



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

January 29, 2013 Government Records Council Meeting

Walter G. Wargacki
Complainant

Complaint No. 2011-198

v.

County of Bergen
Custodian of Record

At the January 29, 2013 public meeting, the Government Records Council (“Council”) considered the January 22, 2013 *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 provided the GRC with a legal certification, the unredacted record requested for the *in camera* inspection and a document index on December 26, 2012. Therefore, the Custodian timely complied with the Council’s December 18, 2012 Interim Order.
2. The Custodian lawfully denied access to the requested record because said record contains attorney client privilege information pursuant to N.J.S.A. 47:1A-1.1. The responsive legal memorandum contained a written legal opinion regarding N.J.S.A. 40A:14-60 et seq. and its applicability to the Complainant’s status regarding the current/proposed layoffs for the County.

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 29th Day of January, 2013

Robin Berg Tabakin, Esq., Chair
Government Records Council



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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: February 6, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
January 29, 2013 Council Meeting**

**Walter G. Wargacki¹
Complainant**

GRC Complaint No. 2011-198

v.

**County of Bergen²
Custodian of Records**

Records Relevant to Complaint: Any and all material, correspondence and documents related to the research relative to a letter dated April 18, 2011.³

Request Made: April 18, 2011
Response Made: April 20, 2011
Custodian: Ralph Kornfeld
GRC Complaint Filed: May 26, 2011⁴

Records Submitted for *In Camera* Examination: Legal memorandum dated April 8, 2011 from Assistant County Counsel, Ms. Christina D'Aloia, ("Ms. D'Aloia") to Deputy County Counsel, James X. Sattely, Jr. ("Mr. Sattely").⁵

Background

December 18, 2012

Government Records Council's Interim Order. At the December 18, 2012 public meeting, the Government Records Council ("Council") considered the October 23, 2012 Executive Director's Findings and Recommendations and all related documentation submitted by the parties.⁶ The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council therefore found that:

1. 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 one (1) page legal memorandum dated April 8, 2011 from Ms. D'Aloia to

¹ No legal representation listed on record.

² Represented by James X. Sattely, Esq. (Hackensack, NJ).

³ The Complainant includes a copy of this letter dated April 18, 2011 as part of his OPRA request to the Custodian.

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

⁵ Acting County Counsel, Mr. Jeff Ziegelheim ("Mr. Ziegelheim"), County Administrator, Mr. Ed Trawinski ("Mr. Trawinski") and the Custodian were copies on this memorandum

⁶ This complaint was prepared and scheduled for adjudication at the Council's October 30, 2012 meeting; however, said meeting was cancelled due to Hurricane Sandy. Additionally, the Council's November 27, 2012 was cancelled due to lack of quorum.

Custodian's Counsel with a copy to Mr. Ziegelheim, Mr. Trawinski and the Custodian regarding the applicability of N.J.S.A. 40A:14-60 in order to determine the validity of Custodian Counsel's assertion that said memorandum contains attorney client privilege information pursuant to N.J.S.A. 47:1A-1.1.

2. **The Custodian must deliver⁷ to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see #1 above), a document or redaction index⁸, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,⁹ that the record provided is the record 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.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

December 19, 2012

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

December 26, 2012

Certification of the Custodian in response to the Order attaching a legal memorandum dated April 8, 2011 from Ms. D'Aloia to Mr. Sattely. The Custodian certifies that he is the Director of Personnel for the County of Bergen. ("County"). The Custodian also certifies that his responsibilities as the Director of Personnel include addressing all personnel issues pertaining to the County, including request for personnel records and other relevant documentation. The Custodian further certifies that on April 4, 2011 he received a letter from the Complainant concerning his termination of employment with the County and in which he petitioned to be exempted from termination pursuant to N.J.S.A. 40A:14-60 *et seq.* (Exempt Volunteer Fireman status). The Custodian additionally certifies that upon receipt of the Complainant's April 4, 2011 letter he referred it to the Office of County Counsel for their review and legal opinion.

