



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

May 24, 2016 Government Records Council Meeting

Charles Urban
Complainant

Complaint No. 2014-343

v.

Clinton Township (Hunterdon)
Custodian of Record

At the May 24, 2016 public meeting, the Government Records Council (“Council”) considered the May 17, 2016 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 complied with the Council’s April 28, 2016 Interim Order because she responded in the prescribed time frame by providing records and simultaneously providing certified confirmation of compliance to the Executive Director.
2. Although the Custodian unlawfully denied access to the requested e-mails by completely withholding them from the Complainant, she did so under the belief that the minutes contained inter-agency or intra-agency advisory, consultative, or deliberative material and attorney-client privileged communications and were therefore not subject to production under OPRA. Furthermore, as requested by the Council’s April 28, 2016 Interim Order, the Custodian delivered to the Complainant copies of the requested e-mails with redactions according to the Order on April 29, 2016. Additionally, the evidence of record does not indicate that the original Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the original 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 24th Day of May, 2016

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: May 27, 2016

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
May 24, 2016 Council Meeting**

**Charles Urban¹
Complainant**

GRC Complaint No. 2014-343

v.

**Clinton Township (Hunterdon)²
Custodial Agency**

Records Relevant to Complaint: Copies of the following:

Regarding Block 68, Lot 6 (9 Echo Lane): any and all correspondence as of 7/31/14 to the present date from/to the following: Zoning Dept., Township Council, Twp. Attorney, Twp. Engineer, Twp. Administrator, Twp. Clerk, Planning Board, Board of Adjustment and its Attorney, and any other citizen regarding the above-referenced property.

Custodian of Record: Carla Conner

Request Received by Custodian: September 26, 2014

Response Made by Custodian: October 7, 2014

GRC Complaint Received: October 9, 2014

Background

April 26, 2016 Council Meeting:

At its April 26, 2016 public meeting, the Council considered the March 22, 2016 *In Camera* Findings and Recommendations of the Executive Director³ and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said *In Camera* findings and recommendations. The Council, therefore, found that:

1. The Custodian complied with the Council's July 1, 2015 Interim Order because she responded in the prescribed extended time frame by providing the requested records and supporting material for the Council to conduct an *in camera* inspection along with certified confirmation of compliance with respect to paragraph 3 of the Interim Order.
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**

¹ No legal representation listed on record.

² Represented by Victoria D. Britton, Esq.

³ This complaint could not be adjudicated at the Council's March 29, 2016 meeting due to lack of a quorum.

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 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 April 28, 2016, the Council distributed its Interim Order to all parties.

On April 29, 2016, the Custodian responded to the Council's Interim Order. The Custodian certified that, per the instructions in the April 28, 2016 Interim Order, she provided the Complainant copies of the responsive e-mails, redacted in accordance with the Council's Order, via e-mail.

Analysis

Compliance

At its April 26, 2016 meeting, the Council ordered the Custodian to comply with the Council's Findings of the *In Camera* Examination and to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On April 28, 2016, 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 May 5, 2016.

On April 29, 2016, the first business day after receipt of the Council's Order, the Custodian certified that per the Council's instructions, she provided the Complainant copies of the responsive e-mails, redacted in accordance with the Council's Order, via e-mail.

Therefore, the Custodian complied with the Council's April 28, 2016 Interim Order because she responded in the prescribed time frame by providing records and simultaneously providing certified confirmation of compliance to the Executive Director.

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

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.

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 (*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)).

Although the Custodian unlawfully denied access to the requested e-mails by completely withholding them from the Complainant, she did so under the belief that the minutes contained inter-agency or intra-agency advisory, consultative, or deliberative material and attorney-client privileged communications and were therefore not subject to production under OPRA. Furthermore, as requested by the Council’s April 28, 2016 Interim Order, the Custodian delivered to the Complainant copies of the requested e-mails with redactions according to the Order on April 29, 2016. Additionally, the evidence of record does not indicate that the original Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the original 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 complied with the Council’s April 28, 2016 Interim Order because she responded in the prescribed time frame by providing records and simultaneously providing certified confirmation of compliance to the Executive Director.
2. Although the Custodian unlawfully denied access to the requested e-mails by completely withholding them from the Complainant, she did so under the belief that the minutes contained inter-agency or intra-agency advisory, consultative, or deliberative material and attorney-client privileged communications and were therefore not subject to production under OPRA. Furthermore, as requested by the Council’s April 28, 2016 Interim Order, the Custodian delivered to the Complainant

copies of the requested e-mails with redactions according to the Order on April 29, 2016. Additionally, the evidence of record does not indicate that the original Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the original 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: Husna Kazmir
Staff Attorney

May 17, 2016



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

April 26, 2016 Government Records Council Meeting

Charles Urban
Complainant

Complaint No. 2014-343

v.

