



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

January 31, 2017 Government Records Council Meeting

Terrence McDonald
Complainant

Complaint No. 2015-274

v.

City of Jersey City (Hudson)
Custodian of Record

At the January 31, 2017 public meeting, the Government Records Council (“Council”) considered the October 18, 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 Council should in part reconsider its May 24, 2016 Interim Order, consistent with N.J.A.C. 5:105-2.10 and in light of prevailing case law on all fours with the “private calendar” currently at issue. Specifically, the Council should rescind Conclusion Nos. 3, 4, and 5 of its Order and find that the Custodian lawfully denied access to the requested records. N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-9; Gannett N.J. Partners, LP v Cnty. of Middlesex, 379 N.J. Super. 205 (App. Div. 2005).
2. The Custodian failed to respond timely to the subject OPRA request and his late response was insufficient because he failed to provide a specific lawful basis for his denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian lawfully denied access to Mayor Fulop’s “private calendar” in accordance with OPRA and prevailing case law. N.J.S.A. 47:1A-1, et seq.; Gannett N.J. Partners, LP v Cnty. of Middlesex, 379 N.J. Super. 205 (App. Div. 2005). 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 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 3, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Reconsideration

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

**Terrence McDonald¹
Complainant**

GRC Complaint No. 2015-274

v.

**City of Jersey City (Hudson)²
Custodial Agency**

Records Relevant to Complaint: Jersey City Mayor Steve Fulop’s “meetings calendar” from January 11, 2014, to May 22, 2015.

Custodian of Record: Robert Byrne

Request Received by Custodian: May 21, 2015

Response Made by Custodian: August 21, 2015

GRC Complaint Received: August 27, 2015

Background

May 24, 2016 Council Meeting:

At its May 24, 2016 public meeting, the Council considered the May 17, 2016 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted 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, denying access, seeking clarification, or requesting an extension of time within the extended time period, 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 Custodian’s response was insufficient by failing to inform the requestor that responsive records were being withheld and failing to state a specific basis for denying access, thus resulting in a violation of N.J.S.A. 47:1A-5(g). Freyer v City of Bayonne (Hudson), GRC Complaint No 2013-110 (January 2014); Morris v. Trenton

¹ Represented by Keith J. Miller, Esq, of Robinson, Miller, LLC (Newark, NJ).

² Represented by John McKinney, Esq. (Jersey City, NJ).

Police Dep't, GRC Complaint No. 2007-160 (May 2008); Rader v. Twp. of Willingboro (Burlington), GRC Complaint No. 2007-239 (June 2008).

3. The GRC questions the Custodian's blanket assertion that all of the Mayor's "private meetings calendar" is privileged as ACD material or contains only personal information needing to be protected from disclosure for privacy reasons. As in Russomano v. Twp. of Edison (Middlesex), GRC Complaint No. 2013-74 (December 2013) and Smith v. N.J. Dept. of Corr., GRC Complaint No. 2005-84 (Interim Order dated November 15, 2006), the GRC must conduct an *in camera* review to determine whether and to what extent the Mayor's private meetings calendar contains exempt ACD material or implicates privacy concerns and personal information outweighing the public's interest in disclosure.
4. **The Custodian must deliver³ to the Council in a sealed envelope nine (9) copies of the requested records, which shall include all records withheld by the Custodian, in unredacted form (see No. 3 above). If any records provided to the Complainant were redacted, the Custodian must provide those records together with a duplicate record in unredacted form and a document or redaction index⁴. The Custodian must also execute and provide the GRC a legal certification, in accordance with N.J. Court Rule 1:4-4,⁵ that the records provided are all 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.

Procedural History:

On May 26, 2016, the Council distributed its Interim Order to all parties. On June 16, 2016, the City filed a motion for leave to appeal with the Appellate Division. On July 7, 2016, the Court denied the City's motion for leave to appeal on the basis that the GRC indicated its intent to reconsider its Interim Order. The Court noted that the City may renew its motion if, upon reconsideration, the Interim Order were to remain unchanged.

