



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

September 25, 2018 Government Records Council Meeting

Jason Marshall Litowitz
Complainant

Complaint No. 2015-301

v.

NJ Department of Transportation
Custodian of Record

At the September 25, 2018 public meeting, the Government Records Council ("Council") considered the September 18, 2018 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 Acting Custodian was required to establish either of the necessary criteria set forth above: either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. See Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The Acting Custodian has established that the complaint should be reconsidered based on mistake. The Acting Custodian has also shown that the Council acted arbitrarily, capriciously or unreasonably. See D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Specifically, the Council erred in determining that the Acting Custodian violated OPRA by not providing the certification of compliance to the Council within the allotted time as noted in the May 22, 2018 Interim Order. Thus, the Council should grant the Acting Custodian's request for reconsideration based on a mistake. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).
2. The Council should rescind its June 26, 2018 Final Decision conclusion No. 1 and find that the Acting Custodian complied with the May 22, 2018 Interim Order and did not violate OPRA.

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 25th Day of September, 2018

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: September 27, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Reconsideration

**Supplemental Findings and Recommendations of the Council Staff
September 25, 2018 Council Meeting**

**Jason Marshall Litowitz¹
Complainant**

GRC Complaint No. 2015-301

v.

**NJ Department of Transportation²
Custodial Agency**

Records Relevant to Complaint:³

1. All e-mails and other documents sent from Stuart A. Brooks to the e-mail addresses brks627@gmail.com or thetabernaclejournal@gmail.com during 2015.
2. All e-mails and other documents received by Stuart A. Brooks to the e-mail addresses brks627@gmail.com or thetabernaclejournal@gmail.com during 2015.
3. All e-mails and other documents sent from or received by Stuart A. Brooks during 2015 addressed to, addressed from, or mentioning any of the following people or organizations:
 - a. Fran Brooks
 - b. Jason Litowitz
 - c. Walter Luers
 - d. NJ Foundation for Open Government (NJFOG)
 - e. Tabernacle Township
 - f. Tabernacle Township Committee
 - g. Medford Farms Volunteer Fire Company
 - h. Tabernacle Fire Company #1
 - i. Kim Brown
 - j. Stephan Lee
 - k. Richard Franzen
 - l. Joseph Yates
 - m. Joseph Barton
 - n. Peter Lange
 - o. LaShawn Barber
 - p. Robert Brick
4. All e-mails and other documents sent from or received by Stuart A. Brooks during 2015 mentioning 67 Moore's Meadow Road.

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Brad M. Reiter.

³ The Complainant sought other records that are not at issue in this matter.

Custodian of Record: Elizabeth H. Ferencevych (Acting)⁴

Request Received by Custodian: August 12, 2015

Response Made by Custodian: August 12, 2015; September 8, 2015; September 11, 2015; September 23, 2015

GRC Complaint Received: September 24, 2015

Background

June 26, 2018 Council Meeting:

At its June 26, 2018 public meeting, the Council considered the June 19, 2018 Supplemental Findings and Recommendations of the Council Staff 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. Ms. Ferencevych failed to fully comply with the Council's May 22, 2018 Interim Order. Specifically, although Ms. Ferencevych timely provided all responsive records to the Complainant, she failed to seek an extension of time to respond to the Interim Order and provide a certification within the designated deadline.
2. The original Custodian unlawfully denied access to the responsive e-mails. N.J.S.A. 47:1A-6. Furthermore, Ms. Ferencevych did not fully comply with the Council's May 22, 2018 Interim Order. However, Ms. Ferencevych timely provided all responsive records to the Complainant on May 30, 2018. Additionally, the evidence of record does not indicate that either the original Custodian or Ms. Ferencevych's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the original Custodian and Ms. Ferencevych'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.

Procedural History:

On June 29, 2018, the Council distributed its Final Decision to all parties. On July 16, 2018, the Custodian filed a request for reconsideration of the Council's June 26, 2018 Final Decision based on a mistake.

The Custodian asserted that reconsideration was proper since Ms. Elizabeth Ferencevych ("Acting Custodian") fully complied with the Council's Interim Order, and did not violate OPRA. The Acting Custodian certified that on May 30, 2018, two (2) days prior to the deadline, she e-mailed the responsive records to the Complainant in accordance with the Interim Order, and executed a certification which affirmed that the responsive records were provided to the Complainant. The Acting Custodian then certified that she directed her staff to send the certification to the Government Records Council ("GRC"). The Acting Custodian certified that the certification was sent to the GRC via U.S. Mail on May 31, 2018.

⁴ The Records Custodian at the time of the OPRA request was Maria C. Jacobi. Amalia McShane is the current Records Custodian.

The Acting Custodian asserted that she complied with the Interim Order by providing the records and simultaneously executing a certification within the allotted time. The Acting Custodian contended that the Interim Order was silent as to when the certification was to be delivered to the GRC. Additionally, the Acting Custodian asserted that she was unaware that her certification did not arrive on or before June 1, 2018 until she received a copy of the June 26, 2018 Final Decision.

Furthermore, the Acting Custodian contended that she did not violate OPRA, stating that the GRC did not cite any provision of OPRA she allegedly violated. The Acting Custodian asserted that she did not violate any provision of OPRA by mailing a copy of her certification to the GRC.

Analysis

Reconsideration

Pursuant to N.J.A.C. 5:105-2.10, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. Requests must be in writing, delivered to the Council and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. N.J.A.C. 5:105-2.10(a) – (e).

In the matter before the Council, the Acting Custodian filed the request for reconsideration of the Council's Order dated June 26, 2018 on July 16, 2018, ten (10) business days from the issuance of the Council's Order.

Applicable case law holds that:

“A party should not seek reconsideration merely based upon dissatisfaction with a decision.” D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a “palpably incorrect or irrational basis;” or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D'Atria, . . . 242 N.J. Super. at 401. “Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement.” Ibid.

[In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).]

Here, the Council's May 22, 2018 Interim Order required the Custodian to comply by the end of business on June 1, 2018. Because the Order required the Acting Custodian to provide the certification of compliance to the Council simultaneous with records disclosure, the Acting Custodian was obligated to execute both by the June 1, 2018 deadline. Notwithstanding, the Acting Custodian certified that she provided the records to the Complainant within the allotted time, and thus did not violate OPRA with respect to the Interim Order. Additionally, the Acting Custodian demonstrated her good faith attempt to timely provide the certification, certifying that she mailed the compliance certification prior to the deadline. Therefore, the Council should reconsider the complaint for the limited purpose of curing the issue of whether the Acting Custodian violated OPRA.

