



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

**FINAL DECISION**

**December 15, 2015 Government Records Council Meeting**

Eileen Murphy  
Complainant

Complaint No. 2014-293

v.

NJ Department of Environmental Protection  
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 voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Custodian provided adequate proof that he timely disclosed to the Complainant the responsive records in electronic format and will refund the \$43.71 payment made by Complainant for paper copies of records, per the GRC’s Order, the Custodian’s actions complied with the Interim Order and rendered moot the Council’s need to conduct an *in camera* review of the remaining records.
2. Although the Custodian did not respond sufficiently or in a timely manner to the Complainant’s OPRA request, he did disclose the requested records in electronic format to the Complainant on November 25, 2015, and otherwise complied with the Council’s Interim Order. Moreover, the evidence of record does not indicate that the Custodian’s actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian’s actions did 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 15<sup>th</sup> 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**

**Eileen Murphy<sup>1</sup>**  
**Complainant**  
**v.**

**GRC Complaint No. 2014-293**

**New Jersey Department of Environmental Protection<sup>2</sup>**  
**Custodial Agency**

**Records Relevant to Complaint:** All e-mail and hard copies of correspondence, from January 1, 2007, through August 31, 2010, to and from Deb Ewalt, Barry Frasco, Jill Lopoti, Jeanne Herb, Lisa Jackson, Gary Sondermeyer, Mark Mauriello, Irene Kropp, Sarah Barrett, Robert Martin, Marilyn Lennon, Scott Brubaker, Michele Putnam, Kerry Pfluegh, Majorie Kaplan, and Mary Jo Baker where “Eileen Murphy” is the subject or within the text of the message.

**Custodian of Record:** Matthew J. Coefer

**Request Received by Custodian:** May 14, 2014

**Response Made by Custodian:** May 15, 2014 and May 30, 2014

**GRC Complaint Received:** August 19, 2014

**Background**

**November 17, 2015 Council Meeting:**

At the November 17, 2015 public meeting, the Government Records Council (“Council”) considered the November 10, 2015 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. By a unanimous vote, the Council adopted the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian admitted that he did not disclose responsive e-mails to the Complainant until after she filed her Complaint, thus failing to bear his burden of proving that the denial of access to the e-mails was authorized by law. N.J.S.A. 47:1A-6. However, the Council declines to order disclosure because the evidence of record reveals that the Custodian delivered said records to the Complainant on September 16, 2014. Additionally, the GRC must conduct an *in camera* review of the remaining twenty-six (26) responsive e-mails to determine the validity of his assertion that the same is ACD material and thus exempt from disclosure under OPRA. Paff v. NJ Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005). N.J.S.A. 47:1A-1.1.

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

<sup>2</sup> Represented by Deputy Attorney General Robert S. Guzek, Jr.

Eileen Murphy v. New Jersey Department of Environmental Protection, 2014-293 – Supplemental Findings and Recommendations of the Executive Director

2. Because the Complainant requested that the records be sent electronically, the Custodian wrongfully denied access by providing paper copies of the records. Mapp v. Borough of Roselle (Union), GRC Complaint No. 2009-334 (November 2010). McBride v. Twp. of Bordentown (Burlington), GRC Complaint No. 2007-217 (August 2009). Although the Custodian argued that paper copies *can* “be reproduced without manipulation, specialized software or information conversion technology and equipment,” he failed to demonstrate that providing electronic copies *would* involve special equipment, an extraordinary expenditure of time or effort, a substantial amount of manipulation, and extra costs. Accordingly, the records should have been made available electronically at no cost. Therefore, the Custodian must refund the full \$43.71 charged to the Complainant. *See* Hall v. Borough of Lawnside (Camden), GRC Complaint No. 2013-214 (August 2013).
3. **The Custodian must deliver to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see No. 2 above), a document or redaction index<sup>3</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, that the record provided is the record requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council’s Interim Order.**
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 November 18, 2015, the Council distributed its Interim Order to call parties. On November 25, 2015, the Custodian responded by e-mail and stated that he disclosed to the Complainant in unredacted form all of the records responsive to the request. He also stated that in compliance with the Order he was refunding to the Complainant the \$43.71 for records that had been requested to be transmitted via e-mail.

