



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

October 31, 2017 Government Records Council Meeting

Susan Fleming
Complainant

Complaint No. 2015-18

v.

Greenwich Township (Warren)
Custodian of Record

At the October 31, 2017 public meeting, the Government Records Council (“Council”) considered the October 24, 2017 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian complied with the Council’s September 26, 2017 Interim Order because she timely responded by providing records and simultaneously provided certified confirmation of compliance to the Executive Director.
2. Although the Custodian violated N.J.S.A. 47:1A-5(i) and unlawfully denied access to responsive records in accordance with the Council’s *in camera* findings, the Custodian complied in full with the Council’s September 26, 2017 Interim Order. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the 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 31st Day of October, 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: November 2, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
October 31, 2017 Council Meeting**

**Susan Fleming¹
Complainant**

GRC Complaint No. 2015-18

v.

**Greenwich Township (Warren)²
Custodial Agency**

Records Relevant to Complaint: Hard copies of:

- 1) “[T]hirteen (13) page report prepared by Joseph M. Wenzel which was referenced in the Express-Times article concerning the termination of Susan Fleming, Court Administrator.”
- 2) “Any and all E-mails regarding myself, Susan (Sue) Fleming and/or the Greenwich Court sent/received by Mayor Tauriello, Atty. Taddeo, Clerk Viscomi and others – specifically from April 1, 2014 thru the present. (The last 9 months)”

Custodian of Record: Kimberly Cooney (née Viscomi)
Request Received by Custodian: December 29, 2014
Response Made by Custodian: January 26, 2015
GRC Complaint Received: January 23, 2015

Background

September 26, 2017 Council Meeting:

At its September 26, 2017 public meeting, the Council considered the September 19, 2017 *In Camera* 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 July 25, 2017 Interim Order because she timely provided nine (9) copies of the requested records, along with a signed certification to the Executive Director.
2. In accordance with the above table and with the exceptions indicated therein, the Custodian lawfully denied access to a majority of the records as they pertained to

¹ No legal representation listed on record.

² Represented by James F. Moscagiuri, Esq. of Lavery, Selvaggi, Abromitis & Cohen (Hackettstown, NJ).

personnel matters and employee misconduct pursuant to N.J.S.A. 47:1A-10. See North Jersey Media Grp. v. Bergen Cnty. Prosecutor's Office, 405 N.J. Super. 386, 390 (App. Div. 2009); Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (March 2004); and Rodriguez v. Kean Univ., GRC Complaint No. 2013-296 (June 2014). Furthermore, the Custodian lawfully denied access to e-mails that contain attorney-client privileged communications pursuant to N.J.S.A. 47:1A-1.1. See Tractenberg v. Twp. of W. Orange, 416 N.J. Super. 354, 376 (App. Div. 2010); In re Env'tl. Ins. Declaratory Judgment Actions, 259 N.J. Super. 308, 313 (App. Div. 1992).

3. **Based on the Council's determination in this matter, as set forth in the above table, the Custodian must disclose all other portions of the requested e-mails and memos to the Complainant (i.e., sender, recipients, date, time, subject, and closing salutations).**
4. With respect to the e-mails marked in the above table, the Custodian unlawfully denied access by failing to produce legible copies of the e-mails. N.J.S.A. 47:1A-6; Lopez v. City of Hudson, GRC Complaint No. 2009-267 (March 2011).
5. **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 conformation of compliance pursuant to N.J. Court Rule 1:4-4 to the GRC.³**
6. 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 September 28, 2017, the Council distributed its Interim Order to all parties. On September 29, 2017, counsel for the Custodian requested an extension of time to comply with the Council's Interim Order. The Government Records Council ("GRC") granted the Custodian's request to until October 13, 2017.

On October 4, 2017, the Custodian responded to the Council's Interim Order, certifying that she followed the directions of the Council's Interim Order and provided the Complainant with the requested records with relevant redactions therein.

Analysis

Compliance

³ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If the Complainant incurred a copying or special service charge, 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.

At its September 26, 2017 meeting, the Council ordered the Custodian to deliver the responsive records to the Complainant and to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On September 28, 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. Thus, the Custodian's response was due by close of business on October 5, 2017.

On September 29, 2017, the first (1st) business day after receipt of the Council's Order, the Custodian sought and was granted an extension of time until October 13, 2017, to comply with the Order. On October 4, 2017, the Custodian provided the Complainant with the relevant records, along with a certified confirmation of compliance to the Executive Director.

Therefore, the Custodian complied with the Council's September 26, 2017 Interim Order because she timely responded by providing records and simultaneously provided 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 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 violated N.J.S.A. 47:1A-5(i) and unlawfully denied access to responsive records in accordance with the Council's *in camera* findings, the Custodian complied in full with the Council's September 26, 2017 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of

conscious wrongdoing or was intentional and deliberate. Therefore, the 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 September 26, 2017 Interim Order because she timely responded by providing records and simultaneously provided certified confirmation of compliance to the Executive Director.
2. Although the Custodian violated N.J.S.A. 47:1A-5(i) and unlawfully denied access to responsive records in accordance with the Council's *in camera* findings, the Custodian complied in full with the Council's September 26, 2017 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the 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: Samuel A. Rosado, Esq.
Staff Attorney

October 24, 2017



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

September 26, 2017 Government Records Council Meeting

Susan Fleming
Complainant

Complaint No. 2015-18

v.

Greenwich Township (Warren)
Custodian of Record

At the September 26, 2017 public meeting, the Government Records Council (“Council”) considered the September 19, 2017 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian complied with the Council’s July 25, 2017 Interim Order because she timely provided nine (9) copies of the requested records, along with a signed certification to the Executive Director.
2. In accordance with the above table and with the exceptions indicated therein, the Custodian lawfully denied access to a majority of the records as they pertained to personnel matters and employee misconduct pursuant to N.J.S.A. 47:1A-10. See North Jersey Media Grp. v. Bergen Cnty. Prosecutor’s Office, 405 N.J. Super. 386, 390 (App. Div. 2009); Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (March 2004); and Rodriguez v. Kean Univ., GRC Complaint No. 2013-296 (June 2014). Furthermore, the Custodian lawfully denied access to e-mails that contain attorney-client privileged communications pursuant to N.J.S.A. 47:1A-1.1. See Tractenberg v. Twp. of W. Orange, 416 N.J. Super. 354, 376 (App. Div. 2010); In re Env’tl. Ins. Declaratory Judgment Actions, 259 N.J. Super. 308, 313 (App. Div. 1992).
3. **Based on the Council’s determination in this matter, as set forth in the above table, the Custodian must disclose all other portions of the requested e-mails and memos to the Complainant (i.e., sender, recipients, date, time, subject, and closing salutations).**
4. With respect to the e-mails marked in the above table, the Custodian unlawfully denied access by failing to produce legible copies of the e-mails. N.J.S.A. 47:1A-6; Lopez v. City of Hudson, GRC Complaint No. 2009-267 (March 2011).
5. **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 conformation of compliance pursuant to N.J. Court Rule 1:4-4 to the GRC.¹

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

Interim Order Rendered by the
Government Records Council
On The 26th Day of September, 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: September 28, 2017

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.

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
September 26, 2017 Council Meeting**

**Susan Fleming¹
Complainant**

GRC Complaint No. 2015-18

v.

