



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

March 29, 2011 Government Records Council Meeting

Joan McGee  
Complainant

Complaint No. 2007-305

v.

Township of East Amwell (Hunterdon)  
Custodian of Record

At the March 29, 2011 public meeting, the Government Records Council (“Council”) considered the March 22, 2011 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the amended findings and recommendations. The Council, therefore, finds that:

1. Because there is no evidence in the record to support a conclusion that the Complainant had full knowledge of her legal rights to confidentiality in the e-mails requested pursuant to N.J.S.A. 47:1A-10 and intended to surrender such rights when she signed and submitted the OPRA request form, the Council’s September 30, 2009 Decision and Order remains undisturbed. *See* W. Jersey Title & Guar. Co. v. Indus. Trust Co., 27 N.J. 144, 152 (1958); County of Morris v. Fauver, 153 N.J. 80, 104-105 (1998); Merchs. Indem. Corp. of N.Y. v. Eggleston, 68 N.J. Super. 235, 254 (App. Div. 1961), *aff’d*, 37 N.J. 114 (1962); Country Chevrolet, Inc. v. Township of N. Brunswick Planning Bd., 190 N.J. Super. 376, 380 (App. Div. 1983); Scibek v. Longette, 339 N.J. Super. 72, 82-84 (App. Div. 2001); Lor-Mar/Toto, Inc. v. 1<sup>st</sup> Constitution Bank, 376 N.J. Super. 520, 536 (App. Div. 2005); Paff v. Byrnes, 385 N.J. Super. 574 (App. Div. 2006).
2. Because the Council has no authority under N.J.S.A. 47:1A-1 et seq. to award a party costs in pursuing an appeal, the Complainant’s request for such costs in this matter is denied.

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 29<sup>th</sup> Day of March, 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: April 1, 2011**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
March 29, 2011 Council Meeting**

**Joan McGee<sup>1</sup>  
Complainant**

**GRC Complaint No. 2007-305**

v.

**Township of East Amwell (Hunterdon)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Review all e-mails between or among Tim Matheny, Don Reilly, Richard Cushing, Esq. and Barbara Wolfe after December 31, 2006.<sup>3</sup>

**Request Made:** October 23, 2007

**Response Made:** November 1, 2007

**Custodian:** Teresa Stahl

**GRC Complaint Filed:** December 6, 2007<sup>4</sup>

**Background**

**September 30, 2009**

Government Records Council's ("Council") Decision and Order. At its September 30, 2009 public meeting, the Council considered the September 23, 2009 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. The Custodian in this complaint delivered to the Council on August 19, 2009 (within five (5) business days from receipt of the Council's Interim Order) a legal certification, in accordance with N.J. Court Rule 1:4-4, that the e-mails have been disclosed to the Complainant as ordered. Therefore, the Custodian has complied with the Council's August 11, 2009 Interim Order.
2. The Complainant has failed to establish in the request for reconsideration of the Council's August 11, 2009 Interim Order that 1) the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, and rendered an arbitrary, capricious or unreasonable decision, said request for

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

<sup>2</sup> Represented by Richard Cushing, Esq., Gebhardt & Keifer (Clinton, NJ).

<sup>3</sup> Other documents were requested which are not relevant to this complaint.

<sup>4</sup> The GRC received the Denial of Access Complaint on said date.

reconsideration is denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

3. Although the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. because she responded verbally to the Complainant's OPRA request and did not provide a written explanation for the denial of access to e-mails requested until the thirteenth (13<sup>th</sup>) business day following receipt of the OPRA request resulting in a "deemed" denial, the Custodian did comply with the Council's April 29, 2009 and August 11, 2009 Interim Orders by providing the requested e-mails to the Council for an *in camera* review and the redacted e-mails to the Complainant pursuant to the *in camera* review findings and recommendations. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's "deemed" denial of access appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

#### **October 7, 2009**

Council's Decision and Order distributed to the parties.

#### **November 5, 2009**

The Complainant appeals the case to the Superior Court of New Jersey, Appellate Division.

#### **November 16, 2010**

The Superior Court of New Jersey, Appellate Division, remands the matter to the GRC to determine whether the Complainant effectively waived her right to confidentiality under OPRA as to the release of the requested personnel records because the Custodian had no opportunity to present evidence before the GRC on this issue, or whether there are countervailing concerns or policies that would preclude release of the records.

#### **January 14, 2011**

Letter from the GRC to Custodian's Counsel.<sup>5</sup> The GRC states that the Appellate Division issued its decision on November 16, 2010 in the Complainant's appeal. The GRC further states that specifically, the Appellate Division remanded this matter to the GRC to "determine whether McGee effectively waived her right to confidentiality under OPRA as to those [four e-mails which the GRC determined concern purely 'personnel

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<sup>5</sup> The Complainant was copied on this letter.

matters’]” and noted that East Amwell Township had no opportunity to present evidence before the GRC on this issue prior to the Complainant’s appeal. The GRC requests that Counsel provide any factual evidence and legal argument supporting East Amwell Township’s position regarding this issue to the GRC by January 28, 2011.

**March 18, 2011**

Telephone call from the GRC to Custodian’s Counsel. The GRC states that on January 14, 2011, the GRC requested the Custodian to provide any factual evidence and legal argument supporting East Amwell Township’s position by January 28, 2011 and did not receive a response. The GRC states that if the Township wishes to submit evidence or argument in support of its position, Counsel should call the GRC.

**March 18, 2011**

E-mail from the GRC to the Complainant. The GRC asks the Complainant to submit any facts or argument in support of her contention that she waived her right of confidentiality in the requested records. The GRC asks that the Complainant submit such materials by March 22, 2011.

**March 21, 2011**

Telephone call from Custodian’s Counsel to the GRC. Custodian’s Counsel states that they will review the matter and determine what, if anything, to submit by March 22, 2011.

**March 22, 2011**

E-mail from Custodian’s Counsel to the GRC. Custodian’s Counsel states that the Township was not aware of any waiver by the Complainant of her rights to confidentiality in the four (4) e-mails which the GRC determined to be personnel records in its *in camera* review at the time the GRC was reviewing the case. Counsel argues that waiver of a right must be voluntary and there must be a clear act of the party waiving the right demonstrating knowledge of the right and the intent to waive it. County of Morris v. Fauver, 153 N.J. 80, 104-105 (1998); Lor-Mar/Toto, Inc. v. 1<sup>st</sup> Constitution Bank, 376 N.J.Super. 520, 536 (App. Div. 2005); Scibek v. Longette, 339 N.J.Super. 72, 82-84 (App. Div. 2001). Counsel further states that there was no evidence before the GRC constituting a clear act of waiver with knowledge of the right waived. Counsel asserts that the GRC should find that the Complainant had not waived her right to confidentiality in her personnel records at the time it reached its decision.

However, Counsel further states that on November 19, 2010, just after the Appellate Division rendered its decision in this matter, the Complainant filed another OPRA request with the Township via e-mail seeking, among other things, the personnel e-mails at issue in the Appellate Division decision. In such OPRA request, the Complainant specifically waived her right to confidentiality in such e-mails. Counsel states that he responded to the OPRA request by letter dated December 1, 2010, explaining the Township’s legal position regarding the records requested and confirming an extension of time to reply due to the absence of the Township Clerk for medical reasons. Counsel further states that when the Township Clerk returned to work in January, 2011, the Township provided Ms. McGee with copies of the requested e-mails. Counsel states that the Complainant therefore has the personnel e-mails requested in this

matter regardless of whether she waived her right of confidentiality when the matter was before the GRC.

### **March 22, 2011**

E-mail from the Complainant to the GRC. The Complainant states that she did waive her right to confidentiality under OPRA, the common law and her right to privacy regarding all material in the Township's possession concerning her employment and issues regarding her termination. The Complainant states that Complainant's Counsel and the Township have already acknowledged her right to some of the e-mails requested and sent some of them to her after the Appellate Division rendered its decision. The Complainant further states that her issues concerning all of the requested e-mails have been resolved with the termination of her employment and settlement of her lawsuit, and that all issues discussed in the requested e-mails have been concluded.

The Complainant states that she is hereby seeking "reasonable costs" to pursue this appeal to the Appellate Division of \$200 filing fee and \$21.00 in copying costs, as per the Appellate Division's decision on McGee v. Township of East Amwell (Hunterdon), GRC Complaint No. 2006-165<sup>6</sup> decided November 2010.<sup>7</sup>

### **Analysis**

#### **Whether the Complainant effectively waived her right to confidentiality under OPRA as to those four (4) e-mails which the GRC determined concern purely personnel matters?**

OPRA provides that:

"government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access accorded by [OPRA] ...shall be construed in favor of the public's right of access ... all government records shall be subject to public access unless exempt from such access by [OPRA] ...." N.J.S.A.47:1A-1.

OPRA also provides that:

"Notwithstanding the provisions of [OPRA] ...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.

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<sup>6</sup> The Appellate Division's decision rendered November 2010 concerned McGee v. Township of East Amwell (Hunterdon), GRC Complaint No. 2007-305, the matter which is the subject of this Supplemental Findings and Recommendations.

<sup>7</sup> The Complainant makes additional arguments and asks several questions regarding the state of the law which are not relevant to the adjudication of this matter.

OPRA further provides that:

“personnel or pension records of any individual shall be accessible...when authorized by an individual in interest....” N.J.S.A. 47:1A-10.

In the matter now before the Council, the Superior Court of New Jersey, Appellate Division, required the Council to determine whether the Complainant herein effectively waived the confidentiality in her personnel records accorded to her by N.J.S.A. 47:1A-10 and is therefore entitled to disclosure of the four (4) requested e-mails which the Council determined in its August 11, 2009 Interim Order concern purely “personnel matters.”

