



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

August 29, 2017 Government Records Council Meeting

Regina Discenza
Complainant

Complaint No. 2015-223

v.

Lacey Township Board of Education (Ocean)
Custodian of Record

At the August 29, 2017 public meeting, the Government Records Council (“Council”) considered the August 22, 2017 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The current Custodian complied with the Council’s July 25, 2017 Interim Order because he responded in the prescribed time frame by providing the responsive records to the Complainant in accordance with the Council’s *In Camera* Examination. Further, the current Custodian simultaneously provided certified confirmation of compliance to the Executive Director.
2. The Custodian’s failure to respond in a timely manner resulted in a “deemed” denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the Custodian unlawfully denied access to certain portions of the responsive e-mails reviewed *in camera*. However, the Custodian lawfully denied access to the Complainant’s OPRA request item No. 2. Moreover, the Custodian lawfully denied access to portions of the responsive e-mails. Additionally, the evidence of record does not indicate that the Custodian’s violations of OPRA had a positive element of conscious wrongdoing or were 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 29th Day of August, 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: August 31, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
August 29, 2017 Council Meeting**

**Regina Discenza¹
Complainant**

GRC Complaint No. 2015-223

v.

**Lacey Township Board of Education (Ocean)²
Custodial Agency**

Records Relevant to Complaint: Copies of:

1. Legal memoranda, correspondence, and e-mails to DiCara, Rubino (“DiCara”), an architectural firm, as noted in legal bills dated November 18, and December 18, 2013.
2. Correspondence the Lacey Township Board of Education (“BOE”) received from DiCara, as identified in the December 20, 2013 entry of a legal bill.
3. Legal memoranda and correspondence from the Custodian’s Counsel to Maureen M. Tirella, BOE President, from January 5, 2015, to the present.

Custodian of Record: James G. Savage, Jr.³
Request Received by Custodian: June 1, 2015
Response Made by Custodian: June 23, 2015
GRC Complaint Received: July 22, 2015

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. The current Custodian complied with the Council’s December 13, 2016 Interim Order because he responded in the prescribed time frame, provided nine (9) copies of the records requested for an *in camera* review, and simultaneously provided certified confirmation of compliance to the Executive Director.

¹ \No legal representation listed on record.

² Represented by Christopher M. Supsie, Esq., of Stein & Supsie, P.C. (Forked River, NJ).

³ The current custodian of record is Patrick S. DeGeorge.

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 to the GRC pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005).⁴**
3. The Custodian must disclose all other portions of the twenty-three (23) requested e-mails to the Complainant (*i.e.*, sender, recipients, date, time, subject, and salutations where applicable). As to those portions of the requested e-mails, the Custodian has unlawfully denied access. *See Ray v. Freedom Acad. Charter Sch. (Camden)*, GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010).
4. **The Custodian shall comply with conclusion 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 1:4-4,⁵ to the GRC.⁶**
5. 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 current Custodian’s compliance with the Council’s Interim Order.

Procedural History:

On July 27, 2017, the Council distributed its Interim Order to all parties. On August 2, 2017, the Government Records Council (“GRC”) received the Custodian’s August 1, 2017 response to the Council’s Interim Order. Therein, the Custodian certified that she simultaneously sent copies of the responsive e-mails to all parties in accordance with the Council’s *In Camera* Examination.

Analysis

Compliance

At its July 25, 2017 meeting, the Council ordered the current Custodian to comply with the Council’s *In Camera* Examination findings and to submit certified confirmation of

⁴ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

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."

⁶ 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.

compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On July 27, 2017, the Council distributed its Interim Order to all parties, providing the current Custodian five (5) business days to comply with the terms of said Order. Thus, the current Custodian's response was due by close of business on August 3, 2017.

On August 2, 2017, the fourth (4th) business day after receipt of the Council's Order, the current Custodian disclosed the responsive e-mails to the Complainant in accordance with the Council's findings. The current Custodian also simultaneously provided certified confirmation of compliance to the Executive Director.

Therefore, the current Custodian complied with the Council's July 25, 2017 Interim Order because he responded in the prescribed time frame by providing the responsive records to the Complainant in accordance with the Council's *In Camera* Examination. Further, the current Custodian 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)).

In the instant matter, the Custodian's failure to respond in a timely manner resulted in a “deemed” denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the Custodian unlawfully denied access to certain portions of the responsive e-mails reviewed *in camera*. However, the Custodian lawfully denied access to the Complainant's OPRA request item No. 2.

Moreover, the Custodian lawfully denied access to portions of the responsive e-mails. Additionally, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or were 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.⁷

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The current Custodian complied with the Council's July 25, 2017 Interim Order because he responded in the prescribed time frame by providing the responsive records to the Complainant in accordance with the Council's *In Camera* Examination. Further, the current Custodian simultaneously provided certified confirmation of compliance to the Executive Director.
2. The Custodian's failure to respond in a timely manner resulted in a "deemed" denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the Custodian unlawfully denied access to certain portions of the responsive e-mails reviewed *in camera*. However, the Custodian lawfully denied access to the Complainant's OPRA request item No. 2. Moreover, the Custodian lawfully denied access to portions of the responsive e-mails. Additionally, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or were 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: Frank F. Caruso
Communications Specialist/Resource Manager

August 22, 2017

⁷ The GRC notes that it need not address whether the current Custodian also knowingly and willfully violated OPRA because he did not commit an OPRA violation. Further, the current Custodian timely complied with both the Council's December 13, 2016 and July 25, 2017 Interim Orders.



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CHRIS CHRISTIE
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KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

INTERIM ORDER

July 25, 2017 Government Records Council Meeting

Regina Discenza
Complainant

Complaint No. 2015-223

v.

