



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 23, 2017 Government Records Council Meeting**

Demetrios Damplias  
Complainant

Complaint No. 2014-96

v.

NJ Department of Corrections  
Custodian of Record

At the May 23, 2017 public meeting, the Government Records Council (“Council”) considered the May 16, 2017 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 March 28, 2017 Interim Order because the Custodian timely forwarded certified confirmation of compliance to the Executive Director, wherein he stated that his office mailed to the Complainant copies of records on March 30, 2017, in compliance with said Order.
2. Although the Custodian denied the Complainant access to records, or portions thereof, that the Council subsequently determined via an *in camera* examination should have been disclosed, the Custodian did disclose all records, or portions thereof, in compliance with the Council’s March 28, 2017 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 23<sup>rd</sup> Day of May, 2017

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 30, 2017**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
May 23, 2017 Council Meeting**

**Demetrios Damplias<sup>1</sup>  
Complainant**

**GRC Complaint No. 2014-96**

v.

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

**Records Relevant to Complaint:**

1. Copy of objections and comments made by any third parties in response to International Prison Transfer Request.
2. Copy of the Commissioner's "Statement of Reasons" upon which he based his decisions denying International Prison Transfer Requests.<sup>3</sup>

**Custodian of Record:** John Falvey  
**Request Received by Custodian:** January 10, 2014  
**Response Made by Custodian:** January 21, 2014  
**GRC Complaint Received:** March 3, 2014

**Background**

March 28, 2017 Council Meeting:

At its March 28, 2017 public meeting, the Government Records Council ("Council") considered the January 24, 2017 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 Custodian complied with the Council's October 28, 2014 Interim Order because he responded in a timely manner by providing the records ordered for the *in camera* inspection, a document or redaction index, and a legal certification that the records provided are the records requested by the Council for the *in camera* inspection.
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**

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

<sup>2</sup> No legal representation listed on record.

<sup>3</sup> There were other records requested that are not relevant to this complaint.

Demetrios Damplias v. New Jersey Department of Corrections, 2014-96 – Supplemental Findings and Recommendations of the Executive Director

**simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.**

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 March 30, 2017, the Council distributed its March 28, 2017 Interim Order to all parties. On March 30, 2017, the Custodian responded to the Council's Interim Order by providing certified confirmation of compliance to the Executive Director.

**Analysis**

**Compliance**

On March 28, 2017, the Council ordered the above-referenced compliance. On March 30, 2017, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Therefore, compliance was due on or before April 6, 2017. On March 30, 2017, the day the Custodian received the Interim Order, he forwarded certified confirmation of compliance to the Executive Director, wherein he stated that his office mailed to the Complainant copies of records on March 30, 2017, in compliance with the Council's March 28, 2017 Interim Order.<sup>4</sup>

Therefore, the Custodian complied with the Council's March 28, 2017 Interim Order because the Custodian timely forwarded certified confirmation of compliance to the Executive Director, wherein he stated that on March 30, 2017, his office mailed to the Complainant copies of records in compliance with said Order.

**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

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<sup>4</sup> The Custodian attached to the certification of compliance copies of the records he mailed to the Complainant. *Demetrios Damplias v. New Jersey Department of Corrections*, 2014-96 – Supplemental Findings and Recommendations of the Executive Director

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 denied the Complainant access to records, or portions thereof, that the Council subsequently determined via an *in camera* examination should have been disclosed, the Custodian did disclose all records, or portions thereof, in compliance with the Council’s March 28, 2017 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. The Custodian complied with the Council’s March 28, 2017 Interim Order because the Custodian timely forwarded certified confirmation of compliance to the Executive Director, wherein he stated that his office mailed to the Complainant copies of records on March 30, 2017, in compliance with said Order.
2. Although the Custodian denied the Complainant access to records, or portions thereof, that the Council subsequently determined via an *in camera* examination should have been disclosed, the Custodian did disclose all records, or portions thereof, in compliance with the Council’s March 28, 2017 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: John E. Stewart

May 16, 2017



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
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CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
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CHARLES A. RICHMAN  
Commissioner

INTERIM ORDER

March 28, 2017 Government Records Council Meeting

Demetrios Damplias  
Complainant

Complaint No. 2014-96

v.

