



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

August 27, 2013 Government Records Council Meeting

Jane Gasparik
Complainant

Complaint No. 2012-234

v.

Township of Middletown (Monmouth)
Custodian of Record

At the August 27, 2013 public meeting, the Government Records Council (“Council”) considered the August 20, 2013 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. Paragraphs numbered 2 and 3 of the Council’s July 23, 2013 Interim Order, which provide for disclosure of the requested e-mail, are hereby vacated.
2. The Custodian lawfully denied access to the requested e-mail because an *in camera* inspection of said e-mail revealed same to contain intra-agency advisory, consultative or deliberative material exempt from disclosure. N.J.S.A. 47:1A-1.1. See also Education Law Center v. NJ Department of Education, 198 N.J. 274 (2009); O’Shea v. West Milford Board of Education, GRC Complaint No. 2004-93 (April 2006).
3. Although the Custodian did not comply in a timely manner with the Council’s June 25, 2013 Interim Order requiring the Custodian to make the requested record available to the GRC for an *in camera* inspection, thereby obstructing the GRC in its efforts to “...receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian...” pursuant to N.J.S.A. 47:1A-7(b), the Custodian did not unlawfully deny access to the requested record because the *in camera* inspection allowed the Council to determine that the requested record was properly denied as advisory, consultative or deliberative material. As such, under the totality of the circumstances, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access.



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

Final Decision Rendered by the
Government Records Council
On The 27th Day of August, 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: August 29, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
August 27, 2013 Council Meeting**

**Jane Gasparik¹
Complainant**

GRC Complaint No. 2012-234

v.

**Township of Middletown (Monmouth)²
Custodial Agency**

Record Relevant to Complaint: Copy of an e-mail sent by Anthony Mercantante to Richard DeBenedetto regarding “Jane – personnel” on July 10, 2012 at approximately 10:00 a.m.³

Custodian of Record: Heidi R. Brunt

Request Received by Custodian: July 20, 2012

Response Made by Custodian: July 31, 2012

GRC Complaint Received: August 7, 2012

Background

July 23, 2013 Council Meeting:

At its July 23, 2013 public meeting, the Government Records Council (“Council”) considered the July 16, 2013 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, found that:

1. The Custodian has not complied with the terms of the Council’s June 25, 2013 Interim Order because the Custodian failed to comply with the terms of said Order within the required five (5) business days from date of receipt.
2. The Custodian has failed to bear her burden of proving a lawful basis for a denial of access to the requested record. N.J.S.A. 47:1A-6. As such, the Custodian must disclose to the Complainant in unredacted form the e-mail sent by Anthony Mercantante to Richard DeBenedetto regarding “Jane – personnel” on July 10, 2012, at approximately 10:00 a.m., being the same record identified by the Custodian as a single page e-mail from the Township Administrator to a department head.

¹ No legal representation listed on record.

² Represented by Brian M. Nelson, Esq., of Archer & Greiner, LLC (Shrewsbury, NJ).

³ There were other records requested that are not relevant to this complaint.

3. **The Custodian shall comply with item #2 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Procedural History and Compliance:

1. **Failure to Comply with Council's June 25, 2013 Interim Order**

On June 25, 2013, the Council ordered an *in camera* review of the requested record, an e-mail sent by Anthony Mercantante to Richard DeBenedetto regarding "Jane – personnel" on July 10, 2012 at approximately 10:00 a.m. (hereinafter, the "e-mail"). The *in camera* review was ordered to determine the validity of the Custodian's assertion that the record is exempt from disclosure because it is a personnel record and also advisory, consultative, or deliberative ("ACD") material. The Custodian failed to comply with the Council's June 25, 2013 Order.

2. **Failure to Comply with Council's July 23, 2013 Interim Order**

Based upon the Custodian's failure to comply with the June 25, 2013 Interim Order, the Council was unable to conduct an *in camera* review of the e-mail to determine the validity of the Custodian's assertion that the record is exempt from disclosure because it is a personnel record and also exempt by the deliberative process privilege. As a result of the Custodian's failure to comply, the Council could not determine whether the Custodian had previously asserted a lawful basis for a denial of access to the requested record. Therefore, on July 23, 2013, the Council ordered that the requested e-mail be disclosed to the Complainant.