Lacey Township Board of Education (Ocean)
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 voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The current Custodian complied with the Council’s December 13, 2016 Interim Order because he responded in the prescribed time frame, provided nine (9) copies of the records requested for an *in camera* review, and simultaneously provided certified confirmation of compliance to the Executive Director.
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 to the GRC pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005).¹**
3. The Custodian must disclose all other portions of the twenty-three (23) requested e-mails to the Complainant (*i.e.*, sender, recipients, date, time, subject, and salutations where applicable). As to those portions of the requested e-mails, the Custodian has unlawfully denied access. See Ray v. Freedom Acad. Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010).
4. **The Custodian shall comply with conclusion 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**

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.



redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,² to the GRC.³

5. 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 current 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

² "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 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
July 25, 2017 Council Meeting**

**Regina Discenza¹
Complainant**

GRC Complaint No. 2015-223

v.

**Lacey Township Board of Education (Ocean)²
Custodial Agency**

Records Relevant to Complaint: Copies of:

1. Legal memoranda, correspondence, and e-mails to DiCara, Rubino (“DiCara”), an architectural firm, as noted in legal bills dated November 18, and December 18, 2013.
2. Correspondence the Lacey Township Board of Education (“BOE”) received from DiCara, as identified in the December 20, 2013 entry of a legal bill.
3. Legal memoranda and correspondence from the Custodian’s Counsel to Maureen M. Tirella, BOE President, from January 5, 2015, to the present.

Custodian of Record: James G. Savage, Jr.³

Request Received by Custodian: June 1, 2015

Response Made by Custodian: June 23, 2015

GRC Complaint Received: July 22, 2015

Records Submitted for *In Camera* Examination: 37 e-mails/correspondence from Custodian’s Counsel to the BOE, Ms. Tirella, and/or DiCara.

Background

December 13, 2016 Council Meeting:

At its December 13, 2016 public meeting, the Council considered the December 6, 2016 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request, either granting access,

¹ \No legal representation listed on record.

² Represented by Arthur Stein, Esq., of Stein & Supsie, P.C. (Forked River, NJ).

³ The current custodian of record is Patrick S. DeGeorge.

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).

2. The Complainant’s request item No. 2 is invalid because it failed to provide the following ample identifiers necessary for the Custodian to locate additionally responsive records: date or range of dates and content or subject. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005); NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010); Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order May 24, 2011). *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2011-119 (Interim Order dated July 31, 2012); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2011-160, *et seq.* (Final Decision dated September 25, 2012). The Custodian has thus lawfully denied access to request item No. 2. N.J.S.A. 47:1A-6.
3. The GRC must conduct an *in camera* review of the 37 records responsive to the Complainant’s OPRA request item Nos. 1 and 3 to validate the Custodian’s assertion that the records were exempt from disclosure under the attorney-client privilege, as “inter-agency or intra-agency advisory, consultative, or deliberative” material, because of the presence of collective bargaining discussions, or because of their designation as student records. *See* Paff v. NJ Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005); N.J.S.A. 47:1A-1.1.
4. **The Custodian must deliver⁴ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 2 above), a document or redaction index⁵, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,⁶ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council’s Interim Order.**
5. 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.

⁴ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

⁵ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

⁶ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

Procedural History:

On December 14, 2016, the Council distributed its Interim Order to all parties. On December 20, 2016, the Custodian responded to the Council's Interim Order. The Custodian certified that she was providing nine (9) copies of the 37 records for an *in camera* review, consistent with the Council's Order. The Custodian also affirmed that there was an error in the document index, which reflected that she denied access to two (2) e-mails "dated December 18, 2013 sent from Mr. Stein to Mr. DiCara . . ." The Custodian certified that the index should read that she denied access "to one [(1)] e-mail dated December 17, 2013 and one [(1)] e-mail dated December 18, 2013." Finally, the Custodian affirmed that she included item No. 12 from the Statement of Information to support the lawful basis for denying access to the responsive records.

Analysis

Compliance

At its December 13, 2016 meeting, the Council ordered the Custodian to submit nine (9) copies of the requested 37 records for an *in camera* review. The Council also ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On December 14, 2016, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on December 21, 2016.

On December 20, 2016, the fourth (4th) business day after receipt of the Council's Order, the current Custodian submitted to the GRC nine (9) copies of the requested 37 records for an *in camera* review. Additionally, the current Custodian provided certified confirmation of compliance to the Executive Director.

Therefore, the current Custodian complied with the Council's December 13, 2016 Interim Order because he responded in the prescribed time frame, provided nine (9) copies of the records requested for an *in camera* review, and simultaneously provided certified confirmation of compliance 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.

Additionally, OPRA exempts access to "any record within the attorney-client privilege." N.J.S.A. 47:1A-1.1. Further, "[t]he provisions of [OPRA] shall not abrogate or erode any . . . grant of confidentiality . . . recognized by . . . court rule." N.J.S.A. 47:1A-9(b). As such, OPRA does not allow for the disclosure of attorney work product, consisting of "the mental

impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.” New Jersey Court Rules R. 4:10-2(c).

In the context of public entities, these privileges extend 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 Envtl. Ins. Actions, 259 N.J. Super. 308, 313 (App. Div. 1992); O’Boyle v. Borough of Longport, 218 N.J. 168 (2014). At the same time, the attorney-client and work product privileges do not automatically and completely insulate attorney correspondence from disclosure. *See* Hunterdon Cnty. P.B.A. Local 188 v. Twp. of Franklin, 286 N.J. Super. 389, 394; In the Matter of Grand Jury Subpoenas, 241 N.J. Super. 18, 30 (App. Div. 1989).

Further, OPRA provides that the definition of a government record “shall not include . . . inter-agency or intra-agency advisory, consultative, or deliberative [(“ACD”)] material.” When this exception is invoked, a governmental entity may “withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated.” Educ. Law Center v. N.J. Dep’t of Educ., 198 N.J. 274, 285 (2009)(*citing* NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975)). The custodian claiming an exception to the disclosure requirements under OPRA on that basis must initially satisfy two conditions: (1) the document must be pre-decisional, meaning that the document was generated prior to the adoption of the governmental entity’s policy or decision; and (2) the document must reflect the deliberative process, which means that it must contain opinions, recommendations, or advice about agency policies. Id. at 286 (internal citations and quotations omitted).