Analysis

Reconsideration

Pursuant to N.J.A.C. 5:105-2.10(a), the Council may reconsider any decision it renders at its

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 must identify the record and/or each redaction asserted and the lawful basis for each 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."

own discretion. Id. The GRC thus reconsiders this matter of its own volition in order to amend the Council’s May 26, 2016 Interim Order.

Specifically, the Council previously ordered that the Custodian provide Mayor Fulop’s private calendar for an *in camera* review based on its prior decision in Smith v. NJ Dept. of Corr., GRC Complaint No. 2005-84 (Interim Order dated November 15, 2006) and Russomano v. Twp. of Edison (Middlesex), GRC Complaint No. 2013-74 (December 2013). However, the Council did not take into account prevailing case law that falls more on point with the record the GRC requested for an *in camera* review. Specifically, Council relied on case law regarding the disclosability of a non-descript general calendar, as opposed to the “private calendar” at issue here.

To that end, the privilege asserted by the Custodian related to these documents is derived from a privilege set forth case law and applicable under OPRA. *See* N.J.S.A. 47:1A-9(b) (“The provisions of [OPRA], shall not abrogate or erode any . . . grant of confidentiality heretofore established or recognized by . . . judicial case law, which privilege or grant of confidentiality may duly be claimed to restrict public access to a public record or government record.”).

In its Statement of Information (“SOI”), the Custodian argued that his denial was lawful under N.J.S.A. 47:1A-1 and Gannett N.J. Partners, LP v. Cnty. of Middlesex, 379 N.J. Super. 205 (App. Div. 2005). In Gannett, the Appellate Division extended the privilege afforded to telephone billing records to the non-public calendar of County Counsel. Id. at 217-18. In reaching this conclusion, the Court looked to N. Jersey Newspapers Co. v. Passaic Cnty. Bd. of Chosen Freeholders, 127 N.J. 9, 17 (1992), where the Supreme Court held that telephone billing records were exempt from disclosure under the Right to Know Law (OPRA’s predecessor):

there may be times—and they may be the most critical times—when a government official will have to make a telephone call that has an arguable claim to confidentiality—times when, for example, a mayor might need to call a city council member from an opposing political party on a most highly sensitive community issue to enlist that person’s support; or times when a mayor might need to call a community activist to calm troubled waters, without causing disruption that might result from appearing to negotiate with a dissident who may, at the moment, be perceived as a lawbreaker.

Id. at 216 (*quoting* N. Jersey Newspapers, at 16-18).

The Court held that N. Jersey Newspapers constituted “‘judicial case law’ that ‘established or recognized’ the ‘confidentiality’ of telephone billing records before enactment of OPRA within the intent of N.J.S.A. 47:1A-9(b).” Id. at 217. Based on the foregoing, the Gannett Court concluded that it was appropriate to extend the rationale of N. Jersey Newspapers to a County Counsel’s calendar because:

[a]lthough County Counsel’s appointment book does not contain telephone numbers, it reveals the identity of persons with whom County Counsel planned to meet and the purpose of the meetings. Such information implicates privacy interests of persons who meet with public officials similar to the identity of

persons who call and are called by public officials. Consequently, we conclude that the rationale of [N. Jersey Newspapers, 127 N.J. 9 (1992)] extends to the information contained in County Counsel’s appointment book.

Id. at 217-218.