#### Analysis

#### Compliance

On November 17, 2015, the Council ordered the above-referenced compliance. On November 18 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. On November 25, 2015, the Custodian stated via e-mail that he disclosed to the Complainant the unredacted records responsive to the request in electronic format; to wit, the remaining twenty six (26) e-mails previously withheld under the belief that the records constituted advisory, consultative, or deliberative material. He also stated that the New Jersey Department of Environmental Protection had begun processing the refund of \$43.71 per the GRC’s Order but that it might take

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<sup>3</sup> The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

“a few weeks” for the Complainant to receive the refund. He suggested that his disclosure of the responsive records and payment of the refund to the Complainant rendered moot further proceedings with the Council.

Therefore, because the Custodian provided adequate proof that he timely disclosed to the Complainant the responsive records in electronic format and will refund the \$43.71 payment made by Complainant for paper copies of records, per the GRC’s Order, the Custodian’s actions complied with the Interim Order in substantial part and rendered moot the Council’s need to conduct an *in camera* review of the remaining records

### **Knowing & Willful**

OPRA states that “[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty ...” N.J.S.A. 47:1A-11(a). OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically, OPRA states “... [i]f the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA]...” N.J.S.A. 47:1A-7(e).

Certain legal standards must be considered when making the determination of whether the Custodian’s actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian’s actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian’s actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian’s actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian’s actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

Although the Custodian did not respond sufficiently or in a timely manner to the Complainant’s OPRA request, he did disclose the requested records in electronic format to the Complainant on November 25, 2015, and otherwise complied with the Council’s Interim Order. Moreover, the evidence of record does not indicate that the Custodian’s actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian’s actions did 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. Because the Custodian provided adequate proof that he timely disclosed to the Complainant the responsive records in electronic format and will refund the \$43.71 payment made by Complainant for paper copies of records, per the GRC's Order, the Custodian's actions complied with the Interim Order and rendered moot the Council's need to conduct an *in camera* review of the remaining records.
2. Although the Custodian did not respond sufficiently or in a timely manner to the Complainant's OPRA request, he did disclose the requested records in electronic format to the Complainant on November 25, 2015, and otherwise complied with the Council's Interim Order. Moreover, the evidence of record does not indicate that the Custodian's actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian's actions did 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: Ernest Bongiovanni  
Staff Attorney

Reviewed By: Joseph D. Glover  
Executive Director

December 8, 2015



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

**INTERIM ORDER**

**November 17, 2015 Government Records Council Meeting**

Eileen Murphy  
Complainant

Complaint No. 2014-293

v.

NJ Department of Environmental Protection  
Custodian of Record

At the November 17, 2015 public meeting, the Government Records Council (“Council”) considered the November 10, 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. The Custodian admitted that he did not disclose responsive e-mails to the Complainant until after she filed her Complaint, thus failing to bear his burden of proving that the denial of access to the e-mails was authorized by law. N.J.S.A. 47:1A-6. However, the Council declines to order disclosure because the evidence of record reveals that the Custodian delivered said records to the Complainant on September 16, 2014. Additionally, the GRC must conduct an *in camera* review of the remaining twenty-six (26) responsive e-mails to determine the validity of his assertion that the same is ACD material and thus exempt from disclosure under OPRA. Paff v. NJ Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005). N.J.S.A. 47:1A-1.1.
2. Because the Complainant requested that the records be sent electronically, the Custodian wrongfully denied access by providing paper copies of the records. Mapp v. Borough of Roselle (Union), GRC Complaint No. 2009-334 (November 2010). McBride v. Twp. of Bordentown (Burlington), GRC Complaint No. 2007-217 (August 2009). Although the Custodian argued that paper copies *can* “be reproduced without manipulation, specialized software or information conversion technology and equipment,” he failed to demonstrate that providing electronic copies *would* involve special equipment, an extraordinary expenditure of time or effort, a substantial amount of manipulation, and extra costs. Accordingly, the records should have been made available electronically at no cost. Therefore, the Custodian must refund the full \$43.71 charged to the Complainant. See Hall v. Borough of Lawnside (Camden), GRC Complaint No. 2013-214 (August 2013).