Clinton Township (Hunterdon)
Custodian of Record

At the April 26, 2016 public meeting, the Government Records Council (“Council”) considered the March 22, 2016 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 July 1, 2015 Interim Order because she responded in the prescribed extended time frame providing the requested records and supporting material for the Council to conduct an *in camera* inspection, as well as certified confirmation of compliance with respect to paragraph 3 of the Interim Order.
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 Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

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

Interim Order Rendered by the
Government Records Council
On The 26th Day of April, 2016

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 28, 2016

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
April 26, 2016 Council Meeting**

**Charles Urban¹
Complainant**

GRC Complaint No. 2014-343

v.

**Clinton Township (Hunterdon)²
Custodial Agency**

Records Relevant to Complaint: Copies of the following:

Regarding Block 68, Lot 6 (9 Echo Lane): any and all correspondence as of 7/31/14 to the present date from/to the following: Zoning Dept., Township Council, Twp. Attorney, Twp. Engineer, Twp. Administrator, Twp. Clerk, Planning Board, Board of Adjustment and its Attorney, and any other citizen regarding the above-referenced property.

Custodian of Record: Carla Conner

Request Received by Custodian: September 26, 2014

Response Made by Custodian: October 7, 2014

GRC Complaint Received: October 9, 2014

Records Submitted for *In Camera* Examination: Previously denied e-mail records

Background

June 30, 2015 Council Meeting:

At its June 30, 2015 public meeting, the Council considered the June 23, 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, found that:

1. The GRC must conduct an *in camera* review of the undisclosed records in order to determine the validity of the Custodian's assertions that the ten documents withheld are in fact exempt from disclosure based on OPRA's exemptions for attorney-client privilege; advisory, consultative and deliberative materials; and draft documents pursuant to N.J.S.A. 47:1A-1.1 and Parave-Fogg v. Lower Alloways Creek Twp., GRC Complaint No. 2006-51.

¹ No legal representation listed on record.

² Represented by Victoria D. Britton, Esq.

2. **In Camera Order** - The Custodian must deliver³ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see #1 above), a document or redaction 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.

Procedural History:

On July 1, 2015 the Council distributed its Interim Order to all parties. On July 8, 2015, the Custodian responded to the Council's Interim Order by delivering to the GRC in a sealed envelope nine (9) copies of the requested e-mails responsive to the request for an *in camera* inspection. The legal certification also addressed the Custodian's compliance with paragraph 3 of the Interim Order.

Analysis

Compliance

At its June 30, 2015 meeting, the Council ordered the Custodian to deliver to the GRC nine (9) copies of the requested e-mails responsive to the request for an *in camera* inspection. The Council also ordered the Custodian to deliver to the GRC a legal certification that the records provided are the records requested by the Council for the *in camera* inspection, a redaction index, and a certification of compliance with respect to paragraph 3 of the Interim Order. On July 1, 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 July 9, 2015.

On July 8, 2015, the Custodian delivered to the GRC nine (9) copies of the requested e-mails, a legal certification that the records provided are the records requested by the Council for the *in camera* inspection, a redaction index, and a certification of compliance with respect to paragraph 3 of the Interim Order.

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."

Accordingly, the Custodian complied with the Council's July 1, 2015 Interim Order because she responded in the prescribed extended time frame by providing the requested records and supporting material for the Council to conduct an *in camera* inspection and certified confirmation of compliance with respect to paragraph 3 of the Interim Order.

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 Custodian contends that the records submitted for *in camera* examination are exempt from disclosure because they constitute advisory, consultative, or deliberative ("ACD") material and contain attorney-client privileged material, pursuant to N.J.S.A. 47:1A-1.1. 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 deliberative process privilege is a doctrine that permits government agencies to withhold documents that reflect advisory opinions, recommendations, and deliberations submitted as part of a process by which governmental decisions and policies are formulated. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150, 95, S. Ct. 1504, 1516, 44 L. Ed. 2d 29, 47 (1975). This long-recognized privilege is rooted in the concept that the sovereign has an interest in protecting the integrity of its deliberations. The earliest federal case adopting the privilege is Kaiser Alum. & Chem. Corp. v. United States, 157 F. Supp. 939 (1958). Federal district courts and circuit courts of appeal subsequently adopted the privilege and its rationale. United States v. Farley, 11 F.3d 1385, 1389 (7th Cir. 1993). It has also been codified in the federal Freedom of Information Act ("FOIA") 5 U.S.C. §552(b)(5).

