



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

December 15, 2015 Government Records Council Meeting

Harry B. Scheeler, Jr.
Complainant

Complaint No. 2014-230

v.

Woodbine Board of Education (Cape May)
Custodian of Record

At the December 15, 2015 public meeting, the Government Records Council (“Council”) considered the December 8, 2015 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that it dismisses the complaint because the Complainant withdrew the complaint via an e-mail to the GRC on November 18, 2015. Therefore, no further adjudication is required.

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 15th Day of December, 2015

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: December 17, 2015



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
December 15, 2015 Council Meeting**

**Harry B. Scheeler, Jr.¹
Complainant**

GRC Complaint No. 2014-230

v.

**Woodbine Board of Education (Cape May)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of all e-mails sent and received between Superintendent Lynda Towns (“Superintendent Towns”) and Marina Lepore, Esq., regarding the subjects: “Scheeler v. Woodbine,” OPRA, Harry Scheeler, Sebastien Scheeler, due process, school board, Eric Harrison, Susan Hodges, GRC, “State v. Lynda Towns,” state monitor, and James Riehman from 2012 to 2014.

Custodian of Record: Allen Parmelee
Request Received by Custodian: March 11, 2014
Response Made by Custodian: March 12, 2014
GRC Complaint Received: May 21, 2014

Background

July 28, 2015 Council Meeting:

At its July 28, 2015 public meeting, the Council considered the July 21, 2015 *In Camera* Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted said findings and recommendations. The Council, therefore, found that:

[S]ince there are issues of contested facts, this complaint should be referred to the OAL for an *in camera* review *de novo* to determine whether the Custodian properly provided requested records to the GRC and whether he unlawfully denied access to same. Specifically, because the Custodian failed to provide the GRC with an adequate document index, the GRC cannot determine whether the e-mails to which the Custodian denied access contain attorney-client privileged information pursuant to N.J.S.A. 47:1A-1.1. Additionally, if necessary, the Office of Administrative Law should determine whether the Custodian knowingly and willfully violated OPRA and unlawfully denied access to the requested invoices under the totality of the circumstances pursuant to N.J.S.A. 47:1A-11. Further,

¹ Represented by Michelle J. Douglass, Esq., of Douglass, Kinniry (Northfield, NJ).

² Represented by Susan Hodges, Esq., of Archer & Greiner, P.C. (Haddonfield, NJ).

the Office of Administrative Law should determine whether the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6.

Procedural History:

On July 29, 2015, the Council distributed its Interim Order to all parties. On September 22, 2015, the complaint was transmitted to the Office of Administrative Law ("OAL").

On November 18, 2015, the Complainant e-mailed the GRC, asking to withdraw the complaint. On the same day, the GRC forwarded the Complainant's withdrawal letter to the OAL, requesting that OAL withdraw the matter from consideration and return the complaint.

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends that the Council dismiss the complaint because the Complainant withdrew the complaint via an e-mail to the GRC on November 18, 2015. Therefore, no further adjudication is required.

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

Reviewed By: Joseph D. Glover
Executive Director

December 8, 2015



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

INTERIM ORDER

July 28, 2015 Government Records Council Meeting

Harry B. Scheeler, Jr.
Complainant

Complaint No. 2014-230

v.

Woodbine Board of Education (Cape May)
Custodian of Record

At the July 28, 2015 public meeting, the Government Records Council (“Council”) considered the July 21, 2015 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that since there are issues of contested facts, this complaint should be referred to the OAL for an *in camera* review *de novo* to determine whether the Custodian properly provided requested records to the GRC and whether he unlawfully denied access to same. Specifically, because the Custodian failed to provide the GRC with an adequate document index, the GRC cannot determine whether the e-mails to which the Custodian denied access contain attorney-client privileged information pursuant to N.J.S.A. 47:1A-1.1. Additionally, if necessary, the Office of Administrative Law should determine whether the Custodian knowingly and willfully violated OPRA and unlawfully denied access to the requested invoices under the totality of the circumstances pursuant to N.J.S.A. 47:1A-11. Further, the Office of Administrative Law should determine whether the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee pursuant to N.J.S.A. 47:1A-6.

Interim Order Rendered by the
Government Records Council
On The 28th Day of July, 2015

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 29, 2015



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
July 28, 2015 Council Meeting**

**Harry B. Scheeler, Jr.¹
Complainant**

GRC Complaint No. 2014-230

v.

**Woodbine Board of Education (Cape May)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of all e-mails sent and received between Superintendent Lynda Towns (“Superintendent Towns”) and Marina Lepore, Esq., regarding the subjects: “Scheeler v. Woodbine,” OPRA, Harry Scheeler, Sebastien Scheeler, due process, school board, Eric Harrison, Susan Hodges, GRC, “State v. Lynda Towns,” state monitor, and James Riehman from 2012 to 2014.