3. **The Custodian must deliver<sup>1</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see No. 2 above), a document or redaction index<sup>2</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,<sup>3</sup> that the record provided is the record requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
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 17<sup>th</sup> Day of November, 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: November 18, 2015**

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<sup>1</sup> 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.

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

<sup>3</sup> "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."



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
November 17, 2015 Council Meeting**

**Eileen Murphy**<sup>1</sup>

**GRC Complaint No. 2014-293**

**v.**

**New Jersey Department of Environmental Protection**<sup>2</sup>  
**Custodial Agency**

**Records Relevant to Complaint:** All e-mail and hard copies of correspondence, from January 1, 2007, through August 31, 2010, to and from Deb Ewalt, Barry Frasco, Jill Lopoti, Jeanne Herb, Lisa Jackson, Gary Sondermeyer, Mark Mauriello, Irene Kropp, Sarah Barrett, Robert Martin, Marilyn Lennon, Scott Brubaker, Michele Putnam, Kerry Pfluegh, Majorie Kaplan, and Mary Jo Baker where “Eileen Murphy” is the subject or within the text of the message.

**Custodian of Record:** Matthew J. Coefer

**Request Received by Custodian:** May 14, 2014

**Response Made by Custodian:** May 15, 2014 and May 30, 2014

**GRC Complaint Received:** August 19, 2014

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

**Request and Response:**

On May 14, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian, seeking the above-mentioned records. Because the Complainant was a former employee of the New Jersey Department of Environmental Protection (“NJDEP”), she specifically waived any confidentiality in obtaining the records if they were maintained in her personnel files. Further, she stated that because of the waiver, the records could not be considered confidential.

On May 15, 2014, the Custodian responded in writing and stated that the search criteria for e-mails requested were overly broad. He asked the Complainant to narrow her request. On the same day, the Complainant narrowed her request. The Custodian, however, advised the Complainant that the request was still overbroad. On May 19, 2014, the Complainant agreed with the Custodian’s suggestion to narrow yet further the request to e-mails within the prescribed

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

<sup>2</sup> Represented by Deputy Attorney General Robert S. Guzek, Jr.

<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.

Eileen Murphy v. New Jersey Department of Environmental Protection, 2014-293 – Findings and Recommendations of the Executive Director

time frame wherein the Complainant's name was within the subject line. On May 30, 2014, the Custodian advised the Complainant that the processing of her narrowed request was completed.

On June 2, 2014, the Custodian advised the Complainant that requested records, which consisted of 474 pages and a CD, would be made available upon receipt of a fee of \$28.00 for copying plus additional costs for "shipping and handling." On the same day, the Complainant responded, asking whether the records could instead be supplied electronically. On June 17, 2014, having neither received the records or a final bill, the Complainant e-mailed the Custodian, asking, "[c]ouldn't the 471 pages be supplied electronically or is copying hard copies the only way to access them?"<sup>4</sup> The Custodian did not respond to the specific inquiry but commented that the "files are separate." On July 8, 2014, having not received any records, the Complainant e-mailed the Custodian and offered to visit his office to do an onsite inspection. However, the Custodian replied on July 9, 2014, that the copy job was planned for that day, and that an invoice would be mailed.

On July 22, 2014, following receipt of the Complainant's payment of \$43.71, the Custodian provided copies of the Complainant's personnel files, which included six (6) e-mails. On the same day, the Complainant advised the Custodian that she did not ask for nor need her personnel file. Rather, she stated that her request was for e-mails. The next day, the Custodian advised the Complainant that he was withholding and denying access to twenty-eight (28) additional e-mails because they contained "deliberative communications" of the agency and thus were exempt under OPRA.