**Greenwich Township (Warren)²
Custodial Agency**

Records Relevant to Complaint: Hard copies of:

- 1) “[T]hirteen (13) page report prepared by Joseph M. Wenzel which was referenced in the Express-Times article concerning the termination of Susan Fleming, Court Administrator.”
- 2) “Any and all E-mails regarding myself, Susan (Sue) Fleming and/or the Greenwich Court sent/received by Mayor Tauriello, Atty. Taddeo, Clerk Viscomi and others – specifically from April 1, 2014 thru the present. (The last 9 months)”

Custodian of Record: Kimberly Viscomi
Request Received by Custodian: December 29, 2014
Response Made by Custodian: January 26, 2015
GRC Complaint Received: January 23, 2015

Records Submitted for *In Camera* Examination: Responsive e-mails withheld from disclosure on the grounds that the records contain advisory, consultative, or deliberative (“ACD”) material and/or contain attorney-client privileged communications.

Background

July 25, 2017 Council Meeting:

At its July 25, 2017 public meeting, the Council considered the July 18, 2017 *In Camera* 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 No legal representation listed on record.

² Represented by James F. Moscagiuri, Esq. of Lavery, Selvaggi, Abromitis & Cohen (Hackettstown, NJ).

1. The Custodian complied with the Council's January 31, 2017 Interim Order because she timely provided nine (9) copies of the requested records, along with a signed certification to the Executive Director.
2. The Complainant complied with the Council's January 31, 2017 Interim Order because she timely responded and included a signed certification.
3. A review of the records indicates that the Custodian's broad claim that the withheld records contain ACD and/or attorney-client privileged communications is insufficient for the GRC to adequately verify. Therefore, the Custodian shall provide a more detailed redaction index justifying her decision to withhold the responsive records, indicating the exact OPRA exemption for each record.
4. Because the Complainant is unable to provide allegedly responsive yet unproduced responsive records, the Council is unable to compare them with the Custodian's production at the time of the initial response and for *in camera* review. Thus, the Council cannot determine whether the Custodian located and produced all responsive records on this basis. Schneble v. NJ Dep't of Env'tl. Protection, GRC Complaint No. 2007-220 (April 2008).
5. With respect to the e-mails provided for *in camera*, the Custodian might have unlawfully denied access by failing to produce legible copies of the e-mails. N.J.S.A. 47:1A-6; Lopez v. City of Hudson, GRC Complaint No. 2009-267 (March 2011). Therefore, the Custodian shall conduct a search for more legible copies of the remaining January 26, 2015 production, or re-certify that more legible copies do not exist.
6. **The Custodian must deliver to the Council a revised document redaction index (see Item No. 3 above) as well as a legal certification from the Custodian (see Item No. 5 above), in accordance with N.J. Court Rule 1:4-4. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
7. 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 27, 2017, the Council distributed its Interim Order to all parties. The Custodian responded to the Council's Interim Order on July 31, 2017, requesting an extension of time to respond to the Order, which the GRC granted.

On August 15, 2017, the Custodian responded by delivering to the GRC an updated redaction index for the records subject to *in camera* review, along with a signed certification.

Analysis

Compliance

At its July 25, 2017 meeting, the Council ordered the Custodian to deliver to the GRC a more detailed redaction index and to recertify that more legible copies do not exist. The Council also ordered the Custodian to submit certified confirmation of compliance to the Executive Director. On July 27, 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. Thus, the Custodian's response was due by close of business on August 3, 2017.

On July 31, 2017, the Custodian requested an extension of time to respond to the Interim Order. The GRC granted an extension of ten (10) additional business days to respond, setting the new return date to August 17, 2017. On August 15, 2017, the Custodian delivered a revised document index and a legal certification with respect to paragraphs three (3), five (5) and six (6) of the Interim Order.

Therefore, the Custodian complied with the Council's July 25, 2017 Interim Order because she timely provided the revised index, along with a signed certification, to the Executive Director.

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.

Attorney-Client Privileged Communications

OPRA provides that a "government record" shall not include "any record within the attorney-client privilege." N.J.S.A. 47:1A-1.1. To assert attorney-client privilege, a party must show that there was a confidential communication between lawyer and client in the course of that relationship and in professional confidence. N.J.R.E. 504(1). Such communications are only those "which the client either expressly made confidential or which [one] could reasonably assume under the circumstances would be understood by the attorney to be so intended." State v. Schubert, 235 N.J. Super. 212, 221 (App. Div. 1989). However, merely showing that "the communication was from client to attorney does not suffice [and] the circumstances indicating the intention of secrecy must appear." Id. at 220-21.

In the context of public entities, the attorney-client privilege extends to communications between the public body, the attorney retained to represent it, necessary intermediaries, and agents through whom communications are conveyed, and co-litigants who have employed a lawyer to act for them in a common interest. *See* Tractenberg v. Twp. of W. Orange, 416 N.J.

Super. 354, 376 (App. Div. 2010); In re Env'tl. Ins. Declaratory Judgment Actions, 259 N.J. Super. 308, 313 (App. Div. 1992).

Employee Disciplinary Actions/Investigations of Employee Misconduct

The Council has determined that records involving employee discipline or investigations into employee misconduct are properly classified as personnel records exempt from disclosure under N.J.S.A. 47:1A-10. In Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (March 2004), the Council found that records of complaints or internal reprimands against a municipal police officer were properly classified as personnel records encompassed within the provisions of N.J.S.A. 47:1A-10. For this reason, the Council concluded that “records of complaints filed against [the police officer] and/or reprimands [the officer] received are not subject to public access.” Id.

Further, the Council has addressed whether personnel records, which are not specifically identified in OPRA, are subject to disclosure. Rodriguez v. Kean Univ., GRC Complaint No. 2013-296 (June 2014). The complainant in that matter sought an employee’s reimbursement to Kean University of what was believed to be a 2011 ethics violation. Therein, the complainant argued that disciplinary actions are not part of the personnel record because they do not pertain to employee relations, human resources issues, or the employee’s employment. In turn, the custodian argued that acknowledging that the employee was disciplined would be in contravention to OPRA’s presumption that personnel records, with certain exceptions, are exempt from disclosure. The Council reasoned that “[b]ased on the complainant’s description in his OPRA request, the records sought appear to relate to a possible disciplinary action. Thus, if [the employee] was disciplined for an ethics violation, it is reasonable that the documented disciplinary action would ‘bear many of the indicia of personnel files.’” Id., citing North Jersey Media Grp. v. Bergen Cnty. Prosecutor’s Office, 405 N.J. Super. 386, 390 (App. Div. 2009). The Council therefore held that “disciplinary actions are not specifically identified as personnel information subject to disclosure under OPRA.” Rodriguez, GRC No. 2013-296.

The GRC conducted an *in camera* examination on the submitted records.³ The results of the examination are set forth in the following table:

Record or Redaction Number	Record Name/Date	Description of Record or Redaction	Custodian’s Explanation/ Citation for Non-disclosure or Redactions	Findings of the <i>In Camera</i> Examination⁴

³ A review of the provided records indicates that a portion of them are either not e-mails, were created after the date of the request, December 29, 2014, or the date was unknown. The GRC disregarded those records as not responsive to the Complainant’s OPRA request. Additionally, records marked with “*” were already provided to the Complainant on January 26, 2015. *See infra*, pp. 17-18.

⁴ **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

2. Beginning of Exhibit “A”	E-mail dated 05/08/2014.	From Joe Tauriello to Greenwich Township, Francesco Taddeo, and the Court Administrator.	<u>N.J.S.A.</u> 47:1A-1.1. Attorney- client privileged regarding personnel issue with Sue Fleming.	The e-mail does not contain attorney-client privileged communications. Thus, the Custodian has unlawfully denied access to this e-mail and must disclose same.
3.	Facsimile dated 12/18/2014.	From Guy and Susan Fleming to Kim Viscomi.	<u>N.J.S.A.</u> 47:1A-1.1. Not produced when attached on an e-mail to the Township Council as attorney-client privileged communicatio ns.	The facsimile does not contain attorney-client privileged communications. Thus, the Custodian has unlawfully denied access to this e-mail and must disclose same.
4.	E-mail dated 05/02/2014.	From Joe Tauriello to Court Administrator, with copy to Kim Viscomi and Francesco Taddeo, Esq.	<u>N.J.S.A.</u> 47:1A-1.1. Not produced when attached on an e-mail to the Township Council as attorney-client privileged communicatio ns.	The e-mail is exempt from disclosure as it contains attorney- client privileged communications related to an employee’s personnel file. <u>N.J.S.A.</u> 47:1A- 1.1.