Custodian of Record: Allen Parmelee
Request Received by Custodian: March 11, 2014
Response Made by Custodian: March 12, 2014
GRC Complaint Received: May 21, 2014

Records Submitted for *In Camera* Examination: N/A

Background

January 30, 2015 Council Meeting:

At its January 30, 2015, public meeting, the Council considered the January 20, 2015, Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. By a majority vote, the Council adopted said findings and recommendations. The Council, therefore, found that:

1. The GRC must conduct an *in camera* review of the responsive e-mails between Superintendent Towns and Ms. Lepore to determine the validity of the Custodian’s assertion that the same is attorney-client privileged and exempt from disclosure under OPRA. *See Paff*, 379 N.J. Super. at 346; N.J.S.A. 47:1A-1.1.
2. **The Custodian must deliver³ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 1 above), a document or redaction**

¹ Represented by Michelle J. Douglass, Esq., of Douglass, Kinniry (Northfield, NJ).

² Represented by Susan Hodges, Esq., of Archer & Greiner, P.C. (Haddonfield, NJ).

Harry B. Scheeler, Jr. v. Woodbine Board of Education (Cape May), 2014-230 – *In Camera* Findings and Recommendations of the Executive Director

index⁴, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,⁵ 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. 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.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On February 3, 2015, the Council distributed its Interim Order to all parties. On February 9, 2015, the GRC received the Custodian's response to the Council's Interim Order. The Custodian certified that he was providing nine (9) copies of the responsive e-mails and attachments for an *in camera* review per the Council's Order.

On June 17, 2015, the GRC sought additional information. Specifically, in anticipation of performing the *in camera* review, the GRC determined that the Custodian had not provided a document index. Without a document index, the GRC was unable to identify the three (3) e-mails out of the several provided that were the subject of the *in camera* review. The GRC thus requested that the Custodian provide a document index under cover of legal certification. The GRC required the Custodian to submit his legal certification by close of business on June 24, 2015. Further, the GRC noted that submissions received after the deadline may not be considered by the Council.⁶

Analysis

Compliance

At its January 30, 2015, meeting, the Council ordered the Custodian to submit nine (9) copies of e-mails between Superintendent Towns and Ms. Lepore for an *in camera* review, submit a document or redaction index, and further provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On February 3, 2015, 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 February 10, 2015.

³ 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.

⁴ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

⁵ "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."

⁶ The Custodian did not respond to the GRC's request for additional information. However, on June 30, 2015, he notified the GRC and Complainant that he was retiring effective July 1, 2015.

On February 9, 2015, the fourth (4th) business day after receipt of the Council's Order, the GRC received the Custodian's compliance, which included nine (9) copies of two (2) e-mails (with attachments), two (2) e-mail chains, and certified confirmation of compliance to the Executive Director. Therein, the Custodian certified that three (3) of the e-mails represented those the GRC sought for an *in camera* review. However, the Custodian did not include a document index. Absent the benefit of the document index, the GRC had an extremely difficult time determining which e-mails the Custodian had certified were being provided for the *in camera* review. For that reason, on June 17, 2015, the GRC sought to obtain a completed document index from the Custodian. However, the Custodian failed to respond.

The Custodian's failure to provide a completed document index results in the Custodian's failure to comply with the Council's Order. Therefore, the Custodian did not fully comply with the Council's January 30, 2015, Interim Order. Specifically, although the Custodian responded in the prescribed time frame by providing nine (9) copies of the records at issue for an *in camera* review and certified confirmation of compliance to the Executive Director, he failed to submit a document index identifying those exact e-mails to which he denied access.

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.

The Appellate Division of the New Jersey Superior Court has proffered ways in which the GRC may determine whether a Custodian's claimed exemption applies to a record. In Hyman v. City of Jersey City, 2012 N.J. Super. Unpub. LEXIS 2032 (App. Div. 2012), the Court held that:

The GRC functions in an adjudicative capacity and is statutorily charged, if it is able to do so, to "make a determination as to a record's accessibility based upon the complaint and the custodian's response thereto[.]" N.J.S.A. 47:1A-7(e) (emphasis added). If the custodian's response to the complaint does not justify the denial of access based upon the claimed privilege or exception, the GRC has a number of options available to it . . . It may conclude the proffered privilege does not apply and order the release of the document. Ibid. It may, through its Executive Director, require the custodian to submit, within prescribed time limits, additional information deemed necessary for the GRC to adjudicate the complaint. N.J.S.A. 47:1A-7(c) . . . Additionally, it may "conduct a hearing on the matter in conformity with the rules and regulations provided for hearings by a state agency in contested cases under the 'Administrative Procedure Act,' . . . insofar as they may be applicable and practicable." N.J.S.A. 47:1A-7(e).