The key factor in this determination is whether the contents of the document reflect “formulation or exercise of . . . policy-oriented judgment or the process by which policy is formulated.” Id. at 295 (adopting the federal standard for determining whether material is “deliberative” and quoting Mapother v. Dep’t of Justice, 3 F.3d 1533, 1539 (D.C. Cir. 1993)). Once the governmental entity satisfies those two threshold requirements, a presumption of confidentiality is established, which the requester may rebut by showing that the need for the materials overrides the government’s interest in confidentiality. Id. at 286-87.

OPRA also provides that a government record shall not include “information generated by or on behalf of public employers or public employees in connection . . . with collective negotiations, including documents and statements of strategy or negotiating position.” N.J.S.A. 47:1A-1.1.

OPRA further provides that its provisions “shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to [OPRA]; any other statute . . . regulation promulgated under the authority of any statute or Executive Order of the Governor . . .” N.J.S.A. 47:1A-9(a).

The Family Educational Rights & Privacy Act (“FERPA”) provides the following:

Each educational agency or institution shall maintain a record, kept with the education records of each student . . . Such record of access shall be available only to parents, to the school official and his assistants who are responsible for the custody of such records, and to persons or organizations authorized in, and under the conditions of, clauses (A) and (C) of paragraph (1) as a means of auditing the operation of the system.

20 USCA §1 232g(b)(4)(A).

Further, N.J.A.C. 6A:32-7.4 provides that “[t]he chief school administrator . . . shall be responsible for . . . assuring that access to [student] records is limited to authorized persons.”

Initially, the GRC notes that it identified eleven (11) of the e-mails provided for *in camera* were e-mails in which the Complainant was copied as part of her position as a BOE member. Because the Complainant received those e-mails, the GRC will not review them *in camera* because doing so would not advance the purposes of OPRA. See Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609 (App. Div. 2008). Those e-mails are as follows:

- E-mail from Custodian’s Counsel to multiple parties (including the Complainant), dated January 28, 2015 (4:07 pm).
- E-mail from Custodian’s Counsel to Ms. Tirella copying multiple parties (including the Complainant), dated February 24, 2015 (3:01 pm).
- E-mail from Custodian’s Counsel to multiple parties (including the Complainant), dated March 20, 2015 (4:58 pm).
- E-mail from Ms. Tirella to multiple parties (including the Complainant), dated March 23, 2015 (8:15 am).
- E-mail from Ms. Tirella to multiple parties (including the Complainant), dated March 23, 2015 (6:42 pm).
- E-mail from Custodian’s Counsel to multiple parties (including the Complainant), dated March 24, 2015 (2:52 pm).
- E-mail from Custodian’s Counsel to multiple parties (including the Complainant), dated March 27, 2015 (2:32 pm).
- E-mail from Custodian’s Counsel to multiple parties (including the Complainant), dated April 1, 2015 (3:40 pm).
- E-mail from Custodian’s Counsel to multiple parties (including the Complainant), dated April 15, 2015 (5:32 pm).
- E-mail from Ms. Tirella to the Custodian copying multiple parties (including the Complainant), dated April 20, 2015 (8:47 am).
- E-mail from Custodian’s Counsel to multiple parties (including the Complainant), dated May 13, 2015 (1:46 pm).

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

Record No.	Record Name/Date	Description of Record	Custodian's Explanation/ Citation for Non-disclosure	Findings of the In Camera Examination⁷
1.	E-mail from the Custodian's Counsel to Joseph DiCara, dated December 17, 2013 (attaching a memorandum composed by Custodian's Counsel to his file dated December 12, 2013) (5 pages)	Counsel requested seeking input from DiCara, Rubino about the State of New Jersey Comptroller Office's investigation about its solar panel contract. The attached memorandum recapitulated Counsel's teleconference with the Comptroller investigation team.	Attorney-client privilege, attorney-work product, and ACD material. <u>N.J.S.A. 47:1A-1.1</u> ; <u>N.J.S.A. 47:1A-9(b)</u> ; <u>R. 4:10-2(c)</u> .	The e-mail body and attached memorandum fall within the attorney-client privilege. Specifically, the records contain advice, opinions, and mental impressions of Counsel regarding the teleconference. Thus, the Custodian lawfully denied access to the e-mail body and memorandum. <u>N.J.S.A. 47:1A-6</u> .
2.	E-mail from the Custodian's Counsel to Mr. DiCara, dated December 18, 2013	Counsel seeks status on his request for input.	Attorney-client privilege, attorney-work product, and ACD material. <u>N.J.S.A. 47:1A-1.1</u> ; <u>N.J.S.A. 47:1A-9(b)</u> ; <u>R. 4:10-2(c)</u> .	The e-mail body contained Counsel's follow-up to the teleconference and is exempt under the attorney-client privilege. Thus, the Custodian lawfully denied access to the e-mail body. <u>N.J.S.A. 47:1A-1.1</u>
1.	E-mail from Custodian's	Counsel seeks to schedule call regarding	Attorney-client privilege, attorney-	In this e-mail, Counsel seeks

⁷ **Unless expressly identified for redaction, everything in the record shall be disclosed.** For purposes of identifying redactions, unless otherwise noted a paragraph/new paragraph begins whenever there is an indentation and/or a skipped space(s). The paragraphs are to be counted starting with the first whole paragraph in each record and continuing sequentially through the end of the record. If a record is subdivided with topic headings, renumbering of paragraphs will commence under each new topic heading. Sentences are to be counted in sequential order throughout each paragraph in each record. Each new paragraph will begin with a new sentence number. If only a portion of a sentence is to be redacted, the word in the sentence which the redaction follows or precedes, as the case may be, will be identified and set off in quotation marks. If there is any question as to the location and/or extent of the redaction, the GRC should be contacted for clarification before the record is redacted. The GRC recommends the redactor make a paper copy of the original record and manually "black out" the information on the copy with a dark colored marker, then provide a copy of the blacked-out record to the requester.