The Custodian certifies that on April 8, 2011 he received a legal memorandum from Ms. D'Aloia which discussed the applicability of N.J.S.A. 40A:14-60 *et seq.* The Custodian also certifies that this memorandum provided a legal opinion as to the applicability of N.J.S.A. 40A:14-60 *et seq.* to the Complainant. The Custodian further certifies that on April 13, 2011 he sent a letter to the Complainant advising him that his petition to be exempted from the current/proposed lay-off procedure may not be accommodated. The Custodian additionally certifies that on April 18, 2011 the

⁷ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

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

⁹ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

Complainant submitted an OPRA request seeking “any and all material, correspondence and documents related to the research relative to a letter dated April 18, 2011.” The Custodian certifies that on April 20, 2011 Custodian’s Counsel responded to the Complainant stating that access to the requested record is denied because any and all communications on legal issues or matters between the Office of County Counsel and the Custodian are considered attorney client privilege are exempt pursuant to N.J.S.A. 47:1A-1.1.

Analysis

Whether the Custodian complied with the Council’s December 18, 2012 Interim Order?

At its December 18, 2012 public meeting, the Council determined that because the Custodian has asserted that the requested records were lawfully denied because such records are considered attorney client privilege the Council must determine whether the legal conclusion asserted by the Custodian is 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 record was properly denied.

The Council therefore ordered the Custodian to deliver to the Council in a sealed envelope nine (9) copies of the requested unredacted record, 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 record provided is the record requested by the Council for the *in camera* inspection. Such delivery was to be received by the GRC within five (5) business days from receipt of the Council’s Interim Order or on December 27, 2012.

The Custodian provided the GRC with a legal certification, the unredacted records requested for the *in camera* inspection and a document index on December 26, 2012. Therefore, the Custodian timely complied with the Council’s December 18, 2012 Interim Order.

Whether the Custodian unlawfully denied the Complainant 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* ...A government record shall not include any record within the *attorney client privilege*.” (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.

The Custodian asserts that he lawfully denied the Complainant access to the requested records because any and all communications on legal issues or matters between the Office of County Counsel and the Custodian are considered attorney client privilege are exempt pursuant to N.J.S.A. 47:1A-1.1. Conversely, the Complainant made no legal arguments or factual assertions in support of his Denial of Access Complaint.

The GRC conducted an *in camera* examination on the submitted record. 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> Examination¹⁰
Legal memorandum from Ms. D’Aloia to Mr. Sattely. ¹¹	April 8, 2011	Legal memorandum denied in its entirety	Memorandum is exempt from disclosure under OPRA as attorney client privileged material pursuant to <u>N.J.S.A.</u> 47:1A-1.1	Withhold the record in its entirety, because it contains legal recommendations, opinions or advice about the applicability of <u>N.J.S.A.</u> 40A:14-60 <i>et seq.</i> to the

¹⁰ **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.

¹¹ Acting County Counsel, Mr. Jeff Ziegelheim (“Mr. Ziegelheim”), County Administrator, Mr. Ed Trawinski (“Mr. Trawinski”) and the Custodian were copies on this memorandum
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				Complainant regarding the current/proposed layoffs for the County.
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Thus, the Custodian lawfully denied access to the requested record because said record contains attorney client privileged information pursuant to N.J.S.A. 47:1A-1.1. The responsive legal memorandum contained a written legal opinion regarding N.J.S.A. 40A:14-60 et seq. and its applicability to the Complainant's status regarding the current/proposed layoffs for the County.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian provided the GRC with a legal certification, the unredacted record requested for the *in camera* inspection and a document index on December 26, 2012. Therefore, the Custodian timely complied with the Council's December 18, 2012 Interim Order.

2. The Custodian lawfully denied access to the requested record because said record contains attorney client privilege information pursuant to N.J.S.A. 47:1A-1.1. The responsive legal memorandum contained a written legal opinion regarding N.J.S.A. 40A:14-60 et seq. and its applicability to the Complainant's status regarding the current/proposed layoffs for the County.

