



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

September 30, 2014 Government Records Council Meeting

David J. Roundtree
Complainant

Complaint No. 2013-133

v.

NJ Department of State, Division of Elections
Custodian of Record

At the September 30, 2014 public meeting, the Government Records Council (“Council”) considered the September 23, 2014 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 failed to fully comply with the Council’s July 29, 2014, Interim Order because although he timely responded and submitted certified confirmation of compliance, he failed to provide all e-mails in accordance with conclusion No. 3. However, the Custodian later responded to the GRC’s request for additional information within the extended time frame rectifying these deficiencies.
2. The Custodian unlawfully denied access to eleven (11) of the e-mails and all other unprivileged portions of the remaining e-mails and failed to fully comply with the Council’s July 29, 2014, Interim Order. However, the Custodian timely complied with the Council’s February 25, 2014 Interim Order and also lawfully denied access to the contents of the remaining e-mails and attachments. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, 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.

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 30th Day of September, 2014

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: October 3, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
September 30, 2014 Council Meeting**

**David J. Roundtree¹
Complainant**

GRC Complaint No. 2013-133

v.

**New Jersey Department of State, Division of Elections²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of

1. "As to your written letter, yesterday, stating case law, please forward all documents pertaining to your letter ..."
2. "... all of [the Complainant's] requests for information on the names [he] wanted to challenge from previous e-mails that was (sic) never given ..."
3. "... a copy of that Sample ballot in the names [the Complainant] ask (sic) for in the challenge of the petitions."
4. "... full petitions of all names listed on the letter of denial and a review of procedures ... to how this process was done."
5. "... e-mails between Lt. Gov, Division of Elections [{"Elections"}] and any advise (sic) that was rendered by ... all attorneys for the State from [March 31, 2013] to present."
6. "... policy guidelines of the laws in which you are governed and steps [Elections] is to follow in the State of New Jersey."

Custodian of Record: Robert Giles

Request Received by Custodian: April 11, 2013³

Response Made by Custodian: April 18, 2013

GRC Complaint Received: May 9, 2013

Background

July 29, 2014 Council Meeting:

At its July 29, 2014 public meeting, the Council considered the July 29, 2014 *In Camera* Findings and Recommendations of the Executive Director and all related documentation

¹ No legal representation listed on record.

² Represented by Deputy Attorney General George N. Cohen.

³ The Complainant included additional requests in his Denial of Access Complaint; however, these requests do not reference OPRA and are thus not considered valid OPRA requests. See Wolosky v. Twp. of East Hanover (Morris), GRC Complaint No. 2010-205 (Interim Order dated October 25, 2011) at 8-9.

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 complied with the Council's February 25, 2014 Interim Order because he submitted nine (9) copies of the records at issue to the GRC and submitted certified confirmation of compliance to the Executive Director within the prescribed time frame to comply.
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.**⁴
3. The Custodian must disclose all other portions of the requested e-mails to the Complainant (i.e. sender, recipients, date, time, subject, and salutations where applicable). To these portions of the requested e-mails, the Custodian has unlawfully denied access. See Ray v. Freedom Academy Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010).
4. **The Custodian must comply with conclusion No. 3 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.**
5. 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 July 30, 2014, the Council distributed its Interim Order to all parties. On August 1, 2014, the Custodian's Counsel sought an extension of time until August 15, 2014 to respond to the Council's Order due to pending absences from work.⁵ The GRC granted the requested extension on the same day.

On August 14, 2014, the Custodian responded to the Council's Interim Order. The Custodian certified that he disclosed to the Complainant the eleven (11) e-mails required to be disclosed per the Council's Order.

⁴ 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.

⁵ The GRC notes that the Complainant objected to Custodian Counsel's request for an extension of time.

On August 19, 2014, the GRC advised the Custodian's Counsel that the Custodian failed to comply with conclusion No. 3 of the Order requiring disclosure of ". . . all other portions of the requested e-mails to the Complainant (i.e. sender, recipients, date, time, subject, and salutations where applicable)." The GRC requested that the Custodian rectify his failure to comply by close of business on August 22, 2014. On August 20, 2014, the Custodian's Counsel requested an extension of time until August 28, 2014 to rectify the Custodian's response because the Custodian was away and would not return until August 26, 2014.⁶

On August 22, 2014, the GRC granted an extension until August 28, 2014 based on the circumstances provided by Custodian's Counsel. The GRC noted that no further extensions would be granted. On August 27, 2014, the Custodian responded via e-mail providing the Complainant with the remainder of the e-mails (with redactions) and simultaneously provided certified confirmation of compliance to the Executive Director.

Analysis

Compliance

At its July 29, 2014 meeting, the Council ordered the Custodian to comply with its *in camera* findings. On July 30, 2014, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on August 6, 2014

On August 1, 2014, the first (1st) business day after receipt of the Council's Order, the Custodian's Counsel requested an extension of time until August 15, 2014, which the GRC granted. On August 14, 2014, the Custodian provided eleven (11) unredacted e-mails to the Complainant and simultaneously submitted certified confirmation of compliance. However, the Custodian failed to disclose the remainder to the e-mails at issue in accordance with conclusion No. 3.

Thus, on August 19, 2014, the GRC advised Custodian's Counsel that the Custodian failed to fully comply with the Council's Order and provided the Custodian until August 22, 2014 to complete his compliance. On August 26, 2014, within the extended time frame granted by the GRC, the Custodian completed compliance and simultaneously submitted certified confirmation of compliance to the Executive Director.