Id. at 20-21.

The Administrative Procedures Act provides that the Office of Administrative Law (“OAL”) “shall acquire jurisdiction over a matter only after it has been determined to be a contested case by an agency head and has been filed with the [OAL] . . .” N.J.A.C. 1:1-3.2(a).

As noted above, the Custodian provided to the GRC two (2) e-mail chains and two (2) e-mails (with attachments) for an *in camera* review. However, as part of his compliance, the Custodian failed to provide the GRC with a document index identifying the exact e-mails subject to an *in camera* review. The GRC attempted to determine which of the e-mails represented the subject e-mails from the vague index that the Custodian sent to the Complainant as part of his initial response. In said index, the Custodian identified three (3) e-mails between Superintendent Towns and Ms. Lepore, all dated March 10, 2014. The GRC was able to match one (1) e-mail to that index but was unable to match any of the other e-mails. Thus, the GRC sought a document index from the Custodian; however, he again failed to provide same. Based on the foregoing, the GRC is unable to perform an adequate *in camera* review due to the absence of a document index, which the Custodian was required to provide and which the GRC unsuccessfully attempted to obtain.

At this juncture, the GRC must defer to the Court’s analysis in Hyman. There, the Court determined that Jersey City’s document index, submitted as part of the *in camera* review, “prevented meaningful adjudication by the GRC.” Id. at 17. Here, the Custodian neither provided a document index nor responded to the GRC’s request to obtain same. Absent the document index, the GRC has no way of knowing which of the e-mails provided are part of the *in camera* review. For that reason, contested facts exist that warrant a hearing to develop the record.

Therefore, since there are issues of contested facts, this complaint should be referred to the OAL for an *in camera* review *de novo* to determine whether the Custodian properly provided the subject e-mails to the GRC and whether he unlawfully denied access to same. Specifically, because the Custodian failed to provide the GRC with an adequate document index, the GRC cannot determine whether the e-mails to which the Custodian denied access contain attorney-client privileged information pursuant to N.J.S.A. 47:1A-1.1. Additionally, if necessary, the OAL should determine whether the Custodian knowingly and willfully violated OPRA and unlawfully denied access to the requested records under the totality of the circumstances pursuant to N.J.S.A. 47:1A-11. Furthermore, the OAL should determine whether the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee pursuant to N.J.S.A. 47:1A-6.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that since there are issues of contested facts, this complaint should be referred to the OAL for an *in camera* review *de novo* to determine whether the Custodian properly provided requested records to the GRC and whether he unlawfully denied access to same. Specifically, because the Custodian failed to provide the GRC with an adequate document index, the GRC cannot determine whether the e-mails to which the Custodian denied access contain attorney-client privileged information pursuant to N.J.S.A. 47:1A-1.1. Additionally, if necessary, the Office of Administrative Law should determine whether the Custodian knowingly and willfully violated OPRA and unlawfully

denied access to the requested invoices under the totality of the circumstances pursuant to N.J.S.A. 47:1A-11. Further, the Office of Administrative Law should determine whether the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6.

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

Reviewed By: Joseph D. Glover
Executive Director

July 21, 2015



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

January 30, 2015 Government Records Council Meeting

Harry B. Scheeler, Jr.
Complainant

Complaint No. 2014-230

v.

Woodbine Board of Education (Cape May)
Custodian of Record

At the January 30, 2015 public meeting, the Government Records Council ("Council") considered the January 20, 2015 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The GRC must conduct an *in camera* review of the responsive e-mails between Superintendent Towns and Ms. Lepore to determine the validity of the Custodian's assertion that the same is attorney-client privileged and exempt from disclosure under OPRA. See Paff, 379 N.J. Super. at 346; 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. 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.
4. The Council defers analysis of whether the Complainant is a prevailing party 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 30th Day of January, 2015

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 3, 2015

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 30, 2015 Council Meeting**

**Harry B. Scheeler, Jr.¹
Complainant**

GRC Complaint No. 2014-230

v.

**Woodbine Board of Education (Cape May)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of all e-mails sent and received between Superintendent Lynda Towns (“Superintendent Towns”) and Marina Lepore, Esq., regarding the subjects “Scheeler v. Woodbine,” OPRA, Harry Scheeler, Sebastien Scheeler, due process, school board, Eric Harrison, Susan Hodges, GRC, “State v. Lynda Towns,” state monitor and James Riehman from 2012 to 2014.

Custodian of Record: Allen Parmelee
Request Received by Custodian: March 11, 2014
Response Made by Custodian: March 12, 2014
GRC Complaint Received: May 21, 2014

Background³

Request and Response:

On March 11, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On March 12, 2014, the Custodian responded in writing denying access to three (3) e-mails as attorney-client privileged material. N.J.S.A. 47:1A-1.1. That day, the Complainant e-mailed the Custodian disputing that the e-mails were exempt simply because an attorney communicated with Superintendent Towns. The Complainant requested proof that Ms. Lepore actually represented Superintendent Towns.