NJ Department of Corrections  
Custodian of Record

At the March 28, 2017 public meeting, the Government Records Council (“Council”) considered the January 24, 2017 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 October 28, 2014 Interim Order because he responded in a timely manner by providing the records ordered for the *in camera* inspection, a document or redaction index, and a legal certification that the records provided are the records requested by the Council for the *in camera* inspection.
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.<sup>1</sup>**
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.

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<sup>1</sup> 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 28<sup>th</sup> Day of March, 2017

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: March 30, 2017**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director  
March 28, 2017 Council Meeting**

**Demetrios Damplias<sup>1</sup>  
Complainant**

**GRC Complaint No. 2014-96**

v.

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

**Records Relevant to Complaint:**

1. Copy of objections and comments made by any third parties in response to International Prison Transfer Request.
2. Copy of the Commissioner's "Statement of Reasons" upon which he based his decisions denying International Prison Transfer Requests.<sup>3</sup>

**Custodian of Record:** John Falvey  
**Request Received by Custodian:** January 10, 2014  
**Response Made by Custodian:** January 21, 2014  
**GRC Complaint Received:** March 3, 2014

**Records Submitted for *In Camera* Examination:**

1. Eleven (11) records responsive to request item number 1.
2. Fourteen (14) records responsive to request item number 2.

**Background**

October 28, 2014 Council meeting

At the October 28, 2014 public meeting, the Government Records Council ("Council") considered the October 21, 2014 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. Pursuant to Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the records responsive to request item number 1 to determine the validity of the Custodian's assertion that they were lawfully redacted to remove telephone numbers for privacy, safety and security reasons, as well as ACD material exempt from access pursuant to N.J.S.A. 47:1A-1.1.

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

<sup>2</sup> No legal representation listed on record.

<sup>3</sup> There were other records requested that are not relevant to this complaint.



The GRC must also conduct an *in camera* review of the records responsive to request item number 2 to determine the validity of the Custodian's assertion that they are exempt from access in their entirety as ACD material pursuant to N.J.S.A. 47:1A-1.1.

2. **The Custodian must deliver to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see paragraph #1 above), nine (9) copies of the redacted records, a document or redaction index, as well as a legal certification in accordance with N.J. Court Rule 1:4-4, 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 October 29, 2014, the Council distributed its October 28, 2014 Interim Order to all parties. On October 30, 2014, the Custodian responded to the Interim Order by delivering to the GRC in a sealed envelope nine (9) copies of the unredacted records and nine (9) copies of the redacted records responsive to request item number 1, as well as nine (9) copies of the unredacted records responsive to request item number 2 for an *in camera* inspection. The Custodian also included a document or redaction index, as well as a legal certification that the record provided is the record requested by the Council for the *in camera* inspection.

On December 13, 2016, this complaint was reviewed by the Council in closed session, whereupon the Council directed that more information must be obtained from the Custodian. On December 14, 2016, the GRC requested a certification from the Custodian in order to provide the GRC with more detailed background information. On December 19, 2016, the Custodian forwarded a response to the GRC. The Custodian certified that it was unknown whether redacted material disclosed to the Complainant was readable beneath the redaction markings; however the Custodian stated that it was likely that the redacted portions could not be read because it is the practice of the Department of Corrections to review redacted records prior to disclosure. In response to the GRC's request for the Custodian to provide a more comprehensive explanation for asserting that a telephone number was exempt for safety and security and/or personnel record reasons, the Custodian certified that he no longer contests the disclosure of the redacted number. The Custodian further certified that on December 19, 2016, he disclosed to the Complainant unredacted copies of the records that originally had the telephone number redacted. The Custodian attached copies of the records to his certification.<sup>4</sup>