Therefore, the Custodian failed to fully comply with the Council's July 29, 2014, Interim Order because although he timely responded and submitted certified confirmation of compliance, he failed to provide all e-mails in accordance with conclusion No. 3. However, the Custodian later responded to the GRC's request for additional information within the extended time frame rectifying these deficiencies.

⁶ The GRC notes that the Complainant also objected to this request for an extension of time.

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 (Felder 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 (*id.*; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); 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)).

The Custodian unlawfully denied access to eleven (11) of the e-mails and all other unprivileged portions of the remaining e-mails and failed to fully comply with the Council’s July 29, 2014, Interim Order. However, the Custodian timely complied with the Council’s February 25, 2014 Interim Order and also lawfully denied access to the contents of the remaining e-mails and attachments. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, 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.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian failed to fully comply with the Council’s July 29, 2014, Interim Order because although he timely responded and submitted certified confirmation of compliance, he failed to provide all e-mails in accordance with conclusion No. 3. However, the Custodian later responded to the GRC’s request for additional information within the extended time frame rectifying these deficiencies.

2. The Custodian unlawfully denied access to eleven (11) of the e-mails and all other unprivileged portions of the remaining e-mails and failed to fully comply with the Council's July 29, 2014, Interim Order. However, the Custodian timely complied with the Council's February 25, 2014 Interim Order and also lawfully denied access to the contents of the remaining e-mails and attachments. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, 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.

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

Approved By: Dawn R. SanFilippo, Esq.
Acting Executive Director

September 23, 2014



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 29, 2014 Government Records Council Meeting

David J. Roundtree
Complainant

Complaint No. 2013-133

v.

NJ Department of State, Division of Elections
Custodian of Record

At the July 29, 2014 public meeting, the Government Records Council (“Council”) considered the July 22, 2014 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 complied with the Council’s February 25, 2014 Interim Order because he submitted nine (9) copies of the records at issue to the GRC and submitted certified confirmation of compliance to the Executive Director within the prescribed time frame to comply.
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.¹**
3. The Custodian must disclose all other portions of the requested e-mails to the Complainant (i.e. sender, recipients, date, time, subject, and salutations where applicable). To these portions of the requested e-mails, the Custodian has unlawfully denied access. *See Ray v. Freedom Academy Charter Sch. (Camden)*, GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010).
4. **The Custodian must comply with conclusion No. 3 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.**

¹ 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.

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

Interim Order Rendered by the
Government Records Council
On The 29th Day of July, 2014

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 30, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
July 29, 2014 Council Meeting**

**David J. Roundtree¹
Complainant**

GRC Complaint No. 2013-133

v.

**New Jersey Department of State, Division of Elections²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of

1. “As to your written letter, yesterday, stating case law, please forward all documents pertaining to your letter ...”
2. “... all of [the Complainant’s] requests for information on the names [he] wanted to challenge from previous e-mails that was (sic) never given ...”
3. “... a copy of that Sample ballot in the names [the Complainant] ask (sic) for in the challenge of the petitions.”
4. “... full petitions of all names listed on the letter of denial and a review of procedures ... to how this process was done.”
5. “... e-mails between Lt. Gov, Division of Elections [(“Elections”)] and any advise (sic) that was rendered by ... all attorneys for the State from [March 31, 2013] to present.”
6. “... policy guidelines of the laws in which you are governed and steps [Elections] is to follow in the State of New Jersey.”

Custodian of Record: Robert Giles

Request Received by Custodian: April 11, 2013³

Response Made by Custodian: April 18, 2013

GRC Complaint Received: May 9, 2013

Records Submitted for *In Camera* Examination: 28 e-mail chains and six (6) attachments.

Background

February 25, 2014 Council Meeting:

At its February 25, 2014 public meeting, the Council considered the February 18, 2014

¹ No legal representation listed on record.

² Represented by Deputy Attorney General George N. Cohen.

³ The Complainant included additional requests in his Denial of Access Complaint; however, these requests do not reference OPRA and are thus not considered valid OPRA requests. See Wolosky v. Twp. of East Hanover (Morris), GRC Complaint No. 2010-205 (Interim Order dated October 25, 2011) at 8-9.

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. Pursuant to Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the 28 e-mails and "draft" documents to determine the validity of the Custodian's assertion that the records constitute attorney-client privileged material and draft documents which are exempt from disclosure pursuant to 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 records (see No. 1 above), a document or redaction index⁵, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,⁶ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
3. Because the Complainant's supplemental April 26, 2013 request item Nos. 1 through 3 and 5 through 7 sought non-specific records and information based on a number of questions and item No. 4 failed to seek identifiable government records, the request is invalid under OPRA. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); LaMantia v. Jamesburg Public Library (Middlesex), GRC Complaint No. 2008-140 (February 2009); Watt v. Borough of North Plainfield (Somerset), GRC Complaint No. 2007-246 (September 2009). Thus, the Custodian has not unlawfully denied access to the Complainant's supplemental request. *See also* Ohlson v. Twp. of Edison (Middlesex), GRC Complaint No. 2007-233 (August 2009) *and* Rummel v. Cumberland Cnty. Bd. of Chosen Freeholders, GRC Complaint No. 2011-168 (December 2012).
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:

On February 26, 2014, The Council distributed its Interim Order to all parties on. On February 28, 2014, the Custodian responded to the Council's Interim Order. The Custodian certified that he denied access to 28 e-mails and five (5) attachments under the attorney-client

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

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."

privilege and draft record exemptions. N.J.S.A. 47:1A-1.1. The Custodian certified that, in accordance with the Council's Order, he is submitting nine (9) copies of the records ordered by the GRC to be reviewed *in camera*. The Custodian noted that there are actually six (6) draft documents and not five (5) as originally stated.