	<p>Counsel to Ms. Tirella, dated January 11, 2015</p> <p>*Note: Other e-mails included in chain not identified as responsive to Complainant's OPRA request.</p>	labor negotiations.	work product, ACD material, and information in connection with collective bargaining negotiations. <u>N.J.S.A. 47:1A-1.1</u> ; <u>N.J.S.A. 47:1A-9(b)</u> ; <u>R. 4:10-2(c)</u> .	confirmation on a date suitable for Ms. Tirella. The GRC is not satisfied that the e-mail falls within any of the cited exemptions. It does not contain attorney-client privileged information, nothing akin to ACD information, and provides no information regarding collective bargaining. Thus, the Custodian has unlawfully denied access to this e-mail and must disclose it. <u>N.J.S.A. 47:1A-6.</u>
2.	E-mail from Custodian's Counsel to Ms. Tirella, dated January 15, 2015.	Counsel contacted Ms. Tirella regarding labor negotiations.	Attorney-client privilege, attorney-work product, ACD material, and information in connection with collective bargaining negotiations. <u>N.J.S.A. 47:1A-1.1</u> ; <u>N.J.S.A. 47:1A-9(b)</u> ; <u>R. 4:10-2(c)</u> .	This e-mail body contains a brief discussion regarding collective negotiations, which is exempt from disclosure. Thus, the Custodian lawfully denied access to the e-mail body. <u>N.J.S.A. 47:1A-6.</u>
3.	E-mail from the Custodian's Counsel to Ms. Tirella, dated February 6, 2015.	Counsel provides advice based on a question posed by Ms. Tirella about pending labor negotiations.	Attorney-client privilege, attorney-work product, ACD material, and information in connection with collective bargaining negotiations. <u>N.J.S.A. 47:1A-1.1</u> ; <u>N.J.S.A. 47:1A-9(b)</u> ; <u>R. 4:10-2(c)</u> .	The e-mail body contains significant legal advice and clearly fits within the attorney-client privilege exemption. <u>N.J.S.A. 47:1A-1.1.</u> Thus, the Custodian lawfully denied access to the e-mail body. <u>N.J.S.A. 47:1A-6.</u>

4.	E-mail from the Custodian’s Counsel to Ms. Tirella, dated February 12, 2015. *Note: Other e-mails included in chain not identified as responsive to Complainant’s OPRA request.	Counsel states that a previously scheduled meeting was cancelled.	Attorney-client privilege, attorney-work product, ACD material, and information in connection with collective bargaining negotiations. <u>N.J.S.A. 47:1A-1.1</u> ; <u>N.J.S.A. 47:1A-9(b)</u> ; <u>R. 4:10-2(c)</u> .	This e-mail body contains a brief discussion regarding collective negotiations, which is exempt from disclosure. Thus, the Custodian lawfully denied access to the e-mail body. <u>N.J.S.A. 47:1A-6</u> .
5.	E-mail from the Custodian’s Counsel to Ms. Tirella, dated February 17, 2015. *Note: Other e-mails included in chain not identified as responsive to Complainant’s OPRA request.	Counsel confirms his knowledge of changes to the monthly BOE meeting schedule.	Attorney-client privilege, attorney-work product, ACD material, and information in connection with collective bargaining negotiations. <u>N.J.S.A. 47:1A-1.1</u> ; <u>N.J.S.A. 47:1A-9(b)</u> ; <u>R. 4:10-2(c)</u> .	In this e-mail body, Counsel alerts Ms. Tirella of a meeting cancellation. The GRC is not persuaded that the e-mail falls within any of the cited exemptions. It does not contain attorney-client privileged information, nothing akin to ACD information, and provides no specific information regarding collective bargaining. Thus, the Custodian has unlawfully denied access to this e-mail and must disclose it. <u>N.J.S.A. 47:1A-6</u>.
6.	E-mail from the Custodian’s Counsel to Ms. Tirella, dated February 23, 2015. *Note: Other e-mails included in chain not identified as responsive to	Counsel states, “Thanks.”	Attorney-client privilege, attorney-work product, ACD material, and information in connection with collective bargaining negotiations. <u>N.J.S.A. 47:1A-1.1</u> ;	The e-mail does not contain attorney-client privileged information, nothing akin to ACD information, and provides no specific information regarding collective bargaining. Thus,

	Complainant's OPRA request.		<u>N.J.S.A.</u> 47:1A-9(b); <u>R.</u> 4:10-2(c).	the Custodian must disclose the e-mail.
7.	E-mail from the Custodian's Counsel to Ms. Tirella and Robert Greitz, NJ School Boards Association, dated February 26, 2015. *Note: Other e-mails included in chain not identified as responsive to Complainant's OPRA request.	Counsel clarified a point made by Mr. Greitz in a prior e-mail.	Attorney-client privilege, attorney-work product, ACD material, and information in connection with collective bargaining negotiations. <u>N.J.S.A.</u> 47:1A-1.1; <u>N.J.S.A.</u> 47:1A-9(b); <u>R.</u> 4:10-2(c).	The e-mail does not contain attorney-client privileged information, nothing akin to ACD information, and provides no specific information regarding collective bargaining. Thus, the Custodian must disclose the e-mail.
8.	E-mail from Ms. Tirella to the Custodian's Counsel, dated May 17, 2015. *Note: Other e-mails included in chain not identified as responsive to Complainant's OPRA request.	Ms. Tirella stated, "No problem."	Attorney-client privilege, attorney-work product, ACD material, and information in connection with collective bargaining negotiations. <u>N.J.S.A.</u> 47:1A-1.1; <u>N.J.S.A.</u> 47:1A-9(b); <u>R.</u> 4:10-2(c).	The e-mail does not contain attorney-client privileged information, nothing akin to ACD information, and provides no specific information regarding collective bargaining. Thus, the Custodian must disclose the e-mail.
9.	E-mail from the Custodian's Counsel to Ms. Tirella (and other BOE parties), dated May 19, 2015.	Counsel provides advice on language in a contract proposal.	Attorney-client privilege, attorney-work product, ACD material, and information in connection with collective bargaining negotiations. <u>N.J.S.A.</u> 47:1A-1.1; <u>N.J.S.A.</u> 47:1A-9(b); <u>R.</u> 4:10-2(c).	The e-mail body contains significant legal advice and clearly fits within the attorney-client privilege exemption. <u>N.J.S.A.</u> 47:1A-1.1. Thus, the Custodian lawfully denied access to the e-mail body. <u>N.J.S.A.</u> 47:1A-6.
1.	E-mail from the Custodian's Counsel to Ms. Tirella, dated	Ms. Tirella and Counsel attempt to schedule time to discuss nondescript issues.	Attorney-client privilege, attorney-work product, and ACD material.	The e-mail does not contain attorney-client privileged information, nothing