The evidence of record in this matter discloses that the Complainant submitted an OPRA request on October 23, 2007 seeking review of all e-mails between or among Tim Matheny, Don Reilly, Richard Cushing, Esq. and Barbara Wolfe after December 31, 2006. The evidence of record further discloses that the Township Attorney asserted that twenty (20) of the e-mails requested by the Complainant were subject to the attorney-client privilege and potentially contained advisory, consultative and deliberative material, and were therefore exempt from disclosure under N.J.S.A. 47:1A-1.1. As noted by the Appellate Division, the GRC determined that the following e-mails were exempt from disclosure as personnel records:

Record Name/Date	Description of Record or Redaction	Custodian’s Explanation/ Citation for Non-disclosure or Redactions	Findings of the In Camera Examination
E-mail from Don Reilly to Larry Tatsch (with copies to Larry Tatsch, Fred Gardner, Timothy Matheny, Barbara Wolfe and Richard Cushing) dated January 18, 2007 8:09 a.m.	Title: RE: Check List, etc.	Information exempt from disclosure pursuant to the attorney-client privilege for pending litigation pursuant to <u>N.J.S.A. 47:1A-1.1</u> and personnel matters pursuant to <u>N.J.S.A. 47:1A-10</u> involving the Complainant.	This e-mail is exempt from disclosure because its contents are exempt as personnel matters pursuant to <u>N.J.S.A. 47:1A-10</u> .
E-mail from Timothy Matheny to Larry Tatsch and Don Reilly (with copies to Fred Gardner, Barbara Wolfe, and Richard	Title: RE: Check List, etc.	Information exempt from disclosure pursuant to the attorney-client privilege for pending litigation pursuant to	This e-mail is exempt from disclosure because its contents are exempt as personnel matters pursuant to <u>N.J.S.A. 47:1A-10</u> .

Cushing) dated January 18, 2007 11:47 a.m.		<u>N.J.S.A.</u> 47:1A-1.1 and personnel matters pursuant to <u>N.J.S.A.</u> 47:1A-10 involving the Complainant.	
E-mail from Fred Gardner to Timothy Matheny, Larry Tatsch, and Don Reilly (with copies to Barbara Wolfe and Richard Cushing) dated January 18, 2007 4:12 p.m.	Title: RE: Check List, etc.	Information exempt from disclosure pursuant to the attorney-client privilege for pending litigation pursuant to <u>N.J.S.A.</u> 47:1A-1.1 and personnel matters pursuant to <u>N.J.S.A.</u> 47:1A-10 involving the Complainant.	This e-mail is exempt from disclosure because its contents are exempt as personnel matters pursuant to <u>N.J.S.A.</u> 47:1A-10.
E-mail from Barbara Wolfe to Timothy Matheny (with copy to Richard Cushing) dated January 20, 2007 9:29 a.m.	Title: RE: Check List, etc.	Information exempt from disclosure pursuant to the attorney-client privilege for pending litigation pursuant to <u>N.J.S.A.</u> 47:1A-1.1 and personnel matters pursuant to <u>N.J.S.A.</u> 47:1A-10 involving the Complainant.	This e-mail is exempt from disclosure because its contents are exempt as personnel matters pursuant to <u>N.J.S.A.</u> 47:1A-10.

The question before the Council is whether the evidence of record indicates that the Complainant voluntarily and intentionally waived the right of confidentiality afforded to these personnel records under N.J.S.A. 47:1A-10 and is therefore entitled to disclosure of such records.

Waiver is the voluntary and intentional relinquishment of a known right. W. Jersey Title & Guar. Co. v. Indus. Trust Co., 27 N.J. 144, 152 (1958). An effective waiver requires a party to have full knowledge of his legal rights and intend to surrender those rights. *Id.* at 153. The intent to waive need not be stated expressly, provided the circumstances clearly show that the party knew of the right and then abandoned it, either by design or indifference. *See Merchs. Indem. Corp. of N.Y. v. Eggleston*, 68 N.J. Super. 235, 254 (App. Div. 1961), *aff'd*, 37 N.J. 114 (1962). The party waiving a known right



must do so clearly, unequivocally, and decisively. Country Chevrolet, Inc. v. Township of N. Brunswick Planning Bd., 190 N.J. Super. 376, 380 (App. Div. 1983).

In Paff v. Byrnes, 385 N.J. Super. 574 (App. Div. 2006), the Appellate Division determined that an attorney hired by a municipality, who was required by the township's ordinance to obtain a Certificate of Ethical Conduct from the New Jersey Office of Attorney Ethics in order to continue his employment, waived his right to confidentiality of the attendant ethics history report under N.J. Ct. R. 1:20-9 when he voluntarily completed the Authorization and Release form which permitted the release of his personal disciplinary records to the township. *Id.* at 579-80. The Appellate Division therefore reversed the trial court's grant of summary judgment in favor of the township clerk and remanded the matter to the trial court for further consideration. *Id.*

In the matter before the Council, there is no evidence in the record to indicate that the Complainant herein knew of her rights to confidentiality in the e-mails requested afforded pursuant to N.J.S.A. 47:1A-10 and intentionally waived the right to confidentiality of her personnel records when she signed and submitted the OPRA request form. The record before the Council discloses that the Complainant first raised the issue of waiver during the pendency of her appeal before the Superior Court of New Jersey, Appellate Division. By e-mail to the GRC dated March 22, 2011, the Custodian argued that there was no evidence of the Complainant's knowing and voluntary waiver of her rights to confidentiality in the requested e-mails at the time of the GRC's consideration of this matter. By e-mail to the GRC dated March 22, 2011, the Complainant asserted that she had waived her rights of confidentiality in the requested e-mails, but submitted no evidence nor any citation to the record before the GRC which would support this contention. The Complainant, moreover, stated that her issues concerning all of the requested e-mails have been resolved with the termination of her employment and settlement of her lawsuit, and that all issues discussed in the requested e-mails have been concluded.

Therefore, because there is no evidence in the record to support a conclusion that the Complainant had full knowledge of her legal rights to confidentiality in the e-mails requested afforded pursuant to N.J.S.A. 47:1A-10 and intended to surrender such rights when she signed and submitted the OPRA request form, the Council's September 30, 2009 Decision and Order remains undisturbed. *See W. Jersey Title & Guar. Co. v. Indus. Trust Co.*, 27 N.J. 144, 152 (1958); County of Morris v. Fauver, 153 N.J. 80, 104-105 (1998); Merchs. Indem. Corp. of N.Y. v. Eggleston, 68 N.J. Super. 235, 254 (App. Div. 1961), *aff'd*, 37 N.J. 114 (1962); Country Chevrolet, Inc. v. Township of N. Brunswick Planning Bd., 190 N.J. Super. 376, 380 (App. Div. 1983); Scibek v. Longette, 339 N.J. Super. 72, 82-84 (App. Div. 2001); Lor-Mar/Toto, Inc. v. 1<sup>st</sup> Constitution Bank, 376 N.J. Super. 520, 536 (App. Div. 2005); Paff v. Byrnes, 385 N.J. Super. 574 (App. Div. 2006).

**Whether the Complainant is entitled to the reasonable costs of pursuing this appeal to the Superior Court of New Jersey, Appellate Division?**

OPRA provides that a requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-7.f.

OPRA also provides in pertinent part that:

“The council shall, by a majority vote of its members, render a decision as to whether the record which is the subject of the complaint is a government record which must be made available for public access pursuant to [OPRA] .... 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 [N.J.S.A. 47:1A-6].... A decision of the council may be appealed to the Appellate Division of the Superior Court.” N.J.S.A. 47:1A-7.e.

OPRA further provides that:

“A public official, officer, employee or custodian who knowingly and willfully violates [OPRA], ... and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty of \$1,000 for an initial violation, \$2,500 for a second violation that occurs within 10 years of an initial violation, and \$5,000 for a third violation that occurs within 10 years of an initial violation. This penalty shall be collected and enforced in proceedings in accordance with the "Penalty Enforcement Law of 1999," P.L.1999, c.274 (C.2A:58-10 et seq.), and the rules of court governing actions for the collection of civil penalties. The Superior Court shall have jurisdiction of proceedings for the collection and enforcement of the penalty imposed by this section.” N.J.S.A. 47:1A-11.a.

The Complainant herein has requested that the Council award her the “reasonable costs” attendant upon her pursuit of this appeal in the Superior Court of New Jersey, Appellate Division, *to wit*, a \$200 filing fee and \$21.00 in copying costs. Pursuant to OPRA, the Council has the authority to award a prevailing party attorney fees and to levy a civil penalty upon a public official, officer, employee or custodian who knowingly and willfully violates OPRA and who is found to have unreasonably denied access to requested government records under the totality of the circumstances. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-7.e.; N.J.S.A. 47:11.a. However, the Council has no authority under N.J.S.A. 47:1A-1 et seq. to award a party costs incurred in pursuing an appeal.

Therefore, because the Council has no authority under N.J.S.A. 47:1A-1 et seq. to award a party costs in pursuing an appeal, the Complainant’s request for such costs in this matter is denied.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Because there is no evidence in the record to support a conclusion that the Complainant had full knowledge of her legal rights to confidentiality in the e-

mails requested afforded pursuant to N.J.S.A. 47:1A-10 and intended to surrender such rights when she signed and submitted the OPRA request form, the Council's September 30, 2009 Decision and Order remains undisturbed. *See* W. Jersey Title & Guar. Co. v. Indus. Trust Co., 27 N.J. 144, 152 (1958); County of Morris v. Fauver, 153 N.J. 80, 104-105 (1998); Merchs. Indem. Corp. of N.Y. v. Eggleston, 68 N.J. Super. 235, 254 (App. Div. 1961), *aff'd*, 37 N.J. 114 (1962); Country Chevrolet, Inc. v. Township of N. Brunswick Planning Bd., 190 N.J. Super. 376, 380 (App. Div. 1983); Scibek v. Longette, 339 N.J. Super. 72, 82-84 (App. Div. 2001); Lor-Mar/Toto, Inc. v. 1<sup>st</sup> Constitution Bank, 376 N.J. Super. 520, 536 (App. Div. 2005); Paff v. Byrnes, 385 N.J. Super. 574 (App. Div. 2006).

2. Because the Council has no authority under N.J.S.A. 47:1A-1 et seq. to award a party costs in pursuing an appeal, the Complainant's request for such costs in this matter is denied.

Prepared By: Karyn Gordon, Esq.  
In House Counsel

Approved By: Catherine Starghill, Esq.  
Executive Director

March 22, 2011



**State of New Jersey**  
GOVERNMENT RECORDS COUNCIL  
101 SOUTH BROAD STREET  
PO BOX 819  
TRENTON, NJ 08625-0819

JON S. CORZINE  
Governor

CHARLES A. RICHMAN  
Acting Commissioner

**FINAL DECISION**

**September 30, 2009 Government Records Council Meeting**

Joan McGee  
Complainant

Complaint No. 2007-305

v.

