



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

February 27, 2018 Government Records Council Meeting

Michael Feaster
Complainant

Complaint No. 2015-308

v.

Buena Borough (Atlantic)
Custodian of Record

At the February 27, 2018 public meeting, the Government Records Council (“Council”) considered the February 20, 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 Custodian complied with the Council’s January 30, 2018 Interim Order because she timely provided the requested record, along with a signed certification, to the Council Staff.
2. Although the Custodian unlawfully denied access to the e-mail correspondence as determined in the Council’s in camera findings, the Custodian complied in full with the Council’s June 27, 2017 and January 30, 2018 Interim Orders. 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 27th Day of February, 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: March 2, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Council Staff
February 27, 2018 Council Meeting**

**Michael Feaster¹
Complainant**

GRC Complaint No. 2015-308

v.

**Buena Borough (Atlantic)²
Custodial Agency**

Records Relevant to Complaint: A list of all electronic or hard copy correspondence containing the following: any and all e-mails, memos or other documents from the Business Administrator, Mayor, Council, Legal Counsel, Auditors, Insurance providers (JIF, NJU JIF, PERMA) and citizens regarding the dissolution, incorporation, or shared service with regards to the Buena Borough [Municipal Utilities Authority (“MUA”)] from January 1, 2014, to September 18, 2015.

Custodian of Record: Maryann Coraluzzo

Request Received by Custodian: September 8, 2015; September 18, 2015

Response Made by Custodian: September 17, 2015; September 28, 2015

GRC Complaint Received: September 25, 2015

Background

January 30, 2018 Council Meeting:

At its January 30, 2018 public meeting, the Council considered the January 23, 2017 *In Camera* Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian complied with the Council’s June 27, 2017 Interim Order because she timely provided the records, along with a signed certification, to the Executive Director.
2. The *in camera* examination reveals that the Custodian lawfully denied access to the body of the e-mail record as it contains attorney-client privileged communications. N.J.S.A. 47:1A-1.1. See Tractenberg v. Twp. of W. Orange, 416 N.J. Super. 354, 376 (App. Div. 2010); In re Env’tl. Ins. Declaratory Judgment Actions, 259 N.J. Super. 308, 313 (App. Div. 1992). Additionally, the Custodian lawfully denied access to the draft report as the record contains ACD material and is exempt pursuant to N.J.S.A. 47:1A-1.1; In Re the

¹ No legal representation listed on record.

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

Liquidation of Integrity Ins. Co., 165 N.J. 75, 84-85, 88 (2000); Rademacher v. Borough of Eatontown, GRC Complaint No. 2004-18 (December 2005).

3. **Based on the Council's determination in this matter, 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).**
4. **The Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in Item No. 3 above within five (5) business days from receipt of this Order and simultaneously provide certified conformation of compliance pursuant to N.J. Court Rule 1:4-4 to the GRC.³**
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 February 1, 2018, the Council distributed its Interim Order to all parties. The Custodian responded to the Council's Interim Order on February 5, 2018, certifying her compliance with the Council's Interim Order and providing the Complainant with the requested record with relevant redactions contained therein.

Analysis

Compliance

At its January 30, 2018 meeting, the Council ordered the Custodian to provide the Complainant with the redacted record. The Council also ordered the Custodian to submit certified confirmation of compliance to the Council Staff. On February 1, 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 February 8, 2018.

On February 5, 2018, the Custodian provided the Council Staff with evidence demonstrating she provided the Complainant with the redacted correspondence. The Custodian also provided the Council Staff with a certified confirmation of compliance.

Therefore, the Custodian complied with the Council's January 30, 2018 Interim Order because she timely provided the requested record, along with a signed certification, to the Council Staff.

³ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

Knowing & Willful

OPRA states that “[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty . . .” N.J.S.A. 47:1A-11(a). OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states “. . . [i]f the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA] . . .” N.J.S.A. 47:1A-7(e).