Prepared By: Harlynn A. Lack, Esq.
Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

January 22, 2013



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

December 18, 2012 Government Records Council Meeting

Walter G. Wargacki
Complainant

Complaint No. 2011-198

v.

County of Bergen
Custodian of Record

At the December 18, 2012 public meeting, the Government Records Council ("Council") considered the October 23, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. 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 one (1) page legal memorandum dated April 8, 2011 from Ms. D'Aloia to Custodian's Counsel with a copy to Mr. Ziegelheim, Mr. Trawinski and the Custodian regarding the applicability of N.J.S.A. 40A:14-60 in order to determine the validity of Custodian Counsel's assertion that said memorandum contains attorney client privilege information pursuant to N.J.S.A. 47:1A-1.1.
2. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see #1 above), a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,³ that the record provided is the record 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.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

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

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

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

Interim Order Rendered by the
Government Records Council
On The 18th Day of December, 2012

Robin Berg Tabakin, Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: December 19, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
December 18, 2012 Council Meeting**

**Walter G. Wargacki¹
Complainant**

GRC Complaint No. 2011-198

v.

**County of Bergen²
Custodian of Records**

Records Relevant to Complaint: Any and all material, correspondence and documents related to the research relative to a letter dated April 18, 2011.³

Request Made: April 18, 2011
Response Made: April 20, 2011
Custodian: Ralph Kornfeld
GRC Complaint Filed: May 26, 2011⁴

Background

April 18, 2011

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

April 20, 2011

Custodian's Counsel response to the OPRA request. The Custodian responds in writing via letter to the Complainant's OPRA request on the second (2nd) business day following receipt of such request. The Custodian states that access to the requested record is denied because any and all communications on legal issues or matters between the Office of County Counsel and the Custodian are considered attorney client privilege are exempt pursuant to N.J.S.A. 47:1A-1.1.

May 26, 2011

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

- Complainant's OPRA request dated April 18, 2011
- Letter from the Custodian to the Complainant dated April 20, 2011.

¹ No legal representation listed on record.

² Represented by James X. Sattely, Esq. (Hackensack, NJ).

³ The Complainant includes a copy of this letter dated April 18, 2011 as part of his OPRA request to the Custodian.

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

The Complainant agrees to mediate this complaint.⁵

June 6, 2011

Offer of Mediation sent to the Custodian.

June 15, 2011

The Custodian declines mediation.

June 15, 2011

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

June 21, 2011

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated April 18, 2011
- Letter from the Custodian to the Complainant dated April 20, 2011.

The Custodian certifies that he received a letter from the Complainant regarding termination of his employment with the County of Bergen and which referenced his Exempt Volunteer Fireman status pursuant to N.J.S.A. 40A:14-60 on April 4, 2011.⁶ The Custodian also certifies that he referred the Complainant’s letter to the Office of County Counsel for their review and legal opinion. The Custodian further certifies that he received a legal memorandum from Assistant County Counsel Christina D’Aloia (“Ms. D’Aloia”) on April 8, 2011 which provided a legal opinion as to the applicability of N.J.S.A. 40A:14-60 to the Complainant’s termination of employment. The Custodian additionally certifies that he sent a letter to the Complainant on April 13, 2011, referencing the detailed legal research of N.J.S.A. 40A:14-60, advising him that his request to be exempted from the current/proposed lay-off plan may not be accommodated. The Custodian certifies that he received the Complainant’s OPRA request on April 18, 2011. The Custodian states that Custodian’s Counsel denied the request on April 20, 2011 pursuant to the attorney client exemption set forth in N.J.S.A. 47:1A-1.1..