On July 24, 2013, the Council distributed its Interim Order to all parties. In a July 30, 2013 letter, Custodian's Counsel informed the GRC that, "...the Township's position has not changed in that the requested record is exempt from disclosure pursuant to N.J.S.A. 47:1A-10 and under the deliberative process privilege pursuant to McGee v. Tp. of East Amwell, 416 N.J. Super. 602 (App. Div. 2010)." Accordingly, the Custodian failed to comply with the Council's July 23, 2013 Order.

3. **August 20, 2013: Production of the Requested E-mail for an *In Camera* Inspection**

On August 20, 2013, the Custodian's Counsel informed the GRC that the Custodian decided to comply with the Council's June 25, 2013 Interim Order by submitting the requested e-mail to the GRC for an *in camera* inspection to determine the validity of the Custodian's assertion that the record is exempt from disclosure because it is a personnel record and also constitutes ACD material. Counsel stated that the

requested e-mail was sent by the Complainant's department head to the Township Administrator and Assistant Township Administrator who are responsible for employee discipline under the Township's form of government. Counsel submitted the e-mail to the GRC as an attachment to his August 20, 2013 letter.

Analysis

Compliance

The Council's July 23, 2013 Interim Order determined that the Custodian failed to comply with the terms of the Council's June 25, 2013 Interim Order in a timely manner. Paragraphs numbered 2 and 3 of the Order required the Custodian to disclose to the Complainant the record relevant to the complaint and to simultaneously provide certified confirmation of compliance to the Executive Director. The Custodian's Counsel acknowledged receipt of the Order on or before July 30, 2013, by sending a July 30, 2013 e-mail to the GRC, but the Custodian did not comply with the terms of said Order. However, the Custodian did comply belatedly with the Council's June 25, 2013 Interim Order by producing the requested e-mail for an *in camera* inspection on August 20, 2013.⁴

As such, paragraphs numbered 2 and 3 of the Council's July 23, 2013 Interim Order, which provide for disclosure of the requested e-mail, should be vacated.

Unlawful Denial of Access

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

In O'Shea v. West Milford Board of Education, GRC Complaint No. 2004-93 (April 2006), the Council stated that

[N]either the statute nor the courts have defined the terms ... "advisory, consultative, or deliberative" in the context of the public records law. The Council looks to an analogous concept, the deliberative process privilege, for guidance in

⁴ The Custodian did not fully comply with the Order because the Custodian only produced one (1) copy of the e-mail, and failed to provide a document index and a legal certification that the record provided is the record requested by the Council for the *in camera* inspection pursuant to the Council's June 25, 2013 Interim Order. However, the Council already determined in its July 23, 2013 Interim Order that the Custodian did not comply with the terms of the Council's June 25, 2013 Interim Order.

the implementation of OPRA's ACD exemption. Both the ACD exemption and the deliberative process privilege enable a governmental entity to shield from disclosure material that is pre-decisional and deliberative in nature. Deliberative material contains opinions, recommendations, or advice about agency policies. In Re the Liquidation of Integrity Insurance Company, 165 N.J. 75, 88 (2000); In re Readoption With Amendments of Death Penalty Regulations, 182 N.J. 149 (App. Div. 2004).

Id.

The deliberative process privilege is a doctrine that permits government agencies to withhold documents that reflect advisory opinions, recommendations and deliberations submitted as part of a process by which governmental decisions and policies are formulated. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150, 95 S. Ct. 1504, 1516, 44 L. Ed. 2d 29, 47 (1975). Specifically, the New Jersey Supreme Court has ruled that a record that contains or involves factual components is entitled to deliberative-process protection under the exemption in OPRA when it was used in decision-making process *and* its disclosure would reveal deliberations that occurred during that process. Education Law Center v. NJ Department of Education, 198 N.J. 274, 966 A.2d 1054, 1069 (2009). This long-recognized privilege is rooted in the concept that the sovereign has an interest in protecting the integrity of its deliberations. The earliest federal case adopting the privilege is Kaiser Alum. & Chem. Corp. v. United States, 157 F. Supp. 939 (1958). The privilege and its rationale were subsequently adopted by the federal district courts and circuit courts of appeal. United States v. Farley, 11 F.3d 1385, 1389 (7th Cir.1993).