Similarly, in New York Pub. Radio v. Office of the Governor, Docket No. MER-L-1345-14 (Law Div. Dec. 5, 2014)(Oral Opinion), app’d on other grounds, No. A-565-15 (App. Div. July 13, 2016), the trial court affirmed the Office of the Governor’s denial of the plaintiff’s OPRA request for the Governor’s private meeting schedule. The trial court determined that the case was controlled by Gannett, and N. Jersey Newspapers, analogizing the Governor’s private meeting schedule to the protected county counsel’s appointment book sought by North Jersey Newspapers. Id. at 82:8-11. Like the appointment book, the Governor’s private meeting schedule was considered a deliberative document that, if disclosed, would reveal the identity of persons with whom the Governor met, as well as the purpose of those meetings. Ibid. Thus, to preserve the privacy interests of those individuals and the confidentiality of the government officials who engage in frank discussions with them the trial court did not order disclosure of the Governor’s private meeting schedule. Id. at 82:16-22. The trial court further expounded that the “calendar exemption” is a “categorical exemption to OPRA,” pursuant to Gannett. Ibid. As such, *in camera* review of the Governor’s private meeting schedule was not needed, and the custodian did not have to provide a Vaughn Index explaining the basis for redacted material. Ibid. Although that opinion is unpublished and non-binding authority from the Law Division, the Council finds the trial court’s reasoning to be persuasive.

The record at issue in the instant complaint is Mayor Fulop’s private calendar. The Custodian disclosed a public calendar but argued in the SOI that the private calendar was exempt due to, among other reasons, privacy concerns raised in N.J.S.A. 47:1A-1 and Gannett, 379 N.J. Super. 205. The GRC looked to Smith, GRC 2005-84, and Russomano, GRC 2013-74; however, the GRC may not have given sufficient weight to Gannett. This is especially true because the non-descript calendar in Smith, GRC 2005-84, and Russomano, GRC 2013-74, is not similar to the private calendar at issue here. Thus, it inherently follows that the same privilege extended from the Governor’s private calendar to County Counsel’s private calendar equally extends to Mayor Fulop’s private calendar. Because this “calendar exemption” is categorical, as per the reasoning in NY Pub. Radio, the Council need not conduct an *in camera* review of the meeting schedule as previously ordered.

Thus, the Council should in part reconsider its May 24, 2016 Interim Order, consistent with N.J.A.C. 5:105-2.10 and in light of prevailing case law on all fours with the “private calendar” currently at issue. Specifically, the Council should rescind Conclusion Nos. 3, 4, and 5 of its Order and find that the Custodian lawfully denied access to the requested records. N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-9; Gannett, 379 N.J. Super. at 217-218.

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)).

Here, the Custodian failed to respond timely to the subject OPRA request, and his late response was insufficient because he failed to provide a specific lawful basis for his denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian lawfully denied access to Mayor Fulop’s “private calendar” in accordance with OPRA and prevailing case law. N.J.S.A. 47:1A-1, *et seq.*; Gannett, 379 N.J. Super. 205. 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 Council should in part reconsider its May 24, 2016 Interim Order, consistent with N.J.A.C. 5:105-2.10 and in light of prevailing case law on all fours with the “private calendar” currently at issue. Specifically, the Council should rescind Conclusion Nos. 3, 4, and 5 of its Order and find that the Custodian lawfully denied access to the requested records. N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-9; Gannett N.J. Partners, LP v Cnty. of Middlesex, 379 N.J. Super. 205 (App. Div. 2005).
2. The Custodian failed to respond timely to the subject OPRA request and his late response was insufficient because he failed to provide a specific lawful basis for his denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Custodian

lawfully denied access to Mayor Fulop’s “private calendar” in accordance with OPRA and prevailing case law. N.J.S.A. 47:1A-1, et seq.; Gannett N.J. Partners, LP v Cnty. of Middlesex, 379 N.J. Super. 205 (App. Div. 2005). 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: Frank F. Caruso
Communications Specialist/Resource Manager

October 18, 2016⁶

⁶ The complaint was prepared for adjudication at the Council’s October 25, 2015 meeting, but legal counsel needed more time to review the matter and asked that the item be tabled. Additionally, the complaint was prepared for adjudication at the Council’s December 13, 2016 meeting but could not be adjudicated due to lack of quorum.



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CHRIS CHRISTIE
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INTERIM ORDER

May 24, 2016 Government Records Council Meeting

Terrence McDonald
Complainant

Complaint No. 2015-274

v.