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<sup>4</sup> The records are a NJ DOC letter to the Woodbridge Police Chief dated October 23, 2008, a NJ DOC letter to the NJ Attorney General's Office dated October 23, 2008, a NJ DOC letter to the Sentencing Judge dated May 1, 2009, a NJ DOC letter to the Sentencing Judge dated October 23, 2008, a NJ DOC letter to the Middlesex County Prosecutor's Office dated October 23, 2008, a NJ DOC letter to the NJ Attorney General's Office dated May 16, 2012, a NJ DOC letter to the Middlesex County Prosecutor's Office dated May 16, 2012, and a NJ DOC letter to Sentencing Judge dated May 16, 2012. Because these records have been disclosed in unredacted form, they are no longer subject to *in camera* examination.

The GRC also requested answers to a Privacy Interest Balancing Test Questionnaire from both the Complainant and the Custodian. Both the Complainant and Custodian responded to the GRC's request. The Complainant submitted a certification to the GRC wherein he stated that he declined to submit answers to the questionnaire because he was not asserting an unlawful denial of access to the redacted telephone number on the records upon which that redaction appeared. The Custodian did submit answers to the questionnaire; however, it is unnecessary for the GRC to conduct a balancing test because the Custodian has since disclosed to the Complainant in unredacted form the only records that would have been subject to the balancing test.

## Analysis

### Compliance

At its October 28, 2014 meeting, the Council ordered the Custodian to deliver to the GRC nine (9) copies of the unredacted records and nine (9) copies of the redacted records responsive to request item number 1, as well as nine (9) copies of the unredacted records responsive to request item number 2 for an *in camera* inspection. The Council also ordered the Custodian to deliver to the GRC a document or redaction index and a legal certification that the records provided are the records requested by the Council for the *in camera* inspection. On October 29, 2014, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by the close of business on November 6, 2014.

On October 30, 2014, the Custodian delivered to the GRC the records ordered for the *in camera* inspection, a document or redaction index and a legal certification that the records provided are the records requested by the Council for the *in camera* inspection. Accordingly, the Custodian complied with the Council's October 28, 2014 Interim Order because he responded in a timely manner by providing the records ordered for the *in camera* inspection, a document or redaction index, and a legal certification that the records provided are the records requested by the Council for the *in camera* inspection.

## 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.

On January 21, 2014, the Custodian disclosed the records responsive to request item number 1, redacted to remove exempt advisory, consultative, or deliberative ("ACD") material pursuant to N.J.S.A. 47:1A-1.1. The Custodian did not disclose to the Complainant the records responsive to request item number 2 because he certified that those records were exempt in their entirety as ACD material.

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.”

In O’Shea v. West Milford BOE, GRC Complaint No. 2004-93 (April 2006), the Council stated that:

[N]either the statute nor the courts have defined the terms ... “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. In Re the Liquidation of Integrity Ins. Co., 165 N.J. 75, 88 (2000); In re Readoption With Amendments of Death Penalty Regulations, 182 N.J.149 (App. Div. 2004).

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 (1975). Specifically, the New Jersey Supreme Court has ruled that a record that contains or involves factual components is entitled to deliberative-process protection under the exemption in OPRA when it was used in the decision-making process *and* its disclosure would reveal deliberations that occurred during that process. Educ. Law Ctr. v. NJ Dep’t of Educ., 198 N.J. 274 (2009). 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). The privilege and its rationale were subsequently adopted by the federal district courts and circuit courts of appeal. United States v. Farley, 11 F.3d 1385, 1389 (7th Cir.1993).

The deliberative process privilege was discussed at length in Integrity at 84-88. 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. Coll. Hosp., 99 N.J. 346 (1985). Id. 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.

Id. at 84-85 (citations omitted).

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

The 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.

Integrity, 165 N.J. at 88 (citing McClain, 99 N.J. at 361-62).