The deliberative process privilege was discussed at length in Integrity, *supra*. There, the Court addressed the question of whether the Commissioner of Insurance, acting in the capacity of Liquidator of a regulated entity, could protect certain records from disclosure which she claimed contained opinions, recommendations or advice regarding agency policy. Id. at 81. The Court adopted a qualified deliberative process privilege based upon the holding of McClain v. College Hospital, 99 N.J. 346 (1985), Integrity, *supra*, at 88. In doing so, the Court noted that:

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

Id. at 84-85 (Citations omitted).

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

The initial burden falls on the state agency to show that the documents it seeks to shield are pre-decisional and deliberative in nature (containing opinions, recommendations, or advice about agency policies). Once the deliberative nature of the documents is established, there is a presumption against disclosure. The burden then falls on the party seeking discovery to show that his or her compelling or substantial need for the materials overrides the government's interest in non-disclosure. Among the considerations are the importance of the evidence to the movant, its availability from other sources, and the effect of disclosure on frank and independent discussion of contemplated government policies.”

Integrity, *supra*, at 88 (citing McClain, *supra*, at 361-62).

The GRC conducted an *in camera* inspection of the requested record to determine the validity of the Custodian's assertion that the record is exempt from disclosure as ACD material and as a personnel record pursuant to N.J.S.A. 47:1A-10. The record submitted for *in camera* inspection is a one (1) paragraph e-mail sent on July 10, 2012 at 10:05 a.m. from Anthony Mercantante to Richard DeBenedetto. The subject of the e-mail is titled “Jane – Confidential Personnel Matter.” The Custodian's Counsel informed the GRC that the sender is the Complainant's department head and that the recipients are the Township Administrator and Assistant Township Administrator who are responsible for employee discipline under the Township's form of government. Although there is only one recipient, the e-mail is copied to another individual who is likely the Assistant Township Administrator identified by Counsel.

Based upon Counsel's identification of the sender and the recipients by position, the *in camera* inspection revealed the e-mail to comprise internal municipal correspondence between administrators. Therefore, the e-mail is a government record. The inspection further revealed the e-mail to contain advice concerning an employee which was transmitted from a department head to Township Administrators about potential future action. As such, the e-mail contains advisory and deliberative content. Accordingly, the Custodian lawfully denied access to the requested e-mail because an *in camera* inspection of said e-mail revealed same to contain intra-agency ACD material exempt from disclosure. N.J.S.A. 47:1A-1.1. *See also* Education Law Center, *supra*; O'Shea, *supra*.

Since the GRC determined that the requested e-mail is exempt from disclosure as ACD material pursuant to N.J.S.A. 47:1A-1.1, it is unnecessary for the GRC to determine whether the record is exempt as a personnel record pursuant to N.J.S.A. 47:1A-10.

Knowing & Willful

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 “... [i]f 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)).

Here, although the Custodian did not comply in a timely manner with the Council’s June 25, 2013 Interim Order requiring the Custodian to make the requested record available to the GRC for an *in camera* inspection, thereby obstructing the GRC in its efforts to “...receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian...” pursuant to N.J.S.A. 47:1A-7(b), the Custodian did not unlawfully deny access to the requested record because the *in camera* inspection allowed the Council to determine that the requested record was properly denied as ACD material. As such, under the totality of the circumstances, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Paragraphs numbered 2 and 3 of the Council’s July 23, 2013 Interim Order, which provide for disclosure of the requested e-mail, are hereby vacated.
2. The Custodian lawfully denied access to the requested e-mail because an *in camera* inspection of said e-mail revealed same to contain intra-agency advisory, consultative or deliberative material exempt from disclosure. N.J.S.A. 47:1A-1.1. *See also Education Law Center v. NJ Department of Education*, 198 N.J. 274 (2009); O’Shea v. West Milford Board of Education, GRC Complaint No. 2004-93 (April 2006).
3. Although the Custodian did not comply in a timely manner with the Council’s June 25, 2013 Interim Order requiring the Custodian to make the requested record available to the GRC for an *in camera* inspection, thereby obstructing the GRC in its efforts to “...receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian...” pursuant to N.J.S.A. 47:1A-7(b), the Custodian did not unlawfully deny access to the

requested record because the *in camera* inspection allowed the Council to determine that the requested record was properly denied as advisory, consultative or deliberative material. As such, under the totality of the circumstances, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access.