Analysis

Compliance

On February 25, 2014, the Council ordered the Custodian to submit nine (9) copies of the 28 e-mails and draft documents at issue for an *in camera* review and further to provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On February 26, 2014, the Council distributed its Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. The Custodian received the Council's Order on the same day; thus, March 5, 2014 was the last day to comply. On February 28, 2014, the Custodian responded submitting to the GRC nine (9) copies of the records and certified confirmation of compliance.

Therefore, the Custodian complied with the Council's February 25, 2014 Interim Order because he submitted nine (9) copies of the records at issue to the GRC and submitted certified confirmation of compliance to the Executive Director within the prescribed time frame to comply.

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. N.J.S.A. 47:1A-6.

OPRA provides that the definition of a government record ". . . shall not include . . . inter-agency or intra-agency advisory, consultative, or deliberative [“ACD”] material.” When this exception is invoked, a governmental entity may “withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated.” Educ. Law Center v. N.J. Dep't of Educ., 198 N.J. 274, 285 (2009)(citing NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975)). The custodian claiming an exception to the disclosure requirements under OPRA on this basis must initially satisfy two conditions: (1) the document must be pre-decisional, meaning that the document was generated prior to the adoption of the governmental entity's policy or decision; and (2) the document must reflect the deliberative process, which means that it must contain opinions, recommendations, or advice about agency policies. Id. at 286 (internal citations and quotations omitted).

The key factor in this determination is whether the contents of the document reflect “formulation or exercise of . . . policy-oriented judgment or the process by which policy is

formulated.” Id. at 295 (adopting the federal standard for determining whether material is “deliberative” and quoting Mapother v. Dep't of Justice, 3 F.3d 1533, 1539 (D.C. Cir. 1993)). Once the governmental entity satisfies these two threshold requirements, a presumption of confidentiality is established, which the requester may rebut by showing that the need for the materials overrides the government's interest in confidentiality. Id. at 286-87.

Similarly, OPRA exempts access to “. . . any record within the attorney-client privilege.” N.J.S.A. 47:1A-1.1. Further, “[t]he provisions of [OPRA] shall not abrogate or erode any . . . grant of confidentiality . . . recognized by . . . court rule.” N.J.S.A. 47:1A-9(b). As such, OPRA does not allow for the disclosure of attorney work product, consisting of “the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.” Rule 4:10-2(c).

In the context of public entities, these privileges extend to communications between the public body, the attorney retained to represent it, necessary intermediaries and agents through whom communications are conveyed, and co-litigants who have employed a lawyer to act for them in a common interest. *See* Tractenberg v. Twp. Of W. Orange, 416 N.J. Super. 354, 376 (App. Div. 2010); In re Env'tl. Ins. Declaratory Judgment Actions, 259 N.J. Super. 308, 313 (App. Div. 1992). At the same time, the attorney-client and work product privileges do not apply to automatically and completely insulate attorney correspondence from disclosure. *See* Hunterdon Cnty. P.B.A. Local 188 v. Twp. of Franklin, 286 N.J. Super. 389, 394; In the Matter of Grand Jury Subpoenas, 241 N.J. Super. 18, 30 (App. Div. 1989).

The GRC conducted an *in camera* examination on the submitted records. The results of this examination are set forth in the following table:

Record Number	Record Name/Date	Description of Record	Custodian's Explanation/ Citation for Non-disclosure	Findings of the <i>In Camera</i> Examination⁷
1.	E-mail from the Custodian to Deputy Attorney General (“DAG”) Donna Kelly dated April 1, 2013 (9:30 a.m.)	Custodian requests meeting with DAG regarding Complainant.	Attorney-client privilege. <u>N.J.S.A.</u> 47:1A-1.1.	There is no discussion in the e-mail that can reasonably be considered attorney-client privileged. Specifically, the Custodian simply asks to meet with DAG Kelly. Thus,

⁷ **Unless expressly identified for redaction, everything in the record shall be disclosed.** 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.

				the Custodian has unlawfully denied access to this e-mail and must disclose same.
2.	E-mail from DAG Kelly to the Custodian dated April 1, 2013 (2:03 p.m.)	Custodian receives advice from DAG on circulator forms.	Attorney-client privilege. <u>N.J.S.A.</u> 47:1A-1.1.	The Custodian lawfully denied access to the discussion in the e-mail. <u>N.J.S.A.</u> 47:1A-1.1.
3.	E-mail from the Custodian to DAG Kelly dated April 1, 2013 (4:12 p.m.)	Custodian forwards link to a story about a Hudson County Law Division decision.	Attorney-client privilege. <u>N.J.S.A.</u> 47:1A-1.1.	There is no discussion in the e-mail that can reasonably be considered attorney-client privileged. Thus, the Custodian has unlawfully denied access to this e-mail and must disclose same.
4.	E-mail from DAG Kelly to the Custodian dated April 1, 2013 (4:16 p.m.) *Note: Record No. 3 included in chain.	DAG asks question regarding specifics of the Hudson County Law Division decision.	Attorney-client privilege. <u>N.J.S.A.</u> 47:1A-1.1.	There is no discussion in the e-mail that can reasonably be considered attorney-client privileged. Specifically, DAG Kelly asks for confirmation of facts regarding the decision. Thus, the Custodian has unlawfully denied access to this e-mail and must disclose same.
5.	E-mail from DAG Kelly to the Custodian dated April 2, 2013 (3:22 p.m.)	DAG provides advice to Custodian	Attorney-client privilege. <u>N.J.S.A.</u> 47:1A-1.1.	The Custodian lawfully denied access to the discussion in the e-mail. <u>N.J.S.A.</u> 47:1A-1.1.