The deliberative process privilege was discussed at length in In Re Liquidation of Integrity Insurance Co., 165 N.J. 75 (2000). There, the court addressed the question of whether the Commissioner of Insurance, acting in the capacity of Liquidator of a regulated entity, could protect certain records from disclosure which she claimed contained opinions, recommendations or advice regarding agency policy. Id. at 81. The court adopted a qualified deliberative process privilege based upon the holding of McClain v. College Hospital, 99 N.J. 346 (1985), Liquidation of Integrity, supra, 165 N.J. at 88. In doing so, the court noted that:

"[a] document must meet two requirements for the deliberative process privilege to apply. First, it must have been generated before the adoption of an agency's policy or decision. In other words, it must be pre-decisional Second, the document must be deliberative in nature, containing opinions, recommendations, or advice about agency policies Purely factual material that does not reflect deliberative processes is not protected Once the government demonstrates

that the subject materials meet those threshold requirements, the privilege comes into play. In such circumstances, the government's interest in candor is the "preponderating policy" and, prior to considering specific questions of application, the balance is said to have been struck in favor of non-disclosure." (Citations omitted.) *Id.* at 84-85.

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

“[t]he initial burden falls on the state agency to show that the documents it seeks to shield are pre-decisional and deliberative in nature (containing opinions, recommendations, or advice about agency policies). Once the deliberative nature of the documents is established, there is a presumption against disclosure. The burden then falls on the party seeking discovery to show that his or her compelling or substantial need for the materials overrides the government's interest in non-disclosure. Among the considerations are the importance of the evidence to the movant, its availability from other sources, and the effect of disclosure on frank and independent discussion of contemplated government policies.” In Re Liquidation of Integrity, *supra*, 165 N.J. at 88, citing McClain, *supra*, 99 N.J. at 361-62, 492 A.2d 991.

In O’Shea v. West Milford Board of Education, GRC Complaint No. 2004-93 (April 2006), the Council stated that “neither the statute nor the courts have defined the terms ‘intra-agency’ or ‘advisory, consultative, or deliberative’ in the context of the public records law. The Council looks to an analogous concept, the deliberative process privilege, for guidance in the implementation of OPRA’s ACD exemption. Both the ACD exemption and the deliberative process privilege enable a governmental entity to shield from disclosure material that is pre-decisional and deliberative in nature. Deliberative material contains opinions, recommendations, or advice about agency policies. Strictly factual segments of an otherwise deliberative document are not exempted from disclosure. In re the Liquidation of Integrity Insurance Company, 165 N.J. 75, 88 (2000); In re Readoption With Amendments of Death Penalty Regulations, *supra* at 73 (App. Div. 2004).”

The GRC conducted an *in camera* examination on the submitted records, numbered one (1) through ten (10). The results of this examination are set forth in the following table:

Record Number	Record Name/Date	Description of Record⁶	Custodian’s Explanation/ Citation for Non-disclosure	Findings of the <i>In Camera</i> Examination⁷

⁶ The GRC disregarded instances where the Custodian submitted a duplicate copy of a record.

1.	E-mails dated 9/19/14 between Cathleen Marcelli, Kristina Hadinger, Esq., and Maureen McIvor	Zoning Permit for Block 68, Lot 6	Attorney-Client privileged communication not subject to disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u>	For the 9/19/2014 e-mail from Cathleen Marcelli to Kristina Hadinger, from 2:09 PM and the 2:02 PM e-mail from Maureen McIvor to Cathleen Marcelli: The bodies of the e-mails are not exempt and do not contain attorney-client privileged discussions. Thus, the Custodian unlawfully denied access to this e-mail chain. <u>N.J.S.A. 47:1A-6.</u> The Custodian must disclose this e-mail chain in its entirety.
2.	E-mails dated 9/19/14-9/22/14 between Cathleen Marcelli, Kristina Hadinger, Esq., and Maureen	Barn Plot Plan	Attorney-Client privileged communication not subject to disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u>	For the 9/19/2014 e-mail from Kristina Hadinger to Cathleen Marcelli, from 2:36 PM and the 9/22/2014 e-mail from Cathleen Marcelli to

⁷ **Unless expressly identified for redaction, everything in the record shall be disclosed.** For purposes of identifying redactions, unless otherwise noted a paragraph/new paragraph begins whenever there is an indentation and/or a skipped space(s). The paragraphs are to be counted starting with the first whole paragraph in each record and continuing sequentially through the end of the record. If a record is subdivided with topic headings, renumbering of paragraphs will commence under each new topic heading. Sentences are to be counted in sequential order throughout each paragraph in each record. Each new paragraph will begin with a new sentence number. If only a portion of a sentence is to be redacted, the word in the sentence which the redaction follows or precedes, as the case may be, will be identified and set off in quotation marks. 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.