Township of East Amwell (Hunterdon)  
Custodian of Record

At the September 30, 2009 public meeting, the Government Records Council (“Council”) considered the September 23, 2009 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 in this complaint delivered to the Council on August 19, 2009 (within five (5) business days from receipt of the Council’s Interim Order) a legal certification, in accordance with N.J. Court Rule 1:4-4, that the e-mails have been disclosed to the Complainant as ordered. Therefore, the Custodian has complied with the Council’s August 11, 2009 Interim Order.
2. The Complainant has failed to establish in the request for reconsideration of the Council’s August 11, 2009 Interim Order that 1) the GRC's decision is based upon a “palpably incorrect or irrational basis” or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, and rendered an arbitrary, capricious or unreasonable decision, said request for reconsideration is denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).
3. Although the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. because she responded verbally to the Complainant’s OPRA request and did not provide a written explanation for the denial of access to e-mails requested until the thirteenth (13<sup>th</sup>) business day following receipt of the OPRA request resulting in a “deemed”



denial, the Custodian did comply with the Council's April 29, 2009 and August 11, 2009 Interim Orders by providing the requested e-mails to the Council for an *in camera* review and the redacted e-mails to the Complainant pursuant to the *in camera* review findings and recommendations. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's "deemed" denial of access appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

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 30<sup>th</sup> Day of September, 2009

Robin Berg Tabakin, Chair  
Government Records Council

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

Janice L. Kovach, Secretary  
Government Records Council

**Decision Distribution Date: October 7, 2009**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
September 30, 2009 Council Meeting**

**Joan McGee<sup>1</sup>**  
**Complainant**

**GRC Complaint No. 2007-305**

**v.**

**Township of East Amwell (Hunterdon)<sup>2</sup>**  
**Custodian of Records**

**Records Relevant to Complaint:** Review all e-mails between or among Tim Matheny, Don Reilly, Richard Cushing, Esq. and Barbara Wolfe after December 31, 2006.<sup>3</sup>

**Request Made:** October 23, 2007

**Response Made:** November 1, 2007

**Custodian:** Teresa Stahl

**GRC Complaint Filed:** December 6, 2007<sup>4</sup>

**Background**

**August 11, 2009**

Government Records Council's Interim Order. At the August 11, 2009 public meeting, the Government Records Council ("Council") considered the August 4, 2009 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. The Custodian in this complaint delivered to the Council on May 8, 2009 (within five (5) business days from receipt of the Council's Interim Order) in a sealed envelope nine (9) copies of the requested unredacted documents, 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 documents provided are the documents requested by the Council for the *in camera* inspection. Therefore, the Custodian has complied with the Council's April 29, 2009 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**

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

<sup>2</sup> Represented by Richard Cushing, Esq. of Gebhardt & Keifer (Clinton, NJ).

<sup>3</sup> Other documents were requested which are not relevant to this complaint.

<sup>4</sup> The GRC received the Denial of Access Complaint on said date.

**forth in the table within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.**

**August 13, 2009**

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

**August 18, 2009**

Custodian's response to the Council's Interim Order. The Custodian certifies that she is the custodian and that she disclosed to the Complainant those e-mails the Council ordered be disclosed on August 18, 2009.

**August 19, 2009<sup>5</sup>**

Complainant's Request for Reconsideration. The Complainant requests that the GRC reconsider the August 11, 2009 Interim Order pursuant to *N.J.A.C. 5:105-2.10*. The Complainant asserts that the GRC reconsider this matter based upon (a) mistake and (b) extraordinary circumstances.

Specifically, the Complainant argues that the Council's *in camera* examination of e-mails 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, and 17 must be reconsidered because these e-mails, which the GRC found exempt from disclosure as (1) inter-agency or intra-agency advisory, consultative or deliberative material ("ACD"), (2) personnel matters, and/or (3) attorney-client privilege, do not qualify under any of these exemptions because Barbara Wolfe (who was either the sender, recipient or copied on these e-mails) is not an official of the Township when these e-mails were created. The Complainant asserts that these e-mails were created between January 2, 2007 through January 25, 2007, but that Ms. Wolfe ceased being a Township official on December 31, 2006. Therefore, the Complainant reasons that Ms. Wolfe's participation in the e-mails waives the attorney-client privilege and the ACD exemption, as well as any confidentiality given to personnel discussions among Township officials.

**August 27, 2009<sup>6</sup>**

Custodian's Objection to the Complainant's Request for Reconsideration. The Custodian states that the Complainant asserts that reconsideration is appropriate of the GRC's August 11, 2009 Interim Order in this matter because of mistake and extraordinary circumstances. The Custodian asserts that the Complainant merely repeats the arguments she made in her Denial of Access Complaint without demonstrating either an extraordinary circumstance or a mistake by the Council in exempting these e-mails from disclosure.

The Custodian states that the Council correctly exempted from disclosure sixteen (16) e-mails because said e-mails contain material that is advisory, consultative or

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<sup>5</sup> The GRC received the Complainant's Request for Reconsideration on August 19, 2009 via regular US Postal Service, however the request is dated August 14, 2009.

<sup>6</sup> The GRC received the Custodian's Objection to the Complainant's Request for Reconsideration on August 27, 2009 via fax, however the objection is dated August 25, 2009.

deliberative (“ACD”) and/or involved a personnel matter. The Custodian asserts that the Complainant’s characterization of Barbara Wolfe as a gossiping random resident whose participation in those e-mails invalidated these exemptions is incorrect. In fact, the Custodian asserts that while Ms. Wolfe was no longer a Township official at the time of the e-mails, her participation was required because as the previous Planning Board Chairperson during the period that was the subject of the discussions, she had first hand knowledge of the issues and the people involved.

Further, the Custodian contends that the Council correctly exempted from disclosure four (4) e-mails based on the attorney-client privilege. Again, the Custodian refutes the Complainant’s argument that Ms. Wolfe’s participation in said e-mails invalidated this exemption. The Custodian asserts that while the Township Attorney may not advise the Planning Board on planning issues, he correctly advised the Planning Board on the personnel issues related to Complainant and discussed in the subject e-mails. Lastly, the Custodian asserts that Ms. Wolfe was central to the Township’s defense in litigation initiated by the Complainant against the Township.

### **Analysis**

#### **Whether the Custodian complied with the Council’s August 11, 2009 Interim Order?**

At its August 11, 2009 public meeting, the Council order the Custodian to disclose certain e-mails requested by the Complainant based on the finding of an *in camera* examination. The Council ordered that the Custodian disclose these e-mails to the Complainant within five (5) business days from receipt of the Interim Order which was distributed to the parties on August 13, 2009, with a legal certification, in accordance with N.J. Court Rule 1:4-4, to the Executive Director indicating that the e-mails has been disclosed as ordered.

The Custodian in this complaint delivered to the Council on August 19, 2009 (within five (5) business days from receipt of the Council’s Interim Order) a legal certification, in accordance with N.J. Court Rule 1:4-4, that the e-mails have been disclosed to the Complainant as ordered. Therefore, the Custodian has complied with the Council’s August 11, 2009 Interim Order.

#### **Whether the Complainant has met the required standard for reconsideration of the Council’s August 11, 2009 Interim Order?**

Pursuant to *N.J.A.C. 5:105-2.10*, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. Requests must be in writing, delivered to the Council and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. *N.J.A.C. 5:105-2.10(a) – (e)*.



Applicable case law holds that:

“[a] party should not seek reconsideration merely based upon dissatisfaction with a decision.” D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a 'palpably incorrect or irrational basis;' or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D'Atria, supra, 242 N.J. Super. at 401. 'Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement.' *Ibid.*" In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

In support of the request for reconsideration, the Complainant argues that the Council's *in camera* examination of e-mails 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, and 17 must be reconsidered because these e-mails, which the GRC found exempt from disclosure as (1) inter-agency or intra-agency advisory, consultative or deliberative material ("ACD"), (2) personnel matters, and/or (3) attorney-client privilege, do not qualify under any of these exemptions because Barbara Wolfe (who was either the sender, recipient or copied on these e-mails) is not an official of the Township when these e-mails were created. The Complainant asserts that these e-mails were created between January 2, 2007 through January 25, 2007, but that Ms. Wolfe ceased being a Township official on December 31, 2006. Therefore, the Complainant reasons that Ms. Wolfe's participation in the e-mails waives the attorney-client privilege and the ACD exemption, as well as any confidentiality given to personnel discussions among Township officials.

It should be noted that Ms. Wolfe was the chair of the Township of Amwell's Planning Board until December 31, 2006 when her term expired. However, the personnel matter which is the subject of the requested e-mails obviously began while Ms. Wolfe was chair of the Planning Board, involved the Planning Board matters and required Ms. Wolfe's continued involvement due to anticipated or on-going litigation including on-going negotiations with the Complainant's attorney regarding said personnel matter. Therefore, it is conceivable that Ms. Wolfe's participation in the requested e-mails is essential given her official position which had only ended one month or less before the creation of the requested e-mails.

As the moving party, the Complainant was required to establish either of the necessary criteria set forth above; namely 1) that the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider

the significance of probative, competent evidence. See Cummings, *supra*. The Complainant failed to do so. The Complainant has also failed to show that the Council's decision in this matter is arbitrary, capricious or unreasonable. See D'Atria, *supra*.

Therefore, because the Complainant has failed to establish in the request for reconsideration of the Council's August 11, 2009 Interim Order that 1) the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, and rendered an arbitrary, capricious or unreasonable decision, said request for reconsideration is denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

**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?**

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, 185 (2001); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (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, 107 (App. Div. 1996).