Certain legal standards must be considered when making the determination of whether the Custodian’s actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian’s actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian’s actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian’s actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (*id.*; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); the Custodian’s actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

Although the Custodian unlawfully denied access to the e-mail correspondence as determined in the Council’s *in camera* findings, the Custodian complied in full with the Council’s June 27, 2017 and January 30, 2018 Interim Orders. 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 Council Staff respectfully recommends the Council find that:

1. The Custodian complied with the Council’s January 30, 2018 Interim Order because she timely provided the requested record, along with a signed certification, to the Council Staff.
2. Although the Custodian unlawfully denied access to the e-mail correspondence as determined in the Council’s *in camera* findings, the Custodian complied in full with the Council’s June 27, 2017 and January 30, 2018 Interim Orders. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: Samuel A. Rosado
Staff Attorney

February 20, 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
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INTERIM ORDER

January 30, 2018 Government Records Council Meeting

Michael Feaster
Complainant

Complaint No. 2015-308

v.

Buena Borough (Atlantic)
Custodian of Record

At the January 30, 2018 public meeting, the Government Records Council (“Council”) considered the January 23, 2018 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian complied with the Council’s June 27, 2017 Interim Order because she timely provided the records, along with a signed certification, to the Executive Director.
2. The *in camera* examination reveals that the Custodian lawfully denied access to the body of the e-mail record as it contains attorney-client privileged communications. N.J.S.A. 47:1A-1.1. See Tractenberg v. Twp. of W. Orange, 416 N.J. Super. 354, 376 (App. Div. 2010); In re Env’tl. Ins. Declaratory Judgment Actions, 259 N.J. Super. 308, 313 (App. Div. 1992). Additionally, the Custodian lawfully denied access to the draft report as the record contains ACD material and is exempt pursuant to N.J.S.A. 47:1A-1.1; In Re the Liquidation of Integrity Ins. Co., 165 N.J. 75, 84-85, 88 (2000); Rademacher v. Borough of Eatontown, GRC Complaint No. 2004-18 (December 2005).
3. **Based on the Council’s determination in this matter, 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).**
4. **The Custodian shall comply with the Council’s Findings of the *In Camera* Examination set forth in Item No. 3 above within five (5) business days from receipt of this Order and simultaneously provide certified conformation of compliance pursuant to N.J. Court Rule 1:4-4 to the GRC.¹**

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



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 30th Day of January, 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: February 1, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Council Staff
January 30, 2018 Council Meeting**

**Michael Feaster¹
Complainant**

GRC Complaint No. 2015-308

v.

**Buena Borough (Atlantic)²
Custodial Agency**

Records Relevant to Complaint: A list of all electronic or hard copy correspondence containing the following: any and all e-mails, memos or other documents from the Business Administrator, Mayor, Council, Legal Counsel, Auditors, Insurance providers (JIF, NJU JIF, PERMA) and citizens regarding the dissolution, incorporation, or shared service with regards to the Buena Borough [Municipal Utilities Authority (“MUA”)] from January 1, 2014, to September 18, 2015.

Custodian of Record: Maryann Coraluzzo

Request Received by Custodian: September 8, 2015; September 18, 2015

Response Made by Custodian: September 17, 2015; September 28, 2015

GRC Complaint Received: September 25, 2015

Records Submitted for *In Camera* Examination: An e-mail correspondence allegedly containing attorney-client privileged communications, and a draft report prepared by a third-party auditing firm considered to be advisory, consultative, or deliberative (“ACD”) material.

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. Pursuant to Paff v. NJ Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the withheld records to validate the Custodian’s assertion that they were lawfully denied in their entirety as containing either attorney-client privileged information or advisory, consultative, or deliberative material that is exempt from access pursuant to N.J.S.A. 47:1A-1.1.

¹ No legal representation listed on record.

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

2. **The Custodian must deliver³ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see #1 above), a document or redaction index⁴, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,⁵ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On June 29, 2017, the Council distributed its Interim Order to all parties. The Custodian responded to the Council's Interim Order on July 3, 2017, delivering to the GRC nine (9) copies of the unredacted records along with a certification to the Executive Director.

Analysis

Compliance

At its June 27, 2017 meeting, the Council ordered the Custodian to deliver to the GRC nine (9) copies of the records withheld from disclosure. The Council also ordered the Custodian to submit certified confirmation of compliance 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, accounting for the Independence Day holiday.

On July 7, 2017, the Custodian delivered nine (9) copies of the withheld records for *in camera* review via certified mail.

Therefore, the Custodian complied with the Council's June 27, 2017 Interim Order because she timely provided the records, along with a signed certification, to the Executive Director.