Prepared By: John E. Stewart, Esq.

Approved By: Brandon D. Minde, Esq.
Executive Director

August 20, 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

July 23, 2013 Government Records Council Meeting

Jane Gasparik
Complainant

Complaint No. 2012-234

v.

Township of Middletown (Monmouth)
Custodian of Record

At the July 23, 2013 public meeting, the Government Records Council (“Council”) considered the July 16, 2013 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 has not complied with the terms of the Council’s June 25, 2013 Interim Order because the Custodian failed to comply with the terms of said Order within the required five (5) business days from date of receipt.
2. The Custodian has failed to bear her burden of proving a lawful basis for a denial of access to the requested record. N.J.S.A. 47:1A-6. As such, the Custodian must disclose to the Complainant in unredacted form the e-mail sent by Anthony Mercantante to Richard DeBenedetto regarding “Jane – personnel” on July 10, 2012, at approximately 10:00 a.m., being the same record identified by the Custodian as a single page e-mail from the Township Administrator to a department head.
3. **The Custodian shall comply with item #2 above within five (5) business days from receipt of the Council’s Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹ to the Executive Director.²**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

¹ "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."

² Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

Interim Order Rendered by the
Government Records Council
On The 23rd Day of July, 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: July 24, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
July 23, 2013 Council Meeting**

**Jane Gasparik¹
Complainant**

GRC Complaint No. 2012-234

v.

**Township of Middletown (Monmouth)²
Custodial Agency**

Record Relevant to Complaint: Copy of an e-mail sent by Anthony Mercantante to Richard DeBenedetto regarding “Jane – personnel” on July 10, 2012 at approximately 10:00 a.m.³

Custodian of Record: Heidi R. Brunt

Request Received by Custodian: July 20, 2012

Response Made by Custodian: July 31, 2012

GRC Complaint Received: August 7, 2012

Background

June 25, 2013 Council Meeting:

At its June 25, 2013 public meeting, the Government Records Council (“Council”) considered the June 18, 2013 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 GRC must conduct an *in camera* review of the e-mail sent by Anthony Mercantante to Richard DeBenedetto regarding “Jane – personnel” on July 10, 2012, at approximately 10:00 a.m., being the same record identified by the Custodian as a single page e-mail from the Township Administrator to a department head, to determine the validity of the Custodian’s assertion that the record is exempt from disclosure because it is a personnel record and is also exempt from disclosure as ACD material. *See Paff v. NJ Department of Labor, Board of Review*, 379 N.J. Super. 346 (App. Div. 2005), N.J.S.A. 47:1A-10, and N.J.S.A. 47:1A-1.1.
2. **The Custodian must deliver⁴ to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see paragraph 1 above), a document or**

¹ No legal representation listed on record.

² Represented by Brian M. Nelson, Esq., of Archer & Greiner, LLC (Shrewsbury, NJ).

³ There were other records requested that are not relevant to this complaint.

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 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.

Procedural History:

On June 26, 2013, the Council distributed its Interim Order to all parties.

Compliance:

On June 27, 2013, the Council's June 25, 2013, Interim Order was received by the Custodian.⁵ The Custodian has failed to comply with the Council's Order. Furthermore the Custodian's failure to comply with the Council's Order was anticipated as the Custodian's Counsel informed the GRC in an e-mail dated June 24, 2013, "...[b]e advised that the Township will not turn over any unredacted emails to the GRC for an *in camera* review absent a court order..."

Analysis

Compliance

The Custodian originally withheld the record relevant to the complaint, which she described as a single page e-mail from the Township Administrator to a department head, because she certified it was exempt from disclosure as a personnel record and inter-agency or intra-agency advisory, consultative, or deliberative ("ACD") material.