6.	E-mail from DAG Kelly to the Custodian dated April 3, 2013 (11:34 a.m.)	DAG discusses strategy and provides advice to the Custodian.	Attorney-client privilege. <u>N.J.S.A.</u> 47:1A-1.1.	The Custodian lawfully denied access to the discussion in the e-mail. <u>N.J.S.A.</u> 47:1A-1.1.
7.	E-mail from the Custodian to DAG Kelly dated April 3, 2013 (1:48 p.m.) *Note: Record No. 6 included in chain to which access was lawfully denied. (See above.)	Custodian confirms strategy and confirms actions he will take based on advice.	Attorney-client privilege. <u>N.J.S.A.</u> 47:1A-1.1.	The Custodian lawfully denied access to the discussion in the e-mail. <u>N.J.S.A.</u> 47:1A-1.1.
8.	E-mail from Donna Barber to the Custodian, Custodian's Counsel, DAG Kelly and Kathleen Kisko dated April 5, 2013 (1:44 p.m.)	Ms. Barber requests advice based on e-mails sent by the Complainant (included in chain).	Attorney-client privilege. <u>N.J.S.A.</u> 47:1A-1.1.	The Custodian lawfully denied access to the discussion in the e-mail. <u>N.J.S.A.</u> 47:1A-1.1.
9.	E-mail from the Custodian's Counsel to Ms. Barber, the Custodian, DAG Kelly and Ms. Kisko dated April 5, 2013 (2:00 p.m.) *Note: Record No. 8 included in chain to which access was lawfully denied. (See above.)	Custodian's Counsel responds to Ms. Barber's request for advice with strategy discussion.	Attorney-client privilege. <u>N.J.S.A.</u> 47:1A-1.1.	The Custodian lawfully denied access to the discussion in the e-mail. <u>N.J.S.A.</u> 47:1A-1.1.
10.	E-mail from DAG Kelly to the Custodian's Counsel, Ms. Barber, Ms. Kisko and the Custodian dated April 5, 2013 (2:07p.m.) *Note: Record Nos. 8 and 9 included in chain to which	DAG Kelly expresses agreement with strategy.	Attorney-client privilege. <u>N.J.S.A.</u> 47:1A-1.1.	The Custodian lawfully denied access to the discussion in the e-mail. <u>N.J.S.A.</u> 47:1A-1.1.

	access was lawfully denied. (See above.)			
11.	E-mail from Custodian's Counsel to the Custodian dated April 8, 2013 (10:07 a.m.)(with draft document attached)	Counsel forwards Custodian an April 7, 2013 e-mail seeking review of the attached draft document.	Attorney-client privilege and ACD material. <u>N.J.S.A. 47:1A-1.1.</u>	The Custodian lawfully denied access to the discussion in the e-mail. <u>N.J.S.A. 47:1A-1.1.</u> Additionally, the attached draft document is exempt as ACD material under <u>N.J.S.A. 47:1A-1.1.</u> See <u>Ciesla v. NJ Dep't of Health and Senior Serv., GRC Complaint No. 2010-38 (May 2011)(aff'd Ciesla v. NJ Dept. of Health & Senior Serv., 429 N.J. Super. 127 (App. Div. 2012).</u>
12.	E-mail from the Custodian's Counsel to the Custodian dated April 8, 2013 (10:07 a.m.)	Counsel forwards an e-mail from DAG Kelly advising on matters involving the Complainant.	Attorney-client privilege. <u>N.J.S.A. 47:1A-1.1.</u>	There is no message in the forwarding e-mail. Thus, the Custodian has unlawfully denied access to this e-mail and must disclose same. However, the Custodian lawfully denied access to the forwarded e-mail from DAG Kelly. <u>N.J.S.A. 47:1A-1.1.</u>
13.	E-mail from the Custodian to DAG Kelly dated April 8,	Custodian seeks advice on recent communication	Attorney-client privilege. <u>N.J.S.A. 47:1A-</u>	The Custodian lawfully denied access to the

	2013 (10:12 a.m.)	from Complainant based on e-mail from Judy Larkin's April 8, 2013 e-mail (included).	1.1.	discussion in the e-mail. <u>N.J.S.A.</u> 47:1A-1.1.
14.	E-mail from DAG Kelly to the Custodian dated April 8, 2013 (10:51 a.m.) *Note: Record No. 13 included in chain to which access was lawfully denied. (See above.)	DAG Kelly provides advice to Custodian about Complainant's communication.	Attorney-client privilege. <u>N.J.S.A.</u> 47:1A-1.1.	The Custodian lawfully denied access to the discussion in the e-mail. <u>N.J.S.A.</u> 47:1A-1.1.
15.	E-mail from the Custodian to Ms. Larkin dated April 8, 2013 (10:51 a.m.) *Note: Record Nos. 13 and 14 included in chain to which access was lawfully denied. (See above.)	Custodian forwards DAG Kelly's advice to Ms. Larkin.	Attorney-client privilege. <u>N.J.S.A.</u> 47:1A-1.1.	There is no discussion in the e-mail that can reasonably be considered attorney-client privileged. Specifically, the Custodian simply states "Donna's response." Thus, the Custodian has unlawfully denied access to this e-mail and must disclose same.
16.	E-mail from the Custodian's Counsel to DAG Kelly and the Custodian dated April 8, 2013 (4:38 p.m.)	Counsel responds to a lengthy chain of e-mails regarding the Complainant's various challenges.	Attorney-client privilege. <u>N.J.S.A.</u> 47:1A-1.1.	The Custodian lawfully denied access to the discussion in the e-mail chain, including all e-mails not from or to the Complainant. <u>N.J.S.A.</u> 47:1A-1.1.
17.	E-mail from the Custodian to the Custodian's Counsel dated April 9, 2013 (9:01 a.m.)(with draft	The Custodian advises Counsel of updates to the draft document.	Attorney-client privilege and ACD material. <u>N.J.S.A.</u> 47:1A-1.1.	The Custodian lawfully denied access to the discussion in the e-mail. <u>N.J.S.A.</u>