Unlawful Denial of Access

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request

³ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

⁴ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

⁵ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

“with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful. N.J.S.A. 47:1A-6.

Attorney-Client Privileged Communications

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

In the context of public entities, the attorney-client privilege extends to communications between the public body, the attorney retained to represent it, necessary intermediaries, and agents through whom communications are conveyed, and co-litigants who have employed a lawyer to act for them in a common interest. See Tractenberg v. Twp. of W. Orange, 416 N.J. Super. 354, 376 (App. Div. 2010); In re Envtl. Ins. Declaratory Judgment Actions, 259 N.J. Super. 308, 313 (App. Div. 1992).

Advisory, Consultative, or Deliberative Material

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

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

[N]either the statute nor the courts have defined the terms ... “advisory, consultative, or deliberative” in the context of the public records law. The Council looks to an analogous concept, the deliberative process privilege, for guidance in the implementation of OPRA’s ACD exemption. Both the ACD exemption and the deliberative process privilege enable a governmental entity to shield from disclosure material that is pre-decisional and deliberative in nature. Deliberative material contains opinions, recommendations, or advice about agency policies. In Re the Liquidation of Integrity Ins. Co., 165 N.J. 75, 88 (2000); In re Readoption With Amendments of Death Penalty Regulations, 182 N.J. 149 (App. Div. 2004).⁶

The deliberative process privilege is a doctrine that permits government agencies to withhold documents that reflect advisory opinions, recommendations, and deliberations submitted

⁶ 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).

as part of a process by which governmental decisions and policies are formulated. NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975). Specifically, the New Jersey Supreme Court has ruled that a record that contains or involves factual components is entitled to deliberative-process protection under the exemption in OPRA when it was used in the decision-making process and its disclosure would reveal deliberations that occurred during that process. Educ. Law Ctr. v. NJ Dep't of Educ., 198 N.J. 274 (2009). This long-recognized privilege is rooted in the concept that the sovereign has an interest in protecting the integrity of its deliberations. The earliest federal case adopting the privilege is Kaiser Alum. & Chem. Corp. v. United States, 157 F. Supp. 939 (1958). The privilege and its rationale were subsequently adopted by the federal district courts and circuit courts of appeal. United States v. Farley, 11 F.3d 1385, 1389 (7th Cir. 1993).

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

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

[Id. at 84-85 (citations omitted).]

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

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

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

The GRC conducted an *in camera* examination of the submitted records. The record is described above under the subheading “Record Submitted for *In Camera* Examination.” The total content consists of a one (1) page e-mail correspondence, and a twelve (12) page draft prepared by the third-party auditing firm hired by the Borough.

The Custodian’s first argument is in relation to the e-mail from the Borough Solicitor to the Mayor regarding the dissolution of the Municipal Utilities Authority (“MUA”). The Custodian asserted that the record contained legal advice from the Solicitor and is thus protected under the attorney-client privilege. See N.J.S.A. 47:1A-1.1. A review of the record demonstrated the advice and legal opinion from the Solicitor regarding the cost savings of dissolving the MUA. Therefore, the e-mail correspondence is exempt from access as attorney-client privileged material pursuant to N.J.S.A. 47:1A-1.1. See Tractenberg, 416 N.J. Super. at 376 and In re Env’tl. Ins., 259 N.J. Super. at 313.

However, consistent with N.J.S.A. 47:1A-5(g), if the custodian of a government record asserts that part of a particular record is exempt from public access pursuant to OPRA, the custodian must delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and must promptly permit access to the remainder of the record. Thus, the Custodian must disclose all other portions of the requested e-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 Custodian has unlawfully denied access.

The Custodian’s next argument is that the Complainant was denied access to the draft report because it constituted ACD material, and therefore exempt from access under N.J.S.A. 47:1A-1.1. The Complainant argued that because the draft report was produced by third-party auditing firm, it is not subject to the ACD exemption under OPRA, as such third-party consultants do not make policy. However, the GRC has held that records prepared by outside consultants may fall under the ACD exemption . See Rademacher v. Borough of Eatontown, GRC Complaint No. 2004-18 (December 2005). The evidence in the record demonstrates that the report contains opinions, recommendations, and advice from the auditing firm regarding the fiscal impacts of dissolving the MUA. The Custodian also certified that the report was predecisional, as the Borough had not made a determination on whether to dissolve the MUA prior to the report’s creation. Thus, the Custodian has satisfied its burden pursuant to Integrity, 165 N.J. at 84-85. In contrast, the Complainant did not demonstrate a compelling enough need for access to override the presumption of non-disclosure. See Integrity, 165 N.J. at 88.