Although the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. because she responded verbally to the Complainant's OPRA request and did not provide a written explanation for the denial of access to e-mails requested until the thirteenth (13<sup>th</sup>) business day following receipt of the OPRA request resulting in a "deemed" denial, the Custodian did comply with the Council's April 29, 2009 and August 11, 2009 Interim Orders by providing the requested e-mails to the Council for an *in camera* review and the redacted e-mails to the Complainant pursuant to the *in camera* review findings and recommendations. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's "deemed" denial of access appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian in this complaint delivered to the Council on August 19, 2009 (within five (5) business days from receipt of the Council's Interim Order) a legal certification, in accordance with N.J. Court Rule 1:4-4, that the e-mails have been disclosed to the Complainant as ordered. Therefore, the Custodian has complied with the Council's August 11, 2009 Interim Order.
2. The Complainant has failed to establish in the request for reconsideration of the Council's August 11, 2009 Interim Order that 1) the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, and rendered an arbitrary, capricious or unreasonable decision, said request for reconsideration is denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).
3. Although the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. because she responded verbally to the Complainant's OPRA request and did not provide a written explanation for the denial of access to e-mails requested until the thirteenth (13<sup>th</sup>) business day following receipt of the OPRA request resulting in a "deemed" denial, the Custodian did comply with the Council's April 29, 2009 and August 11, 2009 Interim Orders by providing the requested e-mails to the Council for an *in camera* review and the redacted e-mails to the Complainant pursuant to the *in camera* review findings and recommendations. Therefore, it is concluded that the

Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's "deemed" denial of access appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

Prepared and  
Approved By: Catherine Starghill, Esq.  
Executive Director

September 23, 2009



State of New Jersey  
GOVERNMENT RECORDS COUNCIL  
101 SOUTH BROAD STREET  
PO BOX 819  
TRENTON, NJ 08625-0819

JON S. CORZINE  
Governor

CHARLES A. RICHMAN  
Acting Commissioner

**INTERIM ORDER**

**August 11, 2009 Government Records Council Meeting**

Joan McGee  
Complainant

Complaint No. 2007-305

v.

Township of East Amwell (Hunterdon)  
Custodian of Record

At the August 11, 2009 public meeting, the Government Records Council (“Council”) considered the August 4, 2009 *In Camera* 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 in this complaint delivered to the Council on May 8, 2009 (within five (5) business days from receipt of the Council’s Interim Order) in a sealed envelope nine (9) copies of the requested unredacted documents, 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 documents provided are the documents requested by the Council for the *in camera* inspection. Therefore, the Custodian has complied with the Council’s April 29, 2009 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 table below within five (5) business days from receipt of this Order and simultaneously 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 <sup>1</sup>
1.	E-mail from Barbara Wolfe to Richard Cushing dated January 2, 2007 10:04 a.m.	Title: RE: Status of Things	Information exempt from disclosure pursuant to the attorney-client privilege for pending litigation pursuant to <u>N.J.S.A. 47:1A-1.1</u> and personnel matters pursuant to <u>N.J.S.A. 47:1A-10</u> involving the Complainant.	Disclose this e-mail with redactions for home telephone number, home fax number, cell phone number, and home address which are exempt because of privacy concerns pursuant to <u>N.J.S.A. 47:1A-1</u> .
2.	E-mail from Barbara Wolfe to Richard Cushing and Eric Harrison dated January 12, 2007 9:40 p.m.	Titled: Joan Confidential	Information exempt from disclosure pursuant to the attorney-client privilege for pending litigation pursuant to <u>N.J.S.A.</u>	This e-mail is exempt from disclosure because its contents are exempt as advisory, consultative or deliberative material pursuant to <u>N.J.S.A. 47:1A-</u>

<sup>1</sup> **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.

			47:1A-1.1 and personnel matters pursuant to <u>N.J.S.A.</u> 47:1A-10 involving the Complainant.	1.1 and <u>N.J.S.A.</u> 47:1A-10 as personnel matters.
3.	E-mail from Barbara Wolfe to Richard Cushing and Eric Harrison dated January 12, 2007 9:40 a.m.	Titled: Joan Confidential <sup>2</sup>	Information exempt from disclosure pursuant to the attorney-client privilege for pending litigation pursuant to <u>N.J.S.A.</u> 47:1A-1.1 and personnel matters pursuant to <u>N.J.S.A.</u> 47:1A-10 involving the Complainant.	This e-mail is exempt from disclosure because its contents are exempt as advisory, consultative or deliberative material pursuant to <u>N.J.S.A.</u> 47:1A-1.1 and <u>N.J.S.A.</u> 47:1A-10 as personnel matters.
4.	E-mail from Timothy Matheny to Barbara Wolfe (with copies to Richard Cushing, Esq., Don Reily, Lary Tatsch, and Fred Gardner) dated January 15, 2007 9:38 p.m.	Titled: Check List, etc.	Information exempt from disclosure pursuant to the attorney-client privilege for pending litigation pursuant to <u>N.J.S.A.</u> 47:1A-1.1 and personnel matters pursuant to <u>N.J.S.A.</u> 47:1A-10	This e-mail is exempt from disclosure because its contents are exempt as advisory, consultative or deliberative material pursuant to <u>N.J.S.A.</u> 47:1A-1.1 and <u>N.J.S.A.</u> 47:1A-10 as personnel matters.

<sup>2</sup> This e-mail is different from the e-mail above it (#3.) despite the fact that both have the same date and time.

			involving the Complainant.	
5.	E-mail from Don Reily to Timothy Matheny (with copies to Lary Tatsch, Fred Gardner, Barbara Wolfe and Richard Cushing) dated January 16, 2007 8:46 a.m.	Title: RE: Check List, etc.	Information exempt from disclosure pursuant to the attorney-client privilege for pending litigation pursuant to <u>N.J.S.A.</u> 47:1A-1.1 and personnel matters pursuant to <u>N.J.S.A.</u> 47:1A-10 involving the Complainant.	This e-mail is exempt from disclosure because its contents are exempt under the attorney-client privilege pursuant to <u>N.J.S.A.</u> 47:1A-1.1.
6.	E-mail from Barbara Wolfe to Timothy Matheny (with copies to Richard Cushing, Don Reily, Lary Tatsch, and Fred Gardner) dated January 16, 2007 9:56 a.m.	Titled: RE: Check List, etc.	Information exempt from disclosure pursuant to the attorney-client privilege for pending litigation pursuant to <u>N.J.S.A.</u> 47:1A-1.1 and personnel matters pursuant to <u>N.J.S.A.</u> 47:1A-10 involving the Complainant.	This e-mail is exempt from disclosure because its contents are exempt as advisory, consultative or deliberative material pursuant to <u>N.J.S.A.</u> 47:1A-1.1 and <u>N.J.S.A.</u> 47:1A-10 as personnel matters.
7.	E-mail from Fred Gardner to Barbara Wolfe, Timothy Matheny and	Title: RE: Check List, etc.	Information exempt from disclosure pursuant to the attorney-client	This e-mail is exempt from disclosure because its contents are exempt as



	Richard Cushing (with copies to Don Reily and Lary Tatsch) dated January 16, 2007 6:50 p.m.		privilege for pending litigation pursuant to <u>N.J.S.A.</u> 47:1A-1.1 and personnel matters pursuant to <u>N.J.S.A.</u> 47:1A-10 involving the Complainant.	advisory, consultative or deliberative material pursuant to <u>N.J.S.A.</u> 47:1A-1.1 and <u>N.J.S.A.</u> 47:1A-10 as personnel matters.
8.	E-mail from Barbara Wolfe to Fred Gardner, Timothy Matheny and Richard Cushing (with copies to Don Reily and Lary Tatsch) dated January 16, 2007 7:23 p.m.	Title: RE: Check List, etc.	Information exempt from disclosure pursuant to the attorney-client privilege for pending litigation pursuant to <u>N.J.S.A.</u> 47:1A-1.1 and personnel matters pursuant to <u>N.J.S.A.</u> 47:1A-10 involving the Complainant.	This e-mail is exempt from disclosure because its contents are exempt as advisory, consultative or deliberative material pursuant to <u>N.J.S.A.</u> 47:1A-1.1 and <u>N.J.S.A.</u> 47:1A-10 as personnel matters.
9.	E-mail from Fred Gardner to Barbara Wolfe, Richard Cushing, Lary Tatsch, Don Reily, and Timothy Matheny dated January 16, 2007 9:46 p.m.	Title: RE: Check List, etc.	Information exempt from disclosure pursuant to the attorney-client privilege for pending litigation pursuant to <u>N.J.S.A.</u> 47:1A-1.1 and personnel matters	Disclose the first (1 <sup>st</sup> ) paragraph. The remainder of this e-mail is exempt from disclosure because its contents are exempt as advisory, consultative or deliberative material pursuant to <u>N.J.S.A.</u> 47:1A-

			pursuant to <u>N.J.S.A.</u> 47:1A-10 involving the Complainant.	1.1 and <u>N.J.S.A.</u> 47:1A-10 as personnel matters.
10.	E-mail from Don Reily to Fred Gardner (with copies to Lary Tatsch, Timothy Matheny, Barbara Wolfe and Richard Cushing) dated January 17, 2007 9:00 a.m.	Title: RE: Check List, etc.	Information exempt from disclosure pursuant to the attorney-client privilege for pending litigation pursuant to <u>N.J.S.A.</u> 47:1A-1.1 and personnel matters pursuant to <u>N.J.S.A.</u> 47:1A-10 involving the Complainant.	This e-mail is exempt from disclosure because its contents are exempt as advisory, consultative or deliberative material pursuant to <u>N.J.S.A.</u> 47:1A-1.1 and <u>N.J.S.A.</u> 47:1A-10 as personnel matters.
11.	E-mail from Don Reily to Lary Tatsch (with copies to Lary Tatsch, Fred Gardner, Timothy Matheny, Barbara Wolfe and Richard Cushing) dated January 18, 2007 8:09 a.m.	Title: RE: Check List, etc.	Information exempt from disclosure pursuant to the attorney-client privilege for pending litigation pursuant to <u>N.J.S.A.</u> 47:1A-1.1 and personnel matters pursuant to <u>N.J.S.A.</u> 47:1A-10 involving the Complainant.	This e-mail is exempt from disclosure because its contents are exempt as personnel matters pursuant to <u>N.J.S.A.</u> 47:1A-10.
12.	E-mail from Timothy	Title: RE: Check List, etc.	Information exempt from	This e-mail is exempt from

	Matheny to Lary Tatsch and Don Reily (with copies to Fred Gardner, Barbara Wolfe, and Richard Cushing) dated January 18, 2007 11:47 a.m.		disclosure pursuant to the attorney-client privilege for pending litigation pursuant to <u>N.J.S.A. 47:1A-1.1</u> and personnel matters pursuant to <u>N.J.S.A. 47:1A-10</u> involving the Complainant.	disclosure because its contents are exempt as personnel matters pursuant to <u>N.J.S.A. 47:1A-10</u> .
13.	E-mail from Fred Gardner to Timothy Matheny, Lary Tatsch, and Don Reily (with copies to Barbara Wolfe and Richard Cushing) dated January 18, 2007 4:12 p.m.	Title: RE: Check List, etc.	Information exempt from disclosure pursuant to the attorney-client privilege for pending litigation pursuant to <u>N.J.S.A. 47:1A-1.1</u> and personnel matters pursuant to <u>N.J.S.A. 47:1A-10</u> involving the Complainant.	This e-mail is exempt from disclosure because its contents are exempt as personnel matters pursuant to <u>N.J.S.A. 47:1A-10</u> .
14.	E-mail from Richard Cushing to Don Reily and Lary Tatsch (with copies to Lary Tatsch, Fred Gardner, Timothy Matheny and	Title: RE: Check List, etc.	Information exempt from disclosure pursuant to the attorney-client privilege for pending litigation pursuant to <u>N.J.S.A.</u>	This e-mail is exempt from disclosure because its contents are exempt under the attorney-client privilege pursuant to <u>N.J.S.A. 47:1A-1.1</u> .