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.

5.	E-mail dated 08/20/2014.	From Kim Viscomi to Joe Tauriello and Francesco Taddeo, Esq.	<u>N.J.S.A.</u> 47:1A-1.1. Attorney-client privileged related to investigation of personnel issue with Sue Fleming for termination.	The e-mail does not contain attorney-client privileged communications. Thus, the Custodian has unlawfully denied access to this e-mail and must disclose same.
6.	E-mail dated 05/27/2014.	From Kim Viscomi to Joseph Wenzell, Esq., forwarding a message from Kim Viscomi to Joe Tauriello and copying Francesco Taddeo, Esq.	<u>N.J.S.A.</u> 47:1A-1.1. Attorney-client privileged e-mail to attorney regarding Sue Fleming disciplinary action.	The e-mail is exempt from disclosure as it contains attorney-client privileged communications related to an employee's personnel file. <u>N.J.S.A.</u> 47:1A-1.1.
8.	E-mail dated 04/02/2014 (2 pp.).	E-mail chain between Joe Tauriello, Kim Viscomi, and Francesco Taddeo, Esq.	<u>N.J.S.A.</u> 47:1A-10. Personnel matters related to various employees on Rice notices.	The body of the e-mail is exempt from disclosure as it contains personnel discussions regarding and among various employees. <u>N.J.S.A.</u> 47:1A-10.
9.	E-mail dated 04/03/2014 (3 pp.).	E-mail chain between Joe Tauriello and Kim Viscomi, with copy to Francesco Taddeo, Esq.	<u>N.J.S.A.</u> 47:1A-1.1; <u>N.J.S.A.</u> 47:1A-10. Attorney-client privileged related to a personnel complaint	The e-mail does not contain attorney-client privileged communications. However, the record is exempt, as it contains discussions pertaining to disciplinary

			copied to the Township attorney related to the Complainant.	actions against a public employee. <u>N.J.S.A. 47:1A-10.</u>
10.*	E-mail dated 04/11/2014 (1 pg.).	From Joe Tauriello to “Mr. Davidson” and copied to the Acting Court Administrator, Deputy Court Administrator, and the Township Clerk.	<u>N.J.S.A. 47:1A-1.1.</u> Believed to be mistakenly included in the excluded documents. It was an e-mail which the Complainant received. To the extent it was not produced in response to the OPRA request, which I cannot confirm, it would have been in error, but nonetheless she would have possessed same.	The Custodian provided the Complainant with a copy of the record on January 26, 2015. However, the copy provided for <i>in camera</i> review is of a higher quality than what was delivered to the Complainant. Thus, the Custodian has unlawfully denied access to this e-mail and must disclose same.
11.	E-mail dated 05/19/2014 (2 pp.).	From Joe Tauriello to Kim Viscomi, with copy to Francesco Taddeo, Esq.	<u>N.J.S.A. 47:1A-1.1;</u> <u>N.J.S.A. 47:1A-10.</u> A complaint forwarded for review to Township Council as attorney-client privileged regarding	The first two (2) lines in the body of the e-mail do not contain ACD material, nor does it contain attorney-client privileged communications. However, the subject line and the remaining body of the e-mail

			personnel matters, specifically an incident regarding the Complainant.	are exempt from disclosure as they contain attorney-client privileged communications related to an employee's personnel file. <u>N.J.S.A. 47:1A-1.1.</u>
12.	E-mail dated 12/17/2014 (1 pg.).	From Joe Tauriello to Kim Viscomi, with copy to Francesco Taddeo, Esq.	<u>N.J.S.A. 47:1A-1.1;</u> <u>N.J.S.A. 47:1A-10.</u> A complaint forwarded for review to Township Council as attorney-client privileged regarding personnel matters, specifically an incident regarding the Complainant.	The first two (2) lines in the body of the e-mail do not contain ACD material, nor do they contain attorney-client privileged communications. However, the subject line and remaining body of the e-mail are exempt from disclosure as they contain attorney-client privileged communications related to an employee's personnel file. <u>N.J.S.A. 47:1A-1.1.</u>
13.*	E-mail dated 11/26/2014 (2 pp.).	From Joe Tauriello to Kim Viscomi, with copy to Francesco Taddeo, Esq.	<u>N.J.S.A. 47:1A-1.1;</u> <u>N.J.S.A. 47:1A-10.</u> A complaint forwarded for review to Township Council as attorney-client privileged regarding	The Custodian provided the Complainant with a redacted copy of the record on January 26, 2015 (omitting the first two lines). The redacted portion is valid as it pertains to disciplinary actions against a public employee.

			personnel matters, specifically an incident regarding the Complainant.	<u>N.J.S.A.</u> 47:1A-10. However, the copy provided for <i>in camera</i> review is of a higher quality than what was delivered to the Complainant. Thus, the Custodian has unlawfully denied access to this e-mail and must disclose same, with the redactions remaining intact.
19.	E-mail dated 12/29/2014 (1 pg.).	From Joe Tauriello to Kim Viscomi.	<u>N.J.S.A.</u> 47:1A-1.1. Attorney-client privileged communication regarding ongoing litigation.	The e-mail does not contain attorney-client privileged communications. Thus, the Custodian has unlawfully denied access to this e-mail and must disclose same.
26 & 27.	E-mail w/ attached facsimile dated 12/18/2014 (2 pp).	From Kim Viscomi to Francesco Taddeo, Esq. with copy to Joe Tauriello.	<u>N.J.S.A.</u> 47:1A-1.1. Attached correspondence to attorney, attorney-client privileged, pending or threatened litigation involving the Complainant.	The e-mail is exempt from disclosure as it contains attorney-client privileged communications related to an employee's personnel file. <u>N.J.S.A.</u> 47:1A-1.1. However, the included attachment does not contain attorney-client

				privileged communications. Thus, the Custodian has unlawfully denied access to this attachment and must disclose same.
28. Beginning of Exhibit "B"	E-mail with Rice Notice attached dated 12/17/2014 (2 pp.)	From Kim Viscomi to Francesco Taddeo, Esq. with copy to Joe Tauriello.	<u>N.J.S.A.</u> 47:1A-1.1; <u>N.J.S.A.</u> 47:1A-10. Attorney-client privileged personnel matter, potential litigation with attachment that was in the possession and believed to be provided as well to the Complainant, but not with e-mail to Township Counsel.	The e-mail is exempt from disclosure as it contains attorney-client privileged communications related to an employee's personnel file. <u>N.J.S.A.</u> 47:1A-1.1. The attached Rice Notice is a personnel record under <u>N.J.S.A.</u> 47:1A-10. Thus, the record is exempt from disclosure except with regard to personnel information required to be disclosed under <u>N.J.S.A.</u> 47:1A-10. <i>See Scheeler v. Salem Cnty. Special Servs. Sch. District</i> , GRC Complaint No. 2014-108 (April 2015). For that portion of the record, the Custodian unlawfully

				denied access.
29.	E-mail dated 08/07/2014 (1 pg.).	From Kim Viscomi to Francesco Taddeo, w/ copy to Joe Tauriello.	<u>N.J.S.A.</u> 47:1A-1.1; <u>N.J.S.A.</u> 47:1A-10. Attorney-client privileged personnel matter, pending and/or threatening litigation involving the Complainant.	The e-mail is exempt from disclosure as it contains attorney-client privileged communications related to an employee's personnel file. <u>N.J.S.A.</u> 47:1A-1.1.
30.	Correspondence dated 08/15/2014 (2 pp).	From Francesco Taddeo, Esq. to Jeffrey M. Russo, Esq. w/ copy to Joseph M. Wenzel, Esq., Kim Viscomi, and the Greenwich Township Committee.	<u>N.J.S.A.</u> 47:1A-1.1; <u>N.J.S.A.</u> 47:1A-10. Personnel matter regarding an investigation pertinent to the Complainant. However, the letter was to her counsel and her receipt of same is presumed. Nonetheless, because it was a personnel matter, it is believed prior Counsel deemed it unable to be produced, but "I cannot	The correspondence does not contain attorney-client privileged communications. However, the content matter of the record is exempt, as it pertains to disciplinary actions against a public employee. <u>N.J.S.A.</u> 47:1A-10.