As the moving party, the Acting Custodian was required to establish either of the necessary criteria set forth above: either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. See Cummings, 295 N.J. Super. at 384. The Acting Custodian has established that the complaint should be reconsidered based on mistake. The Acting Custodian has also shown that the Council acted arbitrarily, capriciously or unreasonably. See D'Atria, 242 N.J. Super. at 401. Specifically, the Council erred in determining that the Acting Custodian violated OPRA by not providing the certification of compliance to the Council within the allotted time as noted in the May 22, 2018 Interim Order. Thus, the Council should grant the Acting Custodian's request for reconsideration based on a mistake. Cummings, 295 N.J. Super. at 384; D'Atria, 242 N.J. Super. at 401; Comcast, 2003 N.J. PUC at 5-6.

Based on the foregoing, the Council should rescind its June 26, 2018 Final Decision conclusion No. 1 and find that the Acting Custodian complied with the May 22, 2018 Interim Order and did not violate OPRA.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. The Acting Custodian was required to establish either of the necessary criteria set forth above: either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. See Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The Acting Custodian has established that the complaint should be reconsidered based on mistake. The Acting Custodian has also shown that the Council acted arbitrarily, capriciously or unreasonably. See D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Specifically, the Council erred in determining that the Acting Custodian violated OPRA by not providing the certification of compliance to the Council within the allotted time as noted in the May 22, 2018 Interim Order. Thus, the Council should grant the Acting Custodian's request for reconsideration based on a mistake. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel.

Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

2. The Council should rescind its June 26, 2018 Final Decision conclusion No. 1 and find that the Acting Custodian complied with the May 22, 2018 Interim Order and did not violate OPRA.

Prepared By: Samuel A. Rosado
Staff Attorney

July 24, 2018⁵

⁵ The matter was scheduled for adjudication at the July 31, 2018 and August 28, 2018 meetings, but were tabled for additional review.



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FINAL DECISION

June 26, 2018 Government Records Council Meeting

Jason Marshall Litowitz
Complainant

Complaint No. 2015-301

v.

NJ Department of Transportation
Custodian of Record

At the June 26, 2018 public meeting, the Government Records Council (“Council”) considered the June 19, 2018 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. Ms. Ferencevych failed to fully comply with the Council’s May 22, 2018 Interim Order. Specifically, although Ms. Ferencevych timely provided all responsive records to the Complainant, she failed to seek an extension of time to respond to the Interim Order and provide a certification within the designated deadline.
2. The original Custodian unlawfully denied access to the responsive e-mails. N.J.S.A. 47:1A-6. Furthermore, Ms. Ferencevych did not fully comply with the Council’s May 22, 2018 Interim Order. However, Ms. Ferencevych timely provided all responsive records to the Complainant on May 30, 2018. Additionally, the evidence of record does not indicate that either the original Custodian or Ms. Ferencevych’s violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the original Custodian and Ms. Ferencevych’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 26th Day of June, 2018

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: June 29, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Council Staff
June 26, 2018 Council Meeting**

**Jason Marshall Litowitz¹
Complainant**

GRC Complaint No. 2015-301

v.

**NJ Department of Transportation²
Custodial Agency**

Records Relevant to Complaint:³

1. All e-mails and other documents sent from Stuart A. Brooks to the e-mail addresses brks627@gmail.com or thetabernaclejournal@gmail.com during 2015.
2. All e-mails and other documents received by Stuart A. Brooks to the e-mail addresses brks627@gmail.com or thetabernaclejournal@gmail.com during 2015.
3. All e-mails and other documents sent from or received by Stuart A. Brooks during 2015 addressed to, addressed from, or mentioning any of the following people or organizations:
 - a. Fran Brooks
 - b. Jason Litowitz
 - c. Walter Luers
 - d. NJ Foundation for Open Government (NJFOG)
 - e. Tabernacle Township
 - f. Tabernacle Township Committee
 - g. Medford Farms Volunteer Fire Company
 - h. Tabernacle Fire Company #1
 - i. Kim Brown
 - j. Stephan Lee
 - k. Richard Franzen
 - l. Joseph Yates
 - m. Joseph Barton
 - n. Peter Lange
 - o. LaShawn Barber
 - p. Robert Brick
4. All e-mails and other documents sent from or received by Stuart A. Brooks during 2015 mentioning 67 Moore's Meadow Road

Custodian of Record: Amalia McShane⁴

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Brad M. Reiter.

³ The Complainant sought other records that are not at issue in this matter.

⁴ The Records Custodian at the time of the OPRA request was Maria C. Jacobi.

Request Received by Custodian: August 12, 2015

Response Made by Custodian: August 12, 2015; September 8, 2015; September 11, 2015; September 23, 2015

GRC Complaint Received: September 24, 2015

Background

May 22, 2018 Council Meeting:

At its May 22, 2018 public meeting, the Council considered the May 15, 2018 Findings and Recommendations of the Council Staff 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 original Custodian did not unlawfully deny access to the redacted portions of these e-mail records because they contain information exempt from disclosure pursuant to N.J.S.A. 47:1A-9(a), HIPPA's Privacy Rule, and N.J.A.C. 17:9-1.2. N.J.S.A. 47:1A-6. See also Michelson v. Wyatt, 379 N.J. Super. 611 (App. Div. 2005).
2. The original Custodian did not unlawfully access to the those e-mail records identified as personal communications and not defined as government records. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-1.1. Additionally, although the records identified in the table contain non-personal communications, the subject matter contains ACD material and are therefore not subject to access. N.J.S.A. 47:1A-1.1; Libertarians for Transparent Gov't v. Gov't Records Council, ___ N.J. Super. ___ (App. Div. 2018). However, consistent with N.J.S.A. 47:1A-5(g), if the custodian of a government record asserts that part of a particular record is exempt from public access pursuant to OPRA, the custodian must delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and must promptly permit access to the remainder of the record. Thus, the Custodian must disclose all other portions of the requested e-mail to the Complainant (*i.e.*, sender, recipients, date, time, subject, and closing salutations). To those portions of the requested e-mails and memos, the original Custodian has unlawfully denied access.
3. **The Custodian shall comply with item nos. 1 & 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁵ to the Council Staff.⁶**

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.

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

Procedural History:

On May 24, 2018, the Council distributed its Interim Order to all parties. On June 4, 2018, Elizabeth H. Ferencevych (“Ms. Ferencevych”), temporarily serving as the Records Custodian, responded to the Council’s Interim Order. Ms. Ferencevych provided a certification asserting that on May 30, 2018, she delivered responsive records to the Complainant in accordance with the Interim Order.

Analysis

Compliance

At its May 22, 2018 meeting, the Council ordered the Custodian to provide responsive records to the Complainant or submit evidence that such records had previously been provided, and to submit certified confirmation of compliance, in accordance with R. 1:4-4, to the Council Staff. On May 24, 2018, 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 June 1, 2018.

On June 4, 2018, the sixth (6th) business day after receipt of the Council’s Order, Ms. Ferencevych responded to the Interim Order, certifying that the responsive records were provided to the Complainant on May 30, 2018, as well as a certified confirmation of compliance to the Council Staff.