City of Jersey City (Hudson)
Custodian of Record

At the May 24, 2016 public meeting, the Government Records Council (“Council”) considered the May 17, 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 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 extended time period, 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 Custodian’s response was insufficient by failing to inform the requestor that responsive records were being withheld and failing to state a specific basis for denying access, thus resulting in a violation of N.J.S.A. 47:1A-5(g). Freyer v City of Bayonne (Hudson), GRC Complaint No 2013-110 (January 2014); Morris v. Trenton Police Dep’t, GRC Complaint No. 2007-160 (May 2008); Rader v. Twp. of Willingboro (Burlington), GRC Complaint No. 2007-239 (June 2008).
3. The GRC questions the Custodian’s blanket assertion that all of the Mayor’s “private meetings calendar” is privileged as ACD material or contains only personal information needing to be protected from disclosure for privacy reasons. As in Russomano v. Twp. of Edison (Middlesex), GRC Complaint No. 2013-74 (December 2013) and Smith v. N.J. Dept. of Corr., GRC Complaint No. 2005-84 (Interim Order dated November 15, 2006), the GRC must conduct an *in camera* review to determine whether and to what extent the Mayor’s private meetings calendar contains exempt ACD material or implicates privacy concerns and personal information outweighing the public’s interest in disclosure.



4. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested records, which shall include all records withheld by the Custodian, in unredacted form (see No. 3 above). If any records provided to the Complainant were redacted, the Custodian must provide those records together with a duplicate record in unredacted form and a document or redaction index². The Custodian must also execute and provide the GRC a legal certification, in accordance with N.J. Court Rule 1:4-4,³ that the records provided are all 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 24th Day of May, 2016

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: May 26, 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 must identify the record and/or each redaction asserted and the lawful basis for each 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
May 24, 2016 Council Meeting**

**Terrence McDonald¹
Complainant**

GRC Complaint No. 2015-274

v.

**City of Jersey City (Hudson)²
Custodial Agency**

Records Relevant to Complaint: Jersey City Mayor Steve Fulop’s “meetings calendar” from January 11, 2014, to May 22, 2015.

Custodian of Record: Robert Byrne

Request Received by Custodian: May 21, 2015

Response Made by Custodian: August 21, 2015

GRC Complaint Received: August 27, 2015

Background³

Request and Response:

On May 21, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian to seek the above-mentioned records. On August 21, 2015, the sixty-fourth (64th) day business day after receipt of the OPRA request, the Custodian responded in writing by providing the Complainant with records of the Mayor’s “Public Schedule” for the time frame sought.

Denial of Access Complaint:

On August 27, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that he made an OPRA request on May 21, 2015, and that the Custodian asked for an initial seven day extension. According to the Complainant, the City thereafter ignored the request until August 21, 2015, when the Complainant finally received the records. Moreover, the Complainant contends that the Custodian only provided the Mayor’s public calendar, consisting of “ribbon cuttings, groundbreaking etc.,” and did not include events such as “fundraisers, private meetings, etc.”

¹ No legal representation listed on record.

² Represented by John McKinney, Esq., Jersey City, 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.

The Complainant further alleged that when he objected to the omitted items, the City's spokesman told him that the "public calendar" was responsive and was all that he would receive.

Statement of Information:

On October 7, 2015, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on May 21, 2015. He stated that he "initially responded to the request on June 1, 2015."⁴ The Custodian certified that he next responded to the Complainant on August 21, 2015, by providing "Mayor Fulop's Public Schedule," which chronicles the Mayor's weekly attendance or participation in public events. The calendar itemizes each event by dates, beginning April 5, 2014, and ending May 15, 2015.