Here, the records are not per se exempt from access under OPRA based upon the Custodian's mere recitation. Rather, the exemptions asserted by the Custodian are often subject to interpretation and subjectivity, and thus need to be confirmed by the GRC. As such, on June 25, 2013, the Council ordered an *in camera* inspection so that the GRC could examine the requested records and confirm the Custodian's assertion that the requested record is exempt from disclosure as a personnel record and/or ACD material. The GRC provided the Custodian with legal authority for ordering the Custodian to comply with paragraph 2 of the Order by citing to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), which

⁴ 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.

⁵ UPS Next Day Air® Proof of Delivery revealed that the Order was delivered to the Custodian on June 27, 2013, at 10:18 a.m.

provides in relevant part, "...[w]e hold...that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal." Id. at 355.

The Custodian received the Council's Interim Order on June 27, 2013; therefore, the Custodian was required to comply with the terms of said Order by July 5, 2013. However, the Custodian failed to comply with the terms of the Order in a timely manner or otherwise communicate with the GRC after receiving the Order.

Despite the GRC's efforts to examine the unredacted record in order to validate the Custodian's assertion that it was lawfully withheld from disclosure, the Custodian denied such efforts by failing to comply with the Council's Order. Indeed, on June 24, 2013, in anticipation of the Order, the Custodian notified the GRC through Counsel that, "the Township will not turn over any unredacted emails to the GRC for an *in camera* review absent a court order..."

Accordingly, the Custodian has not complied with the terms of the Council's June 25, 2013 Interim Order because the Custodian failed to comply with the terms of said Order within the required five (5) business days from date of receipt.

Disclosure

Any limitations on the right of access accorded by [OPRA] as amended and supplemented, shall be construed in favor of the public's right of access[.] N.J.S.A. 47:1A-1.

The Custodian has failed to allow the GRC to examine the requested record to validate the Custodian's assertion that the record is exempt from disclosure; therefore, the Custodian leaves the GRC with no alternative other than to find in favor of the Complainant's right of access.

Accordingly, the Custodian has failed to bear her burden of proving a lawful basis for a denial of access to the requested record. N.J.S.A. 47:1A-6. As such, the Custodian must disclose to the Complainant in unredacted form the e-mail sent by Anthony Mercantante to Richard DeBenedetto regarding "Jane – personnel" on July 10, 2012, at approximately 10:00 a.m., being the same record identified by the Custodian as a single page e-mail from the Township Administrator to a department head.

Knowing & Willful

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. The Custodian has not complied with the terms of the Council's June 25, 2013 Interim Order because the Custodian failed to comply with the terms of said Order within the required five (5) business days from date of receipt.
2. The Custodian has failed to bear her burden of proving a lawful basis for a denial of access to the requested record. N.J.S.A. 47:1A-6. As such, the Custodian must disclose to the Complainant in unredacted form the e-mail sent by Anthony Mercantante to Richard DeBenedetto regarding "Jane – personnel" on July 10, 2012, at approximately 10:00 a.m., being the same record identified by the Custodian as a single page e-mail from the Township Administrator to a department head.
3. **The Custodian shall comply with item #2 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁶ to the Executive Director.⁷**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: John E. Stewart, Esq.

Approved By: Brandon D. Minde, Esq.
Executive Director

July 16, 2013

⁶ "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."

⁷ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.



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INTERIM ORDER

June 25, 2013 Government Records Council Meeting

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Complaint No. 2012-234

v.

Township of Middletown (Monmouth)
Custodian of Record

At the June 25, 2013 public meeting, the Government Records Council ("Council") considered the June 18, 2013 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 GRC must conduct an *in camera* review of the e-mail sent by Anthony Mercantante to Richard DeBenedetto regarding "Jane – personnel" on July 10, 2012, at approximately 10:00 a.m., being the same record identified by the Custodian as a single page e-mail from the Township Administrator to a department head, to determine the validity of the Custodian's assertion that the record is exempt from disclosure because it is a personnel record and is also exempt from disclosure as ACD material. See Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), N.J.S.A. 47:1A-10, and 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 paragraph 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 25th Day of June, 2013

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

Steven Ritardi, Esq., Acting Chair
Government Records Council

Decision Distribution Date: June 26, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 25, 2013 Council Meeting**

**Jane Gasparik¹
Complainant**

GRC Complaint No. 2012-234

v.