Accordingly, the *in camera* examination reveals that the Custodian lawfully denied access to the body of the e-mail record as it contains attorney-client privileged communications. N.J.S.A. 47:1A-1.1. See Tractenberg, 416 N.J. Super. at 376 and In re Env’tl. Ins., 259 N.J. Super. at 313. Additionally, the Custodian lawfully denied access to the draft report as the record contains ACD material and is exempt pursuant to N.J.S.A. 47:1A-1.1; Integrity, 165 N.J. at 84-85, 88; Rademacher, GRC 2004-18.

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 Council Staff respectfully recommends the Council find that:

1. The Custodian complied with the Council's June 27, 2017 Interim Order because she timely provided the records, along with a signed certification, to the Executive Director.
2. The *in camera* examination reveals that the Custodian lawfully denied access to the body of the e-mail record as it contains attorney-client privileged communications. N.J.S.A. 47:1A-1.1. See Tractenberg v. Twp. of W. Orange, 416 N.J. Super. 354, 376 (App. Div. 2010); In re Env'tl. Ins. Declaratory Judgment Actions, 259 N.J. Super. 308, 313 (App. Div. 1992). Additionally, the Custodian lawfully denied access to the draft report as the record contains ACD material and is exempt pursuant to N.J.S.A. 47:1A-1.1; In Re the Liquidation of Integrity Ins. Co., 165 N.J. 75, 84-85, 88 (2000); Rademacher v. Borough of Eatontown, GRC Complaint No. 2004-18 (December 2005).
3. **Based on the Council's determination in this matter, 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).**
4. **The Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in Item No. 3 above within five (5) business days from receipt of this Order and simultaneously provide certified conformation of compliance pursuant to N.J. Court Rule 1:4-4 to the GRC.⁷**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances, pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Samuel A. Rosado
Staff Attorney

January 23, 2018

⁷ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

INTERIM ORDER

June 27, 2017 Government Records Council Meeting

Michael Feaster
Complainant

Complaint No. 2015-308

v.

Buena Borough (Atlantic)
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. Pursuant to Paff v. NJ Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the withheld records to validate the Custodian’s assertion that they were lawfully denied in their entirety as containing either attorney-client privileged information or advisory, consultative, or deliberative material that is exempt from access pursuant to N.J.S.A. 47:1A-1.1.
2. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see #1 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.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

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."



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

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 27, 2017 Council Meeting**

**Michael Feaster¹
Complainant**

GRC Complaint No. 2015-308

v.

**Buena Borough (Atlantic)²
Custodial Agency**

Records Relevant to Complaint:

A list of all electronic or hard copy correspondence containing the following: any and all e-mails, memos or other documents from the Business Administrator, Mayor, Council, Legal Counsel, Auditors, Insurance providers (JIF, NJU JIF, PERMA) and citizens regarding the dissolution, incorporation, or shared service with regards to the Buena Borough [Municipal Utilities Authority (“MUA”)] from January 1, 2014, to September 18, 2015.

Custodian of Record: Maryann Coraluzzo

Request Received by Custodian: September 8, 2015; September 18, 2015

Response Made by Custodian: September 17, 2015; September 28, 2015

GRC Complaint Received: September 25, 2015

Background³

Request and Response:

On September 8, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On or around September 17, 2015, the Custodian responded in writing, providing responsive records but withholding two (2) records as exempt from disclosure on separate grounds. One record was withheld as containing attorney-client privileged communications; the other was withheld as being advisory, consultative, or deliberative (“ACD”) material. On September 18, 2015, the Complainant replied to the Custodian regarding the response. On September 22, 2015, the Custodian replied, stating that with the exception of the aforementioned documents, all responsive records in her possession have been provided. Additionally, the Custodian stated that

¹ No legal representation listed on record.

² Represented by Richard P. Tonetta, Esq., Buena Borough Solicitor (Vineland, 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.

she forwarded the request to the Buena Borough Solicitor (“Solicitor”) to provide additional explanation on the exempted documents.