As to "the Mayor's private meetings calendar," the Custodian argued there was no unlawful denial of access. The Custodian contended that disclosing records of events, such as "fund raisers" and "private meetings with City officials," would have several deleterious effects. For example, he contended that the public "might be dissuaded from meeting with their public representatives to voice their concerns due to a risk of having their privacy eroded by an interested press." He also argued that the release of such documents "would run afoul of the privacy expectations of the public and the mayor." *Citing N.J.S.A. 47:1A-1 and Gannet N.J. Partners, LP v Cnty. of Middlesex, 379 N.J. Super 205 (App. Div. 2005).* He also argued that the release of the documents could not be done without revealing "interagency advisory, consultative or deliberate material." The Custodian stated that the "Mayor regularly relies upon his private meetings calendar in the process of forming City policy" The Custodian further stated that "disclosure of the information contained within will expose the deliberative aspects of the process," therefore rendering the entire private meetings calendar exempt. *Citing Education Law Center v. NJ Dep't of Educ., 198 N.J. 274 (2009).*

Additional Submissions:

On October 19, 2015, the Complainant filed "objections" to the SOI. He argued that Item 9 of the SOI fails to specify which documents were denied. He further argued that the City's legitimate concerns could be met by simply redacting records as permitted by N.J.S.A. 47:1A-5.

Analysis

Timeliness and Sufficiency of Response

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

⁴ The Custodian failed to provide in his SOI a document for item number 8, which requests a copy of any written response by the Custodian.

N.J.S.A. 47:1A-5(g).⁵ 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).

OPRA provides that a custodian may request an extension of time to respond to the complainant's OPRA request, but the custodian must provide a specific date by which the Custodian will respond. N.J.S.A. 47:1A-5(i). OPRA further provides that when a custodian fails to respond by that specific date, "access shall be deemed denied." N.J.S.A. 47:1A-5(i). Freyer v City of Bayonne (Hudson), GRC Complaint No 2013-110 (January 2014).

OPRA also requires that "[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor." N.J.S.A. 47:1A-5(g). In Morris v. Trenton Police Dep't, GRC Complaint No. 2007-160 (May 2008), the complainant requested several records. Without further elaboration, the custodian denied access to the requested records. The Council, in finding that the custodian violated OPRA, stated "the Custodian's failure to supply the requester with a detailed lawful basis for denial violates N.J.S.A. 47:1A-5(g)." Subsequently, in Rader v. Twp. of Willingboro (Burlington), GRC Complaint No. 2007-239 (June 2008), the Council, upon finding that the custodian's written response was insufficient, noted that "N.J.S.A. 47:1A-5(g) states that if a custodian is 'unable to comply with a request for access, then the custodian shall indicate the specific basis' for noncompliance."

Here, the Complainant stated that the Custodian initially requested, and the Complainant agreed to, a seven (7) business day extension. In his SOI, the Custodian did not comment on or even acknowledge the extension and merely stated that he "initially responded" on June 1, 2015. Moreover the Custodian did not provide, as requested, a copy of his written response as part of his SOI. The GRC has no proof of the written response. Further, even if the initial response was in writing, there is no proof that the Custodian provided the requestor with a specific date for when a further response would be supplied.⁶ By waiting to respond until August, the Custodian failed to meet the statutory deadline for response. Also, when the Custodian finally provided responsive records on August 21, 2015, he failed to state that he was withholding many other responsive records under various privilege claims and therefore failed to supply the requestor with a detailed lawful basis for those responsive records withheld.

Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request within the extended deadline. 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

⁵ 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.

⁶ Although the Custodian did not include with his SOI any proof that he had requested an extension of time, the Complainant acknowledged in his Denial of Access Complaint that the Custodian had requested an "initial seven-day extension, which [the Complainant] granted."

extended time frame, 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.

Furthermore, the Custodian’s response was insufficient by failing to inform the requestor that responsive records were being withheld and failing to state a specific basis for denying access, thus resulting in a violation of N.J.S.A. 47:1A-5(g). Freyer, GRC 2013-110; Morris, GRC 2007-160, Radar, GRC 2007-239.

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.

Personal Information and Privacy standards

OPRA provides that a “public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy . . .” N.J.S.A. 47:1A-1. OPRA further provides that “[g]overnment record’ or ‘record’ means any paper, written or printed book . . . information stored or maintained electronically The terms shall not include [ACD] material.” N.J.S.A. 47:1A-1.1.