	McIvor ⁸			Kristina Hadinger from 11:09 AM: *Note: Record 1 included in chain: The e-mails are not exempt and do not contain attorney-client privileged discussions. Thus, the Custodian unlawfully denied access to this e-mail chain. <u>N.J.S.A. 47:1A-6.</u> The Custodian must disclose this e-mail chain in its entirety.
3.	E-mails dated 9/22/14 between Jon Drill, Esq., Kristina Hadinger, Esq. and Joseph Rossi, Cathleen Marcelli, Trishka W. Cecil, Esq.	Error with Zoning Permit for Block 68, Lot 6	Attorney-Client privileged communication not subject to disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u> ; Advisory, consultative and deliberative materials not subject to disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u>	For the 9/22/2014 e-mail from Kristina Hadinger to Joseph Rossi, from 11:54 AM: The body of the e-mail is exempt because it contains attorney-client privileged discussions between Counsel and the Zoning Officer, and additionally contains ACD material. Thus, the Custodian lawfully denied access to this portion of the e-mail message. <u>N.J.S.A. 47:1A-6.</u> The Custodian

⁸ The two attachments to this e-mail were previously disclosed to the Complainant, so no *in camera* examination was conducted for those documents.

				<p>must disclose all other portions of the e-mail (sender, recipients, date, time, subject, and salutations where applicable), as these portions are not exempt and do not contain attorney-client privileged discussions or ACD material. <u>N.J.S.A. 47:1A-6.</u></p> <p>For the 9/22/2014 e-mail from Jon Drill to Joseph Rossi, from 12:05 PM: The body of the e-mail is exempt because it contains attorney-client privileged discussions between Counsel and the Zoning Officer, and additionally contains ACD material. Thus, the Custodian lawfully denied access to this portion of the e-mail message. N.J.S.A. 47:1A-6. The Custodian must disclose all other portions of the e-mail (sender, recipients, date,</p>
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				time, subject, and salutations where applicable), as these portions are not exempt and do not contain attorney-client privileged discussions or ACD material. <u>N.J.S.A. 47:1A-6.</u>
4.	E-mails dated 9/22/14-9/23/14 between Jon Drill, Esq., Kristina Hadinger, Joseph Rossi, Cathleen Marcelli, Trishka W. Cecil, Esq. *Note: Record 3 included in chain.	Error with Zoning Permit for Block 68, Lot 6/Right to Farm	Attorney-Client privileged communication not subject to disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u> ; Advisory, consultative and deliberative materials not subject to disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u>	For the 9/23/2014 e-mail from Joseph Rossi to Jon Drill, from 12:40 PM: the body of the e-mail is exempt because it contains attorney-client privileged discussions between Counsel and the Zoning Officer, and additionally contains ACD material. Thus, the Custodian lawfully denied access to this portion of the e-mail message. <u>N.J.S.A. 47:1A-6.</u> The Custodian must disclose all other portions of the e-mail (sender, recipients, date, time, subject, and salutations where applicable), as