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

Item Number/ Record Number <sup>5</sup>	Record Name/Date	Record Denied or Redacted	Custodian’s Explanation/ Citation for Non-disclosure or Redactions	Findings of the <i>In Camera</i> Examination <sup>6</sup>
1/1	NJ DOC letter to the	Third paragraph:	References recommendations	Reveals that Prosecutor’s Office

<sup>5</sup> Unless otherwise noted, all records consist of one (1) page.

<sup>6</sup> **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.

	Middlesex County Prosecutor's Office dated July 27, 2009.	second half of second sentence and all of third sentence.	given by Prosecutor's Office; therefore ACD material pursuant to <u>N.J.S.A.</u> 47:1A-1.1.	made recommendations but does not reveal deliberative material; therefore disclose redacted material.
1/2	NJ DOC letter to Sentencing Judge dated August 14, 2012.	Third paragraph: second half of first sentence and all of second sentence.	Information referencing recommendations given by Judge that went into the NJDOC's decision; therefore ACD material pursuant to <u>N.J.S.A.</u> 47:1A-1.1.	References taking into account "recommendation" but does not reveal deliberative material; therefore disclose redacted material.
1/3	NJ DOC letter to the Middlesex County Prosecutor's Office dated August 14, 2012.	Third paragraph: second half of first sentence and all of second sentence.	Information referencing recommendations given by Prosecutor's Office that went into the NJDOC's decision; therefore ACD material pursuant to <u>N.J.S.A.</u> 47:1A-1.1.	References taking into account "recommendation" but does not reveal deliberative material; therefore disclose redacted material.
2/1	Memo to NJDOC Commissioner dated July 15, 2009 discussing opinions and recommendations received regarding international transfer (2 pages).	Access denied to entire record.	Discusses opinions and recommendations received regarding international transfer; therefore is ACD material pursuant to <u>N.J.S.A.</u> 47:1A-1.1.	The first three paragraphs and first sentence in fourth paragraph contain factual narrative. As such, they are subject to disclosure.  The balance of the fourth paragraph and paragraph 5 contain opinions, omission of opinions and/or recommendations

				<p>regarding a request for transfer and were properly denied as ACD material pursuant to <u>N.J.S.A. 47:1A-1.1.</u></p> <p>Paragraph 6, (consisting of one sentence), and Paragraph 7 contain advisory material and prompt for an opinion. They were properly denied as ACD material pursuant to <u>N.J.S.A. 47:1A-1.1.</u></p> <p>Paragraph 8, consisting of one sentence, contains no ACD material and should be disclosed.</p>
2/2	Memo to NJDOC Commissioner dated July 16, 2009 discussing opinions and recommendations received regarding international transfer (2 pages).	Access denied to entire record.	Discusses opinions and recommendations received regarding international transfer; therefore is ACD material pursuant to <u>N.J.S.A. 47:1A-1.1.</u>	Provides advice and recommendations and seeks opinion; therefore was properly denied as ACD material pursuant to <u>N.J.S.A. 47:1A-1.1.</u>
2/3	Letter from NJ Attorney General's Office to NJDOC dated July 1, 2009, giving	Access denied to entire record.	Gives recommendations and concerns with respect to international transfer; therefore is ACD material	Provides advice and recommendations; therefore was properly denied as ACD material pursuant to

	recommendations and concerns with respect to international transfer.		pursuant to <u>N.J.S.A. 47:1A-1.1.</u>	<u>N.J.S.A. 47:1A-1.1.</u>
2/4	Letter from Sentencing Judge to NJDOC dated June 5, 2009, giving recommendations and concerns with respect to international transfer.	Access denied to entire record.	Gives recommendations and concerns with respect to international transfer; therefore is ACD material pursuant to <u>N.J.S.A. 47:1A-1.1.</u>	Expresses an opinion and was properly denied as ACD material pursuant to <u>N.J.S.A. 47:1A-1.1.</u>
2/5	Letter from Middlesex County Prosecutor's Office to NJDOC dated November 19, 2008, giving recommendations and concerns with respect to international transfer (2 pages).	Access denied to entire record.	Gives recommendations and concerns with respect to international transfer; therefore is ACD material pursuant to <u>N.J.S.A. 47:1A-1.1.</u>	<p>The first sentence of first paragraph contains no ACD material and should be disclosed. The second sentence of first paragraph expresses an opinion and was properly denied as ACD material pursuant to <u>N.J.S.A. 47:1A-1.1.</u></p> <p>The second paragraph contains opinions and recommendations and was properly denied as ACD material pursuant to <u>N.J.S.A. 47:1A-1.1.</u></p> <p>The third and fourth paragraphs contain factual narrative. As such, they are subject to</p>