	January 14, 2015.		<u>N.J.S.A.</u> 47:1A-1.1; <u>N.J.S.A.</u> 47:1A-9(b); <u>R.</u> 4:10-2(c).	akin to ACD information, and provides no specific information regarding collective bargaining. Thus, the Custodian must disclose the e-mail.
2.	E-mail from the Custodian's Counsel to Ms. Tirella (copying other BOE parties), dated January 19, 2015. *Note: Other e-mails included in chain not identified as responsive to Complainant's OPRA request.	Counsel provides date of prior ethics training for BOE members.	Attorney-client privilege, attorney-work product, and ACD material. <u>N.J.S.A.</u> 47:1A-1.1; <u>N.J.S.A.</u> 47:1A-9(b); <u>R.</u> 4:10-2(c).	The e-mail does not contain attorney-client privileged information, nothing akin to ACD information, and provides no specific information regarding collective bargaining. Thus, the Custodian must disclose the e-mail.
3.	E-mail from the Custodian's Counsel to Ms. Tirella (copying other BOE parties), dated January 26, 2015.	Counsel seeks the status of an upcoming meeting.	Attorney-client privilege, attorney-work product, and ACD material. <u>N.J.S.A.</u> 47:1A-1.1; <u>N.J.S.A.</u> 47:1A-9(b); <u>R.</u> 4:10-2(c).	The e-mail does not contain attorney-client privileged information, nothing akin to ACD information, and provides no specific information regarding collective bargaining. Thus, the Custodian must disclose the e-mail.
4.	E-mail from the Custodian's Counsel and Ms. Tirella, dated April 13, 2015. *Note: Another e-mail included in chain not identified as responsive to Complainant's OPRA request.	Counsel seeks status on his attendance at upcoming meeting. Ms. Tirella asks Counsel to contact her.	Attorney-client privilege, attorney-work product, and ACD material. <u>N.J.S.A.</u> 47:1A-1.1; <u>N.J.S.A.</u> 47:1A-9(b); <u>R.</u> 4:10-2(c).	The e-mail does not contain attorney-client privileged information, nothing akin to ACD information, and provides no specific information regarding collective bargaining. Thus, the Custodian must disclose the e-mail.

5.	E-mail from the Custodian’s Counsel and Ms. Tirella (copying other BOE parties), dated May 3, 2015. *Note: Another e-mail included in chain not identified as responsive to Complainant’s OPRA request.	Ms. Tirella and Counsel discusses contracted fees for Counsel’s participation in BOE meetings.	Attorney-client privilege, attorney-work product, and ACD material. <u>N.J.S.A.</u> 47:1A-1.1; <u>N.J.S.A.</u> 47:1A-9(b); <u>R.</u> 4:10-2(c).	The e-mail body falls within the attorney-client privilege. Specifically, Counsel provides advice on his contract with the BOE. Thus, the Custodian lawfully denied access to the e-mail body and memorandum. <u>N.J.S.A.</u> 47:1A-6.
1.	E-mail from the Custodian’s Counsel and Ms. Tirella, dated February 25, 2015. *Note: Another e-mail included in chain not identified as responsive to Complainant’s OPRA request.	Ms. Tirella and Counsel attempt to set a meeting.	Attorney-client privilege, attorney-work product, and ACD material. <u>N.J.S.A.</u> 47:1A-1.1; <u>N.J.S.A.</u> 47:1A-9(b); <u>R.</u> 4:10-2(c).	The e-mail does not contain attorney-client privileged information, nothing akin to ACD information, and provides no specific information regarding collective bargaining. Thus, the Custodian must disclose the e-mail.
2.	E-mail from the Custodian’s Counsel and Ms. Tirella (copying other BOE parties), dated March 16, 2015. *Note: One additional e-mail included in the chain is copied to the Complainant.	Counsel states, “Thanks.”	Attorney-client privilege, attorney-work product, and ACD material. <u>N.J.S.A.</u> 47:1A-1.1; <u>N.J.S.A.</u> 47:1A-9(b); <u>R.</u> 4:10-2(c).	The e-mail does not contain attorney-client privileged information, nothing akin to ACD information, and provides no specific information regarding collective bargaining. Thus, the Custodian must disclose the e-mail.