			<p>these portions are not exempt and do not contain attorney-client privileged discussions or ACD material. <u>N.J.S.A. 47:1A-6.</u></p> <p>For the 9/23/2014 e-mail from Jon Drill to Joseph Rossi, from 12:47 PM: the body of the e-mail is exempt because it contains attorney-client privileged discussions between Counsel and the Zoning Officer, and additionally contains ACD material. Thus, the Custodian lawfully denied access to this portion of the e-mail message. <u>N.J.S.A. 47:1A-6.</u> The Custodian must disclose all other portions of the e-mail (sender, recipients, date, time, subject, and salutations where applicable), as these portions are not exempt and do not contain attorney-client privileged</p>
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				<p>discussions or ACD material. <u>N.J.S.A. 47:1A-6.</u></p> <p>For the 9/23/2014 e-mail from Jon Drill to Kristina Hadinger, from 12:48 PM: the body of the e-mail is exempt because it contains attorney-client privileged discussions between Counsel and the Zoning Officer, and additionally contains ACD material. Thus, the Custodian lawfully denied access to this portion of the e-mail message. <u>N.J.S.A. 47:1A-6.</u></p> <p>The Custodian must disclose all other portions of the e-mail (sender, recipients, date, time, subject, and salutations where applicable), as these portions are not exempt and do not contain attorney-client privileged discussions or ACD material. <u>N.J.S.A. 47:1A-6.</u></p>
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5.	E-mails dated 9/22/14-9/23/14 between Joseph Rossi, Kristina Hadinger, Esq., Jon Drill, Esq., Cathleen Marcelli, and Trishka W. Cecil, Esq.	Error with Zoning Permit for Block 68, Lot 6	Attorney-Client privileged communication not subject to disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u> ; Advisory, consultative and deliberative materials not subject to disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u>	<p>For the 9/23/2014 e-mail from Joseph Rossi to Kristina Hadinger, from 3:10 PM, *Note: Record 3 included in this chain.: The e-mail is not exempt and does not contain attorney-client privileged discussions. Thus, the Custodian unlawfully denied access to this e-mail chain. <u>N.J.S.A. 47:1A-6. The Custodian must disclose this individual e-mail in its entirety.</u></p> <p>For the 9/23/2014 e-mail from Joseph Rossi to Jon Drill, from 3:06 PM, *Note: Record 3 included in this e-mail chain: the body of the e-mail is exempt because it contains attorney-client privileged discussions between Counsel and the Zoning Officer, and additionally contains ACD material. Thus, the Custodian lawfully denied access to this</p>
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				<p>portion of the e-mail message. <u>N.J.S.A. 47:1A-6.</u> The Custodian must disclose all other portions of the e-mail (sender, recipients, date, time, subject, and salutations where applicable), as these portions are not exempt and do not contain attorney-client privileged discussions or ACD material. <u>N.J.S.A. 47:1A-6.</u></p>
6.	E-mails dated 9/22/14-9/23/14 between Joseph Rossi, Kristina Hadinger, Esq., Jon Drill, Esq., Cathleen Marcelli, and Trishka W. Cecil, Esq.	Error with Zoning Permit for Block 68, Lot 6/Notice from Zoning	Attorney-Client privileged communication not subject to disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u> ; Advisory, consultative and deliberative materials not subject to disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u>	For 9/23/2014 e-mail from Joseph Rossi to Kristina Hadinger, from 3:15 PM, *Note: Record 3 included in this e-mail chain: The e-mail is not exempt and does not contain attorney-client privileged discussions. Thus, the Custodian unlawfully denied access. <u>N.J.S.A. 47:1A-6.</u> The Custodian must disclose this individual e-mail in its entirety.

7.	E-mails dated 9/22/14-9/23/14 between Jon Drill, Joseph Rossi, Kristina Hadinger, Esq., Cathleen Marcelli, Trishka W. Cecil, Esq.	Error with Zoning Permit for Block 68, Lot 6	Advisory, consultative and deliberative materials not subject to disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u>	<p>For the 9/23/2014 e-mail from Jon Drill to Joseph Rossi, from 3:55 PM: The body of the e-mail is exempt because it contains ACD material. Thus, the Custodian lawfully denied access to this portion of the e-mail message. N.J.S.A. 47:1A-6. The Custodian must disclose all other portions of the e-mail (sender, recipients, date, time, subject, and salutations where applicable), as these portions are not exempt and do not contain attorney-client privileged discussions or ACD material. <u>N.J.S.A. 47:1A-6.</u></p> <p>For the 9/23/2014 e-mail from Jon Drill to Joseph Rossi, from 3:12 PM *Note: Record 3 included in this e-mail chain: the body of the e-mail is exempt because it contains attorney-client</p>
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			<p>privileged discussions between Counsel and the Zoning Officer, and additionally contains ACD material. Thus, the Custodian lawfully denied access to this portion of the e-mail message. <u>N.J.S.A. 47:1A-6.</u></p> <p>The Custodian must disclose all other portions of the e-mail (sender, recipients, date, time, subject, and salutations where applicable), as these portions are not exempt and do not contain attorney-client privileged discussions or ACD material. <u>N.J.S.A. 47:1A-6.</u></p> <p>For the 9/23/2014 e-mail from Jon Drill to Joseph Rossi, from 3:50 PM, * Note: Record 5 included in this e-mail chain: The body of the e-mail is exempt because it contains ACD material. Thus, the Custodian</p>
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				<p>lawfully denied access to this portion of the e-mail message. N.J.S.A. 47:1A-6. The Custodian must disclose all other portions of the e-mail (sender, recipients, date, time, subject, and salutations where applicable), as these portions are not exempt and do not contain attorney-client privileged discussions or ACD material. <u>N.J.S.A. 47:1A-6.</u></p> <p>For the 9/23/2014 e-mail from Joseph Rossi to Jon Drill, from 3:15 PM, * Note: Records 3 and 5 included in this e-mail chain: The e-mail is not exempt and does not contain attorney-client privileged discussions. Thus, the Custodian unlawfully denied access to this e-mail chain. <u>N.J.S.A. 47:1A-6.</u> The Custodian must disclose this individual e-mail</p>
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				<p>in its entirety.</p> <p>For the 9/23/2014 e-mail from Joseph Rossi to Jon Drill, from 3:38 PM: *Note: Records 3 and 5 included in this e-mail chain: The e-mail is not exempt and does not contain attorney-client privileged discussions. Thus, the Custodian unlawfully denied access to this e-mail chain. <u>N.J.S.A. 47:1A-6.</u> The Custodian must disclose this individual e-mail in its entirety.</p>
8.	E-mails dated 9/23/14 between Jon Drill, Esq. and Kristina Hadinger, Esq.	Error with Zoning Permit for Block 68, Lot 6/Notice from Zoning	Advisory, consultative and deliberative materials not subject to disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u>	<p>For the 9/23/2014 e-mail from Jon Drill to Kristina Hadinger, from 4:00 PM: The body of the e-mail is exempt because it contains ACD material. Thus, the Custodian lawfully denied access to this portion of the e-mail message. <u>N.J.S.A. 47:1A-6.</u> The Custodian must disclose all other portions of the e-mail (sender,</p>