	document attached)			47:1A-1.1. Additionally, the attached draft document is exempt as ACD material under <u>N.J.S.A. 47:1A-1.1</u> . See <u>Ciesla, GRC 2010-38</u> .
18.	E-mail from the Custodian’s Counsel to the Custodian dated April 9, 2010 (9:03 a.m.) *Note: Record No. 17 included in chain to which access was lawfully denied. (See above.)	Counsel states “thanks (sic) Bob.”	Attorney-client privilege. <u>N.J.S.A. 47:1A-1.1</u> .	There is no discussion in the e-mail that can reasonably be considered attorney-client privileged. Thus, the Custodian has unlawfully denied access to this e-mail and must disclose same.
19.	E-mail from the Custodian’s Counsel to the Custodian copying Donald Palombi dated April 9, 2013 (9:58 a.m.)(with draft document attached)	Counsel requests that Custodian and others in the Department of State review the draft document.	Attorney-client privilege and ACD material. <u>N.J.S.A. 47:1A-1.1</u> .	The Custodian lawfully denied access to the discussion in the e-mail. <u>N.J.S.A. 47:1A-1.1</u> . Additionally, the attached draft document is exempt as ACD material under <u>N.J.S.A. 47:1A-1.1</u> . See <u>Ciesla, GRC 2010-83</u> .
20.	E-mail from the Custodian’s Counsel to the Custodian, dated April 9, 2013 (11:13 a.m.)(with draft document attached)	Counsel advises of additional corrections to draft document.	Attorney-client privilege and ACD material. <u>N.J.S.A. 47:1A-1.1</u> .	The Custodian lawfully denied access to the discussion in the e-mail. <u>N.J.S.A. 47:1A-1.1</u> . Additionally, the attached draft document is exempt as ACD material under

				<u>N.J.S.A.</u> 47:1A-1.1. <i>See Ciesla</i> , GRC 2010-83.
21.	E-mail from DAG Kelly to the Custodian dated April 9, 2013 (11:17 a.m.)	DAG Kelly seeks update on document production to Complainant.	Attorney-client privilege. <u>N.J.S.A.</u> 47:1A-1.1.	There is no discussion in the e-mail that can reasonably be considered attorney-client privileged. Thus, the Custodian has unlawfully denied access to this e-mail and must disclose same.
22.	E-mail from the Custodian's Counsel to DAG Kelly, Robert Lougy and the Custodian dated April 9, 2013 (3:29 p.m.)	Counsel provides update and advice regarding production of information to Complainant.	Attorney-client privilege. <u>N.J.S.A.</u> 47:1A-1.1.	The Custodian lawfully denied access to the discussion in the e-mail. <u>N.J.S.A.</u> 47:1A-1.1.
23.	E-mail from the Custodian's Counsel to DAG Kelly, Mr. Lougy and the Custodian dated April 9, 2013 (3:37 p.m.) *Note: Record No. 22 included in chain to which access was lawfully denied. (See above.)	Counsel updates the status regarding production of information to the Complainant.	Attorney-client privilege. <u>N.J.S.A.</u> 47:1A-1.1.	There is no discussion in the e-mail that can reasonably be considered attorney-client privileged. Thus, the Custodian has unlawfully denied access to this e-mail and must disclose same.
24.	E-mail from the Custodian's Counsel to the Custodian dated April 9, 2013 (4:19 p.m.)	Counsel provides advice to the Custodian regarding the draft document (not attached).	Attorney-client privilege. <u>N.J.S.A.</u> 47:1A-1.1.	The Custodian lawfully denied access to the discussion in the e-mail. <u>N.J.S.A.</u> 47:1A-1.1.
25.	E-mail from DAG Kelly to the Custodian's Counsel, Mr. Lougy, the Custodian dated April 9, 2013 (4:55 p.m.) *Note: Record Nos.	DAG Kelly states "Ok."	Attorney-client privilege. <u>N.J.S.A.</u> 47:1A-1.1.	There is no discussion in the e-mail that can reasonably be considered attorney-client privileged. Thus,

	22 and 23 included in chain to which access was lawfully denied. (See above.)			the Custodian has unlawfully denied access to this e-mail and must disclose same.
26.	E-mail from the Custodian to the Custodian's Counsel dated April 9, 2013 (5:20 p.m.)(with draft document attached). *Note: Record No. 24 included in chain to which access was lawfully denied. (See above.)	Custodian directs Counsel to insert the content of the attached document into the draft document (not attached).	Attorney-client privilege. <u>N.J.S.A.</u> 47:1A-1.1.	There is no discussion in the e-mail that can reasonably be considered attorney-client privileged. Thus, the Custodian has unlawfully denied access to this e-mail and must disclose same.
27.	E-mail from the Custodian's Counsel to the Custodian dated April 10, 2013 (10:49 a.m.)(with draft document attached).	Counsel requests that Custodian review the draft document and provides additional advice.	Attorney-client privilege and ACD material. <u>N.J.S.A.</u> 47:1A-1.1.	The Custodian lawfully denied access to the discussion in the e-mail. <u>N.J.S.A.</u> 47:1A-1.1. Additionally, the attached draft document is exempt as ACD material under <u>N.J.S.A.</u> 47:1A-1.1. <i>See Ciesla</i> , GRC 2010-83.
28.	E-mail from Ms. Kisko to the Custodian dated April 10, 2013 (12:55p.m.)(with draft document attached).	Ms. Kisko forwards an e-mail from Melissa Orsen regarding the draft document.	Attorney-client privilege and ACD material. <u>N.J.S.A.</u> 47:1A-1.1.	There is no message in the forwarding e-mail. Thus, the Custodian has unlawfully denied access to this e-mail and must disclose same. However, the attached draft document is exempt as ACD material under <u>N.J.S.A.</u> 47:1A-