The Custodian certifies that there is a one (1) page legal memorandum dated April 8, 2011 from Ms. D’Aloia to Custodian’s Counsel with a copy to Acting County Counsel, Mr. Jeff Ziegelheim (“Mr. Ziegelheim”), County Administrator, Mr. Ed Trawinski (“Mr. Trawinski”) and the Custodian regarding the applicability of N.J.S.A. 40A:14-60. The Custodian certifies that the search for the requested records is not applicable to this complaint. The Custodian also certifies that the record responsive must permanently maintained in accordance with the Records Destruction Schedule established and approved by Records Management Services.

Custodian’s Counsel states that any and all communications between the Office of County Counsel and the Custodian are specifically exempt from disclosure as attorney

⁵ The Complainant made no legal arguments or factual assertions in support of his Denial of Access Complaint.

⁶ The Custodian encloses a copy of this letter along with the SOI.

client privilege pursuant to N.J.S.A. 47:1A-1.1. Counsel also argues that in Paff v. Division of Law, 412 N.J. Super. 140 (App. Div. 2010), the Court held that advice letters are records within the attorney client privilege and thus exempt from disclosure under OPRA. Counsel further states that the Court went on to note that the attorney client privilege has been codified in New Jersey by statute and by rule, which provides in relevant part:

“Communications between lawyer and his client in the course of that relationship and in professional confidence, are privileged, and a client has a privilege (a) to refuse to disclose any such communication and (b) to prevent any other witnesses from disclosing such communication if it came to the knowledge of such witness and (c) to prevent any other witness from disclosing such communication if it came to the knowledge of such witness (i) in the course of its transmittal between the client and the lawyer; (ii) in a manner not reasonably to be anticipated; (iii) as a result of a breach of the lawyer-client privilege or (iv) in the course of a recognized confidential or privileged communication between the client and such witness. The privilege shall be claimed by the lawyer unless otherwise instructed by the client or his representative. N.J.S.A. 2A:84A-20(1) and N.J.R.E. 504) Id. at 150.

Counsel states that the purpose of the attorney client privilege is “to encourage clients to make full disclosure to their attorneys. The policy privilege is to promote full and free discussion between a client and this attorney...It is essential that a client be able to protect his discussions with his attorney from disclosure.” Macey v. Rollins Envtl. Servs. (N.J.), Inc., 179 N.J. Super. 539 (App. Div. 1981) (quoting Fisher v. United States, 425 U.S. 391 (1976)).

Counsel states in In re Grand Jury Subpoena Duces Tecum served by Sussex County, 241 N.J. Super. 18 (App. Div. 1989), the Court held that “the attorney client privilege is fully applicable to communications between a public body and an attorney retained to represent it.” Counsel also states that the Court considered the situation of a law firm retained by a County Board of Freeholders as Special Counsel to “render professional legal services” in connection with the functioning of the County Adjuster set as to “bring the practices of the...Adjuster’s Office into compliance with...current laws and regulations.” Id. at 22.

Counsel also states that in Payton v. New Jersey Turnpike Authority, 148 N.J. 524, 550-551 (1997), the Court held that a unit of State government is a “client” for the purposes of the attorney client privilege and consequently any legal advice rendered by retained counsel fell within that privilege and those records was shielded from disclosure. Counsel argues that in applying the privilege to the relationship between an attorney and a government agency, the court in Paff, *supra*, reasoned that a state agency has the same need for “sound legal advice” as a private client and that the “confidentiality of communications” between the government and its attorney is in the public interest.

Counsel argues that in the matter before the Council, the Complainant seeks to obtain a copy of a legal memorandum that was prepared by an Assistant County Counsel

at the request of the Custodian, who inquired as to the applicability of the Exempt Fireman's Tenure Act, set forth in N.J.S.A. 40A:14-60. Counsel also argues that the subject of the legal memorandum contains legal opinions of counsel and references to case law, statutory authority and also its applicability to the Complainant. Counsel further argues that based upon the attorney client privilege exception to OPRA and the relevant case law, it is clear that the Custodian's denial was proper. Counsel requests that the Council dismiss this complaint with prejudice.

Analysis

Whether the Custodian unlawfully denied access to the requested record?