Therefore, Ms. Ferencevych failed to fully comply with the Council’s May 22, 2018 Interim Order. Specifically, although Ms. Ferencevych timely provided all responsive records to the Complainant, she failed to seek an extension of time to respond to the Interim Order and provide a certification within the designated deadline.

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 (E.C.E.S. v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

In the matter before the Council, the original Custodian unlawfully denied access to the responsive e-mails. N.J.S.A. 47:1A-6. Furthermore, Ms. Ferencevych did not fully comply with the Council’s May 22, 2018 Interim Order. However, Ms. Ferencevych timely provided all responsive records to the Complainant on May 30, 2018. Additionally, the evidence of record does not indicate that either the original Custodian or Ms. Ferencevych’s violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the original Custodian and Ms. Ferencevych’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 Council Staff respectfully recommends the Council find that:

1. Ms. Ferencevych failed to fully comply with the Council’s May 22, 2018 Interim Order. Specifically, although Ms. Ferencevych timely provided all responsive records to the Complainant, she failed to seek an extension of time to respond to the Interim Order and provide a certification within the designated deadline.
2. The original Custodian unlawfully denied access to the responsive e-mails. N.J.S.A. 47:1A-6. Furthermore, Ms. Ferencevych did not fully comply with the Council’s May 22, 2018 Interim Order. However, Ms. Ferencevych timely provided all responsive records to the Complainant on May 30, 2018. Additionally, the evidence of record does not indicate that either the original Custodian or Ms. Ferencevych’s violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the original Custodian and Ms. Ferencevych’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: Samuel A. Rosado
Staff Attorney

June 19, 2018



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

May 22, 2018 Government Records Council Meeting

Jason Marshall Litowitz
Complainant

Complaint No. 2015-301

v.

NJ Department of Transportation
Custodian of Record

At the May 22, 2018 public meeting, the Government Records Council (“Council”) considered the May 15, 2018 Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian complied with the Council’s June 27, 2017 Interim Order because she responded in the prescribed time frame providing nine (9) copies of the responsive records for *in camera* review and simultaneously provided certified confirmation of compliance to the Executive Director.
2. The original Custodian did not unlawfully deny access to the redacted portions of these e-mail records because they contain information exempt from disclosure pursuant to N.J.S.A. 47:1A-9(a), HIPPA’s Privacy Rule, and N.J.A.C. 17:9-1.2. N.J.S.A. 47:1A-6. See also Michelson v. Wyatt, 379 N.J. Super. 611 (App. Div. 2005).
3. The original Custodian did not unlawfully access to the those e-mail records identified as personal communications and not defined as government records. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-1.1. Additionally, although the records identified in the table contain non-personal communications, the subject matter contains ACD material and are therefore not subject to access. N.J.S.A. 47:1A-1.1; Libertarians for Transparent Gov’t v. Gov’t Records Council, ___ N.J. Super. ___ (App. Div. 2018). However, consistent with N.J.S.A. 47:1A-5(g), if the custodian of a government record asserts that part of a particular record is exempt from public access pursuant to OPRA, the custodian must delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and must promptly permit access to the remainder of the record. Thus, the Custodian must disclose all other portions of the requested e-mail to the Complainant (*i.e.*, sender, recipients, date, time, subject, and closing salutations). To those portions of the requested e-mails and memos, the original Custodian has unlawfully denied access.



4. **The Custodian shall comply with item no. 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,¹ to the Council Staff.²**
5. The Council defers analysis of whether the original Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 22nd Day of May, 2018

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 24, 2018

¹ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

² Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Council Staff
May 22, 2018 Council Meeting**

**Jason Marshall Litowitz¹
Complainant**

GRC Complaint No. 2015-301

v.

**NJ Department of Transportation²
Custodial Agency**

Records Relevant to Complaint:³

1. All e-mails and other documents sent from Stuart A. Brooks to the e-mail addresses brks627@gmail.com or thetabernaclejournal@gmail.com during 2015.
2. All e-mails and other documents received by Stuart A. Brooks to the e-mail addresses brks627@gmail.com or thetabernaclejournal@gmail.com during 2015.
3. All e-mails and other documents sent from or received by Stuart A. Brooks during 2015 addressed to, addressed from, or mentioning any of the following people or organizations:
 - a. Fran Brooks
 - b. Jason Litowitz
 - c. Walter Luers
 - d. NJ Foundation for Open Government (NJFOG)
 - e. Tabernacle Township
 - f. Tabernacle Township Committee
 - g. Medford Farms Volunteer Fire Company
 - h. Tabernacle Fire Company #1
 - i. Kim Brown
 - j. Stephan Lee
 - k. Richard Franzen
 - l. Joseph Yates
 - m. Joseph Barton
 - n. Peter Lange
 - o. LaShawn Barber
 - p. Robert Brick
4. All e-mails and other documents sent from or received by Stuart A. Brooks during 2015 mentioning 67 Moore's Meadow Road

Custodian of Record: Maria C. Jacobi⁴

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Valentina M. DiPippo.

³ The Complainant sought other records that are not at issue in this matter.

⁴ The current Custodian of Record is Amalia McShane.

Request Received by Custodian: August 12, 2015

Response Made by Custodian: August 12, 2015; September 8, 2015; September 11, 2015; September 23, 2015

GRC Complaint Received: September 24, 2015

Records Submitted for *In Camera* Examination: 136 responsive e-mails withheld from disclosure on the basis they contain personal communications are therefore not government records under N.J.S.A. 47:1A-1.1.

Background

June 27, 2017 Council Meeting:

At its June 27, 2017 public meeting, the Council considered the June 20, 2017 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. Although the Custodian properly sought an extension of time on August 12, 2015, to respond to the Complainant's OPRA request, the request is "deemed" denied because the Custodian failed to respond timely within the extended timeframe. 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 dated October 31, 2007).
2. Item Nos. 1 & 2 of the Complainant's August 12, 2015 OPRA request are invalid because they fail to include the subject matter or content of the requested e-mails. *See* MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005); Elcavage v. Twp. of West Milford (Passaic), GRC Complaint Nos. 2009-07 & 2009-08 (March 2010); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2009-124 (April 2010). Thus, there was no unlawful denial of access regarding that portion of the OPRA request. N.J.S.A. 47:1A-6.
3. Because Item Nos. 3 & 4 of the Complainant's OPRA request for e-mail correspondence contain the sender and/or recipient, content and/or subject matter, and a specific date range, they are valid requests under OPRA. *See* Elcavage v. Twp. of West Milford (Passaic), GRC Complaint Nos. 2009-07 & 2009-08 (March 2010); Sandoval v. NJ State Parole Bd., GRC Complaint No. 2006-167 (Interim Order dated March 28, 2007); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2015-97 *et seq.* (Interim Order dated March 22, 2016).
4. The content within the e-mail pertaining to an employee's health insurance is not subject to disclosure under OPRA. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-10; Michelson v. Wyatt, 379 N.J. Super. 611 (App. Div. 2005). However, consistent with N.J.S.A. 47:1A-5(g), if the custodian of a government record asserts that part of a particular record is exempt from public access under OPRA, the custodian must delete or excise that portion from a copy of the record and must promptly permit access to the remainder of the record. Thus, the

Custodian must disclose all other portions of the requested e-mails to the Complainant (*i.e.*, sender, recipients, date, time, subject, and closing salutations). To these portions of the e-mail, the Custodian has unlawfully denied access. *See Ray v. Freedom Academy Charter Sch. (Camden)*, GRC Complaint No. 2009-185 (Interim Order dated May 24, 2011).