In Paff v. NJ Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the Council,⁷ which dismissed the complaint by accepting the custodian’s legal conclusion for the denial of access without further review. The Court stated that “OPRA contemplates the GRC’s meaningful review of the basis for an agency’s decision to withhold government records When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers.” Id. The Court also stated that:

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

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

⁷ 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. at 355,

Moreover, in Smith v. NJ Dept. of Corr., GRC Complaint No. 2005-84 (Interim Order dated November 15, 2006) , the Council faced a similar issue of determining whether “the agenda or schedule of . . . Commissioner Devon Brown . . .” was exempt under the executive privilege and ACD exemptions. The Council held that it was necessary to conduct an *in camera* review of the schedules, reasoning that:

[I]t implicates privacy interests of persons who meet with public officials. However, the general appearances of the Commissioner (which might be otherwise publicized) is not likely exempt from public access in the same manner in which the telephone numbers or the identity of persons with whom the Commissioner might have met.

Id. at 7.

Advisory Consultative and Deliberative Privilege

OPRA excludes from the definition of a government record “inter-agency or intra-agency advisory, consultative or deliberative material.” N.J.S.A. 47:1A-1.1. It is evident that this phrase is intended to exclude from the definition of a government record the types of documents that are the subject of the “deliberative process privilege.”

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

[N]either the statute nor the courts have defined the terms . . . “advisory, consultative, or deliberative” in the context of the public records law. The Council looks to an analogous concept, the deliberative process privilege, for guidance in the implementation of OPRA’s ACD exemption. Both the ACD exemption and the deliberative process privilege enable a governmental entity to shield from disclosure material that is pre-decisional and deliberative in nature. Deliberative material contains opinions, recommendations, or advice about agency policies. In re Liquidation of Integrity Ins. Co., 165 N.J. 75, 88 (2000); In re Readoption With Amendments of Death Penalty Regulations, 182 N.J.149 (2004).

The deliberative process privilege is a doctrine that permits government agencies to withhold documents that reflect advisory opinions, recommendations, and deliberations submitted as part of a process by which governmental decisions and policies are formulated. NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975). Specifically, the New Jersey Supreme Court has ruled that a record that contains or involves factual components is entitled to

deliberative-process protection under the exemption in OPRA when it was used in the decision-making process *and* its disclosure would reveal deliberations that occurred during that process. Educ. Law Ctr. v. NJ Dep't of Educ., 198 N.J. 274 (2009).

The deliberative process privilege was discussed at length in Integrity. There, the Court addressed the question of whether the Commissioner of Insurance, acting in the capacity of liquidator of a regulated entity, could protect certain records from disclosure. The Commissioner asserted that the records contained opinions, recommendations, or advice regarding agency policy. Id. at 81. The Court adopted a qualified deliberative process privilege, based upon the holding of McClain v. Coll. Hosp., 99 N.J. 346 (1985). Integrity, 165 N.J. 88. In doing so, the Court noted that:

A document must meet two requirements for the deliberative process privilege to apply. First, it must have been generated before the adoption of an agency's policy or decision. In other words, it must be pre-decisional . . . Second, the document must be deliberative in nature, containing opinions, recommendations, or advice about agency policies . . . Purely factual material that does not reflect deliberative processes is not protected . . . Once the government demonstrates that the subject materials meet those threshold requirements, the privilege comes into play. In such circumstances, the government's interest in candor is the “preponderating policy” and, prior to considering specific questions of application, the balance is said to have been struck in favor of non-disclosure.

Id. at 84-85 (citations omitted).

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

The initial burden falls on the state agency to show that the documents it seeks to shield are pre-decisional and deliberative in nature (containing opinions, recommendations, or advice about agency policies). Once the deliberative nature of the documents is established, there is a presumption against disclosure. The burden then falls on the party seeking discovery to show that his or her compelling or substantial need for the materials overrides the government's interest in non-disclosure. Among the considerations are the importance of the evidence to the movant, its availability from other sources, and the effect of disclosure on frank and independent discussion of contemplated government policies.