			<p>recipients, date, time, subject, and salutations where applicable), as these portions are not exempt and do not contain attorney-client privileged discussions or ACD material. <u>N.J.S.A. 47:1A-6.</u></p> <p>For the 9/23/2014 e-mail from Kristina Hadinger to Jon Drill, from 3:57 PM: The body of the e-mail is exempt because it contains ACD material. Thus, the Custodian lawfully denied access to this portion of the e-mail message. N.J.S.A. 47:1A-6. The Custodian must disclose all other portions of the e-mail (sender, recipients, date, time, subject, and salutations where applicable), as these portions are not exempt and do not contain attorney-client privileged discussions or ACD material.</p>
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				<u>N.J.S.A. 47:1A-6.</u>
9.	E-mails dated 9/22/14-9/25/14 between Kristina Hadinger, Esq., Joseph Rossi, Jon Drill, Esq., Cathleen Marcelli, and Trishka W. Cecil, Esq.	Error with Zoning Permit for Block 68, Lot 6/Notice from Zoning	Attorney-Client privileged communication not subject to disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u> ; Advisory, consultative and deliberative materials not subject to disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u> ; Draft documents are not subject to disclosure pursuant to <u>Parave-Fogg v. Lower Alloways Creek Twp., GRC</u> Complaint No. 2006-51	For the 9/23/2014 e-mail from Kristina Hadinger to Joseph Rossi from 4:01 PM, *Note: Records 3 and 5 included in this e-mail chain: The body of the e-mail is exempt because it contains attorney-client privileged discussions between Counsel and the Zoning Officer, and additionally contains ACD material. Thus, the Custodian lawfully denied access to this portion of the e-mail message. N.J.S.A. 47:1A-6. The Custodian must disclose all other portions of the e-mail (sender, recipients, date, time, subject, and salutations where applicable), as these portions are not exempt and do not contain attorney-client privileged discussions or ACD material. <u>N.J.S.A. 47:1A-6.</u>

				<p>For the 9/25/2014 e-mail from Joseph Rossi to Kristina Hadinger, from 8:26 AM, *Note: Record 3 included in this e-mail chain: the body of the e-mail is exempt because it contains attorney-client privileged discussions between Counsel and the Zoning Officer, and additionally contains ACD material. Thus, the Custodian lawfully denied access to this portion of the e-mail message. <u>N.J.S.A. 47:1A-6.</u> The Custodian must disclose all other portions of the e-mail (sender, recipients, date, time, subject, and salutations where applicable), as these portions are not exempt and do not contain attorney-client privileged discussions or ACD material. <u>N.J.S.A. 47:1A-6.</u></p>
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				<p>For the 9/25/2014 e-mail from Kris Hadinger to Joseph Rossi, from 9:53 AM: The body of the e-mail and attachment are exempt because they contain attorney-client privileged discussions between Counsel and the Zoning Officer, and additionally contains ACD material. Thus, the Custodian lawfully denied access to this portion of the e-mail message. N.J.S.A. 47:1A-6. The Custodian must disclose all other portions of the e-mail (sender, recipients, date, time, subject, and salutations where applicable), as these portions are not exempt and do not contain attorney-client privileged discussions or ACD material. <u>N.J.S.A. 47:1A-6.</u></p>
10.	E-mails dated 9/25/14	Error with Zoning Permit	Attorney-Client privileged	For the 9/25/2014 e-mail from