3.	E-mail from the Custodian's Counsel and Ms. Tirella (copying other BOE parties), dated May 20, 2015 (without attachment).	Counsel's secretary forwards Ms. Tirella a copy of the BOE's contract with Counsel.	Attorney-client privilege, attorney-work product, and ACD material. <u>N.J.S.A. 47:1A-1.1</u> ; <u>N.J.S.A. 47:1A-9(b)</u> ; <u>R. 4:10-2(c)</u> .	The e-mail does not contain attorney-client privileged information, nothing akin to ACD information, and provides no specific information regarding collective bargaining. Thus, the Custodian must disclose the e-mail.
1.	E-mail from the Custodian's Counsel and Ms. Tirella, dated May 3, 2017. *Note: The parents' original e-mail, and others not identified as responsive to the subject OPRA, is included in the chain.	Ms. Tirella seeks advice on a draft response sent to parents of a student and Counsel provides same.	Attorney-client privilege, attorney-work product, ACD material, and student records. <u>N.J.S.A. 47:1A-1.1</u> ; <u>N.J.S.A. 47:1A-9(b)</u> ; <u>R. 4:10-2(c)</u> .	The e-mail body falls within the attorney-client privilege. Specifically, Counsel provides advice on a draft response to the parents. Thus, the Custodian lawfully denied access to the e-mail body and memorandum. <u>N.J.S.A. 47:1A-6.</u>
2.	E-mail from the Custodian's Counsel and Ms. Tirella, dated May 5, 2017. *Note: The parents' original e-mail, and others not identified as responsive to the subject OPRA, are included in the chain.	Ms. Tirella seeks advice on a addressing a sent to parents of a student and Counsel provides same.	Attorney-client privilege, attorney-work product, ACD material, and student records. <u>N.J.S.A. 47:1A-1.1</u> ; <u>N.J.S.A. 47:1A-9(b)</u> ; <u>R. 4:10-2(c)</u> .	The e-mail body falls within the attorney-client privilege. Specifically, Counsel provides advice on the parental issue. Thus, the Custodian lawfully denied access to the e-mail body and memorandum. <u>N.J.S.A. 47:1A-6.</u>
3.	E-mail from the Custodian's Counsel to Ms. Tirella, dated May 6, 2017.	Counsel provides a draft letter being sent to a parent for input.	Attorney-client privilege, attorney-work product, ACD material, and student records.	The e-mail body falls within the attorney-client privilege. Specifically,

			<u>N.J.S.A.</u> 47:1A-1.1; <u>N.J.S.A.</u> 47:1A-9(b); <u>R.</u> 4:10-2(c).	Counsel provides advice on the parental issue. Thus, the Custodian lawfully denied access to the e-mail body and memorandum. <u>N.J.S.A.</u> 47:1A-6.
4.	E-mail from the Custodian’s Counsel and Ms. Tirella, dated May 6, 2017. *Note: E-mail No. 4 above is included here.⁸	Counsel followed-up with Ms. Tirella about the draft letter.	Attorney-client privilege, attorney-work product, ACD material, and student records. <u>N.J.S.A.</u> 47:1A-1.1; <u>N.J.S.A.</u> 47:1A-9(b); <u>R.</u> 4:10-2(c).	The e-mail body falls within the attorney-client privilege. Specifically, Counsel provides advice on the parental issue. Thus, the Custodian lawfully denied access to the e-mail body and memorandum. <u>N.J.S.A.</u> 47:1A-6.
1.	Memorandum from the Custodian’s Counsel to Ms. Tirella Re: “Board member ethics matter,” dated May 13, 2015.	Counsel memorializes a conversation he had with the president of another board of education regarding a conversation she had with the Complainant.	Attorney-client privilege, attorney-work product, and ACD material. <u>N.J.S.A.</u> 47:1A-1.1; <u>N.J.S.A.</u> 47:1A-9(b); <u>R.</u> 4:10-2(c).	The memorandum, forwarded to Ms. Tirella upon request, memorializes a conversation between him and another individual that the BOE believed had ethics implications. Thus, the Custodian lawfully denied access to the e-mail body. <u>N.J.S.A.</u> 47:1A-6.

Additionally, consistent with N.J.S.A. 47:1A-5(g), if the custodian of a government

⁸ The Custodian identified three (3) e-mails dated May 6, 2015 as responsive to the Complainant’s OPRA request. However, upon reviewing the records, the GRC determined that only two (2) e-mails between the Custodian’s Counsel and Ms. Tirella were provided. The third (3rd) e-mail chain matching this date is between Custodian’s Counsel and Superintendent Sandra D. Brower and is not actually responsive to the Complainant’s OPRA request. Thus, the GRC need not review this e-mail as part of its *in camera* review.

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 twenty-three (23) responsive e-mails to the Complainant (*i.e.*, sender, recipients, date, time, subject, and salutations where applicable). As to those portions of the requested e-mails, the Custodian has unlawfully denied access. *See Ray v. Freedom Acad. Charter Sch. (Camden)*, GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010).

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 current Custodian's compliance with the Council's Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The current Custodian complied with the Council's December 13, 2016 Interim Order because he responded in the prescribed time frame, provided nine (9) copies of the records requested for an *in camera* review, and simultaneously provided certified confirmation of compliance to the Executive Director.
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 to the GRC pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005).⁹**
3. The Custodian must disclose all other portions of the twenty-three (23) requested e-mails to the Complainant (*i.e.*, sender, recipients, date, time, subject, and salutations where applicable). As to those portions of the requested e-mails, the Custodian has unlawfully denied access. *See Ray v. Freedom Acad. Charter Sch. (Camden)*, GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010).
4. **The Custodian shall comply with conclusion 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**

⁹ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹⁰ to the GRC.¹¹

5. 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 current Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

July 18, 2017

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."

¹¹ 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.



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DEPARTMENT OF COMMUNITY AFFAIRS
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

INTERIM ORDER

December 13, 2016 Government Records Council Meeting

Regina Discenza
Complainant

Complaint No. 2015-223

v.

Lacey Township Board of Education (Ocean)
Custodian of Record

At the December 13, 2016 public meeting, the Government Records Council (“Council”) considered the December 6, 2016 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the 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).
2. The Complainant’s request item No. 2 is invalid because it failed to provide the following ample identifiers necessary for the Custodian to locate additionally responsive records: date or range of dates and content or subject. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005); NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010); Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order May 24, 2011). *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2011-119 (Interim Order dated July 31, 2012); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2011-160, *et seq.* (Final Decision dated September 25, 2012). The Custodian has thus lawfully denied access to request item No. 2. N.J.S.A. 47:1A-6.
3. The GRC must conduct an *in camera* review of the 37 records responsive to the Complainant’s OPRA request item Nos. 1 and 3 to validate the Custodian’s assertion



that the records were exempt from disclosure under the attorney-client privilege, as “inter-agency or intra-agency advisory, consultative, or deliberative” material, because of the presence of collective bargaining discussions, or because of their designation as student records. See Paff v. NJ Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005); N.J.S.A. 47:1A-1.1.

4. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 2 above), a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,³ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council’s Interim Order.**
5. 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 13th Day of December, 2016

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: December 14, 2016

¹ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

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

³ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
December 13, 2016 Council Meeting**

**Regina Discenza¹
Complainant**

GRC Complaint No. 2015-223

v.

**Lacey Township Board of Education (Ocean)²
Custodial Agency**

Records Relevant to Complaint: Copies of:

1. Legal memoranda, correspondence, and e-mails to DiCara, Rubino (“DiCara”), an architectural firm, as noted in legal bills dated November 18, and December 18, 2013.
2. Correspondence the Lacey Township Board of Education (“BOE”) received from DiCara, as identified in the December 20, 2013 entry of a legal bill.
3. Legal memoranda and correspondence from the Custodian’s Counsel to Maureen M. Tirella, BOE President, from January 5, 2015, to the present.

Custodian of Record: James G. Savage, Jr.

Request Received by Custodian: June 1, 2015

Response Made by Custodian: June 23, 2015

GRC Complaint Received: July 22, 2015

Background³

Request and Response:

On June 1, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On June 23, 2015, the sixteenth (16th) business day after receipt of the OPRA request, the Custodian responded in writing, stating that no records responsive to any of the Complainant’s request items existed.

Denial of Access Complaint:

On July 22, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that, as a member of the

¹ \No legal representation listed on record.

² Represented by Arthur Stein, Esq., of Stein & Supsie, P.C. (Forked River, 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.

BOE, she attempted to obtain responsive records beginning on April 29, 2015. The Complainant averred that she decided to submit an OPRA request after waiting a month for the BOE to fulfill her informal requests. The Complainant noted that she sought at least one status update from the Custodian, who advised that he was working on the request with Custodian's Counsel. The Complainant stated that the BOE's legal bills confirm that the records sought exist.

Statement of Information:

On August 12, 2015, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on June 1, 2015. The Custodian certified that his search included reviewing the BOE's records. The Custodian affirmed that he also contacted Custodian's Counsel to review his files because the OPRA request suggested that Counsel might possess responsive records. The Custodian certified that he and Counsel located records and reviewed them to determine if any were exempt. However, the Custodian certified that he responded to the Complainant in writing on June 23, 2015, stating that no records exist.

The Custodian certified that the records at issue here were generated between the BOE and New Jersey Office of the State Comptroller ("OSC") as part of an investigation into a solar panel installation and contract entered in by the BOE. The Custodian affirmed that DiCara, who assisted the BOE on the project as the contracted architect, prepared and provided information to Custodian's Counsel to assist him in corresponding with the OSC. The Custodian stated that the Complainant's OPRA request identified documents by dates taken from legal bills. The Custodian noted that in many instances, correspondence memorialized by date on legal bills regularly do not match the actual date of the correspondence. The Custodian further noted that this is because the legal bill date typically reflects the date the correspondence was drafted and not necessarily sent.

Regarding OPRA request item No. 1, the Custodian certified that he was unable to locate responsive correspondence dated November 18, 2013. However, the Custodian affirmed that he located two (2) e-mails dated December 18, 2013, which he argued were exempt from disclosure as attorney-client privileged material, attorney work product, and "inter-agency or intra-agency advisory, consultative, or deliberative" ("ACD") material. N.J.S.A. 47:1A-1.1; N.J.S.A. 2A:84A-20; N.J.R.E. 504. The Custodian argued that BOE received information from DiCara in order for Custodian's Counsel to respond to the OSC's inquiries. The Custodian asserted that these communications were precisely the type of legal advice protected by the attorney-client privilege. Further, the Custodian argued that the records constituted ACD material because the BOE needed DiCara's information in order to craft adequate responses to the OSC.

Regarding OPRA request item No. 2, the Custodian certified that he did not locate any responsive correspondence dated December 20, 2013.

Regarding OPRA request item No. 3, the Custodian certified that he located 34 responsive e-mails, which he argued were exempt for the reasons previously stated. Additionally, The Custodian asserted that the Complainant's request for this information is confusing because, as a BOE member, she received training that communications between the BOE and Custodian's

Counsel were privileged unless the BOE takes official action to allow for disclosure. The Custodian asserted that the communications between Ms. Tirella and the Custodian's Counsel were attorney-client privileged and ACD in nature because they reveal legal advice and contemplation of BOE actions. The Custodian also noted that some of the communications regarded labor negotiations and student actions, which rendered them exempt under N.J.S.A. 47:1A-1.1.

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).

Here, the Custodian certified in the SOI that he received the Complainant's OPRA request on June 1, 2015. However, the Custodian certified that he did not respond until June 23, 2015, sixteen (16) business days after receipt of the request. The facts thus support that the Custodian failed to respond in a timely manner and the subject request was "deemed" denied.

Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the 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, GRC 2007-11.

Validity of Request

The New Jersey Appellate Division has held that:

While OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records "readily accessible for inspection, copying, or examination."* N.J.S.A. 47:1A-1.

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.

MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005)(emphasis added).

The Court reasoned that:

Most significantly, the request failed to identify with any specificity or particularity the governmental records sought. *MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past.* Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted.

Id. at 549 (emphasis added).

The Court further held that “[u]nder OPRA, agencies are required to disclose only ‘identifiable’ government records not otherwise exempt In short, OPRA does not countenance open-ended searches of an agency's files.” Id. at 549 (emphasis added). Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005);⁵ NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

The GRC has established specific criteria deemed necessary under OPRA to request an e-mail communication. See Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010). The Council determined that to be valid, such requests must contain: (1) the content and/or subject of the e-mail, (2) the specific date or range of dates during which the e-mail(s) were transmitted, and (3) the identity of the sender and/or the recipient thereof. See Elcavage, GRC 2009-07; Sandoval v. NJ State Parole Bd., GRC Complaint No. 2006-167 (Interim Order March 28, 2007). The Council has also applied the criteria set forth in Elcavage to other forms of correspondence, such as letters. See Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order May 24, 2011). The GRC notes that the Council has previously determined that requests seeking correspondence based on attorney billing invoice entries that lacked all requisite Elcavage, factors were invalid. See Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2011-119 (Interim Order dated July 31, 2012); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2011-160, *et seq.* (Final Decision dated September 25, 2012).