**Township of Middletown (Monmouth)²
Custodian of Records**

Records Relevant to Complaint: Copy of an e-mail sent by Anthony Mercantante to Richard DeBenedetto regarding “Jane – personnel” on July 10, 2012 at approximately 10:00 a.m.³

Request Made: July 20, 2012

Response Made: July 31, 2012

GRC Complaint Filed: August 7, 2012⁴

Background⁵

Request and Response:

On July 20, 2012, the Complainant submitted an Open Public Records Act (“OPRA”) request seeking the above-listed record. On July 31, 2012, the seventh (7th) business day following receipt of said request, the Custodian responded in writing informing the Complainant that her request was denied because N.J.S.A. 47:1A-10 limits disclosure of personnel information to 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.

Denial of Access Complaint:

On August 7, 2012, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that she provided her request to the Custodian on July 20, 2012 and that the Custodian denied her request on July 31, 2012, pursuant to N.J.S.A. 47:1A-10.

¹ No legal representation listed on record.

² Heidi R. Brunt, Custodian of Records. Represented by Brian M. Nelson, Esq., of Nelson Supko & Hanlon, LLC (Shrewsbury, NJ).

³ There were other records requested that are not relevant to this complaint.

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

⁵ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

Statement of Information:

On September 11, 2012, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that she received the Complainant’s OPRA request on July 20, 2012, and that she responded to the request on July 31, 2012. The Custodian certifies that the record responsive to the Complainant’s request is a one (1) page e-mail from the Township Administrator to a department head and it was denied because it relates to a personnel matter based on a citizen complaint. The Custodian further certifies that N.J.S.A. 47:1A-10 specifically exempts personnel records from disclosure. The Custodian also certifies that the record is subject to the deliberative process privilege and is exempt from disclosure under OPRA as advisory, consultative and deliberative (“ACD”) material. The Custodian cites to McGee v. Tp. Of East Amwell, 416 N.J. Super. 602 (App. Div. 2010), in support of her argument denying access to the requested record.

Analysis⁶

Unlawful Denial of Access

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.

A government record “...shall not include inter-agency or intra-agency advisory, consultative, or deliberative material.” N.J.S.A. 47:1A-1.1.

OPRA provides that “...the personnel or pension records of any individual in the possession of a public agency...shall not be considered a government record and shall not be made available for public access, except that an individual’s name, title, position, salary, payroll record, length of service, date of separation and the reason therefore, and the amount and type of pension received shall be a government record...” N.J.S.A. 47:1A-10.

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.”

⁶ There may be other OPRA issues in this matter; however, the Council’s analysis is based solely on the claims made in the Complainant’s Denial of Access Complaint.

⁷ Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005).

The Court also stated that:

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

Further, the Court stated that:

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

Here, the Custodian certified in the SOI that the requested record was denied because it was a personnel record exempt from disclosure pursuant to N.J.S.A. 47:1A-10. The Custodian also certified that the record was exempt from disclosure because it constituted ACD material. ACD material is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

Therefore, the GRC must conduct an *in camera* review of the e-mail sent by Anthony Mercantante to Richard DeBenedetto regarding “Jane – personnel” on July 10, 2012 at approximately 10:00 a.m., being the same record identified by the Custodian as a single page e-mail from the Township Administrator to a department head, to determine the validity of the Custodian’s assertion that the record is exempt from disclosure because it is a personnel record and is also exempt from disclosure as ACD material. See Paff, supra, N.J.S.A. 47:1A-10, and N.J.S.A. 47:1A-1.1.

Knowing & Willful

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. The GRC must conduct an *in camera* review of the e-mail sent by Anthony Mercantante to Richard DeBenedetto regarding “Jane – personnel” on July 10, 2012,

at approximately 10:00 a.m., being the same record identified by the Custodian as a single page e-mail from the Township Administrator to a department head, to determine the validity of the Custodian's assertion that the record is exempt from disclosure because it is a personnel record and is also exempt from disclosure as ACD material. See Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), N.J.S.A. 47:1A-10, and 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 paragraph 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 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: John E. Stewart, Esq.

Approved By: Brandon D. Minde, Esq.
Executive Director

June 18, 2013

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."