			verify positively.”	
32.	Correspondence dated 05/08/2014 (1 pg.).	From Francesco Taddeo to The Complainant.	<u>N.J.S.A.</u> 47:1A-1.1. A document that was inadvertently included in the withheld documents. This was produced in response to the OPRA request “to the best of my recollection,” and also was a letter sent directly to her and in her possession.	The correspondence does not contain ACD material, nor does it contain attorney-client privileged communications. However, the content matter of the record is exempt, as it pertains to disciplinary actions against a public employee. <u>N.J.S.A.</u> 47:1A-10.
33.	E-mail dated 05/27/2014 (1 pg.).	From Kim Viscomi to Joseph M. Wenzel, Esq.	<u>N.J.S.A.</u> 47:1A-1.1; <u>N.J.S.A.</u> 47:1A-10. Personnel matter, attorney-client privileged, pending and/or potential litigation regarding the Complainant.	The correspondence does not contain attorney-client privileged communications. However, the content matter of the record is exempt, as it pertains to disciplinary actions against a public employee. <u>N.J.S.A.</u> 47:1A-10.
34.	E-mail dated 05/27/2014 (1 pg.).	From Kim Viscomi to Joseph M. Wenzel, Esq.	<u>N.J.S.A.</u> 47:1A-1.1; <u>N.J.S.A.</u> 47:1A-10. Personnel matter,	The correspondence does not contain attorney-client privileged communications. However, the

			attorney-client privileged, pending and/or potential litigation regarding the Complainant.	content matter of the record is exempt, as it pertains to disciplinary actions against a public employee. <u>N.J.S.A. 47:1A-10.</u>
35.	E-mail dated 05/27/2014 (1 pg.).	From Kim Viscomi to Joseph M. Wenzel, Esq.	<u>N.J.S.A. 47:1A-1.1;</u> <u>N.J.S.A. 47:1A-10.</u> A forwarding of the above e-mails [<i>see</i> Nos. 33 & 34] to the attorney handling the investigation of the Complainant, and was attorney-client privileged, personnel matter.	The correspondence does not contain attorney-client privileged communications. However, the content matter of the record is exempt, as it pertains to disciplinary actions against a public employee. <u>N.J.S.A. 47:1A-10.</u>
37.*	E-mail dated 07/11/2014 (1 pg.).	From Joe Tauriello to Kim Viscomi.	<u>N.J.S.A. 47:1A-1.1;</u> <u>N.J.S.A. 47:1A-10.</u> Attorney-client privileged, personnel matter, correspondence related to the investigation and pending and/or potential litigation with the	The Custodian provided the Complainant with a copy of the record on January 26, 2015. However, the copy provided for <i>in camera</i> review is of a higher quality than what was delivered to the Complainant. Thus, the Custodian has unlawfully denied access to this e-mail and

			Complainant.	must disclose same.
38.	E-mail dated 06/30/2014 (1 pg.).	From Joseph Tauriello to Kim Viscomi.	“I believe this was inadvertently included in the Index, and was provided, although I have no recollection to verify that with 100% assurance.”	The e-mail does not contain attorney-client privileged communications. Thus, the Custodian has unlawfully denied access to this e-mail and must disclose same.
39.*	E-mail dated 12/20/2014 (2 pp).	From Joe Tauriello to Tom Callari w/ copy to Dennis Cahill and Kim Viscomi.	<u>N.J.S.A.</u> 47:1A-10. Personnel matter related to termination. However, “I believe this may have been inadvertently included in the Index, and I do believe it was produced to the Complainant. Unfortunately, however, I am uncertain and cannot verify that with 100% assurance.”	The Custodian provided the Complainant with a copy of the record on January 26, 2015, redacting the first paragraph in the body. The redacted paragraph is valid as it pertains to information generated regarding disciplinary actions against an employee. <u>N.J.S.A.</u> 47:1A-10. However, the copy provided for <i>in camera</i> review is of a higher quality than what was delivered to the Complainant. Thus, the Custodian has unlawfully denied access to this e-mail and

				must disclose same, with the redaction remaining intact.
40.*	E-mail dated 12/20/2014 (2 pp).	From Joe Tauriello to Tom Callari with copy to Dennis Cahill and Kim Viscomi.	<u>N.J.S.A.</u> 47:1A-10. Personnel matter related to termination. However, “I believe this may have been inadvertently included in the Index, and I do believe it was produced to the Complainant. Unfortunately, however, I am uncertain and cannot verify that with 100% assurance.”	The Custodian provided the Complainant with a copy of the record on January 26, 2015, redacting the first paragraph in the body. The redacted paragraph is valid as it pertains to information generated regarding disciplinary actions against an employee. <u>N.J.S.A.</u> 47:1A-10. However, the copy provided for <i>in camera</i> review is of a higher quality than what was delivered to the Complainant. Thus, the Custodian has unlawfully denied access to this e-mail and must disclose same, with the redaction remaining intact.
41.*	E-mail dated 12/19/2014 (1 pg.)	From Joe Tauriello to Sheri Aydelotte with copy to the Township Clerk and Tom Callari.	“I believe this was inadvertently included in the Index, and was provided, although I	The e-mail does not contain ACD material, nor does it contain attorney-client privileged communications.

			have no recollection to verify that with 100% assurance.”	Thus, the Custodian has unlawfully denied access to this e-mail and must disclose same.
42.	Correspondence dated 05/08/2014 (1 pg.).	From Francesco Taddeo, Esq. to Susan Fleming with copy to Joe Tauriello, Kim Viscomi, Joseph Bolles, and Honorable Joseph Novak, J.M.C.	<u>N.J.S.A.</u> 47:1A-10. Personnel matter; however, it is presumed that this was in her possession, as it was addressed to her. “In fact, in reviewing the document, I do believe this is inadvertently included in this Index, as I believe it was forwarded to the Complainant in response to the ORPA request. Unfortunately, however, I my recollection is not 100%, and I therefore cannot verify that statement with 100% accuracy.”	The content matter of the record is exempt, as it pertains to disciplinary actions against a public employee. <u>N.J.S.A.</u> 47:1A-10.
43.	E-mail dated 11/25/2014 (1 pg.).	From Lorraine to Kim Viscomi.	<u>N.J.S.A.</u> 47:1A-10. Personnel	The content matter of the record is exempt, as it pertains to

			matter regarding the Complainant's termination and pending and/or potential litigation.	disciplinary actions against a public employee. <u>N.J.S.A. 47:1A-10.</u>
44.	E-mail dated 11/25/2014 (1 pg.).	From Kim Viscomi to Lorraine.	<u>N.J.S.A. 47:1A-10.</u> Personnel matter regarding the Complainant's termination and pending and/or potential litigation.	The content matter of the record is exempt, as it pertains to disciplinary actions against a public employee. <u>N.J.S.A. 47:1A-10.</u>
45.	E-mail dated 11/25/2014 (1 pg.).	From Sheri Aydelotte to Kim Viscomi.	<u>N.J.S.A. 47:1A-10.</u> Personnel matter regarding the Complainant's termination and pending and/or potential litigation.	The content matter of the record is exempt, as it pertains to disciplinary actions against a public employee. <u>N.J.S.A. 47:1A-10.</u>