OPRA provides that:

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

Additionally, OPRA defines a government record as:

"... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file* ... or that has been received in the course of his or its official business ... A government record shall not include the following ... *any record within the attorney-client privilege.*" (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.

In the instant matter, the Complainant made a broad request seeking "any and all material, correspondence, documents related to the research relative to a letter dated April 18, 2011." On its face, such a request is an overly broad, blanket request. See MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005). However, in response to the Complainant's request on April 20, 2011,

Custodian's Counsel informed the Complainant in writing that access to the requested record is denied because any and all communications on legal issues and matters between Office of County Counsel and the Custodian are considered attorney client privilege and are exempt pursuant to N.J.S.A. 47:1A-1.1. The Custodian certified in the SOI that there is a one (1) page legal memorandum dated April 8, 2011 responsive to the Complainant's OPRA request from Ms. D'Aloia to Custodian's Counsel with a copy to Mr. Ziegelheim, Mr. Trawinski and the Custodian regarding the applicability of N.J.S.A. 40A:14-60. Since the Custodian was able to identify a government record responsive to the Complainant's request, notwithstanding the overly broad nature of the request, the GRC will determine whether such record is disclosable under OPRA. See Bond v. Borough of Washington (Warren), GRC Complaint No. 2009-324 (Final Decision dated March 29, 2011) and Darata v. Monmouth County Board of Chosen Freeholders, GRC Complaint No. 2009-312 (Interim Order dated February 24, 2011).

Custodian's Counsel stated in the SOI that the Complainant seeks a copy of a legal memorandum that was prepared by an Assistant County Counsel at the request of the Custodian, who inquired to the applicability N.J.S.A. 40:14-60. Counsel argued in the SOI that the subject of the legal memorandum contains legal opinions of counsel and references to case law, statutory authority and also its applicability to the Complainant. Counsel also argued in the SOI that any and all communications between the Office of County Counsel and the Custodian are specifically exempt from disclosure as attorney client privilege pursuant to 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 GRC⁷ in which the GRC dismissed the complaint by accepting the Custodian's legal conclusion for the denial of access without further review. The court stated that:

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

The court also stated that:

“[t]he statute also contemplates the GRC’s *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the ‘Open Public Meetings Act,’ N.J.S.A. 10:4-6 to -21, it also provides that the GRC ‘may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.’ N.J.S.A. 47:1A-7f. This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.”

Further, the court stated that:

⁷ Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005).
Walter G. Wargacki v. County of Bergen, 2011-198 – Findings and Recommendations of the Executive Director

“[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 one (1) page legal memorandum dated April 8, 2011 from Ms. D’Aloia to Custodian’s Counsel with a copy to Mr. Ziegelheim, Mr. Trawinski and the Custodian regarding the applicability of N.J.S.A. 40A:14-60 in order to determine the validity of Custodian Counsel’s assertion that said memorandum contains attorney client privileged information pursuant to N.J.S.A. 47:1A-1.1.

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

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. 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 one (1) page legal memorandum dated April 8, 2011 from Ms. D’Aloia to Custodian’s Counsel with a copy to Mr. Ziegelheim, Mr. Trawinski and the Custodian regarding the applicability of N.J.S.A. 40A:14-60 in order to determine the validity of Custodian Counsel’s assertion that said memorandum contains attorney client privilege information pursuant to N.J.S.A. 47:1A-1.1.
2. **The Custodian must deliver⁸ to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see #1 above), a document or redaction index⁹, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,¹⁰ that the record provided is the record requested by the Council for the *in camera* inspection. Such**

⁸ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

⁹ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

¹⁰ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

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

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

Prepared By: Harlynn A. Lack, Esq.
Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

October 23, 2012¹¹

¹¹ This complaint was prepared and scheduled for adjudication at the Council's October 30, 2012 meeting; however, said meeting was cancelled due to Hurricane Sandy. Additionally, the Council's November 27, 2012 was cancelled due to lack of quorum.