical records and psychological matters which remain privileged under HIPAA and <u>N.J.S.A. 47:1A-1.1.</u>, <u>N.J.S.A. 47:1A-9</u> and <u>N.J.S.A. 47:1A-10</u>.</p>	<p>following sentences as ACD material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1.</u>: Sentences 2, 6, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 20. Sentences 7, 8, 12, 13, 14, 16, 20 and 21 are also exempt from disclosure because they constitute personnel records in the possession of a public agency and are exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-10</u>. Sentence 14 is also exempt from disclosure pursuant to Executive Order 26 (McGreevey) applicable to OPRA by operation of <u>N.J.S.A. 47:1A-9.a.</u></p> <p><u>PBA Employment Contract:</u> Paragraph 1: Redact. Contains information in connection with collective negotiations exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1.</u></p>
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4	Executive session minutes dated July 2, 2007.	Redacted to remove all references to discussions regarding pending litigation which is subject to attorney-client privilege, personnel and contract matters.	Pursuant to <u>N.J.S.A. 47:1A-1.1.</u> , “government records” do not include records within the attorney-client privilege. Discussions regarding pending litigation between the Borough and its attorney are privileged. The <u>Anticipated Litigation</u> paragraph refers to litigation that is still pending.	<p><u>Anticipated Litigation:</u> Paragraph 1: Redact. This is ACD material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1.</u> Sentences 4 through 6 are also attorney-client privileged, exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1.</u></p> <p><u>Verizon Wireless Contract:</u> Paragraph 1: Redact. This is ACD material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1.</u> Also, sentence 2, if disclosed, would give an advantage to competitors or bidders and is therefore exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u></p> <p><u>Dispatchers/ Record Clerks Contract:</u> Paragraph 1: Redact. This material is exempt from disclosure</p>

				<p>because it constitutes information generated in connection with collective negotiations pursuant to <u>N.J.S.A. 47:1A-1.1</u>. This paragraph also contains ACD material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u>.</p> <p><u>Public Works Contract:</u> Paragraph 1: Redact. This material is exempt from disclosure because it constitutes information generated in connection with collective negotiations pursuant to <u>N.J.S.A. 47:1A-1.1</u>. This paragraph also contains ACD material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u>.</p> <p><u>PBA Grievance:</u> Paragraph 1, redact sentences 2 through 6. These</p>
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				sentences contain information in connection with any grievance filed by or against an individual and is exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1.</u>
5	Executive session minutes dated July 16, 2007.	Redacted to remove all references to discussions regarding pending litigation which is subject to attorney-client privilege, personnel and contract matters.	Pursuant to <u>N.J.S.A. 47:1A-1.1.</u> , “government records” do not include records within the attorney-client privilege. Discussions regarding pending litigation between the Borough and its attorney are privileged. <u>Anticipated Litigation</u> section refers to a Notice of Violation from the Department of Environmental Protection which has been appealed and is still in litigation in the Office of Administrative Law and remains privileged under <u>N.J.S.A. 47:1A-1.</u>	<u>Verizon Wireless Agreement:</u> Paragraph 1: Redact everything after first sentence as ACD material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1.</u> <u>Dispatchers and Records Clerks Agreement:</u> Paragraph 1: Redact. This material is exempt from disclosure because it constitutes information generated in connection with collective negotiations pursuant to <u>N.J.S.A. 47:1A-1.1.</u> Also, this paragraph is exempt because it constitutes ACD material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-</u>

				<p>1.1.</p> <p><u>Anticipated Litigation:</u> Paragraph 2: Redact sentence 2 and sentence 3 as attorney-client privileged material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u>. It also constitutes ACD material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u>.</p> <p><u>Place to Place Transfer Application – Lenny’s Pizzeria and Restaurant:</u> Redact sentences 2 through 4 as attorney-client privileged material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u>.</p> <p><u>Personnel:</u> This section of the record has already been disclosed to the Complainant in unredacted form.</p>
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Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian failed to provide nine (9) copies of the redacted and unredacted documents and a legal certification that the documents provided are the documents requested by the Council for the *in camera* inspection, the Custodian has not complied with the Council's June 25, 2008 Interim Order.

2. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order and provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.**

Prepared By: John E. Stewart
Case Manager/*In Camera* Attorney

Approved By: Catherine Starghill, Esq.
Executive Director

December 10, 2008



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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DAVID FLEISHER
CATHERINE STARGHILL Esq., Executive Director

INTERIM ORDER

June 25, 2008 Government Records Council Meeting

John Paff
Complainant

Complaint No. 2007-209

v.

Borough of Lavallette (Ocean)
Custodian of Record

At the June 25, 2008 public meeting, the Government Records Council ("Council") considered the June 18, 2008 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. By majority vote, the Council adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Although the Custodian responded to the Complainant's July 31, 2007 OPRA request by providing the redacted executive session minutes within the statutorily mandated seven (7) business days time frame required by N.J.S.A. 47:1A-5.i., the Custodian's response was legally insufficient under OPRA because he failed to provide a written response setting forth a detailed and lawful basis for each redaction. *See Paff v. Township of Plainsboro*, GRC Complaint No. 2005-29, (July 2005)(ordering the custodian to provide redacted executive session minutes with a detailed and lawful basis for each redacted part.). *See also Barbara Schwarz v. NJ Department of Human Services*, GRC Complaint No. 2004-60, (February, 2005)(setting forth the proposition that specific citations to the law that allows a denial of access are required at the time of the denial.). Therefore, the Custodian violated OPRA pursuant to N.J.S.A. 47:1A- 5.g. and has not borne his burden of proving the denial of access to the redacted portions was authorized by law pursuant to N.J.S.A. 47:1A-6.
2. Pursuant to Paff v. Department of Labor, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the requested executive session minutes to determine the validity of the Custodian's assertion that the redacted portions contain attorney-client privileged information which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.



3. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted documents, a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, that the documents provided are the documents 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.**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney's fees pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 25th Day of June, 2008

Robin Berg Tabakin, Chairman
Government Records Council

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

David Fleisher, Secretary
Government Records Council

Decision Distribution Date: July 1, 2008

¹ The *in camera* documents 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 document and/or each redaction asserted and the lawful basis for the denial.

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 25, 2008 Council Meeting**

**John Paff¹
Complainant**

GRC Complaint No. 2007-209

v.

**Borough of Lavallette (Ocean)²
Custodian of Records**

Records Relevant to Complaint:³

1. Minutes of Council's April 23, 2007 executive session
2. Minutes of Council's May 21, 2007 executive session
3. Minutes of Council's June 4, 2007 executive session
4. Minutes of Council's July 2, 2007 executive session
5. Minutes of Council's July 16, 2007 executive session

Request Made: July 31, 2007

Response Made: August 7, 2007

Custodian: Christopher F. Parlow⁴

GRC Complaint Filed: September 12, 2007

Background

July 31, 2007

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

August 7, 2007

Custodian's Response to the OPRA request. The Custodian responds to the Complainant's OPRA request on the fifth (5th) business day following receipt of such request, providing redacted copies of the executive session minutes for each of the dates requested.⁵

September 12, 2007

¹ Represented by Walter M. Luers, Esq., of Law Offices of Walter M. Luers, LLC (Atlantic Highlands, NJ).

² Represented by Eric M. Bernstein, Esq., of Eric M. Bernstein & Associates, LLC (Warren, NJ).

³ Complainant requested additional records that are not relevant to this complaint.

⁴ Borough of Lavallette Municipal Clerk. April 23, 2007 executive session minutes were taken by Linda Vizzone, Deputy Municipal Clerk.

⁵ The parties agree that the records were provided on or about this date.