#### Denial of Access Complaint:

On August 18, 2014, the Complainant filed a Denial of Access Complaint. The Complainant asserted that the Custodian wrongfully denied access to twenty-eight (28) e-mails. She further contended that the Custodian, rather than providing her with the requested e-mails, instead disclosed her personnel files, which she had not requested. Further, she argued that because she waived any confidentiality in her personnel files, none of the e-mails in those files was exempt under OPRA. The Complainant contended that "[u]nless the emails reflect agency advisory opinions, recommendations or part of a government decision, I do not see how they can be classified as deliberative." Her Complaint included a copy of the June 2, 2014, e-mail to the Custodian, which questioned why the material could not be sent either electronically or reproduced on a disk, rather than paper copies being sent by mail.

#### Statement of Information:

On September 17, 2014, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on May 14, 2014. The Custodian stated that the search was narrowed to the agreed upon criteria. Addressing the Complainant's argument that she did not request her personnel file, the Custodian noted that in her original request, the Complainant stated "I waive confidentiality for my own personnel files" (emphasis supplied by the Custodian). Regarding the thirty-four (34) responsive e-mails, the

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<sup>4</sup> The number of pages to be copied varied in the communications between the parties. Eventually, the Complainant was invoiced for copying 666 pages.

Custodian argued that twenty-eight (28) of them were privileged under the deliberative communications exemption. *Citing N.J.S.A. 47:1A-1.1. Educ. Law Ctr. Ex rel Abbot v. N.J. Dept. of Educ.*, 198 N.J. 274, 285 (2009); *In Re Liquidation of Integrity Insurance Co*, 165 N.J. 75 (2000); *McGee v. Twp. of E. Amwell*, 416 N.J. Super. 602 (App. Div. 2010). He included a privilege log, sent to the Complainant on August 14, 2014, for e-mails that were denied. However, the Custodian added that, since the filing of the Complaint, he reviewed the responsive e-mails. As a result of his review, on September 16, 2014, he disclosed another two (2) e-mails reducing the number withheld to twenty-six (26).

#### Additional Submissions:

On July 15, 2015, the GRC sought additional information from the Custodian. Regarding the Complainant's inquiries from June 2 and June 17, 2014 as to why the records could not be either transmitted electronically or reproduced on disk, the GRC asked the following:

1. What was the final amount of the charges requested of Ms. Murphy and how much did she pay for the response to her records request? Please include a copy of the invoice.
2. Why were some of the records transmitted as hard copies rather than on a CD or electronically?
3. What was the reason for the amount charged to Ms. Murphy?

On July 24, 2015, the Custodian certified that the Complainant was charged \$43.71. The invoice, attached to his certification, showed that the Complainant was charged for 666 pages of records at five (5) cents per page for a total of \$33.30 plus a shipping charge of \$10.41. Responding to the Complainant's inquiry regarding hard copies versus electronic records,<sup>5</sup> the Custodian stated that the records are maintained in the same paper format that was sent to the Complainant. The Custodian cited OPRA, arguing that "if the public agency does not maintain the records in the medium requested, the custodian must either convert the record in the medium requested *or provide a copy in some other meaningful medium.*" *Citing N.J.S.A. 47:1A-5(d)* (emphasis supplied by the Custodian). *Also Citing N. Media Grp. v. Englewood Pub. School Dist.*, 2013 N.J. Super. Unpub. LEXIS 499 (Law Div. 2013). He contended that the hard copies provided to the Complainant were maintained in a "meaningful medium that fulfills the intent of OPRA" because they afforded the Complainant reasonable access. He also argued that by using the same format (hard copy) as the one in which the records are maintained, the records "could be reproduced without manipulation, specialized software or information conversion technology and equipment." The Custodian agreed that his office did not directly answer the Complainant's inquiry why paper copies had to be provided.

On July 27, 2015, the GRC requested the Custodian to complete a questionnaire, asking if the Custodian sought to justify a special service charge. On July 29, 2015, the Custodian responded, stating that he did not seek a special service charge, and reiterated his contention that OPRA permits the disclosure of hard copy records as a meaningful medium for access.