	<p>between Joseph Rossi and Kristina Hadinger, Esq.</p>	<p>for Block 68, Lot 6/Supplemental Notice from Zoning</p>	<p>communication not subject to disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u>; Draft documents are not subject to disclosure pursuant to <u>Parave-Fogg v. Lower Alloways Creek Twp., GRC Complaint No. 2006-51</u></p>	<p>Joseph Rossi to Kristina Hadinger, from 12:26 PM: The body of the e-mail is exempt because it contains attorney-client privileged discussions between Counsel and the Zoning Officer, and additionally contains ACD material. Thus, the Custodian lawfully denied access to this portion of the e-mail message. N.J.S.A. 47:1A-6. The Custodian must disclose all other portions of the e-mail (sender, recipients, date, time, subject, and salutations where applicable), as these portions are not exempt and do not contain attorney-client privileged discussions or ACD material. <u>N.J.S.A. 47:1A-6.</u></p> <p>For the 9/25/2014 e-mail from Kris Hadinger to Joseph Rossi, from 2:45 PM: The body of the e-</p>
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				<p>mail is exempt because it contains attorney-client privileged discussions between Counsel and the Zoning Officer. Thus, the Custodian lawfully denied access to this portion of the e-mail message. N.J.S.A. 47:1A-6.</p> <p>The Custodian must disclose all other portions of the e-mail (sender, recipients, date, time, subject, and salutations where applicable), as these portions are not exempt and do not contain attorney-client privileged discussions or ACD material. <u>N.J.S.A. 47:1A-6.</u></p>
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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 July 1, 2015 Interim Order because she responded in the prescribed extended time frame providing the requested records and supporting material for the Council to conduct an *in camera* inspection, as well as certified confirmation of compliance with respect to paragraph 3 of the Interim Order.
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.⁹**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Husna Kazmir
Staff Attorney

March 22, 2016¹⁰

⁹ 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.

¹⁰ This complaint could not be adjudicated at the Council's March 29, 2016 meeting due to lack of a quorum.



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

June 30, 2015 Government Records Council Meeting

Charles Urban
Complainant

Complaint No. 2014-343

v.

Clinton Township (Hunterdon)
Custodian of Record

At the June 30, 2015 public meeting, the Government Records Council ("Council") considered the June 23, 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 GRC must conduct an *in camera* review of the undisclosed records in order to determine the validity of the Custodian's assertions that the ten documents withheld are, in fact, exempt from disclosure based on OPRA's exemptions for attorney-client privilege; advisory, consultative and deliberative materials; and draft documents pursuant to N.J.S.A. 47:1A-1.1 and Parave-Fogg v. Lower Alloways Creek Twp., GRC Complaint No. 2006-51.
2. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see #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.

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 June, 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 1, 2015

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Charles Urban¹
Complainant**

GRC Complaint No. 2014-343

v.

**Clinton Township (Hunterdon)²
Custodial Agency**

Records Relevant to Complaint: Copies of the following:

Regarding Block 68, Lot 6 (9 Echo Lane): any and all correspondence as of 7/31/14 to the present date from/to the following: Zoning Dept., Township Council, Twp. Attorney, Twp. Engineer, Twp. Administrator, Twp. Clerk, Planning Board, Board of Adjustment and its Attorney and any other citizen regarding the above-referenced property.

Custodian of Record: Carla Conner

Request Received by Custodian: September 26, 2014

Response Made by Custodian: October 7, 2014

GRC Complaint Received: October 9, 2014

Background³

Request and Response:

On September 26, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to seek the above-mentioned records. On October 7, 2014, the Custodian responded to the Complainant in writing, attaching documents responsive to the request but noting that “some of the records you requested are not subject to disclosure under OPRA.” The Custodian included a “privilege log” that identifies said records and describes the legal basis for the non-disclosure.

The log listed the following denied records:

1. Emails dated 9/19/14 between Cathleen Marcelli; Kristina Hardinger, Esq.; and Maureen McIvor, concerning Zoning Permit for Block 68, Lot 6.

¹ No legal representation listed on record.

² Represented by Victoria D. Britton, Esq.

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.

2. Emails dated 9/19/14 to 9/22/14 between Cathleen Marcelli; Kristina Hardinger, Esq.; and Maureen McIvor, concerning Barn Plot Plan.
3. Emails dated 9/22/14 between Jon Drill, Esq.; Kristina Hadinger, Esq.; Joseph Rossi; Cathleen Marcelli; and Trishka W. Cecil, Esq., concerning error with zoning permit for Block 68, Lot 6.
4. Emails dated 9/22/14 to 9/23/14 between Jon Drill, Esq.; Kristina Hadinger; Joseph Rossi; Cathleen Marcelli; and Trishka W. Cecil, Esq., concerning error with zoning permit for Block 68, Lot 6/Right to Farm.
5. Emails dated 9/22/14 to 9/23/14 between Joseph Rossi; Kristina Hadinger, Esq.; Jon Drill, Esq.; Cathleen Marelli; and Trishka W. Cecil, Esq., concerning error with zoning permit for Block 68, Lot 6
6. Emails dated 9/22/14 to 9/23/14 between Joseph Rossi; Kristina Hadinger, Esq.; Jon Drill, Esq.; Cathleen Marelli; and Trishka W. Cecil, Esq., concerning error with zoning permit for Block 68, Lot 6/Notice from Zoning
7. Emails dated 9/22/14 to 9/23/14 between Jon Drill, Joseph Rossi; Kristina Hadinger, Esq.; Cathleen Marcelli; Trishka W. Cecil, Esq., concerning error with zoning permit for Block 68, Lot 6/Notice from Zoning
8. Emails dated 9/23/14 between Jon Drill, Esq. and Kristina Hadinger, Esq., concerning error with zoning permit for Block 68, Lot 6/Notice from Zoning
9. Emails dated 9/22/14 to 9/25/14 between Kristina Hadinger, Esq.; Joseph Rossi; Jon Drill, Esq.; Cathleen Marcelli; and Trishka W. Cecil, Esq., concerning error with zoning permit for Block 68, Lot 6/Notice from Zoning
10. Emails dated 9/25/14 between Joseph Rossi and Kristina Hadinger, Esq., concerning error with zoning permit for Block 68, Lot 6/Supplemental Notice from Zoning