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

- Complainant’s OPRA request dated July 31, 2007.
- Redacted executive session minutes for April 23, 2007, May 21, 2007, June 4, 2007, July 2, 2007, and July 16, 2007.

Complainant’s Counsel asserts that the Custodian denied access to the executive session minutes because he provided redacted copies of the minutes and did not provide specific reasons for the redactions. Counsel cites Paff v. Township of Old Bridge, GRC Complaint No. 2005-123 (April 11, 2006) to support his assertion that custodians must state specific reasons when denying access to documents. Further, Counsel argues that the Custodian bears the burden of proving the redactions are necessary based upon Spaulding v County of Passaic, GRC Complaint No. 2004-199 (September 21, 2006). Complainant’s Counsel contends that, because the Custodian never provided the basis for the redactions, the Custodian has not met his burden of proof that the redactions were necessary and as a result, unlawfully denied access to the redacted portions of the requested records. Complainant’s Counsel requests that the GRC issue a decision:

1. Finding that the Custodian violated OPRA by redacting records without justification;
2. Ordering the Custodian to provide access to unredacted copies of the requested executive session minutes;
3. Finding that Complainant is a prevailing party and awarding reasonable attorneys fees pursuant to N.J.S.A. 47:1A-6;
4. Fining the Custodian for violating OPRA if it is found that the Custodian knowingly and willfully violated OPRA.

September 12, 2007

Offer of Mediation sent to both parties.

September 14, 2008

The Custodian agreed to mediation.

September 17, 2008

Complainant declined mediation of this complaint.

September 25, 2008

Request for the Statement of Information sent to the Custodian.

September 24, 2007

Custodian’s Statement of Information (“SOI”) attaching redacted executive session minutes for April 23, 2007, May 21, 2007, June 4, 2007, July 2, 2007, and July 16, 2007.

The Custodian certifies that he provided the Complainant copies of the requested executive session minutes; however, the minutes were redacted to remove any and all references to pending litigation. Custodian asserts that a discussion of pending and/or threatened litigation between the Borough and its attorney comes within the attorney-

client privilege exemption pursuant to N.J.S.A. 47:1A-1.1. Further, the Custodian contends that a review of the complete minutes, prior to the redactions, confirms that the redacted portions contain attorney-client privileged material.

October 5, 2007

The Complainant's Response to the Custodian's SOI. Complainant's Counsel alleges that the Custodian admitted an OPRA violation because he certified that the redacted records attached to the SOI are true copies of the records provided and the Custodian failed to provide a legal justification or statutory citation for each redaction as required by Albrecht v. NJ Department of the Treasury, GRC Complaint No. 2006-191, (July 2007). Further, Complainant's Counsel asserts that the Custodian overstates the scope of the attorney-client privilege with regard to the redactions made. Counsel contends the privilege applies only to communications made in professional confidence between an attorney and his/her client to assist in giving legal advice and cites Coyle v. Estate of Simon, 247 N.J. Super. 277, 281 (App. Div. 1991); Payton v. New Jersey Turnpike Authority, 148 N.J. 524, 551 (1997). Additionally, Counsel quotes Seacoast Builders Corp. v. Rutgers, 358 N.J. Super. 524, 541 (App. Div. 2003) for the proposition that the "need for secrecy must be demonstrated with specificity as to each document." Complainant's Counsel disputes the Custodian's assertion that a review of the redacted minutes can reveal whether the redactions were proper. Complainant's Counsel requests that the GRC conduct an *in camera* review of the minutes to determine whether the Custodian's redactions are appropriate.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

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

Additionally, OPRA defines a government record as:

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

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

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

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

OPRA 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] as amended and supplemented, 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 further provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access to a government record or deny a request for access to a government record as soon as possible, but not later than seven business days after receiving the request, provided that the record is currently available and not in storage or archived.” N.J.S.A. 47:1A-5.i.