	Barbara Wolfe) dated January 19, 2007 5:17 p.m.		47:1A-1.1 and personnel matters pursuant to <u>N.J.S.A.</u> 47:1A-10 involving the Complainant.	
15.	E-mail from Barbara Wolfe to Timothy Matheny (with copy to Richard Cushing) dated January 20, 2007 9:29 a.m.	Title: RE: Check List, etc.	Information exempt from disclosure pursuant to the attorney-client privilege for pending litigation pursuant to <u>N.J.S.A.</u> 47:1A-1.1 and personnel matters pursuant to <u>N.J.S.A.</u> 47:1A-10 involving the Complainant.	This e-mail is exempt from disclosure because its contents are exempt as personnel matters pursuant to <u>N.J.S.A.</u> 47:1A-10.
16.	E-mail from Richard Cushing to Barbara Wolfe and Timothy Matheny dated January 20, 2007 12:17 p.m.	Title: RE: Check List, etc.	Information exempt from disclosure pursuant to the attorney-client privilege for pending litigation pursuant to <u>N.J.S.A.</u> 47:1A-1.1 and personnel matters pursuant to <u>N.J.S.A.</u> 47:1A-10 involving the Complainant.	This e-mail is exempt from disclosure because its contents are exempt under the attorney-client privilege pursuant to <u>N.J.S.A.</u> 47:1A-1.1.

17.	E-mail from Barbara Wolfe to Richard Cushing and Timothy Matheny dated January 20, 2007 3:13 p.m.	Title: RE: Check List, etc.	Information exempt from disclosure pursuant to the attorney-client privilege for pending litigation pursuant to <u>N.J.S.A.</u> 47:1A-1.1 and personnel matters pursuant to <u>N.J.S.A.</u> 47:1A-10 involving the Complainant.	This e-mail is exempt from disclosure because its contents are exempt under the attorney-client privilege pursuant to <u>N.J.S.A.</u> 47:1A-1.1.
18.	E-mail from Barbara Wolfe to Don Reily dated January 25, 2007 7:24 p.m.	Title: Fw: COAH Rules	Information exempt from disclosure pursuant to the attorney-client privilege for pending litigation pursuant to <u>N.J.S.A.</u> 47:1A-1.1 and personnel matters pursuant to <u>N.J.S.A.</u> 47:1A-10 involving the Complainant.	This e-mail is not exempt from disclosure. Disclose entire e-mail.
19.	E-mail from Don Reily to Barbara Wolfe dated January 25, 2007 8:30 p.m.	Title: Re: COAH Rules	Information exempt from disclosure pursuant to the attorney-client privilege for	This e-mail is not exempt from disclosure. Disclose entire e-mail.

			pending litigation pursuant to <u>N.J.S.A.</u> 47:1A-1.1 and personnel matters pursuant to <u>N.J.S.A.</u> 47:1A-10 involving the Complainant.	
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Interim Order Rendered by the  
Government Records Council  
On The 11<sup>th</sup> Day of August, 2009

Robin Berg Tabakin, Chair  
Government Records Council

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

Janice L. Kovach  
Government Records Council

**Decision Distribution Date: August 13, 2009**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director  
August 11, 2009 Council Meeting**

**Joan McGee<sup>1</sup>  
Complainant**

**GRC Complaint No. 2007-305**

v.

**Township of East Amwell (Hunterdon)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Review all e-mails between or among Tim Matheny, Don Reilly, Richard Cushing, Esq. and Barbara Wolfe after December 31, 2006.<sup>3</sup>

**Request Made:** October 23, 2007

**Response Made:** November 1, 2007

**Custodian:** Teresa Stahl

**GRC Complaint Filed:** December 6, 2007<sup>4</sup>

**Records Submitted for *In Camera* Examination:** Nineteen (19) e-mails between or among Tim Matheny, Don Reilly, Richard Cushing, Esq. and Barbara Wolfe after December 31, 2006.<sup>5</sup>

**Background**

**April 29, 2009**

Government Records Council's Interim Order. At the April 29, 2009 public meeting, the Government Records Council ("Council") considered the April 22, 2009 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. The Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA

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

<sup>2</sup> Represented by Richard Cushing, Esq. of Gebhardt & Keifer (Clinton, NJ).

<sup>3</sup> Other documents were requested which are not relevant to this complaint.

<sup>4</sup> The GRC received the Denial of Access Complaint on said date.

<sup>5</sup> The Custodian submitted more e-mails, however said e-mails did not fit within the parameters of the OPRA request and are therefore not considered for purposes of the *in camera* examination.

request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

2. 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 twenty (20) undisclosed e-mails to determine the validity of the Custodian's assertion that the e-mails contain attorney-client privileged information or advisory, consultative or deliberative material which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
3. **The Custodian must deliver<sup>6</sup> to the Council in a sealed envelope nine (9) copies of the requested documents (see #2 above) 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 or any other official 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.

#### **May 1, 2009**

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

#### **May 7, 2009**

Certification of the Custodian in response to the Council's Interim Order with twenty (20) e-mails between or among Tim Matheny, Don Reilly, Richard Cushing, Esq., and Barbara Wolfe after December 31, 2006. The Custodian certifies that she is the custodian and the records enclosed are true copies of the records requested by the Council for an *in camera* examination. Additionally, the Custodian certifies that the records were not disclosed to the Complainant upon advice from the Township attorney that the records were exempt from disclosure because they pertained to employment and litigation matters involving the Complainant. (This certification and one (1) copy of the requested records were sent by fax on May 7, 2009 and the original certification and nine (9) copies of the requested records were sent by overnight mail and received by the Council on May 8, 2009.)

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<sup>6</sup> 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.



## Analysis

### **Whether the Custodian complied with the Council's April 29, 2009 Interim Order?**

At its April 29, 2009 public meeting, the Council determined that because the Custodian has asserted that portions of the requested records were lawfully redacted pursuant to N.J.S.A. 10:4-12, the Council must determine whether the legal conclusions asserted by the Custodian are properly applied to the records at issue pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005). Therefore, the GRC must conduct an *in camera* review of the requested records to determine the validity of the Custodian's assertion that the requested records were properly redacted.

The Council therefore ordered that the Custodian must deliver to the Council in a sealed envelope nine (9) copies of the requested unredacted documents, 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 documents provided are the documents 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.

The Custodian in this complaint delivered to the Council on May 8, 2009 (within five (5) business days from receipt of the Council's Interim Order) in a sealed envelope nine (9) copies of the requested unredacted documents, 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 documents provided are the documents requested by the Council for the *in camera* inspection. Therefore, the Custodian has complied with the Council's April 29, 2009 Interim Order.

### **Whether the Custodian unlawfully redacted the nineteen (19) e-mails between or among Tim Matheny, Don Reilly, Richard Cushing, Esq., and Barbara Wolfe after December 31, 2006?**

The Custodian asserts that the requested e-mails for which access was denied to the Complainant involve discussions regarding information which is exempt from disclosure pursuant to the attorney-client privilege for pending litigation pursuant to N.J.S.A. 47:1A-1.1 and personnel matters pursuant to N.J.S.A. 47:1A-10 involving the Complainant.

Considering the Custodian's assertion that the requested e-mails are exempt from access because of the attorney-client privilege, the GRC notes that OPRA excludes from the definition of a government record "any record within the attorney-client privilege." N.J.S.A. 47:1A-1.1. The attorney-client privilege "recognizes that sound legal advice or advocacy serves public ends and that the confidentiality of communications between client and attorney constitutes an indispensable ingredient of our legal system." Matter of Grand Jury Subpoenas, 241 N.J. Super. 18, 27-8 (App.Div.1989). The attorney-client privilege protects communications between a lawyer and the client made in the course of

that professional relationship, and particularly protects information which, if disclosed, would jeopardize the legal position of the client. N.J.S.A. 2A:84A-20; RPC 1.6. The New Jersey Supreme Court has observed that RPC 1.6 “expands the scope of protected information to include all information relating to the representation, regardless of the source or whether the client has requested it be kept confidential or whether disclosure of the information would be embarrassing or detrimental to the client.” In re Advisory Opinion No. 544 of N.J. Sup. Court, 103 N.J. 399, 406 (1986).

Redaction of otherwise public documents is appropriate where protection of privileged or confidential subject matter is a concern. South Jersey Publishing Co., Inc. v. N. J. Expressway Authority, 124 N.J. 478, 488-9 (1991). Moreover, whether the matter contained in the requested documents pertains to pending or closed cases is important, because the need for confidentiality is greater in pending matters. Keddie v. Rutgers, State University, 148 N.J. 36, 54 (1997). Nevertheless, “[e]ven in closed cases. . . attorney work-product and documents containing legal strategies may be entitled to protection from disclosure.” *Id.*

The Custodian also asserts that the requested e-mails are exempt because they contain discussions relating to personnel matters. OPRA exempts from disclosure all personnel records with certain exceptions. Specifically, OPRA provides in relevant part that “personnel or pension records of any individual in the possession of a public agency shall not be considered a government record 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 any pension received shall be a government record.” N.J.S.A. 47:1A-10. Other exceptions to the general exemption of personal records include:

“... personnel or pension records of any individual shall be accessible when required to be disclosed by another law, when disclosure is essential to the performance of official duties of a person duly authorized by this State or the United States, or when authorized by an individual in interest; and data contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension, but not including any detailed medical or psychological information, shall be a government record.” N.J.S.A. 47:1A-10.