In her revised redaction index, the Custodian rescinded any claims that the withheld records contained ACD material. The Custodian now asserts that the records contain attorney-client privileged communications and/or are personnel records related to disciplinary actions against a public employee. In accordance with the above table and with the exceptions indicated therein, the Custodian lawfully denied access to a majority of the records as they pertained to personnel matters and employee misconduct pursuant to N.J.S.A. 47:1A-10. See N.J.M.G., 405 N.J. Super. at 390; Merino, GRC No. 2003-110; and Rodriguez, GRC No. 2013-296. Furthermore, the Custodian lawfully denied access to e-mails that contain attorney-client privileged communications pursuant to N.J.S.A. 47:1A-1.1. See Tractenberg, 416 N.J. Super. at 376 and In re Emtl. Ins., 259 N.J. Super. at 313.

However, consistent with N.J.S.A. 47:1A-5(g), if the custodian of a government record asserts that part of a particular record is exempt from public access pursuant to OPRA, the

custodian must delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and must promptly permit access to the remainder of the record. Thus, the Custodian must disclose all other portions of the requested e-mails and memos to the Complainant (*i.e.*, sender, recipients, date, time, subject, and closing salutations). To those portions of the requested e-mails and memos, the Custodian has unlawfully denied access.

Quality of the Records

In Lopez v. City of Hudson, GRC Complaint No. 2009-267 (March 2011), the custodian provided partially illegible records to the complainant but provided the fully legible records as part of the SOI, demonstrating that legible records existed at the time of the complainant's OPRA request. The Council held that "the [c]ustodian's provision of illegible records to the [c]omplainant in response to the OPRA request when legible records existed constituted a limitation on the right of access accorded by OPRA pursuant to N.J.S.A. 47:1A-1 and a violation of OPRA."

In its July 25, 2017 Findings and Recommendations, the Council noted that a review of the records provided by the Custodian for *in camera* review revealed that some of the records in the above table (marked "**") were provided to the Complainant in her January 25, 2015 response. Moreover, the copies are clearer and more legible than the copies given to the Complainant, contrary to the Custodian's February 8, 2017 certification that there was no other method to obtain copies that are more legible. Thus, the Council ordered the Custodian to conduct an additional search for more legible copies of the January 25, 2015 production, or re-certify that no other legible copies could be located.

In her August 15, 2017 certification, the Custodian stated that she conducted another search for records and was unable to locate more legible copies of records produced on January 25, 2015. The Custodian certified that any records withheld were premised upon the advice of prior counsel, and that she has no objection to releasing any record deemed unlawfully withheld.

Therefore, with respect to the records marked in the above table, the Custodian unlawfully denied access by failing to produce more legible copies of same. N.J.S.A. 47:1A-6; Lopez, GRC 2009-367.

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 25, 2017 Interim Order because she timely provided nine (9) copies of the requested records, along with a signed certification to the Executive Director.
2. In accordance with the above table and with the exceptions indicated therein, the Custodian lawfully denied access to a majority of the records as they pertained to personnel matters and employee misconduct pursuant to N.J.S.A. 47:1A-10. See North Jersey Media Grp. v. Bergen Cnty. Prosecutor's Office, 405 N.J. Super. 386, 390 (App. Div. 2009); Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (March 2004); and Rodriguez v. Kean Univ., GRC Complaint No. 2013-296 (June 2014). Furthermore, the Custodian lawfully denied access to e-mails that contain attorney-client privileged communications pursuant to N.J.S.A. 47:1A-1.1. See Tractenberg v. Twp. of W. Orange, 416 N.J. Super. 354, 376 (App. Div. 2010); In re Env'tl. Ins. Declaratory Judgment Actions, 259 N.J. Super. 308, 313 (App. Div. 1992).
3. **Based on the Council's determination in this matter, as set forth in the above table, the Custodian must disclose all other portions of the requested e-mails and memos to the Complainant (i.e., sender, recipients, date, time, subject, and closing salutations).**
4. With respect to the e-mails marked in the above table, the Custodian unlawfully denied access by failing to produce legible copies of the e-mails. N.J.S.A. 47:1A-6; Lopez v. City of Hudson, GRC Complaint No. 2009-267 (March 2011).
5. **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 conformation of compliance pursuant to N.J. Court Rule 1:4-4 to the GRC.⁵**
6. 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: Samuel A. Rosado
Staff Attorney

September 19, 2017

⁵ 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.



State of New Jersey
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

INTERIM ORDER

July 25, 2017 Government Records Council Meeting

Susan Fleming
Complainant

Complaint No. 2015-18

v.

Greenwich Township (Warren)
Custodian of Record

At the July 25, 2017 public meeting, the Government Records Council (“Council”) considered the July 18, 2017 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian complied with the Council’s January 31, 2017 Interim Order because she timely provided nine (9) copies of the requested records, along with a signed certification to the Executive Director.
2. The Complainant complied with the Council’s January 31, 2017 Interim Order because she timely responded and included a signed certification.
3. A review of the records indicates that the Custodian’s broad claim that the withheld records contain ACD and/or attorney-client privileged communications is insufficient for the GRC to conduct a meaningful review. Therefore, the Custodian shall provide a more detailed redaction index justifying her decision to withhold the responsive records, indicating the exact OPRA exemption for each record.
4. Because the Complainant is unable to provide allegedly responsive yet unproduced responsive records, the Council is unable to compare them with the Custodian’s production at the time of the initial response and for *in camera* review. Thus, the Council cannot determine whether the Custodian located and produced all responsive records on this basis. Schneble v. NJ Dep’t of Env’tl. Protection, GRC Complaint No. 2007-220 (April 2008).
5. With respect to the e-mails provided for *in camera* review, the Custodian might have unlawfully denied access by failing to produce legible copies of the e-mails. N.J.S.A. 47:1A-6; Lopez v. City of Hudson, GRC Complaint No. 2009-267 (March 2011). Therefore, the Custodian shall conduct a search for more legible copies of the remaining January 26, 2015 production, or re-certify that more legible copies do not exist.



6. **The Custodian must deliver to the Council a revised document redaction index (see Item No. 3 above) as well as a legal certification from the Custodian (see Item No. 5 above), in accordance with N.J. Court Rule 1:4-4. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
7. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances, pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 25th Day of July, 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: July 27, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
July 25, 2017 Council Meeting**

**Susan Fleming¹
Complainant**

GRC Complaint No. 2015-18

v.

**Greenwich Township (Warren)²
Custodial Agency**

Records Relevant to Complaint: Hard copies of:

- 1) “[T]hirteen (13) page report prepared by Joseph M. Wenzel which was referenced in the Express-Times article concerning the termination of Susan Fleming, Court Administrator.”
- 2) “Any and all E-mails regarding myself, Susan (Sue) Fleming and/or the Greenwich Court sent/received by Mayor Tauriello, Atty. Taddeo, Clerk Viscomi and others – specifically from April 1, 2014 thru the present. (The last 9 months)”

Custodian of Record: Kimberly Viscomi
Request Received by Custodian: December 29, 2014
Response Made by Custodian: January 26, 2015
GRC Complaint Received: January 23, 2015

Records Submitted for *In Camera* Examination: Responsive e-mails withheld from disclosure on the grounds that the records contain advisory, consultative, or deliberative (“ACD”) material and/or contain attorney-client privileged communications.