				disclosure.  Paragraphs 5 through 7 contain opinions and/or recommendations and were properly denied as ACD material pursuant to <u>N.J.S.A. 47:1A-1.1.</u>
2/6	Memo to NJDOC Commissioner dated August 10, 2012 discussing opinions and recommendations received regarding international transfer (2 pages).	Access denied to entire record.	Discusses opinions and recommendations received regarding international transfer; therefore is ACD material pursuant to <u>N.J.S.A. 47:1A-1.1.</u>	<p>The first three paragraphs and first sentence in fourth paragraph contain factual narrative. As such, they are subject to disclosure.</p> <p>The balance of the fourth paragraph, and paragraphs 5 through 7 contain advisory material, opinions, omission of opinions and/or prompt for a recommendation. As such, they were properly denied as ACD material pursuant to <u>N.J.S.A. 47:1A-1.1.</u></p> <p>Paragraph 8, consisting of one sentence, contains no ACD material and should be disclosed.</p>
2/7	Memo to NJDOC Deputy Commissioner dated August 9, 2012 discussing	Access denied to entire record.	Discusses opinions and recommendations received regarding	The first sentence of first paragraph contains no ACD material and should be disclosed. The



	opinions and recommendations received regarding international transfer.		international transfer; therefore is ACD material pursuant to <u>N.J.S.A. 47:1A-1.1.</u>	<p>second sentence of first paragraph contains a recommendation and was properly denied as ACD material pursuant to <u>N.J.S.A. 47:1A-1.1.</u></p> <p>The first three bullet points contain factual material and should be disclosed. The fourth bullet point contains an informed opinion and was properly denied as ACD material pursuant to <u>N.J.S.A. 47:1A-1.1.</u></p>
2/8	Memo to NJDOC Commissioner dated August 9, 2012 discussing opinions and recommendations received regarding international transfer.	Access denied to entire record.	Discusses opinions and recommendations received regarding international transfer; therefore is ACD material pursuant to <u>N.J.S.A. 47:1A-1.1.</u>	<p>The first sentence of first paragraph contains no ACD material and should be disclosed. The second sentence of first paragraph contains a recommendation and was properly denied as ACD material pursuant to <u>N.J.S.A. 47:1A-1.1.</u></p> <p>The second paragraph contains advice and was properly denied as ACD material pursuant to <u>N.J.S.A. 47:1A-1.1.</u></p> <p>The first two sentences in the</p>

				<p>third paragraph contain factual material and should be disclosed. The third sentence in the third paragraph contains an opinion and was properly denied as ACD material pursuant to <u>N.J.S.A. 47:1A-1.1</u>.</p> <p>Paragraph 4, consisting of one sentence, contains no ACD material and should be disclosed.</p>
2/9	Letter from NJ Attorney General's Office to NJDOC dated July 25, 2012, giving recommendations and concerns with respect to international transfer.	Access denied to entire record.	Gives recommendations and concerns with respect to international transfer; therefore is ACD material pursuant to <u>N.J.S.A. 47:1A-1.1</u> .	Provides advice and recommendations; therefore was properly denied as ACD material pursuant to <u>N.J.S.A. 47:1A-1.1</u> .
2/10	Letter from Sentencing Judge to NJDOC dated June 6, 2012, giving recommendations and concerns with respect to international transfer.	Access denied to entire record.	Gives recommendations and concerns with respect to international transfer; therefore is ACD material pursuant to <u>N.J.S.A. 47:1A-1.1</u> .	Expresses an opinion and was properly denied as ACD material pursuant to <u>N.J.S.A. 47:1A-1.1</u> .
2/11	Letter from Sentencing Judge to	Access denied to entire record.	Gives recommendations and concerns with	The first and second paragraphs, except for the last