Therefore, e-mails may be exempt when their content contains attorney-client privileged discussions pursuant to N.J.S.A. 47:1A-1.1 and personnel matters pursuant to N.J.S.A. 47:1A-10.

The GRC conducted an *in camera* examination 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> Examination <sup>7</sup>
1.	E-mail from Barbara Wolfe to Richard Cushing dated January 2, 2007 10:04 a.m.	Title: RE: Status of Things	Information exempt from disclosure pursuant to the attorney-client privilege for pending litigation pursuant to <u>N.J.S.A. 47:1A-1.1</u> and personnel matters pursuant to <u>N.J.S.A. 47:1A-10</u> involving the Complainant.	Disclose this e-mail with redactions for home telephone number, home fax number, cell phone number, and home address which are exempt because of privacy concerns pursuant to <u>N.J.S.A. 47:1A-1</u> .
2.	E-mail from Barbara Wolfe to Richard Cushing and Eric Harrison dated January 12, 2007 9:40 p.m.	Titled: Joan Confidential	Information exempt from disclosure pursuant to the attorney-client privilege for pending litigation pursuant to	This e-mail is exempt from disclosure because its contents are exempt as advisory, consultative or deliberative material pursuant

<sup>7</sup> **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.

			<u>N.J.S.A.</u> 47:1A-1.1 and personnel matters pursuant to <u>N.J.S.A.</u> 47:1A-10 involving the Complainant.	to <u>N.J.S.A.</u> 47:1A-1.1 and <u>N.J.S.A.</u> 47:1A-10 as personnel matters.
3.	E-mail from Barbara Wolfe to Richard Cushing and Eric Harrison dated January 12, 2007 9:40 a.m.	Titled: Joan Confidential <sup>8</sup>	Information exempt from disclosure pursuant to the attorney-client privilege for pending litigation pursuant to <u>N.J.S.A.</u> 47:1A-1.1 and personnel matters pursuant to <u>N.J.S.A.</u> 47:1A-10 involving the Complainant.	This e-mail is exempt from disclosure because its contents are exempt as advisory, consultative or deliberative material pursuant to <u>N.J.S.A.</u> 47:1A-1.1 and <u>N.J.S.A.</u> 47:1A-10 as personnel matters.
4.	E-mail from Timothy Matheny to Barbara Wolfe (with copies to Richard Cushing, Esq., Don Reily, Lary Tatsch, and Fred Gardner) dated January 15, 2007 9:38 p.m.	Titled: Check List, etc.	Information exempt from disclosure pursuant to the attorney-client privilege for pending litigation pursuant to <u>N.J.S.A.</u> 47:1A-1.1 and personnel matters pursuant to <u>N.J.S.A.</u>	This e-mail is exempt from disclosure because its contents are exempt as advisory, consultative or deliberative material pursuant to <u>N.J.S.A.</u> 47:1A-1.1 and <u>N.J.S.A.</u> 47:1A-10 as personnel matters.

<sup>8</sup> This e-mail is different from the e-mail above it (#3.) despite the fact that both have the same date and time.  
Joan McGee v. Township of East Amwell (Hunterdon), 2007-305 – *In Camera* Findings and Recommendations of the Executive Director

			47:1A-10 involving the Complainant.	
5.	E-mail from Don Reily to Timothy Matheny (with copies to Lary Tatsch, Fred Gardner, Barbara Wolfe and Richard Cushing) dated January 16, 2007 8:46 a.m.	Title: RE: Check List, etc.	Information exempt from disclosure pursuant to the attorney-client privilege for pending litigation pursuant to <u>N.J.S.A. 47:1A-1.1</u> and personnel matters pursuant to <u>N.J.S.A. 47:1A-10</u> involving the Complainant.	This e-mail is exempt from disclosure because its contents are exempt under the attorney-client privilege pursuant to <u>N.J.S.A. 47:1A-1.1</u> .
6.	E-mail from Barbara Wolfe to Timothy Matheny (with copies to Richard Cushing, Don Reily, Lary Tatsch, and Fred Gardner) dated January 16, 2007 9:56 a.m.	Titled: RE: Check List, etc.	Information exempt from disclosure pursuant to the attorney-client privilege for pending litigation pursuant to <u>N.J.S.A. 47:1A-1.1</u> and personnel matters pursuant to <u>N.J.S.A. 47:1A-10</u> involving the Complainant.	This e-mail is exempt from disclosure because its contents are exempt as advisory, consultative or deliberative material pursuant to <u>N.J.S.A. 47:1A-1.1</u> and <u>N.J.S.A. 47:1A-10</u> as personnel matters.
7.	E-mail from Fred Gardner to Barbara Wolfe, Timothy	Title: RE: Check List, etc.	Information exempt from disclosure pursuant to the	This e-mail is exempt from disclosure because its contents are

	Matheny and Richard Cushing (with copies to Don Reily and Lary Tatsch) dated January 16, 2007 6:50 p.m.		attorney-client privilege for pending litigation pursuant to <u>N.J.S.A.</u> 47:1A-1.1 and personnel matters pursuant to <u>N.J.S.A.</u> 47:1A-10 involving the Complainant.	exempt as advisory, consultative or deliberative material pursuant to <u>N.J.S.A.</u> 47:1A-1.1 and <u>N.J.S.A.</u> 47:1A-10 as personnel matters.
8.	E-mail from Barbara Wolfe to Fred Gardner, Timothy Matheny and Richard Cushing (with copies to Don Reily and Lary Tatsch) dated January 16, 2007 7:23 p.m.	Title: RE: Check List, etc.	Information exempt from disclosure pursuant to the attorney-client privilege for pending litigation pursuant to <u>N.J.S.A.</u> 47:1A-1.1 and personnel matters pursuant to <u>N.J.S.A.</u> 47:1A-10 involving the Complainant.	This e-mail is exempt from disclosure because its contents are exempt as advisory, consultative or deliberative material pursuant to <u>N.J.S.A.</u> 47:1A-1.1 and <u>N.J.S.A.</u> 47:1A-10 as personnel matters.
9.	E-mail from Fred Gardner to Barbara Wolfe, Richard Cushing, Lary Tatsch, Don Reily, and Timothy Matheny dated January 16, 2007 9:46 p.m.	Title: RE: Check List, etc.	Information exempt from disclosure pursuant to the attorney-client privilege for pending litigation pursuant to <u>N.J.S.A.</u> 47:1A-1.1 and personnel	Disclose the first (1 <sup>st</sup> ) paragraph. The remainder of this e-mail is exempt from disclosure because its contents are exempt as advisory, consultative or deliberative material pursuant

			matters pursuant to <u>N.J.S.A.</u> 47:1A-10 involving the Complainant.	to <u>N.J.S.A.</u> 47:1A-1.1 and <u>N.J.S.A.</u> 47:1A-10 as personnel matters.
10.	E-mail from Don Reily to Fred Gardner (with copies to Lary Tatsch, Timothy Matheny, Barbara Wolfe and Richard Cushing) dated January 17, 2007 9:00 a.m.	Title: RE: Check List, etc.	Information exempt from disclosure pursuant to the attorney-client privilege for pending litigation pursuant to <u>N.J.S.A.</u> 47:1A-1.1 and personnel matters pursuant to <u>N.J.S.A.</u> 47:1A-10 involving the Complainant.	This e-mail is exempt from disclosure because its contents are exempt as advisory, consultative or deliberative material pursuant to <u>N.J.S.A.</u> 47:1A-1.1 and <u>N.J.S.A.</u> 47:1A-10 as personnel matters.
11.	E-mail from Don Reily to Lary Tatsch (with copies to Lary Tatsch, Fred Gardner, Timothy Matheny, Barbara Wolfe and Richard Cushing) dated January 18, 2007 8:09 a.m.	Title: RE: Check List, etc.	Information exempt from disclosure pursuant to the attorney-client privilege for pending litigation pursuant to <u>N.J.S.A.</u> 47:1A-1.1 and personnel matters pursuant to <u>N.J.S.A.</u> 47:1A-10 involving the Complainant.	This e-mail is exempt from disclosure because its contents are exempt as personnel matters pursuant to <u>N.J.S.A.</u> 47:1A-10.

12.	E-mail from Timothy Matheny to Lary Tatsch and Don Reily (with copies to Fred Gardner, Barbara Wolfe, and Richard Cushing) dated January 18, 2007 11:47 a.m.	Title: RE: Check List, etc.	Information exempt from disclosure pursuant to the attorney-client privilege for pending litigation pursuant to <u>N.J.S.A.</u> 47:1A-1.1 and personnel matters pursuant to <u>N.J.S.A.</u> 47:1A-10 involving the Complainant.	This e-mail is exempt from disclosure because its contents are exempt as personnel matters pursuant to <u>N.J.S.A.</u> 47:1A-10.
13.	E-mail from Fred Gardner to Timothy Matheny, Lary Tatsch, and Don Reily (with copies to Barbara Wolfe and Richard Cushing) dated January 18, 2007 4:12 p.m.	Title: RE: Check List, etc.	Information exempt from disclosure pursuant to the attorney-client privilege for pending litigation pursuant to <u>N.J.S.A.</u> 47:1A-1.1 and personnel matters pursuant to <u>N.J.S.A.</u> 47:1A-10 involving the Complainant.	This e-mail is exempt from disclosure because its contents are exempt as personnel matters pursuant to <u>N.J.S.A.</u> 47:1A-10.
14.	E-mail from Richard Cushing to Don Reily and Lary Tatsch (with copies to Lary Tatsch, Fred Gardner,	Title: RE: Check List, etc.	Information exempt from disclosure pursuant to the attorney-client privilege for pending litigation	This e-mail is exempt from disclosure because its contents are exempt under the attorney-client privilege pursuant to <u>N.J.S.A.</u> 47:1A-