Background

January 31, 2017 Council Meeting:

At its January 31, 2017 public meeting, the Council considered the November 9, 2016³ 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 No legal representation listed on record.

² Represented by James F. Moscagiuri, Esq. of Lavery, Selvaggi, Abromitis & Cohen (Hackettstown, NJ).

³ The matter was originally scheduled for the Council’s November 15, 2016 meeting but was tabled due to lack of a quorum.

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, although the Custodian timely responded to the Complainant's OPRA request in writing, advising that she needed five (5) additional days to respond, the Custodian's failure to respond in writing within the extended time results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(i), and Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2011-326 (February 2013).
2. The Custodian lawfully denied access to the requested record. N.J.S.A. 47:1A-6. There is no evidence in the record supporting a conclusion that the Complainant had full knowledge of her confidentiality rights under N.J.S.A. 47:1A-10 regarding the thirteen (13) page investigative report. Nor is there evidence that the Complainant intended to surrender such rights when she signed and submitted the OPRA request. McGee v. Twp. of East Amwell (Hunterdon), GRC Complaint No. 2007-305 (March 2011).
3. The Complainant shall provide the GRC and the Custodian with copies of any e-mails that are purportedly responsive to her December 29, 2014 OPRA request but not produced by the Custodian. The Complainant shall respond within five (5) business days from receipt of the Council's Interim Order and include a legal certification as to when and from whom she received the alleged records.
4. The GRC must conduct an *in camera* review of those e-mails withheld from disclosure to determine the validity of the Custodian's assertion that those e-mails contain ACD and/or attorney-client privileged information. See Paff v. N.J. Dep't of Labor, 379 N.J. Super. 346 (App. Div. 2005), and N.J.S.A. 47:1A-1.1.
5. **The Custodian must deliver to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see Item No. 4 above), a document or redaction index, as well as a legal certification from the Custodian, 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.**
6. Because the GRC intends to conduct an *in camera* review of records withheld from disclosure, analysis of the quality of the records is deferred and will be completed during the *in camera* review.
7. 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 February 2, 2017, the Council distributed its Interim Order to all parties. The Custodian responded to the Council's Interim Order on February 8, 2017, delivering to the GRC in a sealed envelope nine (9) copies of the requested records for an *in camera* inspection, along with a signed certification. Similarly, the Complainant responded in writing to the Council's Interim Order on February 8, 2017, with a signed certification.

Analysis

Compliance

Custodian

At its January 31, 2017 meeting, the Council ordered the Custodian to deliver to the GRC nine (9) copies of the requested records for an *in camera* inspection. The Council also ordered the Custodian to submit certified confirmation of compliance to the Executive Director. On February 2, 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. Thus, the Custodian's response was due by close of business on February 9, 2017.

On February 8, 2017, the Custodian delivered nine (9) copies of the requested records, a document index, and a legal certification with respect to paragraph (6) of the Interim Order. The Custodian certified that she only possessed copies of the records produced on January 26, 2015, in their current condition, and has no access to more legible copies. Additionally, the Custodian certified that the former Mayor's whereabouts are unknown, as he is no longer with Greenwich Township ("Township"). She certified that he was the source of the responsive e-mails.

Therefore, the Custodian complied with the Council's January 31, 2017 Interim Order because she timely provided nine (9) copies of the requested records, along with a signed certification, to the Executive Director.

Complainant

At its January 31, 2017 meeting, the Council ordered the Complainant to provide copies of records that were alleged to be responsive to her December 29, 2014 OPRA request but that were not produced by the Custodian. The Council also ordered the Complainant to submit certified confirmation of compliance to the Executive Director. On February 2, 2017, the Council distributed its Interim Order to all parties, providing the Complainant five (5) business days to comply with the terms of said Order. Thus, the Complainant's response was due by close of business on February 9, 2017.

On February 8, 2017, the Complainant provided a response to the GRC, stating that she is unable to recover the alleged records in her possession and cannot recall them from memory. However, she included copies of the e-mails she received from the Custodian on January 26, 2015.

Therefore, the Complainant complied with the Council's January 31, 2017 Interim Order because she timely responded and included a signed certification.

Unlawful Denial of Access

In Camera Review

A review of the records indicates that the Custodian's broad claim that the withheld records contain ACD and/or attorney-client privileged communications is insufficient for the GRC to conduct a meaningful review. Therefore, the Custodian shall provide a more detailed redaction index justifying her decision to withhold the responsive records, indicating the exact OPRA exemption for each record.

Completeness of the Records

In Schneble v. NJ Dep't of Env'tl. Protection, GRC Complaint No. 2007-220 (April 2008), the custodian initially responded to the ORPA request by stating that no responsive records existed. However, the complainant submitted e-mails responsive to her own request as part of her Denial of Access Complaint. The custodian then certified that upon receipt of those e-mails, an additional search located records responsive to the complainant's request. The Council held that because the custodian performed an inadequate initial search, he unlawfully denied access to the requested records.

In the instant matter, the Complainant claimed that the responsive records she received from the Custodian were incomplete and asserted that she possessed responsive records that the Custodian failed produce. However, unlike the complainant in Schneble, the Complainant neither certified to her claim nor provided the GRC with copies of those records as part of her complaint. Id. Thus, the Council ordered the Complainant to produce those records in its January 31, 2017 Interim Order. Additionally, the Interim Order sought a certification from the Complainant as to when and from whom she received those records.

The Custodian certified that all responsive records were provided to the Complainant or were provided to the GRC for *in camera* review. On February 8, 2017, the Complainant responded to the Council's Interim Order, certifying that her personal computer had crashed and that she therefore could not provide responsive records nor could she recall them from memory.

Therefore, because the Complainant is unable to provide allegedly responsive yet unproduced responsive records, the Council is unable to compare them with the Custodian's production at the time of the initial response and for *in camera* review. Thus, the Council cannot determine whether the Custodian located and produced all responsive records on this basis. Schneble, GRC 2007-220.

Quality of the Records

In Lopez v. City of Hudson, GRC Complaint No. 2009-267 (March 2011), the custodian provided partially illegible records to the complainant but provided the fully legible records as part of the SOI, demonstrating that legible records existed at the time of the complainant's OPRA request. The Council held that "the [c]ustodian's provision of illegible records to the [c]omplainant in response to the OPRA request when legible records existed constituted a limitation on the right of access accorded by OPRA pursuant to N.J.S.A. 47:1A-1 and a violation of OPRA."

The Complainant disputed the quality of responsive e-mails provided in response to her OPRA request. In its January 31, 2017 Interim Order, the Council deferred analysis regarding the quality of those e-mails pending an *in camera* review of the remaining e-mails withheld from disclosure.

In her February 8, 2017 certification, the Custodian stated that the e-mails provided to the Complainant were not contained on a server accessible to her. Rather, she certified that the e-mails originated from the possession of the former mayor of the Township, who then delivered them to the former counsel for the Township. In response to the Council's Interim Order, the Custodian certified that she reached out to the former counsel to see if he could provide her with better quality e-mails. In an e-mail, the previous counsel responded, stating that he no longer has copies of those records. Additionally, the Custodian certified that the former mayor's whereabouts are unknown. Accordingly, the Custodian certified that she was unaware of any method to obtain better quality copies of those e-mails.

A review of the records provided by the Custodian for *in camera* review indicates that some of the e-mails were provided to the Complainant in the January 26, 2015 response, notwithstanding the Custodian's claim that they are exempt from access as containing ACD and/or attorney-client privileged communications. Moreover, the copies received for *in camera* review are clearer and more legible than the copies given to the Complainant, contrary to the Custodian's certification. Therefore, the evidence in the record suggests that the Custodian may, in fact, have access to more legible copies of e-mails given to the Complainant.