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<sup>5</sup> The invoice indicated the cost of a CD would have been fifty-five (\$.55) cents.

## 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.

#### The Custodian’s Claim of Privilege:

OPRA excludes from the definition of a government record “inter-agency or intra-agency advisory, consultative or deliberative material.” N.J.S.A. 47:1A-1.1. It is evident that this phrase is intended to exclude from the definition of a government record the types of documents that are the subject of the “deliberative process privilege.” The privilege is a doctrine that permits government agencies to withhold documents that reflect advisory opinions, recommendations, and deliberations (“ACD”) submitted as part of a process by which governmental decisions and policies are formulated. NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975).

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 Council<sup>6</sup> 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. at 354. 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

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

Eileen Murphy v. New Jersey Department of Environmental Protection, 2014-293 – Findings and Recommendations of the Executive Director

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 disputes the Custodian's claim that the twenty-eight (28) responsive e-mails were exempt as ACD pursuant to N.J.S.A. 47:1A-1.1. In the SOI, the Custodian argued that the undisclosed e-mails that were part of Complainant's request were exempt pursuant to the deliberative privilege. The Custodian argued that the e-mails involve "frank" internal discussions of the Complainant's position at the NJDEP; they are deliberative in nature; involve opinions concerning duties, titles, and draft Performance Evaluation Reviews. Notwithstanding that initial determination, the Custodian stated that following a subsequent review two (2) additional e-mails could be disclosed. The Custodian certified that he sent copies of same to the Complainant on September 16, 2014.

The Custodian admitted that he did not disclose responsive e-mails to the Complainant until after she filed her Complaint, thus he failed to bear his burden of proving that the denial of access to the e-mails was authorized by law. N.J.S.A. 47:1A-6. However, the Council declines to order disclosure because the evidence of record reveals that the Custodian delivered said records to the Complainant on September 16, 2014. Additionally, the GRC must conduct an *in camera* review of the remaining twenty-six (26) responsive e-mails to determine the validity of his assertion that the same are ACD material and thus exempt from disclosure under OPRA. Paff, 379 N.J. Super. 346. N.J.S.A. 47:1A-1.1.

*The Fees and costs charged:*

Pursuant to N.J.S.A. 47 1A-5.b. and Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), the Custodian must charge the actual cost of duplicating the requested record. Miller v. Westwood School Dist. (Bergen), GRC Complaint No. 2009-49 (February, 2010). Fees charged for providing records under OPRA "must be reasonable and cannot be used as a tool to discourage access." Livecchia v Borough of Mount Arlington, 421 N.J. Super. 24 (App. Div. 2011), quoting Higg-A-Rella Inc. v. Cnty. of Essex, 141 N.J. Super. 35, 53 (App. Div. 1995); Smith v. Hudson Cnty. Register, 411 N.J. Super. 538, 570 (App. Div. 2010).

Generally, records must be reproduced in the medium requested. McBride v. Twp. of Bordentown (Burlington), GRC Complaint No. 2007-217 (August 2009). If the public agency does not maintain the records in the medium requested, the custodian must convert the record to the medium requested or provide a copy in some other meaningful medium. N.J.S.A. 47:1A-5(d). Under OPRA, a requestor may be assessed additional costs, as a special service charge for preparation work involved in responding to a request, where records cannot be reproduced using ordinary equipment, where reproduction involves an extraordinary expenditure of time or effort, or if a "substantial amount of manipulation is needed." Burnett v. Cnty of Bergen, 198 N.J. 408, 438 (2009), Citing N.J.S.A. 47:1A-5(d).

In McBride, GRC 2007-217, the complainant sought access to records via e-mail. The Custodian, however, offered to provide the records via CD-ROM or floppy disk. The Council determined that the custodian, at the time of the request and response, had the ability to provide the records in the medium requested but failed to do so. The Council found that the Custodian's failure to provide the records in the medium requested was a violation of N.J.S.A. 47:1A-5(d). *See also* Blaustein v. Lakewood Bd. of Educ., GRC Complaint No. 2011-109 (July 2012).