	Timothy Matheny and Barbara Wolfe) dated January 19, 2007 5:17 p.m.		pursuant to <u>N.J.S.A.</u> 47:1A-1.1 and personnel matters pursuant to <u>N.J.S.A.</u> 47:1A-10 involving the Complainant.	1.1.
15.	E-mail from Barbara Wolfe to Timothy Matheny (with copy to Richard Cushing) dated January 20, 2007 9:29 a.m.	Title: RE: Check List, etc.	Information exempt from disclosure pursuant to the attorney-client privilege for pending litigation pursuant to <u>N.J.S.A.</u> 47:1A-1.1 and personnel matters pursuant to <u>N.J.S.A.</u> 47:1A-10 involving the Complainant.	This e-mail is exempt from disclosure because its contents are exempt as personnel matters pursuant to <u>N.J.S.A.</u> 47:1A-10.
16.	E-mail from Richard Cushing to Barbara Wolfe and Timothy Matheny dated January 20, 2007 12:17 p.m.	Title: RE: Check List, etc.	Information exempt from disclosure pursuant to the attorney-client privilege for pending litigation pursuant to <u>N.J.S.A.</u> 47:1A-1.1 and personnel matters pursuant to <u>N.J.S.A.</u> 47:1A-10	This e-mail is exempt from disclosure because its contents are exempt under the attorney-client privilege pursuant to <u>N.J.S.A.</u> 47:1A-1.1.

			involving the Complainant.	
17.	E-mail from Barbara Wolfe to Richard Cushing and Timothy Matheny dated January 20, 2007 3:13 p.m.	Title: RE: Check List, etc.	Information exempt from disclosure pursuant to the attorney-client privilege for pending litigation pursuant to <u>N.J.S.A.</u> 47:1A-1.1 and personnel matters pursuant to <u>N.J.S.A.</u> 47:1A-10 involving the Complainant.	This e-mail is exempt from disclosure because its contents are exempt under the attorney-client privilege pursuant to <u>N.J.S.A.</u> 47:1A-1.1.
18.	E-mail from Barbara Wolfe to Don Reily dated January 25, 2007 7:24 p.m.	Title: Fw: COAH Rules	Information exempt from disclosure pursuant to the attorney-client privilege for pending litigation pursuant to <u>N.J.S.A.</u> 47:1A-1.1 and personnel matters pursuant to <u>N.J.S.A.</u> 47:1A-10 involving the Complainant.	This e-mail is not exempt from disclosure. Disclose entire e-mail.
19.	E-mail from Don Reily to Barbara Wolfe dated January 25, 2007 8:30	Title: Re: COAH Rules	Information exempt from disclosure pursuant to the attorney-client	This e-mail is not exempt from disclosure. Disclose entire e-mail.

	p.m.		privilege for pending litigation pursuant to <u>N.J.S.A.</u> 47:1A-1.1 and personnel matters pursuant to <u>N.J.S.A.</u> 47:1A-10 involving the Complainant.	
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**Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian in this complaint delivered to the Council on May 8, 2009 (within five (5) business days from receipt of the Council’s Interim Order) in a sealed envelope nine (9) copies of the requested unredacted documents, 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 documents provided are the documents requested by the Council for the *in camera* inspection. Therefore, the Custodian has complied with the Council’s April 29, 2009 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 simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.**

Prepared and  
Approved By: Catherine Starghill, Esq.  
Executive Director

August 4, 2009



State of New Jersey  
GOVERNMENT RECORDS COUNCIL  
101 SOUTH BROAD STREET  
PO BOX 819  
TRENTON, NJ 08625-0819

JON S. CORZINE  
Governor

JOSEPH V. DORIA, JR.  
Commissioner

INTERIM ORDER

April 29, 2009 Government Records Council Meeting

Joan McGee  
Complainant

Complaint No.2007-305

v.

Township of East Amwell (Hunterdon)  
Custodian of Record

At the April 29, 2009 public meeting, the Government Records Council (“Council”) considered the April 22, 2009 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’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. 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 twenty (20) undisclosed e-mails to determine the validity of the Custodian’s assertion that the e-mails contain attorney-client privileged information or advisory, consultative or deliberative material which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
3. **The Custodian must deliver<sup>1</sup> to the Council in a sealed envelope nine (9) copies of the requested documents (see #2 above) 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**

<sup>1</sup>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.



**the GRC within five (5) business days from receipt of the Council's Interim Order.**

4. The Council defers analysis of whether the Custodian or any other official 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 29<sup>th</sup> Day of April, 2009

Robin Berg Tabakin, Chairwoman  
Government Records Council

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

Janice L. Kovach  
Government Records Council

**Decision Distribution Date: May 1, 2009**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
April 29, 2009 Council Meeting**

**Joan McGee<sup>1</sup>  
Complainant**

**GRC Complaint No. 2007-305**

v.

**Township of East Amwell (Hunterdon)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Review all e-mails between or among Tim Matheny, Don Reilly, Richard Cushing, Esq. and Barbara Wolfe after December 31, 2006.<sup>3</sup>

**Request Made:** October 23, 2007

**Response Made:** November 1, 2007

**Custodian:** Teresa Stahl

**GRC Complaint Filed:** December 6, 2007<sup>4</sup>

**Background**

**October 23, 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. Complainant notes on the OPRA request form that she does not believe that e-mails involving Barbara Wolfe are subject to inter-agency advisory or consultative exception from disclosure because Barbara Wolfe was no longer a Township official during the time period requested.

**November 1, 2007**

Custodian's response to the OPRA request. The Custodian responds verbally to Complainant's OPRA request on the seventh (7<sup>th</sup>) business day following receipt of the request. The Custodian calls the Complainant and tells her the records requested are available for review.

**November 6, 2007**

The Custodian provides the Complainant access to e-mail correspondence and makes copies of selected e-mails as requested by the Complainant.

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

<sup>2</sup> Represented by Richard Cushing Esq., of Gebhardt & Keifer (Clinton, NJ).

<sup>3</sup> Other documents were requested which are not relevant to this complaint.

<sup>4</sup> The GRC received the Denial of Access Complaint on said date.

**November 9, 2007**

Letter from Custodian to Complainant. The Custodian confirms that the Complainant was provided access to and copies of e-mail correspondence on November 6, 2007. The Custodian states that she also advised Complainant on November 6, 2007 that e-mails received or initiated by the Township Attorneys are not disclosable based upon attorney-client privilege and that Planning Board Chairman Don Reilly informed the Custodian that e-mails he may have sent from a former work computer are no longer available to him. The Custodian states that she further advised the Complainant that she contacted the prior Planning Board Chairperson, Barbara Wolfe, and requested copies of her e-mails. Finally, the Custodian requests that the Complainant contact her to schedule a time to review additional e-mails responsive to the Complainant's OPRA request.

**November 13, 2007**

Memorandum from Complainant to Custodian. The Complainant states that she will come in to review the additional e-mails. In addition, the Complainant states that she disagrees with the reasons given for not disclosing all of the e-mails. Specifically, the Complainant asserts that no attorney-client relationship exists between Richard Cushing, Esq., and Barbara Wolfe. The Complainant states that Attorney Cushing is the attorney for the Township Committee and by law cannot represent the Planning Board. Complainant further states that Barbara Wolfe was not an elected or appointed official for the Township of East Amwell during 2007 and therefore was only a citizen and resident at this time and could not have any privileged communications with Attorney Cushing.

The Complainant also contends that State regulations require all public officials to save all e-mails related to official business and if Don Reilly has deleted e-mails, he is in violation of these regulations.

**November 27, 2007**

Custodian's second (2<sup>nd</sup>) response to the OPRA request. The Custodian provides seven (7) additional e-mails and states that access to attorney-client privileged material is denied and refers the Complainant to the Custodian's attached November 9, 2007 letter. The Custodian states that she again asked all parties for any additional e-mails that may have been overlooked previously. Barbara Wolfe and Don Reilly responded that no additional e-mails exist.

**December 6, 2007**

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

- Complainant's OPRA request dated October 23, 2007.
- Letter from the Custodian to the Complainant dated November 9, 2007.
- Memorandum from the Complainant to the Custodian dated November 13, 2007.
- Custodian's second (2<sup>nd</sup>) response to the OPRA request dated November 27, 2007.

The Complainant alleges that the Custodian provided all of the requested e-mails she could obtain except for the e-mails between Township Attorney Richard Cushing, Township Administrator Tim Matheny, Planning Board Chairperson Don Reilly and

Barbara Wolfe. The Complainant states that she voluntarily gave time extensions to the Custodian in an attempt to resolve this matter and is not seeking sanctions against the Custodian because she tried to obtain the requested e-mails. The Complainant alleges that Richard Cushing, Esq., Tim Matheny and Don Reilly are willfully withholding e-mails relating to their contact with Barbara Wolfe and believes they should be sanctioned.

The Complainant further alleges that because Barbara Wolfe was not an elected or appointed public official during 2007, her communications with township officials are not protected by any privilege or exemption under OPRA. The Complainant also alleges that because the Planning Board and Township Committee are required by law to have separate attorneys, Barbara Wolfe, as Chairperson of the East Amwell Planning Board prior to 2007, could not have been a client of the Township Attorney Richard Cushing.

Additionally, the Complainant argues that because Tim Matheny is not an attorney, no attorney-client privilege applies to communications between Mr. Matheny and Barbara Wolfe. Further, the Complainant argues that the attorney-client privilege that does exist between Richard Cushing, Esq., Tim Matheny and members of the Township Committee was waived by including Barbara Wolfe as a recipient in e-mails.

Finally, the Complainant contends that State directives require public officials to maintain copies of all electronic and other documents pertaining to official business. Complainant asserts that Don Reilly's claim that he no longer has access to e-mails that he sent or received on a former work computer violate the State requirements and Mr. Reilly should be sanctioned.

The Complainant did not agree to mediate this complaint.

#### **December 12, 2007**

Request for the Statement of Information sent to the Custodian.

#### **December 19, 2007**

Custodian's Statement of Information ("SOI") with the following attachments:

- E-mail from Barbara Wolfe to Don Reilly and others, dated January 3, 2007.
- E-mail from Barbara Wolfe to Don Reilly dated January 9, 2007.
- E-mail from Barbara Wolfe to Don Reilly dated January 10, 2007.
- E-mail from Barbara Wolfe to Don Reilly and reply from Don Reilly to Barbara Wolfe dated January 25, 2007.
- E-mail from Don Reilly to the Custodian with copy to Barbara Wolfe and Tim Matheny dated June 15, 2007.
- E-mail from Barbara Wolfe to Don Reilly with copy to Tim Matheny dated June 15, 2007.
- Complainant's OPRA request dated October 23, 2007.
- Three (3) e-mails from Larry Tatsch to the Custodian dated October 30, 2007, each e-mail containing one (1) copied e-mail from Barbara Wolfe.
- E-mail from Larry Tatsch to the Custodian dated October 30, 2007 containing seven (7) copied e-mails between him and Barbara Wolfe.