Further, OPRA holds that:

“[t]he provisions of this act ... *shall not abrogate or erode* any executive or legislative privilege or grant of confidentiality heretofore established or recognized by the Constitution of this State, statute, court rule or judicial case law, which privilege or grant of confidentiality may duly be claimed to restrict public access to a public record or government record.” (Emphasis added.) N.J.S.A. 47:1A-9.b.

Although the Custodian responded to the Complainant’s July 31, 2007 OPRA request by providing the redacted executive session minutes within the statutorily mandated seven (7) business days time frame required by N.J.S.A. 47:1A-5.i., the Custodian’s response was legally insufficient under OPRA because he failed to provide a written response setting forth a detailed and lawful basis for each redaction. *See Paff v. Township of Plainsboro*, GRC Complaint No. 2005-29, (July 2005)(ordering the custodian to provide redacted executive session minutes with a detailed and lawful basis for each redacted part.). *See also, Barbara Schwarz v. NJ Department of Human Services*, GRC Complaint No. 2004-60, (February, 2005)(setting forth the proposition that specific citations to the law that allows a denial of access are required at the time of the denial.).

Therefore, the Custodian violated OPRA pursuant to N.J.S.A. 47:1A-5.g and has not borne his burden of proving the denial of access to the redacted portions was authorized by law pursuant to N.J.S.A. 47:1A-6.

Moreover, the Complainant asserts that the Custodian violated OPRA by redacting records without justification. Conversely, the Custodian asserts that each redaction was made to remove all references to pending litigation and was proper pursuant to the attorney-client privilege exemption in N.J.S.A. 47:1A-1.1.

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 GRC⁶ 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 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.”

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.”

Therefore, pursuant to Paff, supra, the GRC must conduct an *in camera* review of the requested executive session minutes to determine the validity of the Custodian’s assertion that the redacted portions contain attorney-client privileged information which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

⁶ Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005).
John Paff v. Borough of Lavallette, 2007-209– Findings and Recommendations of the Executive Director

Whether the Custodian’s delay in access to the requested records rises 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.

Whether the Complainant is a “prevailing party” pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney’s fees?

The Council defers analysis of whether the Complainant is a prevailing party pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney’s fees pending the Custodian’s compliance with the Council’s Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Although the Custodian responded to the Complainant’s July 31, 2007 OPRA request by providing the redacted executive session minutes within the statutorily mandated seven (7) business days time frame required by N.J.S.A. 47:1A-5.i., the Custodian’s response was legally insufficient under OPRA because he failed to provide a written response setting forth a detailed and lawful basis for each redaction. *See Paff v. Township of Plainsboro*, GRC Complaint No. 2005-29, (July 2005)(ordering the custodian to provide redacted executive session minutes with a detailed and lawful basis for each redacted part.). *See also Barbara Schwarz v. NJ Department of Human Services*, GRC Complaint No. 2004-60, (February, 2005)(setting forth the proposition that specific citations to the law that allows a denial of access are required at the time of the denial.). Therefore, the Custodian violated OPRA pursuant to N.J.S.A. 47:1A- 5.g. and has not borne his burden of proving the denial of access to the redacted portions was authorized by law pursuant to N.J.S.A. 47:1A-6.
2. Pursuant to Paff v. Department of Labor, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the requested executive session minutes to determine the validity of the Custodian’s assertion that the redacted portions contain attorney-client privileged information which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
3. **The Custodian must deliver⁷ to the Council in a sealed envelope nine (9) copies of the requested unredacted documents, a document or redaction index⁸, as well as a legal certification from the Custodian, in accordance with**

⁷ The *in camera* documents 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.

⁸ The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

N.J. Court Rule 1:4-4, that the documents provided are the documents 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.

4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney's fees pending the Custodian's compliance with the Council's Interim Order.

Prepared By:

Elizabeth Ziegler-Sears, Esq.
Case Manager/Staff Attorney

Approved By:

Catherine Starghill, Esq.
Executive Director

June 18, 2008