	NJDOC dated May 30, 2012, giving recommendations and concerns with respect to international transfer.		respect to international transfer; therefore is ACD material pursuant to <u>N.J.S.A. 47:1A-1.1</u>	<p>sentence in the second paragraph, contain a factual narrative and should be disclosed.</p> <p>The last sentence in the second paragraph gives advice/opinion and was properly denied as ACD material pursuant to <u>N.J.S.A. 47:1A-1.1</u>.</p> <p>The third paragraph contains no ACD material and should be disclosed, except for the telephone number. It is unknown whether the telephone number is for an office telephone or a private cellular telephone. Further, it is unknown whether the number is listed or unlisted. For these reasons, the telephone number should be redacted pursuant to the exception contained in <u>N.J.S.A. 47:1A-1.1</u>.</p>
2/12	Letter from Middlesex County Prosecutor's Office to NJDOC dated June 8, 2012, giving	Access denied to entire record.	Gives recommendations and concerns with respect to international transfer; therefore is ACD material pursuant to	The first sentence of the first paragraph contains no ACD material and should be disclosed. The second sentence of the first paragraph

	recommendations and concerns with respect to international transfer (2 pages).		<u>N.J.S.A. 47:1A-1.1</u>	contains an opinion and was properly denied as ACD material pursuant to <u>N.J.S.A. 47:1A-1.1</u> .  The second paragraph provides opinion and recommendations; therefore it was properly denied as ACD material pursuant to <u>N.J.S.A. 47:1A-1.1</u> .  The third paragraph contains no ACD material and should be disclosed.
2/13	Letter from Middlesex County Prosecutor's Office to NJDOC dated June 15, 2012, giving recommendations and concerns with respect to international transfer (2 pages).	Access denied to entire record.	Gives recommendations and concerns with respect to international transfer; therefore is ACD material pursuant to <u>N.J.S.A. 47:1A-1.1</u>	Entire letter, except for the last paragraph, provides advice and recommendations and was properly denied as ACD material pursuant to <u>N.J.S.A. 47:1A-1.1</u> .  The last paragraph, consisting of one sentence, contains no ACD material and should be disclosed.
2/14	Letter from Middlesex County Prosecutor's Office to NJDOC dated November 19, 2008, giving recommendations and	Access denied to entire record.	Gives recommendations and concerns with respect to international transfer; therefore is ACD material pursuant to <u>N.J.S.A. 47:1A-1.1</u> .	The first sentence of first paragraph contains no ACD material and should be disclosed. The second sentence of first paragraph expresses an opinion and was properly denied as

	concerns with respect to international transfer (2 pages).			<p>ACD material pursuant to <u>N.J.S.A. 47:1A-1.1.</u></p> <p>The second paragraph contains opinions and recommendations and was properly denied as ACD material pursuant to <u>N.J.S.A. 47:1A-1.1.</u></p> <p>The third and fourth paragraphs contain factual narrative. As such, they are subject to disclosure.</p> <p>Paragraphs 5 through 7 contain opinions and/or recommendations and were properly denied as ACD material pursuant to <u>N.J.S.A. 47:1A-1.1.</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 October 28, 2014 Interim Order because he responded in a timely manner by providing the records ordered for the *in camera* inspection, a document or redaction index, and a legal certification that the records provided are the records requested by the Council for the *in camera* inspection.
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.<sup>7</sup>**

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: John E. Stewart

January 24, 2017<sup>8</sup>

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<sup>7</sup> 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.