5. Given the Custodian's certification that the remaining 136 e-mails were personal communications and not government records under N.J.S.A. 47:1A-1.1, the GRC must conduct an *in camera* review of the e-mails to complaint a meaningful investigation of the complaint. Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).
6. **The Custodian must deliver⁵ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see #5 above), a document or redaction index⁶, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,⁷ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
7. 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 June 29, 2017, the Council distributed its Interim Order to all parties. On July 6, 2017, the Custodian responded to the Council's Interim Order. The Custodian certified that she provided nine (9) unredacted copies of the provided e-mails containing redactions, as well as nine (9) copies of the records withheld from disclosure for *in camera* review.

Analysis

Compliance

At its June 27, 2017 meeting, the Council ordered the Custodian to submit nine (9) copies of the responsive records for *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 June 29, 2017, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on July 7, 2017.

⁵ 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.

⁶ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

⁷ "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."

On July 6, 2017, the fourth (4th) business day after receipt of the Council's Order, the Custodian responded to the Interim Order, providing nine (9) copies of all responsive e-mails withheld from disclosure, as well as nine (9) copies provided to the Complainant containing redactions, as well as a certified confirmation of compliance to the Executive Director.

Therefore, the Custodian complied with the Council's June 27, 2017 Interim Order because she responded in the prescribed time frame providing nine (9) copies of the responsive records for *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.

The Council is permitted to raise additional defenses regarding the disclosure of records pursuant to Paff v. Twp. of Plainsboro, No. A-2122-05T2, 2007 N.J. Super. Unpub. LEXIS 2135 (App. Div. Apr. 2, 2007), certif. denied, 193 N.J. 292 (2007).⁸ In Paff, the complainant challenged the GRC's authority to uphold a denial of access for reasons never raised by the custodian. Slip op. at 3. Specifically, the Council did not uphold the basis for the redactions cited by the custodian. Ibid. The Council, on its own initiative, determined that the Open Public Meetings Act prohibited the disclosure of the redacted portions to the requested executive session minutes. Id. at 2. The Council affirmed the custodian's denial to portions of the executive session minutes but for reasons other than those cited by the custodian. Paff, supra, slip op. at 2. The complainant argued that the GRC did not have the authority to do anything other than determine whether the custodian's cited basis for denial was lawful. Id. at 3-4. The Court held that:

The GRC has an independent obligation to "render a decision as to whether the record which is the subject of the complaint is a government record which must be made available for public access pursuant to' OPRA . . . The GRC is not limited to assessing the correctness of the reasons given for the custodian's initial determination; it is charged with determining if the initial decision was correct."

[Id. at 4.]

The Court further stated that:

Aside from the clear statutory mandate to decide if OPRA requires disclosure, the authority of a reviewing agency to affirm on reasons not advanced by the reviewed agency is well established. Cf. Bryant v. City of Atl. City, 309 N.J. Super. 596, 629-30 (App. Div. 1998) (citing Isko v. Planning Bd. of Livingston, 51 N.J. 162, 175 (1968) (lower court decision may be affirmed for reasons other than those given

⁸ On appeal from Paff v. Township of Plainsboro, GRC Complaint No. 2005-29 (March 2006).

below)); Dwyer v. Erie Inv. Co., 138 N.J. Super. 93, 98 (App. Div. 1975) (judgments must be affirmed even if lower court gives wrong reason), certif. denied, 70 N.J. 142 (1976); Bauer v. 141-149 Cedar Lane Holding Co., 42 N.J. Super. 110, 121 (App. Div. 1956) (question for reviewing court is propriety of action reviewed, not the reason for the action), aff'd, 24 N.J. 139 (1957).

[Id. at 4-5.]

Medical Information (Item No. 4)

OPRA states that, “[t]he provisions of [OPRA] shall not abrogate any exemption of a public record...from public access made pursuant to [OPRA] . . . regulation promulgated under the authority of any statute . . .” N.J.S.A. 47:1A-9(a).

The Health Insurance Portability and Accountability Act (“HIPPA”)’s Privacy Rule protects all individually identifiable health information held or transmitted by a covered entity or its business associate, in any form or media, whether electronic, paper, or oral. 45 C.F.R. 160.103. The Privacy Rule calls this information “protected health information (PHI).” Id. In accordance with HIPPA, the New Jersey Administrative Code section regarding the State Health Benefits Program states in part that “records considered confidential include all matters related to the coverage of individual participants and their families, mailing addresses of active and retired participants and individual files related to claims.” N.J.A.C. 17:9-1.2.

Here, in response to the Council’s Interim Order, the Custodian provided copies of those e-mail records containing health insurance information and marked for redaction. A review of the records reveals that the redacted content explicitly discuss an employee and his spouse’s health insurance coverage and related procedures in applying for and/or changing the coverage. The disclosure of such discussions would clearly violate the privacy provisions under HIPPA and N.J.A.C. 17:9-1.2.

Therefore, the original Custodian did not unlawfully deny access to the redacted portions of these e-mail records because they contain information exempt from disclosure pursuant to N.J.S.A. 47:1A-9(a), HIPPA’s Privacy Rule, and N.J.A.C. 17:9-1.2. N.J.S.A. 47:1A-6. See also Michelson v. Wyatt, 379 N.J. Super. 611 (App. Div. 2005).

Draft Records (Item No. 5)

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.” Ciesla v. N.J. Dep’t of Health & Sr. Servs., 429 N.J. Super. 127, 137 (App. Div. 2012).

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

[N]either the statute nor the courts have defined the terms . . . “advisory, consultative, or deliberative” in the context of the public records law. The Council looks to an analogous concept, the deliberative process privilege, for guidance in the implementation of OPRA’s ACD exemption. Both the ACD exemption and the deliberative process privilege enable a governmental entity to shield from disclosure material that is pre-decisional and deliberative in nature. Deliberative material contains opinions, recommendations, or advice about agency policies. In Re the Liquidation of Integrity Ins. Co., 165 N.J. 75, 88 (2000); In re Readoption With Amendments of Death Penalty Regulations, 182 N.J. 149 (App. Div. 2004).⁹

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. N.J. Dep’t of Educ., 198 N.J. 274 (2009). This long-recognized privilege is rooted in the concept that the sovereign has an interest in protecting the integrity of its deliberations. The earliest federal case adopting the privilege is Kaiser Alum. & Chem. Corp. v. United States, 157 F. Supp. 939 (1958). The privilege and its rationale were subsequently adopted by the federal district courts and circuit courts of appeal. United States v. Farley, 11 F.3d 1385, 1389 (7th Cir. 1993).