On September 23, 2015, the Complainant asked the Custodian to state from whom she received the responsive records. The Custodian responded shortly thereafter on the same day, providing a list of individuals, but stated that she is waiting for records (if any) from two (2) other individuals. The Custodian stated that she doubted said individuals would have any additional documents beyond duplicates but wished to receive confirmation prior to closing the OPRA request.

Denial of Access Complaint:

On September 25, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian’s September 23, 2015 clarification regarding who provided her with responsive records was improper, alleging that responsive records are missing from one of the individuals who allegedly providing responsive records.

Additionally, the Complainant disputed the claimed exemptions made for the following documents:

1. E-mail from Tonetta to Baruffi, 1/5/15 Re: Legal Opinion (1 page)
2. Draft Report by Ford Scott (12 pages)

Regarding Item No. 1, the Complainant questioned whether the claim of attorney-client privileged information is an overly broad answer to warrant exemption. The Complainant also wondered whether being an alternate board member of the MUA would assist in granting access to the record.

For Item No. 2, the Complainant argued that the draft report was not an “inter/intra agency” creation but rather conducted by a third party consultant. The Complainant asserted that since outside consultants do not make policy, draft reports they create do not fall under the ACD exemption.

On September 29, 2015, subsequent to filing his Denial of Access Complaint, the Complainant wrote to the GRC regarding his allegation that he did not receive responsive records from one of the individuals named by the Custodian. The Complainant stated that he ultimately received the full complement of records from the Custodian but still disputed the denial of access to the two (2) exempted records.

Statement of Information:

On October 16, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on September 8, 2015. The Custodian certified that she responded in writing on September 17, 2015, providing

responsive records and denying access to two (2) documents: one containing attorney-client privileged communications and the other containing ACD material.

The Custodian argued that N.J.S.A. 47:1A-9 allows her to claim that a government record is exempt from access if it contains attorney-client privileged information as defined under N.J.S.A. 2A:84A-20. The Custodian certified that Item No. 1 is an e-mail correspondence between the Solicitor and the Mayor of Buena Borough (“Mayor”) regarding the potential dissolution of the Buena Borough MUA as a cost-saving measure.

Regarding Item No. 2, the Custodian certified that the document was a draft report regarding the economic effects of dissolving the MUA. The Custodian certified that the report was not finalized at the time of the OPRA request because additional information was forthcoming from representatives of the MUA. The Custodian certified that she provided the Complainant with an e-mail from one of the MUA representatives to the Mayor, indicating that he had additional information to be incorporated into the report. The Custodian noted that Gannett N.J. Partners, LP v. Cnty. of Middlesex, 379 N.J. Super. 205, 219 (App. Div. 2005), provides that an ACD document must be 1) predecisional and 2) deliberative in nature, containing opinions, recommendations, or advice about the potential decision to be made.

Analysis

Unlawful Denial of Access

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

In the instant matter, the Custodian withheld access to two (2) documents responsive to the Complainant’s OPRA request. An e-mail between the Mayor and Solicitor was withheld on the grounds of containing attorney-client privileged communications pursuant to N.J.S.A. 47:1A-9 and N.J.S.A. 2A:84A-20. Additionally, a twelve (12) page draft report from Borough auditors was withheld as containing ACD material under N.J.S.A. 47:1A-1.1 and Gannett, 379 N.J. Super. at 219.

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,⁴ 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:

⁴ Paff v. NJ Dep’t of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

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

[Id. at 355.]

Further, the court stated that:

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

[Id.]

Therefore, pursuant to Paff, 379 N.J. Super. at 346, the GRC must conduct an *in camera* review of the withheld records to validate the Custodian's assertion that they were lawfully denied in their entirety as containing either attorney-client privileged information or ACD material that is exempt from access pursuant to N.J.S.A. 47:1A-1.1.

Knowing & Willful

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Pursuant to Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the withheld records to validate the Custodian's assertion that they were lawfully denied in their entirety as containing either attorney-client privileged information or advisory, consultative, or deliberative material that is exempt from access pursuant to N.J.S.A. 47:1A-1.1.

2. **The Custodian must deliver⁵ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see #1 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.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Samuel A. Rosado, Esq.
Staff Attorney

June 20, 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."