				1.1. See <u>Ciesla</u> , GRC 2010-83.
--	--	--	--	---------------------------------------

Additionally, consistent with N.J.S.A. 47:1A-5(g), if the custodian of a government record asserts that part of a particular record is exempt from public access pursuant to OPRA, the custodian must delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and must promptly permit access to the remainder of the record.

Thus, the Custodian must disclose all other portions of the requested e-mails to the Complainant (i.e. sender, recipients, date, time, subject, and salutations where applicable). As to these portions of the requested e-mails, the Custodian has unlawfully denied access. See Ray v. Freedom Academy Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010).

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 complied with the Council’s February 25, 2014 Interim Order because he submitted nine (9) copies of the records at issue to the GRC and submitted certified confirmation of compliance to the Executive Director within the prescribed time frame to comply.
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.**⁸
3. The Custodian must disclose all other portions of the requested e-mails to the Complainant (i.e. sender, recipients, date, time, subject, and salutations where applicable). To these portions of the requested e-mails, the Custodian has unlawfully denied access. See Ray v. Freedom Academy Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010).

⁸ 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.

4. **The Custodian must comply with conclusion No. 3 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.**
5. 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: Frank F. Caruso
Senior Case Manager

Approved By: Dawn R. SanFilippo, Esq.
Acting Executive Director

July 22, 2014



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

February 25, 2014 Government Records Council Meeting

David J. Roundtree
Complainant

Complaint No. 2013-133

v.

New Jersey Department of State,
Division of Elections
Custodian of Record

At the February 25, 2014 public meeting, the Government Records Council ("Council") considered the February 18, 2014 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 Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the 28 e-mails and "draft" documents to determine the validity of the Custodian's assertion that the records constitute attorney-client privileged material and draft documents which are exempt from disclosure 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 records (see No. 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 records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
3. Because the Complainant's supplemental April 26, 2013 request item Nos. 1 through 3 and 5 through 7 sought non-specific records and information based on a number of questions and item No. 4 failed to seek identifiable government records, the request is invalid under OPRA. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546

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."



(App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); LaMantia v. Jamesburg Public Library (Middlesex), GRC Complaint No. 2008-140 (February 2009); Watt v. Borough of North Plainfield (Somerset), GRC Complaint No. 2007-246 (September 2009). Thus, the Custodian has not unlawfully denied access to the Complainant's supplemental request. *See also* Ohlson v. Twp. of Edison (Middlesex), GRC Complaint No. 2007-233 (August 2009) *and* Rummel v. Cumberland Cnty. Bd. of Chosen Freeholders, GRC Complaint No. 2011-168 (December 2012).

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.

Interim Order Rendered by the
Government Records Council
On The 25th Day of February, 2014

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 26, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 25, 2014 Council Meeting**

**David J. Roundtree¹
Complainant**

GRC Complaint No. 2013-133

v.

**New Jersey Department of State, Division of Elections²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of

1. "As to your written letter, yesterday, stating case law, please forward all documents pertaining to your letter ..."
2. "... all of [the Complainant's] requests for information on the names [he] wanted to challenge from previous e-mails that was (sic) never given ..."
3. "... a copy of that Sample ballot in the names [the Complainant] ask (sic) for in the challenge of the petitions."
4. "... full petitions of all names listed on the letter of denial and a review of procedures ... to how this process was done."
5. "... e-mails between Lt. Gov, Division of Elections [{"Elections"}] and any advise (sic) that was rendered by ... all attorneys for the State from [March 31, 2013] to present."
6. "... policy guidelines of the laws in which you are governed and steps [Elections] is to follow in the State of New Jersey."

Custodian of Record: Robert Giles
Request Received by Custodian: April 11, 2013³
Response Made by Custodian: April 18, 2013
GRC Complaint Received: May 9, 2013

Background⁴

Request and Response:

On April 11, 2013, the Complainant submitted an Open Public Records Act ("OPRA")

¹ No legal representation listed on record.

² Represented by Deputy Attorney General George N. Cohen.

³ The Complainant included additional requests in his Denial of Access Complaint; however, these requests do not reference OPRA and are thus not considered valid OPRA requests. *See Wolosky v. Twp. of East Hanover (Morris)*, GRC Complaint No. 2010-205 (Interim Order dated October 25, 2011) at 8-9.

⁴ 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.

David J. Roundtree v. New Jersey Department of State, Division of Elections, 2013-133 – Findings and Recommendations of the Executive Director

request to the Custodian seeking the above-mentioned records. On April 18, 2013, the Custodian responded in writing stating the following:

1. The referred-to letter is from Elections' Counsel and falls within the attorney-client privilege. Case law cited is not a record under OPRA and is readily available.
2. Each petition will be sent in multiple e-mails due to the size of the request and e-mail limitations. The voter profiles for these candidates were provided on April 9, 2013.
3. Elections possesses no sample ballots because same are printed by each individual County Clerk and mailed to voters based on information inputted in the Statewide Voter Registration System.
4. See response to No. 2. Additionally, there are no written procedures for how petitions are processed, but there is a check off sheet that is followed during the process. This sheet is attached.
5. Attorney advice is not subject to disclosure under OPRA.
6. Elections does not have policy guidelines; rather, it follows the statutory and regulatory requirements set forth in N.J.S.A. 19:1-1 et seq., and N.J.A.C. 13:17-1 et seq. These do not constitute records under OPRA and are readily available.