The deliberative process privilege was discussed at length in Libertarians for Transparent Gov’t v. Gov’t Records Council, ___ N.J. Super. ___ (App. Div. 2018). There, the Appellate Division addressed the question of whether draft meeting minutes are government records subject to disclosure. Slip op. at 1. The court described the two-prong test as follows:

The judge must determine both that a document is (1) "pre-decisional," meaning it was "generated before the adoption of an agency's policy or decision;" and (2) deliberative, in that it "contain[s] opinions, recommendations, or advice about agency policies." If a document satisfies both prongs, it is exempt from disclosure under OPRA pursuant to the deliberative process privilege.

[Id. at 5 (citations omitted).]

The court held that “a draft document is not a final document.” Id. at 6. “By their very nature, draft documents are preliminary and subject to future revision.” Id. (quoting Ciesla, 429 N.J. Super. at 140.) Therefore, the draft meeting minutes are pre-decisional and satisfied the first prong. Id. Regarding the second prong, the court held that the differences (if any) between the draft document and its approved version is inapposite as to whether it retains protection under the deliberative process privilege. Id. at 8. As draft documents, meeting minutes remain subject to revision by the board members to better reflect the discussions, positions, and decisions which transpired. Id. The court noted that “it is not until an agency’s members approve the minutes that

⁹ Affirmed on appeal. See O’Shea v. West Milford Board of Education, 391 N.J. Super. 534, 538 (App. Div. 2007), certif. denied, 192 N.J. 292 (2007).

they become part of the public record.” *Id.* Thus, the court found that draft meeting minutes satisfy the second prong of the test, and are therefore not subject to access under OPRA. *Id.* at 9.

Here, the GRC conducted an *in camera* examination of the 184 total pages of records. Of those records not noted in the following table, the GRC is satisfied upon review that the subject matter contained therein was personal communications, and not government records as defined under N.J.S.A. 47:1A-1.1:

Record Page Nos.	Record Name/Date	Description of the Record	Custodian’s Explanation/ Citation for Redactions	Findings of the <i>In Camera</i> Examination¹⁰
7-9	E-mail chain from Stuart Brooks to Fran Brooks, dated March 4, 2015 (12:49 p.m.)	Discussion on personal errands; Draft transportation code regulations.	The e-mail contains personal communications and are therefore not government records.	Page 7: The first and second e-mail in the chain contains personal communications and is therefore not a government record. Pages 7-9: Although not a personal record, the third e-mail contains draft regulations to the transportation section of New Jersey’s administrative code, and is therefore draft material not subject to disclosure.
10-12	E-mail chain from Stuart Brooks to Fran Brooks, dated March 4, 2015 (12:46 p.m.)	Discussion on personal errands; Draft transportation code regulations.	The e-mail contains personal communications and are therefore not government records.	Page 10: The first thru fourth e-mail in the chain contains personal communications and is therefore not a government record. Pages 10-12: Although not a personal record, the fifth e-

¹⁰ **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.

				mail contains draft regulations to the transportation section of New Jersey's administrative code, and is therefore draft material not subject to disclosure.
13-15	E-mail chain from Stuart Brooks to Fran Brooks, dated March 4, 2015 (12:31 p.m.)	Discussion on personal errands; Draft transportation code regulations.	The e-mail contains personal communications and are therefore not government records.	Page 13: The first e-mail in the chain contains personal communications and is therefore not a government record. Pages 13-15: Although not a personal communication, the second e-mail contains draft regulations to the transportation section of New Jersey's administrative code, and is therefore draft material not subject to disclosure.
17-18	E-mail from Stuart Brooks to Fran Brooks, dated March 4, 2015 (11:56 a.m.)	Draft transportation code regulations.	The e-mail contains personal communications and are therefore not government records.	Although not a personal communication, the e-mail contains draft regulations to the transportation section of New Jersey's administrative code, and is therefore draft material not subject to disclosure.
139-142	E-mail chain from Fran Brooks to Stuart Brooks, dated March 4, 2015 (1:28 p.m.)	Discussion on personal errands; Draft transportation code regulations.	The e-mail contains personal communications and are therefore not government records.	Page 139: The first thru fifth e-mail in the chain contains personal communications and is therefore not a government record. Pages 140-142: Although not a personal communication, the sixth e-mail contains draft regulations to the transportation section of New Jersey's administrative code, and is therefore draft material not subject to disclosure.
143-145	E-mail chain from Fran Brooks to Stuart Brooks,	Discussion on personal errands; Draft	The e-mail contains personal communications and are therefore	Page 143: The first thru third e-mail in the chain contains personal communications

	dated March 4, 2015 (12:34 p.m.)	transportation code regulations.	not government records.	and is therefore not a government record. Pages 143-145: Although not a personal communication, the fourth e-mail contains draft regulations to the transportation section of New Jersey's administrative code, and is therefore draft material not subject to disclosure.
146-148	E-mail chain from Fran Brooks to Stuart Brooks, dated March 4, 2015 (12:15 p.m.)	Discussion on personal errands; Draft transportation code regulations.	The e-mail contains personal communications and are therefore not government records.	Page 146: The first e-mail in the chain contains personal communications and is therefore not a government record. Pages 146-148: Although not a personal communication, the second e-mail contains draft regulations to the transportation section of New Jersey's administrative code, and is therefore draft material not subject to disclosure.

As set forth in the above table, although the original Custodian improperly identified some of the e-mails as only contained personal matters, the Custodian lawfully denied access to the records on grounds identified by the GRC. N.J.S.A. 47:1A-1.1. The aforementioned e-mails contained in part a "final draft" of a section of New Jersey's transportation regulations. As Stuart Brooks is an employee of New Jersey's Department of Transportation, regulations pertaining to the agency are relevant to his official business.

However, as was the case in Libertarians, draft regulations remain subject final approval, even if described as a "final draft." (Slip op. at 6). As draft documents, they are pre-decisional in nature, thus satisfying the first prong. Furthermore, regulations are a reflection of an agency's public policy. They are formulated based upon recommendations, advice, and input from various sources. See e.g., N.J.A.C. 1:30-5.4. Thus, draft regulations satisfy the second prong of the test.