<sup>8</sup> This complaint was prepared for adjudication at the Council's January 31, 2017 meeting; however, the Council chose to table the matter in order to seek further legal advice.



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET  
PO BOX 819  
TRENTON, NJ 08625-0819

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Commissioner

INTERIM ORDER

October 28, 2014 Government Records Council Meeting

Demetrios Damplias  
Complainant

Complaint No. 2014-96

v.

NJ Department of Corrections  
Custodian of Record

At the October 28, 2014 public meeting, the Government Records Council ("Council") considered the October 21, 2014 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Pursuant to Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the records responsive to request item number 1 to determine the validity of the Custodian's assertion that they were lawfully redacted to remove telephone numbers for privacy, safety and security reasons, as well as ACD material exempt from access pursuant to N.J.S.A. 47:1A-1.1. The GRC must also conduct an *in camera* review of the records responsive to request item number 2 to determine the validity of the Custodian's assertion that they are exempt from access in their entirety as ACD material pursuant to N.J.S.A. 47:1A-1.1.
2. **The Custodian must deliver<sup>1</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see paragraph #1 above), nine (9) copies of the redacted records, a document or redaction index<sup>2</sup>, as well as a legal certification in accordance with N.J. Court Rule 1:4-4,<sup>3</sup> 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.

<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."

Interim Order Rendered by the  
Government Records Council  
On The 28<sup>th</sup> Day of October, 2014

Robin Berg Tabakin, Esq., Chair  
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: October 29, 2014**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
October 28, 2014 Council Meeting**

**Demetrios Damplias<sup>1</sup>  
Complainant**

**GRC Complaint No. 2014-96**

v.

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

**Records Relevant to Complaint:**

1. Copy of objections and comments made by any third parties in response to International Prison Transfer Request.
2. Copy of the Commissioner's "Statement of Reasons" upon which he based his decisions denying International Prison Transfer Requests.<sup>3</sup>

**Custodian of Record:** John Falvey  
**Request Received by Custodian:** January 10, 2014  
**Response Made by Custodian:** January 21, 2014  
**GRC Complaint Received:** March 3, 2014

**Background<sup>4</sup>**

**Request and Response:**

On January 10, 2014, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On January 21, 2014, the sixth (6<sup>th</sup>) business day following receipt of said request, the Custodian responded in writing informing the Complainant that eighteen (18) pages of records responsive to request item number 1 have been located and the records have been redacted because they contain intra-agency advisory, consultative, or deliberative ("ACD") material exempt from access pursuant to N.J.S.A. 47:1A-1.1. The Custodian also informed the Complainant that the records responsive to request item number 2 are denied in their entirety as ACD material.<sup>5</sup>

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

<sup>2</sup> No legal representation listed on record.

<sup>3</sup> There were other records requested that are not relevant to this complaint.

<sup>4</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.

<sup>5</sup> Original request items numbered 3 and 4 have been renumbered as request items numbered 1 and 2, respectively.

### Denial of Access Complaint:

On March 3, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that he mailed the request to the Custodian on or about December 30, 2013, and that the Custodian subsequently responded to the request. The Complainant attached a copy of the Custodian’s January 21, 2014 response to the complaint.

The Complainant asserts that he is entitled to full disclosure of the records responsive to the request. In support of his assertion the Complainant cites Shimoni v. NJ Dep’t of Corr., 412 N.J. Super. 218 (App. Div. 2010) and Nicoletta v. NJ Dist. Water Supply Comm’n, 77 N.J. 145, 166 (1978).

### Statement of Information:

On April 23, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that he received the Complainant’s OPRA request on January 10, 2014 and responded to the request on January 21, 2014.