Here, the Complainant specified that the Custodian "send electronic copies." Rather than provide electronic copies of the documents, the Custodian, on June 2, 2014, forwarded an estimated invoice to the Complainant. The invoice itemized the cost of the records, which consisted of one CD and 474 copies. The Complainant immediately asked why the records could not be sent electronically or be put on a single CD. She was advised only that the materials were "separate." On June 17, 2014, having yet to receive a final bill or records, the Complainant again asked why all the material could not be sent electronically. The Custodian admitted that the Complainant's question was never directly answered.

The GRC asked the Custodian to explain why he used paper copies rather than electronic copies and whether he sought a special service charge. The Custodian denied that his fees for providing hard copies required a special service charge. In his SOI, the Custodian argued that an agency has the option of providing hard copies when that is the medium the agency uses for maintaining the records and further argued that paper copies are a "meaningful medium." However, the GRC has previously determined that "[p]aper copies are distinctly different than electronic copies; *therefore paper copies cannot be considered a meaningful medium if the requestor has specified electronic copies.*" Mapp v. Borough of Roselle (Union), GRC Complaint No. 2009-334 (November 2010). (Emphasis added). *Citing* Wolosky v. Twp. of Frankford (Sussex), GRC Complaint No. 2008-254 (November 2009).

Because the Complainant requested that the records be sent electronically, the Custodian wrongfully denied access by providing paper copies of the records. Mapp, GRC 2009-334; McBride, GRC 2007-217. Although the Custodian argued that paper copies *can* "be reproduced without manipulation, specialized software or information conversion technology and equipment," he failed to demonstrate that providing electronic copies *would* involve special equipment, an extraordinary expenditure of time or effort, a substantial amount of manipulation, and extra costs. Accordingly, the records should have been made available electronically at no cost. Therefore, the Custodian must refund the full \$43.71 charged to the Complainant. *See* Hall v. Borough of Lawnside (Camden), GRC Complaint No. 2013-214 (August 2013).

### **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 admitted that he did not disclose responsive e-mails to the Complainant until after she filed her Complaint, thus failing to bear his burden of proving that the denial of access to the e-mails was authorized by law. N.J.S.A. 47:1A-6. However, the Council declines to order disclosure because the evidence of record reveals that the Custodian delivered said records to the Complainant on September 16, 2014. Additionally, the GRC must conduct an *in camera* review of the remaining twenty-six (26) responsive e-mails to determine the validity of his assertion that the same is ACD material and thus exempt from disclosure under OPRA. Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005). N.J.S.A. 47:1A-1.1.
2. Because the Complainant requested that the records be sent electronically, the Custodian wrongfully denied access by providing paper copies of the records. Mapp v. Borough of Roselle (Union), GRC Complaint No. 2009-334 (November 2010). McBride v. Twp. of Bordentown (Burlington), GRC Complaint No. 2007-217 (August 2009). Although the Custodian argued that paper copies *can* "be reproduced without manipulation, specialized software or information conversion technology and equipment," he failed to demonstrate that providing electronic copies *would* involve special equipment, an extraordinary expenditure of time or effort, a substantial amount of manipulation, and extra costs. Accordingly, the records should have been made available electronically at no cost. Therefore, the Custodian must refund the full \$43.71 charged to the Complainant. *See* Hall v. Borough of Lawnside (Camden), GRC Complaint No. 2013-214 (August 2013).
3. **The Custodian must deliver<sup>7</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see No. 2 above), a document or redaction index<sup>8</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,<sup>9</sup> that the record provided is the record requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
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: Ernest Bongiovanni  
Staff Attorney

Reviewed By: Dawn R. SanFilippo  
Deputy Executive Director

November 10, 2015

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<sup>7</sup> 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.

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

<sup>9</sup> "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."

Eileen Murphy v. New Jersey Department of Environmental Protection, 2014-293 – Findings and Recommendations of the Executive Director