Therefore, the original Custodian did not unlawfully access to the those e-mail records identified as personal communications and not defined as government records. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-1.1. Additionally, although the records identified in the table contain non-personal communications, the subject matter contains ACD material and are therefore not subject to access. N.J.S.A. 47:1A-1.1; Libertarians. However, consistent with N.J.S.A. 47:1A-5(g), if the custodian of a government record asserts that part of a particular record is exempt from public access pursuant to OPRA, the custodian must delete or excise from a copy of the record that portion which

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

Knowing & Willful

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

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. The Custodian complied with the Council's June 27, 2017 Interim Order because she responded in the prescribed time frame providing nine (9) copies of the responsive records for *in camera* review and simultaneously provided certified confirmation of compliance to the Executive Director.
2. The original Custodian did not unlawfully deny access to the redacted portions of these e-mail records because they contain information exempt from disclosure pursuant to N.J.S.A. 47:1A-9(a), HIPPA's Privacy Rule, and N.J.A.C. 17:9-1.2. N.J.S.A. 47:1A-6. See also Michelson v. Wyatt, 379 N.J. Super. 611 (App. Div. 2005).
3. The original Custodian did not unlawfully access to the those e-mail records identified as personal communications and not defined as government records. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-1.1. Additionally, although the records identified in the table contain non-personal communications, the subject matter contains ACD material and are therefore not subject to access. N.J.S.A. 47:1A-1.1; Libertarians for Transparent Gov't v. Gov't Records Council, ___ N.J. Super. ___ (App. Div. 2018). However, consistent with N.J.S.A. 47:1A-5(g), if the custodian of a government record asserts that part of a particular record is exempt from public access pursuant to OPRA, the custodian must delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and must promptly permit access to the remainder of the record. Thus, the Custodian must disclose all other portions of the requested e-mail to the Complainant (*i.e.*, sender, recipients, date, time, subject, and closing salutations). To those portions of the requested e-mails and memos, the original Custodian has unlawfully denied access.
4. **The Custodian shall comply with item no. 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, and**

simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,¹¹ to the Council Staff.¹²

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

Prepared By: Samuel A. Rosado
Staff Attorney

May 15, 2018

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."

¹² 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
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

INTERIM ORDER

June 27, 2017 Government Records Council Meeting

Jason Marshall Litowitz
Complainant

Complaint No. 2015-301

v.

NJ Department of Transportation
Custodian of Record

At the June 27, 2017 public meeting, the Government Records Council (“Council”) considered the June 20, 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. Although the Custodian properly sought an extension of time on August 12, 2015, to respond to the Complainant’s OPRA request, the request is “deemed” denied because the Custodian failed to respond timely within the extended timeframe. 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 dated October 31, 2007).
2. Item Nos. 1 & 2 of the Complainant’s August 12, 2015 OPRA request are invalid because they fail to include the subject matter or content of the requested e-mails. *See* MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005); Elcavage v. Twp. of West Milford (Passaic), GRC Complaint Nos. 2009-07 & 2009-08 (March 2010); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2009-124 (April 2010). Thus, there was no unlawful denial of access regarding that portion of the OPRA request. N.J.S.A. 47:1A-6.
3. Because Item Nos. 3 & 4 of the Complainant’s OPRA request for e-mail correspondence contain the sender and/or recipient, content and/or subject matter, and a specific date range, they are valid requests under OPRA. *See* Elcavage v. Twp. of West Milford (Passaic), GRC Complaint Nos. 2009-07 & 2009-08 (March 2010); Sandoval v. NJ State Parole Bd., GRC Complaint No. 2006-167 (Interim Order dated March 28, 2007); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2015-97 *et seq.* (Interim Order dated March 22, 2016).
4. The content within the e-mail pertaining to an employee’s health insurance is not subject to disclosure under OPRA. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-10; Michelson v. Wyatt, 379 N.J. Super. 611 (App. Div. 2005). However, consistent with N.J.S.A. 47:1A-5(g), if the custodian of a government record asserts that part of a particular record is exempt from public access under OPRA, the custodian must delete or excise that portion from a copy of the record and must promptly permit access to the remainder of the record. Thus, the

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Custodian must disclose all other portions of the requested e-mails to the Complainant (*i.e.*, sender, recipients, date, time, subject, and closing salutations). To these portions of the e-mail, the Custodian has unlawfully denied access. See Ray v. Freedom Academy Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated May 24, 2011).

5. Given the Custodian's certification that the remaining 136 e-mails were personal communications and not government records under N.J.S.A. 47:1A-1.1, the GRC must conduct an *in camera* review of the e-mails to complaint a meaningful investigation of the complaint. Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).
6. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see #5 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.**
7. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 27th Day of June, 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: June 29, 2017

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
June 27, 2017 Council Meeting**

**Jason Marshall Litowitz¹
Complainant**

GRC Complaint No. 2015-301

v.

**NJ Department of Transportation²
Custodial Agency**

Records Relevant to Complaint:³

1. All e-mails and other documents sent from Stuart A. Brooks to the e-mail addresses brks627@gmail.com or thetabernaclejournal@gmail.com during 2015.
2. All e-mails and other documents received by Stuart A. Brooks to the e-mail addresses brks627@gmail.com or thetabernaclejournal@gmail.com during 2015.
3. All e-mails and other documents sent from or received by Stuart A. Brooks during 2015 addressed to, addressed from, or mentioning any of the following people or organizations:
 - a. Fran Brooks
 - b. Jason Litowitz
 - c. Walter Luers
 - d. NJ Foundation for Open Government (NJFOG)
 - e. Tabernacle Township
 - f. Tabernacle Township Committee
 - g. Medford Farms Volunteer Fire Company
 - h. Tabernacle Fire Company #1
 - i. Kim Brown
 - j. Stephan Lee
 - k. Richard Franzen
 - l. Joseph Yates
 - m. Joseph Barton
 - n. Peter Lange
 - o. LaShawn Barber
 - p. Robert Brick
4. All e-mails and other documents sent from or received by Stuart A. Brooks during 2015 mentioning 67 Moore's Meadow Road

Custodian of Record: Maria C. Jacobi

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Valentina M. DiPippo.

³ The Complainant sought other records that are not at issue in this matter.

Request Received by Custodian: August 12, 2015

Response Made by Custodian: August 12, 2015; September 8, 2015; September 11, 2015; September 23, 2015

GRC Complaint Received: September 24, 2015

Background⁴

Request and Response:

On August 12, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. That same day, the Custodian sought an extension of time until September 4, 2015. On, September 8, 2015, the Custodian sought an additional extension to until September 21, 2015. On September 11, 2015, the Custodian informed the Complainant that the records are being reviewed for privileged information. There is no record of a formal response to the OPRA request on or before September 21, 2015. On September 23, 2015,⁵ after the complaint was filed, the Custodian responded in writing denying access to responsive records because they were personal e-mails and not made or maintained in the course of any official State business. N.J.S.A. 47:1A-1.1.

Denial of Access Complaint:

On September 24, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian failed to respond to his OPRA request after two extensions.

Upon receipt of the Custodian’s September 23, 2015 response, the Complainant supplemented his Denial of Access Complaint on September 28, 2015. The Complainant stated that New Jersey’s “Acceptable Internet Usage” policy for public employees limits personal use of Internet access to a *de minimis* or occasional amount. Considering that the Custodian sought two (2) extensions of time to respond, only to state that all responsive e-mail were personal in nature, the Complainant asserted that Stuart A. Brooks (“Mr. Brooks”) was not adhering to this policy. Alternatively, the Complainant proffered that the located e-mails are not personal in nature and should therefore be disclosed.