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

If a document or series of documents consists entirely of ACD material, access may be denied, without attempting to disclose the same with redactions. Anonymous v. Ocean City Historic Preserv. Comm'n, GRC Complaint No. 2015-2 (June 2015), *citing In Re Liquidation of Integrity Ins. Co.* 165 N.J. 75 (2000).

In Russomano v. Twp. of Edison (Middlesex), GRC Complaint No. 2013-74 (December 2013), the Complainant requested copies of the Mayor’s appointments and schedule over a three year period that had been stored on his and his secretary’s computers. Those records were denied by the Custodian, based on claims of ACD exemption, executive privilege, and privacy interests. The GRC found that “the facts . . . fall squarely within the facts presented in Smith” and accordingly ordered an *in camera* review of the responsive records to determine the validity of the Custodian’s contentions.

Here the Custodian argues that the City “simply is not capable of providing the document[s] without risking the exposure of advisory, consultative or deliberative material or information that would violate the privacy expectation of individuals.” However, the GRC is not persuaded by the Custodian’s argument. For example, it is difficult to imagine how a release of a document, which might show that the Mayor attended a campaign rally on any given weekday, entails “advisory, consultative, or deliberative” material. Moreover, since many fundraisers or rallies are held in public, a listing of the event on a Mayor’s calendar could hardly violate the reasonable expectations of privacy of either the Mayor or those who attended.⁸

Therefore, the GRC questions the Custodian’s blanket assertion that all of the Mayor’s “private meetings calendar” is privileged as ACD material or contains only personal information needing to be protected from disclosure for privacy reasons. As in Russomano and Smith, the GRC must conduct an *in camera review* to determine whether and to what extent the Mayor’s personal meetings calendar contains exempt ACD material or implicates privacy concerns and personal information outweighing the public’s interest in disclosure.

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 extended time period, 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).

⁸ The GRC previously addressed the status of the Governor’s daily private meeting schedule, holding that the Governor’s schedule is exempt from disclosure based in part on executive privilege. Shearn v. Office of the Governor, GRC Complaint No. 2003-53 (February 2004). However, the GRC finds no legal basis to justify a finding that a local mayor enjoys the same executive privilege that is afforded to the Governor.

2. The Custodian's response was insufficient by failing to inform the requestor that responsive records were being withheld and failing to state a specific basis for denying access, thus resulting in a violation of N.J.S.A. 47:1A-5(g). Freyer v City of Bayonne (Hudson), GRC Complaint No 2013-110 (January 2014); Morris v. Trenton Police Dep't, GRC Complaint No. 2007-160 (May 2008); Rader v. Twp. of Willingboro (Burlington), GRC Complaint No. 2007-239 (June 2008).
3. The GRC questions the Custodian's blanket assertion that all of the Mayor's "private meetings calendar" is privileged as ACD material or contains only personal information needing to be protected from disclosure for privacy reasons. As in Russomano v. Twp. of Edison (Middlesex), GRC Complaint No. 2013-74 (December 2013) and Smith v. N.J. Dept. of Corr., GRC Complaint No. 2005-84 (Interim Order dated November 15, 2006), the GRC must conduct an *in camera* review to determine whether and to what extent the Mayor's private meetings calendar contains exempt ACD material or implicates privacy concerns and personal information outweighing the public's interest in disclosure.
4. **The Custodian must deliver⁹ to the Council in a sealed envelope nine (9) copies of the requested records, which shall include all records withheld by the Custodian, in unredacted form (see No. 3 above). If any records provided to the Complainant were redacted, the Custodian must provide those records together with a duplicate record in unredacted form and a document or redaction index¹⁰. The Custodian must also execute and provide the GRC a legal certification, in accordance with N.J. Court Rule 1:4-4,¹¹ that the records provided are all 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.

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⁹ 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.

¹⁰ The document or redaction index must identify the record and/or each redaction asserted and the lawful basis for each denial.

¹¹ "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."