- Letter from Township Attorney, Richard Cushing, Esq., to the Custodian dated November 6, 2007.
- E-mail from Barbara Wolfe to the Custodian and Richard Cushing dated November 8, 2007 forwarding copy of a January 3, 2007 e-mail from Barbara Wolfe to Don Reilly.
- Letter from the Custodian to the Complainant dated November 9, 2007.
- Custodian's second (2<sup>nd</sup>) response to the OPRA request dated November 27, 2007.

The Custodian also attaches the following e-mails which were located after the filing of the Denial of Access Complaint, and states that the Complainant will be notified and given access. Those e-mails are:

- E-mail from Maria Andrews<sup>5</sup> dated January 4, 2007 to Barbara Wolfe, Don Reilly and others dated December 28, 2006.
- E-mail from Don Reilly to Maria Andrews, copied to Barbara Wolfe and others, dated January 4, 2007.
- E-mail from Barbara Wolf to Maria Andrews dated January 4, 2007.
- E-mail from Barbara Wolfe to Custodian, copied to Maria Andrews and Don Reilly, dated January 4, 2007.
- E-mail from Barbara Wolfe to Pam Dymek, copied to Custodian and Tim Matheny, dated January 9, 2007.

The Custodian provides the Document Index Table which indicates that four (4) e-mails were provided to the Complainant on November 6, 2007, seven (7) e-mails were provided to the Complainant on November 27, 2007 and access to twenty (20) e-mails was denied based upon attorney-client privilege.

The Custodian certifies that her search for the requested records involved requesting any relevant e-mails from Tim Matheny, Don Reilly, Richard Cushing, Esq., and other Township of East Amwell officials. The Custodian certifies that initially she did not request e-mails from Barbara Wolfe because she was no longer a Township Official. The Custodian certifies that she received e-mails responsive to the Complainant's OPRA request from Tim Matheny. Don Reilly provided one (1) e-mail but no longer had access to e-mails on a former work computer. The Custodian certifies that the other individuals responded that they had no relevant records responsive to the Complainant's OPRA request.

The Custodian certifies she met with the Township Attorney who advised what documents to disclose. The Custodian also certifies that Counsel further advised her to request e-mails from Barbara Wolfe.

The Custodian certifies that she met with the Complainant on November 6, 2007 and provided access to some e-mails and informed the Complainant that additional e-mails were withheld based upon attorney-client privilege. The Custodian certifies that

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<sup>5</sup>Custodian states e-mails to or from Joan McGee were to her e-mail address at the Township, however, the e-mail address was also used by the Complainant's replacement, Maria Andrews.  
Joan McGee v. Township of East Amwell (Hunterdon), 2007-305 – Findings and Recommendations of the Executive Director

she also explained to the Complainant that access to Barbara Wolfe's e-mails would be delayed.

The Custodian certifies that she received the requested e-mails from Barbara Wolfe on November 8, 2008 and that some of those e-mails were not disclosable based upon attorney-client privilege.

Further, the Custodian certifies that she again contacted the same officials to confirm that they had provided all responsive e-mails because the Complainant asked the Custodian to ensure that all e-mails were obtained from the officials.

The Custodian further certifies that Don Reilly informed her that although he no longer had access to the e-mails on the computer at his former employment, in keeping with Township policy, he sent copies of all e-mails about Township business to either the Township Clerk or the Planning Board Administrative Officer. The Custodian certifies that, following up on this information from Mr. Reilly, she was able to locate additional e-mails responsive to the Complainant's OPRA request. The Custodian certifies that those e-mails are attached to the SOI and declares that the Complainant will be notified and given access to the e-mails.

The Township Attorney<sup>6</sup> alleges that all e-mails which were not disclosed are protected by the attorney-client privilege. Counsel argues that the Complainant filed a lawsuit against the municipality and several officials, and Counsel was designated to advise the Mayor and Committee, members of the Planning Board, and Township officials regarding the allegations contained in that case. Counsel argues that the e-mails which were withheld relate to confidential information supplied by clients to the Township Attorney and advice given to clients. Counsel refutes the Complainant's assertion that the attorney-client privilege has been waived and states that all persons who received copies of the undisclosed e-mails requested by the Complainant are represented by the Township Attorney.

The Township Attorney also asserts that the e-mails which were not disclosed may also be legally withheld under the advisory, consultative and deliberative exemption in OPRA. However, Counsel states that the Township will rely on the attorney-client privilege as the legal basis to withhold access to the documents.

Finally, Counsel asserts that Don Reilly attested that he sent copies of all e-mails related to Township business to either the Clerk or Planning Board Administrator as required by Township policy and that the Clerk and current Planning Board Administrator confirm this practice. Based upon the foregoing, Counsel argues that the issue of whether Don Reilly has access to his former employer's computer is irrelevant.

### **January 9, 2008**

The Complainant's response to the Custodian's SOI. The Complainant contests the Township Attorney's assertion that her lawsuit against the Township of East Amwell creates an attorney-client relationship between the Township Attorney and Barbara Wolfe. The Complainant states that she did not name Barbara Wolfe, the Planning Board

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<sup>6</sup> The Township Attorney submitted a separate legal argument to the GRC which accompanied the SOI. Joan McGee v. Township of East Amwell (Hunterdon), 2007-305 – Findings and Recommendations of the Executive Director

or any past or present member of the Planning Board in the lawsuit. Further, the Complainant states that Mr. Cushing is not a named party in the lawsuit and is not the attorney of record representing any of the parties in the lawsuit. The Complainant asserts that there must be a formal agreement of representation between the Township Attorney and the Planning Board as a public entity or between the Township Attorney and Barbara Wolfe. Because there is no formal agreement, the Complainant alleges the communication between the Township Attorney and Barbara Wolfe is not protected by attorney-client privilege.

**October 24, 2008**

E-mail from the GRC to the Custodian. The GRC requests further information from the Custodian. The GRC asks the Custodian to indicate the manner and substance of her November 1, 2007 response to the Complainant, to provide the caption of the original and amended complaints for the lawsuit filed by the Complainant and the Tort Claim Notice filed by the Complainant.

**October 24, 2008**

E-mail from the Custodian to the GRC. The Custodian states that she responded verbally to the Complainant's OPRA request on November 1, 2007 when the Custodian called the Complainant to inform the Complainant that the records requested were available for inspection.

The Custodian faxes to the GRC the caption page of the original, first amended complaint and Tort Claim notices filed by the Complainant against the Township of East Amwell, which list the parties to the subject litigation.

**October 25, 2008**

E-mail from the Complainant to the GRC. The Complainant states that she wishes to clarify information related to her OPRA request. The Complainant again disputes that the documents she requested are subject to the attorney-client privilege because she contends that the Municipal Land Use Law does not allow the Township Attorney to represent the Planning Board. The Complainant argues that beginning January 1, 2007, Barbara Wolfe was a member of the public, not a Township official, was not involved in the Complainant's lawsuit and did not have a right to contact Richard Cushing as the Township Attorney. The Complainant further alleges that Barbara Wolfe's contacts with Tim Matheny, Township Administrator were as a member of the public and are subject to disclosure under OPRA.

**October 25, 2008**

E-mail from the Township Attorney to the GRC and the Complainant. Counsel argues that the prohibition against a township attorney also representing the planning board relates only to planning matters so that planning and zoning issues are kept independent from the governing body. Counsel contends that it is not improper for him, as Township Attorney, to advise the Planning Board with regard to Complainant's claim, which relates to a personnel matter. Counsel also notes that any monetary judgment in favor of the Complainant would be paid by the Township, not the Planning Board.

Further, the Township Attorney alleges that if Barbara Wolfe is not a township official, as Complainant asserts, then Ms. Wolfe has no obligation to release her e-mails and the GRC has no jurisdiction over her. Additionally, the Township Attorney asserts that, if the parties Ms. Wolfe exchanged e-mails with are township officials, they are entitled to the attorney-client privilege and the advisory, consultative and deliberative exemption under OPRA.

The Township Attorney also states that Barbara Wolfe, as a former public official, was Chairperson of the Planning Board and served as Chairperson during public discussions of the Complainant's employment situation. Counsel asserts that Ms. Wolfe's entitlement to the advisory, consultative and deliberative exemption and the attorney-client privilege did not disappear when her term expired regarding issues which arose while she was in office.

### **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 ... The terms shall not include inter-agency or intra-agency advisory, consultative or, or deliberative material." (Emphasis added.) N.J.S.A. 47:1A-1.1.

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

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

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

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian's failure to respond within the required seven (7) business days results in a "deemed" denial. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g. Thus, a custodian's failure to respond in writing to a complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

In the matter before the Council, although the Custodian responded verbally to Complainant's OPRA request granting access to some e-mails within the statutorily mandated time period, she did not respond in writing. Further, Custodian did not provide a written explanation for the denial of access to e-mails received or initiated by the Township Attorney until the thirteenth (13<sup>th</sup>) business day following receipt of the request.

Therefore, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

Additionally, the Township Attorney has asserted that twenty (20) of the e-mails requested by the Complainant are subject to the attorney-client privilege and potentially contain advisory, consultative and deliberative material, and are therefore exempt from disclosure under 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 GRC<sup>7</sup> 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

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<sup>7</sup> Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005).  
Joan McGee v. Township of East Amwell (Hunterdon), 2007-305 – Findings and Recommendations of the Executive Director

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 twenty (20) undisclosed e-mails to determine the validity of the Custodian’s assertion that the e-mails contain attorney-client privileged information or advisory, consultative or deliberative material which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

**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 or any other official 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. The Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. 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 twenty (20) undisclosed e-mails to determine the validity of the Custodian’s assertion that the e-mails contain attorney-client privileged information or advisory, consultative or deliberative material which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

3. **The Custodian must deliver<sup>8</sup> to the Council in a sealed envelope nine (9) copies of the requested documents (see #2 above) 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 or any other official 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.

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

Approved By: Catherine Starghill, Esq.  
Executive Director

April 22, 2009

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<sup>8</sup>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.