



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
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CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

CHARLES A. RICHMAN  
Acting Commissioner

**FINAL DECISION**

**April 28, 2015 Government Records Council Meeting**

Carolyn Schwebel  
Complainant

Complaint No. 2014-251

v.

Township of Middletown (Monmouth)  
Custodian of Record

At the April 28, 2015 public meeting, the Government Records Council (“Council”) considered the April 21, 2015 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. Because the Custodian redacted one of the records responsive to the request as attorney-client privileged but failed to provide a reasonable explanation or general nature description of the information redacted, her failure to provide such explanation or description of same results in an insufficient response. N.J.S.A. 47:1A-5(g); Seibert v. Reading [Twp.], GRC Complaint No. 2004-150 (July 2007); Paff v. [Twp.] of Plainsboro, GRC Complaint No. 2005-29 (July 2005); Paff v. Borough Lavallette (Ocean), GRC Complaint No. 2007-209 (Interim Order June 25, 2008). *See also* Paff v. NJ Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).
2. It is unnecessary for the GRC to determine whether the Custodian lawfully redacted the responsive Fiore e-mail because the Custodian’s Counsel certified that his client waived the attorney-client privilege and thereafter disclosed an unredacted copy of said e-mail to the Complainant on July 23, 2014. Moreover, the Complainant failed to submit any competent, credible evidence to refute Counsel’s certification.

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 28<sup>th</sup> Day of April, 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: April 30, 2015**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
April 28, 2015 Council Meeting**

**Carolyn Schwebel<sup>1</sup>  
Complainant**

**GRC Complaint No. 2014-251**

v.

**Township of Middletown (Monmouth)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies of:

“Email from Carolyn Schwebel re dissolution of Middletown Human Rights Commission read by Tony Fiore at the March 17, 2014 Township Committee meeting and responses to and from Tony Fiore about that e-mail by email, fax, text messages, regular mail, memoranda and other communications, including twitter, and telephone call summaries.”

**Custodian of Record:** Heidi R. Brunt

**Request Received by Custodian:** March 21, 2014

**Response Made by Custodian:** April 1, 2014

**GRC Complaint Received:** July 7, 2014

**Background<sup>3</sup>**

**Request and Response:**

On March 21, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On April 1, 2014, the seventh (7<sup>th</sup>) business day following receipt of said request, the Custodian’s Records Manager responded in writing informing the Complainant that the requested records were attached to the response. The Records Manager also stated that, “[i]nformation that has been redacted is pursuant to N.J.S.A. 47:1A5 et al is Attorney-Client Privileged” (sic).

**Denial of Access Complaint:**

On July 7, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that she filed the OPRA request on March 21, 2014, and that the Custodian denied the request by redaction on April 1,

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

<sup>2</sup> Represented by Brian M. Nelson, Esq., of Archer & Greiner, P.C. (Red Bank, NJ).

<sup>3</sup> 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.

2014. The Complainant asserts that the disclosed record was redacted without any explanation other than “attorney-client privilege.” The Complainant contends that the reason for the redaction does not contain sufficient information about the nature of the communication such that she can determine if it was appropriately redacted.

Statement of Information:

On July 25, 2014, the Custodian’s Counsel filed a Statement of Information (“SOI”).<sup>4</sup> Counsel certified that the Custodian received the Complainant’s OPRA request on March 21, 2014. Counsel certified that two e-mails dated March 9, 2014, were determined to be responsive to the request: a one page e-mail from the Complainant and a two page e-mail string from Committeeman Tony Fiore, which included the Complainant’s e-mail (“Fiore e-mail”). Counsel further certified that the Custodian responded in writing on April 1, 2014, providing all records responsive to the request except for an attorney-client privileged statement in the Fiore e-mail which was redacted pursuant to N.J.S.A. 47:1A-1.1. Counsel certified that the redaction was later removed after the client waived the attorney-client privilege; therefore no records were denied.

On July 29, 2014, the Custodian’s Counsel forwarded to the GRC a certification prepared by the Custodian as a supplement to the SOI. The Custodian certifies that she received the OPRA request on March 21, 2014. The Custodian also certifies that she was provided with two (2) e-mails from Mr. Fiore that were responsive to the request and that after consulting with Counsel, she learned that one of the two e-mails contained attorney-client privileged material. The Custodian certifies that, pursuant to N.J.S.A. 47:1A-1.1, she redacted the contents of the e-mail containing the attorney-client privileged material because it was a direct communication from a member of the Township Committee to the Township Attorney relating to an individual who has a history of litigation against both the Township and individual members of the governing body. The Custodian certifies that she disclosed the redacted and unredacted e-mails to the Complainant along with an explanation that the content of the redacted e-mail was denied as attorney-client privileged material.

Additional Submissions:

By e-mail dated July 23, 2014, the Custodian’s Counsel informs the GRC that although the Complainant contested the assertion of the attorney-client privilege on the basis that it was not sufficiently explained, an adequate explanation would further violate the attorney-client relationship due to the Complainant’s extensive history of litigation with the Township. Counsel further states that the matter would inevitably have to be referred to the Office of Administrative Law; however, to avoid further taxpayer expense, his client has waived the attorney-client privilege. Because the privilege was waived, Counsel attached a copy of the unredacted Fiore e-mail and concurrently disclosed it to the Complainant by copying her on the correspondence.

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<sup>4</sup> The GRC informed the Custodian’s Counsel that the Custodian is required to certify the SOI; however, the Custodian’s Counsel informed the GRC that “...[I] disagree as a matter of law that the GRC can compel a clerk to certify to something prepared by counsel...” As such, it is the understanding of the GRC that the Custodian’s Counsel has sufficient knowledge of all facts set forth in the SOI so as to authoritatively attest to same.