However, in Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012), the Court held that the defendant “performed a search and was able to locate records responsive” which “. . . belied any assertion that the request was lacking in specificity or was overbroad.” Id. at 177. See also Gannett v. Cnty. of Middlesex, 379 N.J. Super. 205 (App. Div. 2005)(holding that “[s]uch a voluntary disclosure of most of the documents sought . . . constituted a waiver of whatever right

⁵ Affirming Bent v. Stafford Police Dep’t, GRC Complaint No. 2004-78 (October 2004).

the County may have had to deny Gannett's entire OPRA request on the ground that it was improper.” Id. at 213).

Generally, in situations where a request was overly broad on its face but the custodian nonetheless was able to locate records, the Council has followed Burke in determining that the request contained sufficient information for record identification. *See* Bond v. Borough of Washington (Warren), GRC Complaint No. 2009-324 (Interim Order dated March 29, 2011). By way of example, in Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2010-302 (Interim Order dated January 31, 2012), the complainant sought correspondence reflected in attorney billings invoices. The custodian identified responsive records but denied access to them under the attorney-client privilege exemption. The Council noted that the request was invalid on its face but elected to perform an *in camera* review of records based on its prior holding in Bond, GRC 2009-324.

Here, the Complainant’s OPRA request item No. 2 sought “correspondence” that the BOE received from DiCara “as identified in the December 20, 2013 entry of a legal bill.” After initially denying access, stating that no records existed, the Custodian certified to this fact in the SOI. Additionally, the Custodian noted that, in many cases, invoice entry dates did not match the actual dates of the correspondence discussed in the entry.

The Complainant’s request item No. 2 is similar the request contemplated in Verry, GRC 2011-119, and distinguishable from Verry, GRC 2010-302. Specifically, as the Council reasoned in Verry, item No. 2 was deficient because it failed to include an actual date or range of dates other than the invoice entry date. Also, item No. 2 includes an additional deficiency: lack of a definable content or subject. The Complainant’s failure to provide these criteria and the Custodian’s failure to locate records further supports a conclusion similar to that in Verry, GRC 2011-119. Thus, the GRC is satisfied that the Custodian could not have reasonably identified records responsive to request item No. 2. Further, unlike the custodian in Verry, GRC 2010-302, the Custodian here certified in the SOI that he was not able to locate any responsive records.

Therefore, the Complainant’s request item No. 2 is invalid because it failed to provide the following ample identifiers necessary for the Custodian to locate additionally responsive records: date or range of dates and content or subject. MAG, 375 N.J. Super. at 546; Bent, 381 N.J. Super. at 37; NJ Builders, 390 N.J. Super. at 180; Schuler, GRC 2007-151; Elcavage, GRC 2009-07; Armenti, GRC 2009-154. *See also* Verry, GRC 2011-119; Verry, GRC 2011-160. The Custodian has thus lawfully denied access to request item No. 2. N.J.S.A. 47:1A-6.

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 GRC first notes that, unlike its determination on request item No. 2, the Complainant's OPRA request item Nos. 1 and 3 are comparable to Burke, 429 N.J. Super. at 177 and Verry, GRC 2010-302. Specifically, the Custodian was able to locate two (2) e-mails he believed to be reasonably responsive to item No. 1. Further, the Custodian identified 34 e-mails and one memorandum as responsive to item No. 3. In both cases, the Custodian denied access to the records. As was the case in Burke, and Verry, even if both request items were overly broad on their face, the GRC will proceed through the adjudication process because the Custodian was able to locate responsive records.

OPRA request item Nos. 1 and 3

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 Council⁶ 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 information as a result of *in camera* review by the GRC. The GRC's obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7(f), which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.

Id.

Here, the Custodian denied access to 37 total records: 36 e-mails and one memorandum. The Custodian argued in the SOI that the records were exempt from disclosure under the attorney-client privilege exemption, attorney work product exemption, ACD material exemption,

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

the collective bargaining exemption, and student records. N.J.S.A. 47:1A-1.1; N.J.S.A. 2A:84A-20; N.J.R.E. 504. Thus, as was the case in Verry, GRC 2010-302, the GRC must review same in order to determine the full applicability of the cited exemptions.

Therefore, the GRC must conduct an *in camera* review of the 37 records responsive to the Complainant's OPRA request item Nos. 1 and 3 to validate the Custodian's assertion that the records were exempt from disclosure under the attorney-client privilege, as ACD material, because of the presence of collective bargaining discussions, or because of their designation as student records. *See Paff*, 379 N.J. Super. at 346; 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. The Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the 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).
2. The Complainant's request item No. 2 is invalid because it failed to provide the following ample identifiers necessary for the Custodian to locate additionally responsive records: date or range of dates and content or subject. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010); Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order May 24, 2011). *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2011-119 (Interim Order dated July 31, 2012); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2011-160, *et seq.* (Final Decision dated September 25, 2012). The Custodian has thus lawfully denied access to request item No. 2. N.J.S.A. 47:1A-6.
3. The GRC must conduct an *in camera* review of the 37 records responsive to the Complainant's OPRA request item Nos. 1 and 3 to validate the Custodian's assertion

that the records were exempt from disclosure under the attorney-client privilege, as “inter-agency or intra-agency advisory, consultative, or deliberative” material, because of the presence of collective bargaining discussions, or because of their designation as student records. *See Paff v. NJ Dep’t of Labor, Bd. of Review*, 379 N.J. Super. 346 (App. Div. 2005); N.J.S.A. 47:1A-1.1.

4. **The Custodian must deliver⁷ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 2 above), a document or redaction index⁸, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,⁹ 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.**
5. 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: Frank F. Caruso
Communications Specialist/Resource Manager

December 6, 2016

⁷ 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.

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

⁹ "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."