Statement of Information:

On October 23, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on August 12, 2015. The Custodian certified that she responded that same day, extending the time to respond to September 4, 2015. The Custodian then certified that she sought a second extension of time on September 8, 2015, to until September 21, 2015. Ultimately, the Custodian responded on September 23, 2015, denying access to responsive records.

⁴ 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 Custodian asserted that Item Nos. 1, 2, and 3 of the Complainant's OPRA request failed to identify the content or subject matter of the e-mails sought in accordance with Elcavage v. Twp. of West Milford (Passaic), GRC Complaint Nos. 2009-07 & 2009-08 (March 2010). Additionally, the Custodian argued that Item No. 4 failed to identify both a sender and recipient of the correspondence. Nevertheless, the Custodian certified that she attempted to search for responsive records and located 138 e-mails matching the Complainant's criteria. Of those, the Custodian certified that 136 of the e-mails pertained to correspondence between Mr. Brooks and members of his family. Regarding the remaining two (2) e-mails, the Custodian certified that one was sent to Human Resources regarding health insurance coverage, and the other pertained to a request to Mr. Brooks' secretary to send invitations to his family for his retirement party. The Custodian argued that none of the e-mails pertained to any official State business and are therefore not government records under OPRA.

Additional Submissions

On October 24, 2015, the Complainant submitted a response to the Custodian's SOI. The Complainant first argued that e-mail referencing health insurance should be considered a public record since it involves Mr. Brooks and a state agency's human resources section. He added that whether the e-mail requires redactions, as it may contain medical information, is a separate question from whether the e-mail is a government record.

Next, the Complainant argued that the e-mail to the secretary regarding Mr. Brooks' retirement party should also be considered a government record because providing instructions that are typical for a subordinate worker should fall within conducting official business. The Complainant again noted that if redactions are necessary, that is a separate matter from determining whether the e-mail is a government record.

Regarding the 136 other e-mails, the Complainant posited that if the Custodian admitted they were reviewing the e-mails for privilege, it suggests that the e-mails were in fact government records, or else there would be no need to scrutinize them for privilege. Lastly, the Complainant objected to the Custodian's claim that Item Nos. 3 and 4 lacked specificity under the requirements set forth in Elcavage. The Complainant noted that Item No. 3 contained sixteen (16) keywords to look for as satisfying the "content or subject matter" requirement and further noted that Item No. 4 explicitly identified Stuart A. Brooks as the sender or recipient of e-mails.

On October 30, 2015, the Custodian submitted a sur-reply to the Complainant's response. The Custodian maintained that all of the identified e-mails are not government records and that conducting a legal review of the e-mails should not infer that they were government records. However, the Custodian enclosed a copy of the e-mail pertaining to Mr. Brooks' retirement party in her sur-reply. Regarding the e-mail pertaining to health insurance, the Custodian argued that even if the e-mail were considered a government record, it would be exempt from disclosure as a personnel record under N.J.S.A. 47:1A-10, since it related to an employee's health insurance benefits. The Custodian maintained that it conducted a search for records in good faith and that there was no denial of access to government records.

On November 2, 2015, the Complainant submitted an additional reply in response to the Custodian's October 30, 2015 correspondence. The Complainant argued that because he neither agreed to nor granted any extension of time, the request should be considered "deemed" denied due to the Custodian's failure to respond within the initial seven (7) business day period. The Complainant added that even if the extension were granted, the Custodian failed to seek a timely (2nd) extension, seeking it only after the Complainant called to request a status update.

Analysis

Insufficient 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 N.J.S.A. 47:1A-5(g).⁶ 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 dated October 31, 2007).

OPRA provides that a custodian may request an extension of time to respond to the Complainant's OPRA request but that a specific date by which the Custodian will further respond must be provided. N.J.S.A. 47:1A-5(i). OPRA also provides that, should the custodian fail to provide a response by that specific date, "access shall be deemed denied." N.J.S.A. 47:1A-5(i).

In the instant matter, the Complainant stated that he submitted the OPRA request on August 12, 2015. That same day, the Custodian responded in writing, seeking an extension of time to respond to until September 4, 2015. The Complainant claimed that after not receiving a response from the Custodian before the end of the extended deadline, he telephoned the Custodian on September 8, 2015, inquiring on the status of his request. That day the Custodian provided a written status update and sought a second extension of time until September 21, 2015. The Custodian certified that she responded on September 23, 2015.

Although the Complainant believes that the Custodian must receive permission to extend the time to respond, the Council has recognized that the only requirements needed for a valid extension is that it be made in writing, timely, and that it specify a date of return. See Criscione v. Town of Guttenberg (Hudson), GRC Complaint No. 2010-68 (November 2010). Nevertheless, the evidence in the record demonstrates that the Custodian failed to respond within the extended timeframe.

⁶ 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.

Therefore, although the Custodian properly sought an extension of time on August 12, 2015, to respond to the Complainant's OPRA request, the request is "deemed" denied because the Custodian failed to respond timely within the extended timeframe. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11.

Validity of the Request

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 Appellate Division has held that "[w]hile 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." MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005) (emphasis added). The MAG 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. (emphasis added). *See also* Bent v. Twp. of Stafford Police Dept., Custodian of Records, 381 N.J. Super. 30, 37 (App. Div. 2005), N.J. Builders Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007), and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

The GRC has established criteria deemed necessary under OPRA to specifically request an e-mail communication. In Elcavage, GRC 2009-07, the Council determined that a valid request must contain: (1) the content and/or subject of the email, (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. Id. *See also* Sandoval v. NJ State Parole Bd., GRC Complaint No. 2006-167 (Interim Order dated 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 dated May 24, 2011).

In Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2009-124 (April 2010), the complainant's OPRA request sought all e-mails to or from a particular e-mail account for a specific time period. The custodian's counsel responded, advising the complainant that his OPRA request was invalid because it represented an open-ended search of the Borough's files. The Council held that the complainant's request was invalid under Elcavage because it did not provide the subject or content of the e-mail(s). Id.

OPRA Request Item Nos. 1 & 2

In the instant matter, Item Nos. 1 & 2 of the Complainant's OPRA request sought e-mails between Stuart Brooks and two identified e-mail addresses for the year 2015. Similar to the

request in Verry, the items here did not identify the subject or content of the e-mails sought. Therefore, Item Nos. 1 & 2 did not meet the express criteria necessary and appropriate to seek e-mail correspondence.

Thus, Item Nos. 1 & 2 of the Complainant's August 12, 2015 OPRA request are invalid because they fail to include the subject matter or content of the requested e-mails. See MAG, 375 N.J. Super. at 546; Elcavage, GRC 2009-07; Verry, GRC 2009-124. Thus, there was no unlawful denial of access regarding that portion of the OPRA request. N.J.S.A. 47:1A-6.