On April 24, 2013, the Complainant contended that the Custodian failed to address all of his request items. On April 25, 2013, the Custodian requested that the Complainant identify those specific items to which he claimed the Custodian failed to respond.

On April 26, 2013, the Complainant submitted a supplemental request for the following information:⁵

1. "What is the department procedure in verifying the status as a voter?"
2. "... if any petition candidate that was denied and the reason for that decision and a copy of supporting facts as to why it didn't meet NJ statute approval."
3. "Copies of all work sheets used to accept or deny any petitions, one candidate, and check off sheet."
4. "... the complete process and procedures and provide the HAVA information and who check (sic) and verified the State voters Data Base (sic) of the names provided to them. (As the candidates named petition; example Jim Whelan; How was it verified; was the name Jim Whelan used and did they find that name if so please provide paperwork). As, to Jim Whelan, Nick Russo for a (sic) example, please explain how each ... signed to have their named (sic) counted on the petition using another name, but using their legal voting names and this petition wasn't rejected, please provide the Statute that allows this other name to be used or what legal document provided by counsel if any, if not state reason why you don't have it."
5. "As proof this is a legal voter in the name issued in the NJ Data bank, please show this name on the voter profile, Sample ballot register, his history of voting in the name taken out in the petition. Also please provide a copy of each sample ballot that was printed up last year of the (sic)"

⁵ The Complainant also argued that the Custodian violated OPRA by failing to provide "court cases" used to deny the Complainant due process in challenging petitions that became public records and must be disclosed. However, he did not identify these records as at issue in the complaint.

6. “[N]ames of each Candidate and Circular to verify that the cross checks was [sic] done properly. Please provide the process in how this was done: Also please give a printed verification of all Circular and Candidates name [sic] as it is printed in the NJ voters Data base a Screen shot is acceptable for verification.”
7. “Please explain why this wasn’t address (sic). Sample ballot as to verification of a legal voter, as to abbreviated name, shortened name, nick name, another legal first name and if this name does appear on the voter card then how can you verify this named (sic) used to be a legal voter as it state (sic) on the Certification of Acceptance clearly it states that this is a guideline to follow so please pull out this paperwork can express this requirement must be met in order to be accepted; according to NJ Constitution Art. IV, sec 1; Par:2 Candidate for office of NJ General Assembly ...”⁶

On May 3, 2013, the Custodian responded noting that item Nos. 1, 2 and 5 were not part of the Complainant’s April 11, 2013 OPRA request. The Custodian further stated that he provided the Complainant records relevant to item Nos. 3, 4, 6 and 7 as part of its April 18, 2013 response. The Custodian finally states that Elections has responded to the Complainant’s OPRA request and subsequent e-mails and that no further response regarding this request will be forthcoming.

Denial of Access Complaint:

On May 9, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant listed several issues in his Denial of Access Complaint that relate to a complaint filed with the Department of State challenging candidate petitions for an upcoming election. Further, the Complainant identified only his April 26, 2013 supplemental request as at issue and indicated that Elections failed to provide him with information.

Statement of Information:

On June 7, 2013, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on April 11, 2013. The Custodian certified that he conducted a search for all records, including e-mails, and reviewed all records received and sent between the Complainant and Departments of State and Elections. The Custodian affirmed that he responded to the Complainant April 18, 2013 by providing responses and/or records for each item. The Custodian further certified that he responded to subsequent correspondence from the Complainant noting that he provided the Complainant with responsive records or that the Complainant identified information not sought in his original OPRA request. The Custodian contended that as noted in its document index, Elections has fully complied with the Complainant’s OPRA request. The Custodian certified that he provided a number of e-mails to the Complainant as part of his response, but withheld 28 e-mails, 5 of which include draft documents, as attorney-client privileged material. N.J.S.A. 47:1A-1.1.

⁶ The Complainant noted that sent these questions not provided as part of the Custodian’s April 18, 2013 response. David J. Roundtree v. New Jersey Department of State, Division of Elections, 2013-133 – Findings and Recommendations of the Executive Director

The Custodian argued that the Complainant filed this complaint based on his dissatisfaction with the candidates he objects to remaining on the June 4, 2013 primary election ballot and not because of a failure to provide records. The Custodian noted, as an example, that the Complainant requested an explanation as to why certain candidates did not use the name appearing on their petitions for office.

The Custodian finally contended that a custodian is not required to respond to requests for non-specific, unidentifiable records or that seek information. The Custodian asserted that the Complainant's expanded supplemental request is not a request for a record; rather, it seeks a statement from Elections regarding the intent of election statutes. The Custodian asserted that he provided all records regarding the primary election petitions for the upcoming election for specific candidates as set forth in the Complainant's OPRA request. The Custodian contended that the Complainant's supplemental request and subsequent complaint improperly expanded on the initial OPRA request and should not be considered a denial of access.

Additional Submissions:

On June 12, 2013, the Complainant disputed the Custodian's denial of the 28 e-mails arguing that they are the result of a challenge filed with Elections and became public once Elections rendered a decision. The Complainant further contended that the e-mails are not attorney-client privileged because they relate to a complaint he filed. The Complainant contended that Elections is using the privilege to hide their wrong-doing.⁷

Analysis

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 further provides that "[t]he terms [of a government record] shall not include inter-agency or intra-agency advisory, consultative, or deliberative material. A government record shall not include . . . any record within the attorney-client privilege." N.J.S.A. 47:1A-1.1.

In Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the Council⁸ dismissing 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

⁷ The Complainant requests that the GRC conduct an investigation of Elections and bring forth charges of conspiracy. The GRC; however, does not have the authority to engage in such actions. N.J.S.A. 47:1A-7(b).

⁸ Paff v. NJ Dep't of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

David J. Roundtree v. New Jersey Department of State, Division of Elections, 2013-133 – Findings and Recommendations of the Executive Director

hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers.” Id. The Court also stated that:

The 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-7(f). This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.

Id. at 355.

Further, the Court stated that:

We 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-7(f), which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.

Id.

In the SOI, the Custodian contended that he lawfully denied access to the 28 e-mails, 5 of which included “draft” documents that were responsive to the Complainant’s initial OPRA request. In June 12, 2013 e-mail to the GRC, the Complainant contended that the e-mails identified in the Custodian’s SOI related to a complaint he filed and should be disclosed.

Therefore, pursuant to Paff, 379 N.J. Super. at 346, the GRC must conduct an *in camera* review of the 28 e-mails and “draft” documents to determine the validity of the Custodian’s assertion that the records constitute attorney-client privileged material and draft documents which are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

Validity of Request

The New Jersey Appellate Division has held that “[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records ‘readily accessible for inspection, copying, or examination.’* N.J.S.A. 47:1A-1.” MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005)(emphasis added). The Court reasoned that:

Most significantly, the request failed to identify with any specificity or particularity the governmental records sought. *MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past.* Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted.

Id. at 549 (emphasis added).

The Court further held that “[u]nder OPRA, agencies are required to disclose only ‘identifiable’ government records not otherwise exempt . . . In short, OPRA does not countenance open-ended searches of an agency's files.” Id. (emphasis added). See also Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005),⁹ NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

Moreover, in LaMantia v. Jamesburg Public Library (Middlesex), GRC Complaint No. 2008-140 (February 2009), the complainant requested the number of Jamesburg residents that hold library cards. The Council deemed that the complainant’s request was a request for information, holding that “because request Item No. 2 of the Complainant’s June 25, 2008 OPRA request seeks information rather than an identifiable government record, the request is invalid pursuant to [MAG] and [Bent] . . .” Id. at 6. The Council similarly held in Watt v. Borough of North Plainfield (Somerset), GRC Complaint No. 2007-246 (September 2009) that the complainant’s September 13, 2007 request seeking answers to five (5) questions regarding a property named the Villa Maria was invalid. See also Ohlson v. Twp. of Edison (Middlesex), GRC Complaint No. 2007-233 (August 2009) and Rummel v. Cumberland Cnty. Bd. of Chosen Freeholders, GRC Complaint No. 2011-168 (December 2012).

In the instant matter, the Complainant contended that the Custodian failed to provide information in response to his supplemental request for information. In the SOI, the Custodian argued that the supplemental request was invalid because it sought information.

Notwithstanding the Custodian’s response to the supplemental request, item Nos. 1 through 3 and 5 through 7 very clearly ask a number of questions. The fact that the Complainant sought “documentation” based on the questions does not cure the deficiency. Further, item No. 4 identifies types of record (worksheets, check off sheets), but does not identify a time frame or specific candidates. It simply refers to provision of those records used to “. . . accept or deny any petition, one candidate . . .”

⁹ Affirming Bent v. Stafford Police Dep’t, GRC Case No. 2004-78 (October 2004).

David J. Roundtree v. New Jersey Department of State, Division of Elections, 2013-133 – Findings and Recommendations of the Executive Director

Therefore, because the Complainant's supplemental April 26, 2013 request item Nos. 1 through 3 and 5 through 7 sought non-specific records and information based on a number of questions and item No. 4 failed to seek identifiable government records, the request is invalid under OPRA. MAG, 375 N.J. Super. at 546; Bent, 381 N.J. Super. at 37; New Jersey Builders, 390 N.J. Super. at 180; LaMantia, GRC 2008-140; Watt, GRC 2007-246. Thus, the Custodian has not unlawfully denied access to the Complainant's supplemental request. *See also* Ohlson, GRC 2007-233 and Rummel, GRC 2011-168.

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. Pursuant to Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the 28 e-mails and "draft" documents to determine the validity of the Custodian's assertion that the records constitute attorney-client privileged material and draft documents which are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
2. **The Custodian must deliver¹⁰ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 1 above), a document or redaction index¹¹, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,¹² that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
3. Because the Complainant's supplemental April 26, 2013 request item Nos. 1 through 3 and 5 through 7 sought non-specific records and information based on a number of questions and item No. 4 failed to seek identifiable government records, the request is invalid under OPRA. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); LaMantia v. Jamesburg Public Library (Middlesex), GRC Complaint No. 2008-140 (February 2009); Watt v. Borough of North Plainfield (Somerset), GRC Complaint No. 2007-246 (September 2009). Thus, the Custodian

¹⁰ 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.

¹¹ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

¹² "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."

David J. Roundtree v. New Jersey Department of State, Division of Elections, 2013-133 – Findings and Recommendations of the Executive Director

has not unlawfully denied access to the Complainant's supplemental request. *See also* Ohlson v. Twp. of Edison (Middlesex), GRC Complaint No. 2007-233 (August 2009) *and* Rummel v. Cumberland Cnty. Bd. of Chosen Freeholders, GRC Complaint No. 2011-168 (December 2012).

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: Frank F. Caruso
Senior Case Manager

Approved By: Dawn R. SanFilippo, Esq.
Senior Counsel

February 18, 2014