Denial of Access Complaint:

On May 21, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant disputed that the responsive records are subject to the attorney-client privilege exemption. The Complainant stated that only

¹ Represented by Michelle J. Douglass, Esq., of Douglass, Kinniry (Northfield, NJ).

² Represented by Susan Hodges, Esq., of Archer & Greiner, P.C. (Haddonfield, NJ).

³ 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.

communications between an attorney and a client “in the course of the relationship and in professional confidence, are privileged.” N.J.S.A. 2A:84A-20. Further, the Complainant noted that the privilege is limited to “those situations in which” legal advice “is the subject of the relationship.” In re: Gonnella, 283 N.J. Super. 509, 512 (Law Div. 1989).

The Complainant contended that the Custodian’s denial of access did not comply with OPRA because it failed to include “specific reliable evidence sufficient to meet the statutorily recognized basis for confidentiality.” Courier Post v. Hunterdon Cnty. Prosecutor’s Office, 373 N.J. Super. 373, 382-83 (App. Div. 2003). The Complainant also contended that custodians must provide a reasonable explanation “without revealing information itself privileged or protected” that allows other parties to access the applicability of any cited exemptions. Paff v. NJ Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346, 354-55 (App. Div. 2005). *See also* Burke v. Brandes, 429 N.J. Super. 169, 178 (App. Div. 2012). The Complainant argued that the Custodian failed to provide enough information for him to reasonably determine whether the attorney-client privilege exemption applied to the responsive e-mails.

The Complainant noted that, even if the e-mails were exempt as attorney-client privileged material, the GRC has previously required disclosure of same with redactions thus disclosing all information not otherwise exempt. Mendes v. Freedom Acad. Charter Sch. (Camden), GRC Complaint No. 2009-184 (Interim Order dated August 24, 2010); Ray v. Freedom Acad. Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated May 24, 2011); Scheeler v. Twp. of Mt. Laurel (Burlington), GRC Complaint No. 2012-83 (Interim Order dated April 30, 2013).

The Complainant thus requested that the GRC conduct an *in camera* review of the responsive e-mails and order disclosure of same with appropriate redactions, where applicable. The Complainant further requested that the GRC determine that he is a prevailing party entitled to an award of reasonable attorney’s fees. N.J.S.A. 47:1A-6.

Statement of Information:

On June 30, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on March 11, 2014. The Custodian certified that he performed a database search that located three (3) e-mails, all dated March 10, 2014. The Custodian affirmed that he determined that the e-mails were exempt as attorney-client privileged material and confirmed same with Custodian’s Counsel. The Custodian certified that he responded in writing on March 12, 2014 denying access to the responsive e-mails as attorney-client privileged material.

The Custodian asserted that the e-mails fit the attorney-client privilege exemption because Superintendent Towns consulted with Ms. Lepore as an attorney. Thus, all communications were deemed to be exempt from disclosure.

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.

In Paff, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the Council⁴ that accepted the custodian’s legal conclusion for the denial of access without further review. The Appellate Division noted 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.” Id. The Court stated that:

[OPRA] 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 found 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.

Here, the Complainant filed his complaint with the GRC disputing that the responsive e-mails were exempt under the attorney-client privilege exemption. Specifically, the Complainant argued that simply communicating with an attorney did not automatically invoke the attorney-client privilege exemption. Further, the Complainant argued that the Custodian failed to provide

⁴ Paff v. NJ Dep’t of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

an adequate description of how the record met the exemption. Conversely, in the SOI, the Custodian argued that Superintendent Towns consulted with Ms. Lepore on an issue. Based on the foregoing, it is necessary for the GRC to conduct an *in camera* examination of the e-mail.

Therefore, the GRC must conduct an *in camera* review of the responsive e-mails between Superintendent Towns and Ms. Lepore to determine the validity of the Custodian's assertion that the same is attorney-client privileged and exempt from disclosure under OPRA. See Paff, 379 N.J. Super. at 346; 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.

Prevailing Party Attorney's Fees

The Council defers analysis of whether the Complainant is a prevailing party 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 responsive e-mails between Superintendent Towns and Ms. Lepore to determine the validity of the Custodian's assertion that the same is attorney-client privileged and exempt from disclosure under OPRA. See Paff, 379 N.J. Super. at 346; N.J.S.A. 47:1A-1.1.
2. **The Custodian must deliver⁵ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 1 above), a document or redaction index⁶, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,⁷ 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. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

⁵ The *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.

⁶ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

⁷ "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."

4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

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Acting Executive Director

January 20, 2015