OPRA Request Item Nos. 3 & 4

In addition to Item Nos. 1 & 2, the Custodian asserted that Item Nos. 3 & 4 also failed to meet the criteria set forth in Elcavage. Specifically, the Custodian argued that Item No. 3 failed to identify a subject matter, and that Item No. 4 failed to identify a sender and recipient.

In Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2015-97 *et seq.* (Interim Order dated March 22, 2016), the Council held that while terms such as "sheet," "vacation," and "sick" were too broad to satisfy the subject matter or content of requested e-mails, proper names such as "Carlton" and "Verry" were indeed valid. The Council noted that because proper names cannot be construed interchangeably, a custodian could easily identify them in a search for responsive documents. Id.

Regarding Item No. 3, the Complainant listed the names of individuals and organizations that sent or received correspondence from Stuart A. Brooks. Additionally, the Complainant sought correspondence mentioning those same individuals and organizations. In accordance with Verry, the use of proper names as both sender/recipient and subject matter for the requested e-mails adequately satisfies the specificity requirements. Therefore, Item No. 3 is a valid request for e-mail records. Furthermore, a requestor need not identify both a sender and recipient in a request for e-mails. See Elcavage, GRC 2009-07.

For Item No. 4, the Complainant identified Mr. Brooks as a potential sender or recipient of the requested e-mails. Therefore, the requirements have been satisfied.

Therefore, because Item Nos. 3 & 4 of the Complainant's OPRA request for e-mail correspondence contain the sender and/or recipient, content and/or subject matter, and a specific date range, they are valid requests under OPRA. See Elcavage, GRC 2009-07; Sandoval, GRC 2006-167; Verry, GRC 2015-97, *et seq.*

Unlawful Denial of Access

E-Mail Regarding Employee's Health Insurance Coverage

In Michelson v. Wyatt, 379 N.J. Super. 611 (App. Div. 2005), the requestor sought information regarding health insurance coverage provided to public employees and their families. The court noted that "information that is deemed confidential is not considered a government record." Id. at 619. That includes particularly "information which is a

communication between a public agency and its insurance carrier, administrative service organization or risk management office.” Id. (quoting N.J.S.A. 47:1A-1.1). Furthermore, N.J.S.A. 47:1A-10 explicitly prohibits disclosure of personnel information except for the public employee’s name, title, position, salary, payroll record, length of service, date of separation, and type and amount of pension. Thus, the court held that “any information [a public agency] receives about an employee’s or retiree’s health care benefits . . . is not considered a government record subject to public disclosure. Michelson, 379 N.J. Super. at 621.

Here, the Custodian certified that an e-mail withheld from disclosure discusses an employee’s personal health insurance coverage. In his October 24, 2015 e-mail, the Complainant contended that even if he were prohibited from accessing confidential information contained within the e-mail, the remaining unrestricted portions should be disclosed. The Complainant did not provide evidence to refute the Custodian’s certification regarding the contents of the e-mail.

Therefore, the content within the e-mail pertaining to an employee’s health insurance is not subject to disclosure under OPRA. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-10; Michelson, 379 N.J. Super. at 621. However, consistent with N.J.S.A. 47:1A-5(g), if the custodian of a government record asserts that part of a particular record is exempt from public access under OPRA, the custodian must delete or excise that portion from a copy of the record and must promptly permit access to the remainder of the record. Thus, the Custodian must disclose all other portions of the requested e-mails to the Complainant (*i.e.*, sender, recipients, date, time, subject, and closing salutations). To these portions of the e-mail, the Custodian has unlawfully denied access. *See* Ray v. Freedom Academy Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated May 24, 2011).

Personal E-Mails

The Custodian contended that the remaining 136 e-mails are personal correspondence and therefore not government records. The Complainant argued that the Custodian’s request for multiple extensions of time to review the records for privilege belies the assertion that all of the withheld records are personal in nature.

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:

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

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

proceeding during which the contents of a contested record would be disclosed.’ N.J.S.A. 47:1A-7(f). This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.

[Id. at 355.]

Further, the court stated that:

We hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal . . . There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC’s obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7(f), which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.

[Id.]

Therefore, given the Custodian’s certification that the remaining 136 e-mails were personal communications and not government records under N.J.S.A. 47:1A-1.1, the GRC must conduct an *in camera* review of the e-mails to complaint a meaningful investigation of the complaint. Paff, 379 N.J. Super. at 346.

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. Although the Custodian properly sought an extension of time on August 12, 2015, to respond to the Complainant’s OPRA request, the request is “deemed” denied because the Custodian failed to respond timely within the extended timeframe. 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 dated October 31, 2007).
2. Item Nos. 1 & 2 of the Complainant’s August 12, 2015 OPRA request are invalid because they fail to include the subject matter or content of the requested e-mails. *See* MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005); Elcavage v. Twp. of West Milford (Passaic), GRC Complaint Nos. 2009-07 & 2009-08 (March 2010); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2009-124 (April 2010). Thus, there was no unlawful denial of access regarding that portion of the OPRA request. N.J.S.A. 47:1A-6.

3. Because Item Nos. 3 & 4 of the Complainant's OPRA request for e-mail correspondence contain the sender and/or recipient, content and/or subject matter, and a specific date range, they are valid requests under OPRA. *See* Elcavage v. Twp. of West Milford (Passaic), GRC Complaint Nos. 2009-07 & 2009-08 (March 2010); Sandoval v. NJ State Parole Bd., GRC Complaint No. 2006-167 (Interim Order dated March 28, 2007); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2015-97 *et seq.* (Interim Order dated March 22, 2016).

4. The content within the e-mail pertaining to an employee's health insurance is not subject to disclosure under OPRA. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-10; Michelson v. Wyatt, 379 N.J. Super. 611 (App. Div. 2005). However, consistent with N.J.S.A. 47:1A-5(g), if the custodian of a government record asserts that part of a particular record is exempt from public access under OPRA, the custodian must delete or excise that portion from a copy of the record and must promptly permit access to the remainder of the record. Thus, the Custodian must disclose all other portions of the requested e-mails to the Complainant (*i.e.*, sender, recipients, date, time, subject, and closing salutations). To these portions of the e-mail, the Custodian has unlawfully denied access. *See* Ray v. Freedom Academy Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated May 24, 2011).

5. Given the Custodian's certification that the remaining 136 e-mails were personal communications and not government records under N.J.S.A. 47:1A-1.1, the GRC must conduct an *in camera* review of the e-mails to complaint a meaningful investigation of the complaint. Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).

6. **The Custodian must deliver⁸ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see #5 above), a document or redaction index⁹, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,¹⁰ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**

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

Prepared By: Samuel A. Rosado
Staff Attorney

June 20, 2017

⁸ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

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

¹⁰ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