The Custodian certifies that eighteen (18) pages of records are responsive to request item number 1, and that the records were disclosed to the Complainant in redacted form. The Custodian certifies that the records were redacted to remove a direct phone number for a Department of Corrections employee. The Custodian certifies that the phone number was redacted for privacy, safety and security reasons. The Custodian also certifies that the agency only posts the main telephone number on its website to ensure that callers are directed to the appropriate personnel. The Custodian certifies the records were also redacted to remove exempt advisory opinions factored into the decision on the transfer. The Custodian certifies that if the opinions were made public they would have a chilling effect on candor.

The Custodian certifies that twenty-one (21) pages of records were determined to be responsive to request item number 2. The Custodian certifies that the records are exempt in their entirety as ACD material and were not disclosed. The Custodian certifies the ACD material contains opinions and advice relied upon in making recommendations for a final decision.

The Custodian certifies that the cases the Complainant cited in the complaint do not support disclosure of the records in the instant complaint. The Custodian states that Shimoni, 412 N.J. Super. 218 had nothing to do with OPRA. The Custodian certifies that the court opined, “[a] prisoner denied international transfer may be entitled to a statement of reasons, but it does not follow that he is entitled to a general review on the question of whether the decision is arbitrary, capricious or unreasonable.”<sup>6</sup> The Custodian certifies that Nicoletta, 77 N.J. 145 is not applicable to the instant complaint.

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<sup>6</sup> The Custodian did not include a page cite.

## 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 determined that eighteen (18) pages of records are responsive to request item number 1, and twenty-one (21) pages of records are responsive to request item number 2. On January 21, 2014, the Custodian disclosed the records responsive to request item number 1, redacted to remove a direct agency phone number citing privacy, safety and security reasons. The Custodian certified the records responsive to request number 1 were also redacted to remove exempt ACD material. The Custodian did not disclose to the Complainant the records responsive to request item number 2 because he certified that those records were exempt in their entirety as ACD material pursuant to N.J.S.A. 47:1A-1.1. Conversely, the Complainant argued that he is entitled to disclosure of the records responsive to the request in unredacted form.

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>7</sup> dismissing the complaint by accepting the custodian’s legal conclusion for the denial of access without further review. The Court stated that “OPRA contemplates the GRC’s meaningful review of the basis for an agency’s decision to withhold government records . . . . When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers.” Id. The Court also stated that:

The statute also contemplates the GRC’s *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the ‘Open Public Meetings Act,’ N.J.S.A. 10:4-6 to -21, it also provides that the GRC ‘may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.’ N.J.S.A. 47:1A-7(f). This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.

Id. at 355.

Further, the Court stated that:

We hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal . . . . There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC’s obligation to

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<sup>7</sup> Paff v. NJ Dep’t of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

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.

Therefore, pursuant to Paff, 379 N.J. Super. at 346, the GRC must conduct an *in camera* review of the records responsive to request item number 1 to determine the validity of the Custodian's assertion that they were lawfully redacted to remove telephone numbers for privacy, safety and security reasons, as well as ACD material exempt from access pursuant to N.J.S.A. 47:1A-1.1. The GRC must also conduct an *in camera* review of the records responsive to request item number 2 to determine the validity of the Custodian's assertion that they are exempt from access in their entirety as ACD material pursuant to N.J.S.A. 47:1A-1.1.

### **Knowing & Willful**

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

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Pursuant to Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the records responsive to request item number 1 to determine the validity of the Custodian's assertion that they were lawfully redacted to remove telephone numbers for privacy, safety and security reasons, as well as ACD material exempt from access pursuant to N.J.S.A. 47:1A-1.1. The GRC must also conduct an *in camera* review of the records responsive to request item number 2 to determine the validity of the Custodian's assertion that they are exempt from access in their entirety as ACD material pursuant to N.J.S.A. 47:1A-1.1.
2. **The Custodian must deliver<sup>8</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see paragraph #1 above), nine (9) copies of the redacted records, a document or redaction index<sup>9</sup>, as well as a legal certification in accordance with N.J. Court Rule 1:4-4,<sup>10</sup> 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.**

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<sup>8</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>9</sup> The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

<sup>10</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."

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: John E. Stewart, Esq.

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

October 21, 2014