By e-mail dated July 24, 2014, the Complainant informs the GRC that the Custodian only disclosed three (3) pages of records to her, which included one (1) blank page. The Complainant also disputes the assertion of the Custodian's Counsel that she has an extensive history of litigation with the Township. The Complainant concludes by stating that the Custodian did not completely fulfill her OPRA request.

On April 15, 2015, the GRC informs the Complainant that on July 23, 2014, the Custodian's Counsel stated that he disclosed to the Complainant the Fiore e-mail in unredacted form but that the following day the Complainant took issue with Counsel's assertion. The GRC further informs the Complainant that she needs to clarify whether the averment in the SOI that there were "no records denied" is an accurate statement. The Complainant did not reply to the GRC's inquiry.

### Analysis

#### Sufficiency of Response

OPRA provides that "...[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefore on the request form and promptly return it to the requestor..." N.J.S.A. 47:1A-5(g).

The Council has long held that a custodian must provide sufficient information to justify the basis for each redaction. In Seibert v. Reading [Twp.], GRC Complaint No. 2004-150 (July 2007), the custodian responded to the complainant's request for a law firm's payment vouchers by disclosing numerous redacted records. The custodian maintained that all redactions were made to excise attorney-client privileged material. The Council found that the custodian failed to provide sufficient information to justify the basis for each redaction and ordered the custodian to provide a proper document index to the GRC. *See also* Paff v. [Twp.] of Plainsboro, GRC Complaint No. 2005-29 (July 2005), where the custodian was ordered to provide redacted minutes with a detailed and lawful basis for each redacted part; and Paff v. Borough Lavallette (Ocean), GRC Complaint No. 2007-209 (Interim Order June 25, 2008), in which the custodian's response was held legally insufficient under OPRA because he failed to provide a written response setting forth a detailed and lawful basis for each redaction.

Here, the Custodian redacted the subject and content of the Fiore e-mail, stating that it was redacted pursuant to the attorney-client privilege.<sup>5</sup> The Custodian failed to provide a document index containing further explanation or a general nature description of the information redacted. On July 23, 2014, the Custodian's Counsel argued that under the circumstances surrounding the complaint, an adequate explanation for the redaction would further violate the attorney-client relationship.

The argument asserted by the Custodian's Counsel is not persuasive. In Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), where the complainant appealed

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<sup>5</sup> The Custodian's Records Manager responded to the request and cited an incorrect provision of OPRA, which was later corrected by the Custodian's Counsel in the SOI.

a final decision of the GRC<sup>6</sup> dismissing the complaint by accepting the custodian's legal conclusion for the denial of access without further review, the Court stated that:

In preparing an explanation of its reasons for denying a request for a government record, an agency need not reveal the contents and should be guided by the standard included in R. 4:10-2(e), which permits a party claiming privilege to “describe the nature of the documents...not produced or disclosed in a manner that, *without revealing information itself privileged or protected*, will enable other parties to assess the applicability of the privilege or protection.” *Ibid.* (Emphasis added).

Id. at 354.

Therefore, because the Custodian redacted one of the records responsive to the request as attorney-client privileged but failed to provide a reasonable explanation or general nature description of the information redacted, her failure to provide such explanation or description of same results in an insufficient response. N.J.S.A. 47:1A-5(g); Seibert, GRC 2004-150; Paff, GRC 2005-29; Paff, GRC 2007-209. See also Paff, 379 N.J. Super. 346, 354.

### **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, the court stated that:

OPRA contemplates the GRC's meaningful review of the basis for an agency's decision to withhold government records . . . . When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers.” Id. Further, the Court stated that “the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal...

Id. at 355.

Here, the Custodian redacted the Fiore e-mail, asserting the attorney-client privilege exemption; however she failed to provide a document index providing a reasonable explanation or general nature description of the information redacted. The Complainant argued that the Custodian failed to provide sufficient information to allow her to determine whether the redaction was justified. As such, the GRC would ordinarily need to conduct an *in camera* review to determine whether the Custodian lawfully redacted the e-mail. However, the Custodian's Counsel certified that he disclosed an unredacted copy of the Fiore e-mail to the Complainant on

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<sup>6</sup> Paff v. NJ Dep't of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

July 23, 2014, and the Complainant failed to submit any competent, credible evidence to refute Counsel's certification.

As such, it is unnecessary for the GRC to determine whether the Custodian lawfully redacted the responsive Fiore e-mail because the Custodian's Counsel certified that his client waived the attorney-client privilege, and thereafter he disclosed an unredacted copy of said e-mail to the Complainant on July 23, 2014. Moreover, the Complainant failed to submit any competent, credible evidence to refute Counsel's certification.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian redacted one of the records responsive to the request as attorney-client privileged but failed to provide a reasonable explanation or general nature description of the information redacted, her failure to provide such explanation or description of same results in an insufficient response. N.J.S.A. 47:1A-5(g); Seibert v. Reading [Twp.], GRC Complaint No. 2004-150 (July 2007); Paff v. [Twp.] of Plainsboro, GRC Complaint No. 2005-29 (July 2005); Paff v. Borough Lavallette (Ocean), GRC Complaint No. 2007-209 (Interim Order June 25, 2008). *See also Paff v. NJ Dep't of Labor, Bd. of Review*, 379 N.J. Super. 346 (App. Div. 2005).
2. It is unnecessary for the GRC to determine whether the Custodian lawfully redacted the responsive Fiore e-mail because the Custodian's Counsel certified that his client waived the attorney-client privilege and thereafter he disclosed an unredacted copy of said e-mail to the Complainant on July 23, 2014. Moreover, the Complainant failed to submit any competent, credible evidence to refute Counsel's certification.

Prepared By: John E. Stewart

Reviewed By: Joseph D. Glover  
Executive Director

April 21, 2015