In the log, the Custodian enumerated the following legal arguments for denying the request. With respect to items 1, 2, 3, 4, 5, 6, 7, 9, and 10, the Custodian stated that the records constituted attorney-client privileged communications that are not subject to disclosure pursuant to N.J.S.A. 47:1A-1.1. She further argued that items 3, 4, 5, 6, 7, 8, 9, and 10 contained advisory, consultative, and deliberative materials that are not subject to disclosure pursuant to N.J.S.A. 47:1A-1.1. Finally, the Custodian noted that items 9 and 10 consisted of draft documents that are not subject to disclosure pursuant to Parave-Fogg v. Lower Alloways Creek Twp., GRC Complaint No. 2006-51.

Denial of Access Complaint:

On October 9, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant provided no additional argument in his complaint.

Statement of Information:

On November 14, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on September 26, 2014. The Custodian noted that upon receipt of the Complainant’s OPRA request, it was forwarded to the Mayor and Council, Township Administrator, Zoning Department, Planning Department, Township Engineer, Township Attorney, Zoning and Planning Boards, and Zoning/Planning Board Attorney for review and retrieval of records. The Custodian certified that she also reviewed files in the Clerk’s Office and searched her email for any responsive records.

The Custodian certified that, following a review of the retrieved records, she withheld all records falling into a statutory exception. The Custodian created a log that identifies and describes the records being withheld and lists the legal bases for withholding the records. The Custodian argued that the following exceptions applied: (1) attorney-client privilege pursuant to N.J.S.A. 47:1A-1.1; (2) advisory, consultative, and deliberative materials pursuant to N.J.S.A. 47:1A-1.1; and (3) draft documents pursuant to Parave-Fogg v. Lower Alloways Creek Twp., GRC Complaint No. 2006-51. Finally, the Custodian certified that she responded in writing on October 7, 2014, and attached eight pages of non-exempt responsive records to the Complainant’s OPRA request.

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 v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the GRC, which dismissed the complaint by accepting the custodian’s legal conclusion for the denial of access without further review. The court stated that:

OPRA contemplates the GRC’s meaningful review of the basis for an agency’s decision to withhold government records...When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers.

Paff, 379 N.J. Super. at 354.

The court also stated that:

The statute . . . 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 10:4-21, 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 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 Custodian has made several arguments, grounded in OPRA and other relevant cases, as to why the ten (10) documents outlined in her privilege log need not be disclosed. Without inspecting the withheld records and in light of the Custodian’s burden to prove a lawful denial of access, the GRC cannot conduct the “meaningful review of the basis for an agency’s decision to withhold government records” contemplated under OPRA. Id. at 354.

Therefore, the GRC must conduct an *in camera* review of the undisclosed records in order to determine the validity of the Custodian’s assertions that the ten documents withheld are, in fact, exempt from disclosure based on OPRA’s exemptions for attorney-client privilege; advisory, consultative and deliberative materials; and draft documents pursuant to N.J.S.A. 47:1A-1.1 and Parave-Fogg.

Knowing & Willful

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The GRC must conduct an *in camera* review of the undisclosed records in order to determine the validity of the Custodian's assertions that the ten documents withheld are, in fact, exempt from disclosure based on OPRA's exemptions for attorney-client privilege; advisory, consultative and deliberative materials; and draft documents pursuant to N.J.S.A. 47:1A-1.1 and Parave-Fogg v. Lower Alloways Creek Twp., GRC Complaint No. 2006-51.
2. **The Custodian must deliver⁴ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see #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. 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: Husna Kazmir
Staff Attorney

Approved By: Dawn R. SanFilippo
Deputy Executive Director

June 23, 2014

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."