Thus, with respect to the e-mails provided for *in camera* review, the Custodian may have unlawfully denied access by failing to produce legible copies of the e-mails. N.J.S.A. 47:1A-6; Lopez, GRC 2009-367. Therefore, the Custodian shall conduct a search for more legible copies of the remaining January 26, 2015 production, or re-certify that more legible copies do not exist.

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 January 31, 2017 Interim Order because she timely provided nine (9) copies of the requested records, along with a signed certification to the Executive Director.
2. The Complainant complied with the Council's January 31, 2017 Interim Order because she timely responded and included a signed certification.
3. A review of the records indicates that the Custodian's broad claim that the withheld records contain ACD and/or attorney-client privileged communications is insufficient for the GRC to conduct a meaningful review. Therefore, the Custodian shall provide a more detailed redaction index justifying her decision to withhold the responsive records, indicating the exact OPRA exemption for each record.
4. Because the Complainant is unable to provide allegedly responsive yet unproduced responsive records, the Council is unable to compare them with the Custodian's production at the time of the initial response and for *in camera* review. Thus, the Council cannot determine whether the Custodian located and produced all responsive records on this basis. Schneble v. NJ Dep't of Env'tl. Protection, GRC Complaint No. 2007-220 (April 2008).
5. With respect to the e-mails provided for *in camera* review, the Custodian might have unlawfully denied access by failing to produce legible copies of the e-mails. N.J.S.A. 47:1A-6; Lopez v. City of Hudson, GRC Complaint No. 2009-267 (March 2011). Therefore, the Custodian shall conduct a search for more legible copies of the remaining January 26, 2015 production, or re-certify that more legible copies do not exist.
6. **The Custodian must deliver to the Council a revised document redaction index (see Item No. 3 above) as well as a legal certification from the Custodian (see Item No. 5 above), in accordance with N.J. Court Rule 1:4-4. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
7. 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: Samuel A. Rosado
Staff Attorney

July 18, 2017



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

INTERIM ORDER

January 31, 2017 Government Records Council Meeting

Susan Fleming
Complainant

Complaint No. 2015-18

v.

Greenwich Township (Warren)
Custodian of Record

At the January 31, 2017 public meeting, the Government Records Council (“Council”) considered the November 9, 2016 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, although the Custodian timely responded to the Complainant’s OPRA request in writing, advising that she needed five (5) additional days to respond, the Custodian’s failure to respond in writing within the extended time results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(i), and Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2011-326 (February 2013).
2. The Custodian lawfully denied access to the requested record. N.J.S.A. 47:1A-6. There is no evidence in the record supporting a conclusion that the Complainant had full knowledge of her confidentiality rights under N.J.S.A. 47:1A-10 regarding the thirteen (13) page investigative report. Nor is there evidence that the Complainant intended to surrender such rights when she signed and submitted the OPRA request. McGee v. Twp. of East Amwell (Hunterdon), GRC Complaint No. 2007-305 (March 2011).
3. The Complainant shall provide the GRC and the Custodian with copies of any e-mails that are purportedly responsive to her December 29, 2014 OPRA request but not produced by the Custodian. The Complainant shall respond within five (5) business days from receipt of the Council’s Interim Order and include a legal certification as to when and from whom she received the alleged records.
4. **The Complainant shall comply with Item No. 3 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each**



redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹ to the GRC.²

5. The GRC must conduct an *in camera* review of those e-mails withheld from disclosure to determine the validity of the Custodian's assertion that those e-mails contain ACD and/or attorney-client privileged information. See Paff v. N.J. Dep't of Labor, 379 N.J. Super. 346 (App. Div. 2005), and N.J.S.A. 47:1A-1.1.
6. **The Custodian must deliver³ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see Item No. 4 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.**
7. Because the GRC intends to conduct an *in camera* review of records withheld from disclosure, analysis of the quality of the records is deferred and will be completed during the *in camera* review.
8. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 31st Day of January, 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: February 2, 2017

¹ "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."

² 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.

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."

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 31, 2017 Council Meeting**

**Susan Fleming¹
Complainant**

GRC Complaint No. 2015-18

v.

**Greenwich Township (Warren)²
Custodial Agency**

Records Relevant to Complaint: Hard copies of:

- 1) “[T]hirteen (13) page report prepared by Joseph M. Wenzel which was referenced in the Express-Times article concerning the termination of Susan Fleming, Court Administrator.”
- 2) “Any and all E-mails regarding myself, Susan (Sue) Fleming and/or the Greenwich Court sent/received by Mayor Tauriello, Atty. Taddeo, Clerk Viscomi and others – specifically from April 1, 2014 thru the present. (The last 9 months)”

Custodian of Record: Kimberly Viscomi
Request Received by Custodian: December 29, 2014
Response Made by Custodian: January 26, 2015
GRC Complaint Received: January 23, 2015

Background³

Request and Response:

On December 29, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian, seeking the above-mentioned records. On, January 6, 2015, the Custodian responded in writing, stating that she needed an additional five (5) business days to respond to the Complainant’s OPRA request. The record does not contain any additional correspondence dated prior to the filing of this complaint.

¹ No legal representation listed on record.

² Represented by Francesco Taddeo, Esq. (Somerville, NJ).

³ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

Denial of Access Complaint:

On January 23, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that she did not receive any additional correspondence from the Custodian beyond her January 6, 2015 e-mail seeking five (5) additional days to complete the request.

Statement of Information:

On February 6, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on December 29, 2014. The evidence in the record indicates that the Custodian responded in writing on January 6, 2015, notifying that she needed five (5) additional days to respond to the Complainant’s OPRA request. No additional correspondence was sent to the Complainant prior to when she filed her Denial of Access Complaint.

The Custodian certified that on January 26, 2015, she responded to the Complainant’s OPRA request, denying access to Item No. 1 based on it being a personnel record. N.J.S.A. 47:1A-10. The Custodian provided responsive e-mails to the Complainant but stated that correspondence between Greenwich Township’s appointed counsel and the Custodian or member of the Greenwich Township Committee were withheld, claiming attorney-client privilege, attorney work product, and/or advisory, consultative, or deliberative discussions. N.J.S.A. 47:1A-1.1 et seq.

Additional Submissions:

On March 3, 2015, the GRC sought additional information from the Complainant. Specifically the Complainant was asked whether the e-mail records produced by the Custodian on January 26, 2015, satisfied Item No. 2 of her December 29, 2014 OPRA request. If in the affirmative, the GRC asked whether the Complainant still wished to pursue an unlawful denial of access claim against the Custodian for those records.

On March 28, 2015, the Complainant responded to the GRC’s request for additional information. The Complainant stated that she was not satisfied with the Custodian’s production on two (2) grounds. Firstly, the Complainant contended that the quality of the provided copies was subpar, stating that a slice of the correspondence is missing on the right-hand side. Secondly, she claimed that responsive e-mails were not included in the production. Lastly, the Complainant objected to the Custodian’s denial of access to the thirteen (13) page report as a personnel record, since she is the subject of the report.

Analysis

Timeliness

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian’s

failure to respond within the required seven (7) business days results in a “deemed” denial. *Id.* Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).⁴ Thus, a custodian’s failure to respond in writing to a complainant’s OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a “deemed” denial of the complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

In Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2011-326 (February 2013), the custodian timely responded in writing on the fifth (5th) business day after receiving the complainant’s OPRA request, seeking five (5) additional days to respond. However, the custodian failed to respond within the additional time requested. Therefore, the Council held that that there was a “deemed” denial of access under N.J.S.A. 47:1A-5(i).

In the instant matter, as in Kohn, the Custodian timely responded to the Complainant’s OPRA request seeking five (5) additional days to respond to the Complainant’s December 29, 2014 OPRA request. However, the Custodian failed to respond within the extended time. The record demonstrates that the Custodian did not respond to the Complainant’s request until three (3) days after she filed her complaint with the GRC.

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, although the Custodian timely responded to the Complainant’s OPRA request in writing, advising that she needed five (5) additional days to respond, the Custodian’s failure to respond in writing within the extended time results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(i), and Kohn, GRC 2011-326.

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.

OPRA Request Item No. 1

Regarding requests for personnel information, OPRA mandates that:

[T]he personnel or pension records of any individual in the possession of a public agency, including but not limited to records relating to any grievance filed by or against an individual, shall not be considered a government record and shall not be made available for public access . . .

⁴ A custodian’s written response, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA.

N.J.S.A. 47:1A-10. Notwithstanding this provision, OPRA also contains exceptions to the personnel record exemption. The following categories are personnel records, which *are* subject to public access:

- [A]n individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefor, and the amount and type of any pension received . . .
- [P]ersonnel or pension records of any individual shall be accessible when required to be disclosed by another law, when disclosure is essential to the performance of official duties of a person duly authorized by this State or the United States, or when authorized by an individual in interest; and
- [D]ata contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension, but not including any detailed medical or psychological information, shall be a government record.

N.J.S.A. 47:1A-10.

In McGee v. Twp. of East Amwell (Hunterdon), GRC Complaint No. 2007-305 (March 2011), the GRC was instructed on remand by the Appellate Division to determine whether the complainant waived her right of confidentiality regarding four (4) records withheld from disclosure under N.J.S.A. 47:1A-10. The GRC found that “[a]n effective waiver requires a party to have full knowledge of his legal rights and intend to surrender those rights. McGee, GRC 2007-305 (citing W. Jersey Title & Guar. Co. v. Indus. Trust Co., 27 N.J. 144, 153 (1958)). “The party waiving a known right must do so clearly, unequivocally, and decisively.” McGee, GRC 2007-305 (citing Merchs. Indem. Corp. of N.Y. v. Eggleston, 68 N.J. Super. 235, 254 (App. Div. 1961)). The GRC held that there was no evidence in the record demonstrating that the complainant knew of her confidentiality rights and intended to waive them at the time she submitted her OPRA request. McGee, GRC 2007-305. Therefore, the custodian lawfully denied access to the records. Id.

In the current matter, Item No. 1 of the Complainant’s OPRA request is a thirteen (13) page investigative report involving the Complainant. The Complainant argued that the personnel exemption should not apply since she is the subject of the record. However, it is neither clear nor unequivocal that the Complainant’s statement is an express waiver of her confidentiality rights. Instead, her argument against the personnel record exemption constituted an exception for herself as an individual, rather than a waiver for the public. Moreover, there is no evidence in the record demonstrating that the Complainant knew of her confidentiality rights and expressly waived them at the time she signed and submitted her OPRA request. *See* McGee, 2007-305.

Therefore, the Custodian lawfully denied access to the requested record. N.J.S.A. 47:1A-6. There is no evidence in the record supporting a conclusion that the Complainant had full knowledge of her confidentiality rights under N.J.S.A. 47:1A-10 regarding the thirteen (13) page

investigative report. Nor is there evidence that the Complainant intended to surrender such rights when she signed and submitted the OPRA request. McGee, GRC 2007-305.

OPRA Request Item No. 2

Completeness of the Records

In the instant matter, the Complainant claimed that the responsive records she received from the Custodian are incomplete. She asserted that she knows “for a fact” that there are responsive records to her request that were not among those provided by the Custodian. However, the Complainant neither certified to her claim nor provided the GRC with copies of those records. For this reason, the GRC will need additional information from the Complainant.

Accordingly, the Complainant shall provide the GRC and the Custodian with copies of any e-mails that are purportedly responsive to her December 29, 2014 OPRA request but not produced by the Custodian. The Complainant shall respond within five (5) business days from receipt of the Council’s Interim Order and include a legal certification as to when and from whom she received the alleged records.

Records Withheld From Disclosure

In Paff v. N.J. Dep’t of Labor, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the Council⁵ that accepted the custodian’s legal conclusion for the denial of access without further review. The Appellate Division noted that “OPRA contemplates the GRC’s meaningful review of the basis for an agency’s decision to withhold government records When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers.” Id. The Court stated that:

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

Id. at 355.

Further, the Court found that:

We hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal There is no reason for concern about unauthorized disclosure of exempt documents or privileged

⁵ Paff v. NJ Dep’t of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

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.

In this matter, the Complainant sought access to e-mails pertaining to herself and/or the Greenwich Court sent by the mayor, the township attorney, or the Custodian from April 1, 2014, through December 29, 2014. The Custodian withheld disclosure of an unknown number of e-mails sent or received by the township attorney on the basis that they contain ACD material and/or attorney-client privileged information. N.J.S.A. 47:1A-1.1. Without providing an index, the GRC is unable to determine whether the Custodian's assertions are valid.

Therefore, the GRC must conduct an *in camera* review of those e-mails withheld from disclosure to determine the validity of the Custodian's assertion that those e-mails contain ACD and/or attorney-client privileged information. *See Paff*, 379 N.J. Super. at 346; and N.J.S.A. 47:1A-1.1.

Quality of the Records

The evidence in the record supports the Complainant's claim that all of the responsive e-mails provided under Item No. 2 of her OPRA request are only partially legible. Specifically, the right side of the e-mail copies are partially cut off, presenting only a portion of the correspondence contained therein.

However, because the GRC intends to conduct an *in camera* review of records withheld from disclosure, analysis of the quality of the records issue is deferred and will be completed during the *in camera* review.

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 compliance with the Council's Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, although the Custodian timely responded to the Complainant's OPRA request in writing, advising that she needed five (5) additional days to respond, the Custodian's failure to respond in writing within the extended time results in a "deemed" denial of the Complainant's

OPRA request pursuant to N.J.S.A. 47:1A-5(i), and Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2011-326 (February 2013).

2. The Custodian lawfully denied access to the requested record. N.J.S.A. 47:1A-6. There is no evidence in the record supporting a conclusion that the Complainant had full knowledge of her confidentiality rights under N.J.S.A. 47:1A-10 regarding the thirteen (13) page investigative report. Nor is there evidence that the Complainant intended to surrender such rights when she signed and submitted the OPRA request. McGee v. Twp. of East Amwell (Hunterdon), GRC Complaint No. 2007-305 (March 2011).
3. The Complainant shall provide the GRC and the Custodian with copies of any e-mails that are purportedly responsive to her December 29, 2014 OPRA request but not produced by the Custodian. The Complainant shall respond within five (5) business days from receipt of the Council's Interim Order and include a legal certification as to when and from whom she received the alleged records.
4. **The Complainant shall comply with Item No. 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁶ to the GRC.⁷**
5. The GRC must conduct an *in camera* review of those e-mails withheld from disclosure to determine the validity of the Custodian's assertion that those e-mails contain ACD and/or attorney-client privileged information. See Paff v. N.J. Dep't of Labor, 379 N.J. Super. 346 (App. Div. 2005), and N.J.S.A. 47:1A-1.1.
6. **The Custodian must deliver⁸ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see Item No. 4 above), a document or redaction index⁹, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,¹⁰ 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.**

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."

⁷ 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.

⁸ 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.

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

¹⁰ "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."

7. Because the GRC intends to conduct an *in camera* review of records withheld from disclosure, analysis of the quality of the records is deferred and will be completed during the *in camera* review.
8. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending compliance with the Council's Interim Order.

Prepared By: Samuel A. Rosado
Staff Attorney

November 9, 2016¹¹

¹¹ The matter was originally scheduled for the Council's November 15, 2016 and December 13, 2016 meetings but was tabled both times due to lack of a quorum.