



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

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

CHARLES A. RICHMAN  
Commissioner

**FINAL DECISION**

**October 31, 2017 Government Records Council Meeting**

Michael I. Inzelbuch, Esq.  
Complainant

Complaint No. 2015-78

v.

NJ Office of Administrative Law  
Custodian of Record

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

1. The Custodian complied with the Council’s September 26, 2017 Interim Order because he responded in the prescribed time frame by providing the responsive records to the Complainant in accordance with the Council’s *In Camera* Examination. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.
2. The Custodian failed to respond timely to the Complainant’s OPRA request and did not fully comply with the Council’s January 31, 2017 Interim Order. Additionally, the Custodian unlawfully denied access to portions of the records reviewed *in camera* by the Council. However, the Custodian lawfully denied access to requested item Nos. 7-9 because no records existed. He lawfully denied access to content contained in the sixteen (16) e-mails and the July, 22, 2011 memorandum in its entirety. Finally, the Custodian timely complied with the Council’s September 28, 2017 Interim Order. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk’s Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.



Final Decision Rendered by the  
Government Records Council  
On The 31<sup>st</sup> Day of October, 2017

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: November 2, 2017**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Michael I. Inzelbuch, Esq.<sup>1</sup>  
Complainant**

**GRC Complaint No. 2015-78**

v.

**NJ Office of Administrative Law<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Copies of the following (from September 2011 to present):

1. Any and all e-mails, letters, correspondence, notes, documents, etc., authored or received by Administrative Law Judge (“ALJ”) Laura Sanders, as to:
  - a. Michael Inzelbuch, Esq.
  - b. Lakewood Board of Education
  - c. Lewis School
  - d. Unapproved or uncredited schools
  - e. Sectarian placements
2. Same as Item No. 1 but as to ALJ Jeffrey S. Masin (now retired)
3. Any and all documentation, notes, e-mails, correspondence, etc. as to ALJ Sanders’ “Memo” dated 9/22/14 including but not limited to:
  - a. who was consulted as to same
  - b. when same was in fact sent out and a listing of those individuals who were to receive same
  - c. any consultation with USDOE, NJDOE (see attached memo)
4. Any and all memorandum (and/or notes, e-mails, documentation as to same) authored and/or received by ALJ Sanders as to:<sup>3</sup>
  - a. The manner in which cases (special education) are heard
  - b. The assignment of ALJs
  - c. Documentation allowed to be considered
5. Documentation as to any and all ALJs who have conflicts with Robin Ballard, Esq.
6. Same as number 5 but as to Michael Inzelbuch, Esq.

---

<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Sandra DeSarno Hlatky, Esq. (Mercerville, NJ).

<sup>3</sup> Because the Complainant did not raise a denial of access issue regarding this item, the GRC will not address it.

7. Any and all documentation, e-mails, notes, correspondences as to why ALJ Pelios no longer hears special education matters and those ALJs who have asked/inquired as to same
8. Any and all review by the Office of Administrative Law (“OAL”) and/or ALJ Sanders as to the issue of “Schneck, Price, Smith & King, LLP” (law firm) and/or Robin Ballard, Esq., appearing at OAL due to possible conflicts as well as any and all documentation as to same
9. Any and all manuals/protocol/memorandum as to the above issue and/or those that would apply to said issue
10. Any and all memorandum, e-mails, notes, documentation authorized by ALJ Sanders as to the *alleged* inappropriate action(s) by ALJ’s since September 2011 to current
11. Any and all memorandum, notes, e-mails, documentations, etc. as to any and all interactions/meetings between OAL Judges including, but not limited to, ALJ Sanders with:
  - a. any individual employed with OSEP
  - b. John Worthington (OSEP)
  - c. Peggy McDonald (OSEP)
  - d. Delores Walters (OSEP)
12. Any and all documents authored by ALJ Jeffrey Masin as to the Lewis School and/or unapproved/unaccredited placements and/or sectarian placements
13. Any and all documentation received/reviewed, and/or responded to as to ALJ conflicts with Michael I. Inzelbuch, Esq.
14. Same as number 13 but as to Robin Ballard, Esq.
15. A copy of ALJ Sanders schedule from January 2014 through August 2015

**Custodian of Record:** Patrick Mulligan

**Request Received by Custodian:** March 9, 2015

**Response Made by Custodian:** March 20, 2015; March 24, 2015

**GRC Complaint Received:** March 24, 2015

### **Background**

#### **September 26, 2017 Council Meeting:**

At its September 26, 2017 public meeting, the Council considered the September 19, 2017 *In Camera* Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian failed to comply fully with the Council's January 31, 2017 Interim Order. Specifically, he provided for *in camera* review nine (9) copies of items 11-27 in the SOI document index. However, the Custodian failed to do so in a timely manner and did not provide a sufficient certified confirmation of compliance to the Executive Director.
2. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.**<sup>4</sup>
3. The Custodian must disclose all other portions of the responsive e-mails to the Complainant (*i.e.*, sender, recipients, date, time, subject, and salutations where applicable or not determined to be exempt). As to these portions of the requested e-mails, the Custodian has unlawfully denied access. See Ray v. Freedom Acad. Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010).
4. **The Custodian must comply with conclusion No. 3 above within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.**
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 September 28, 2017, the Council distributed its Interim Order to all parties. On October 5, 2017, the Custodian responded to the Council's Interim Order. Therein, the Custodian certified that he was providing all responsive records to the Complainant, consistent with the Council's *In Camera* Examination.

#### Analysis

#### Compliance

At its September 26, 2017 meeting, the Council ordered the Custodian to provide the responsive records to the Complainant in accordance with its *In Camera* Examination and to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the

---

<sup>4</sup> 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.

Executive Director. On September 28, 2017, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on October 5, 2017.

On October 5, 2017, the fifth (5<sup>th</sup>) business day after receipt of the Council's Order, the Custodian provided the responsive records to the Complainant with redactions in accordance with the *In Camera* Examination. The Custodian also simultaneously provided certified confirmation of compliance to the Executive Director.

Therefore, the Custodian complied with the Council's September 26, 2017 Interim Order because he responded in the prescribed time frame by providing the responsive records to the Complainant in accordance with the Council's *In Camera* Examination. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.

### **Knowing & Willful**

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

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

In the matter currently before the Council, the Custodian failed to respond timely to the Complainant's OPRA request and did not fully comply with the Council's January 31, 2017 Interim Order. Additionally, the Custodian unlawfully denied access to portions of the records reviewed *in camera* by the Council. However, the Custodian lawfully denied access to requested item Nos. 7-9 because no records existed. He lawfully denied access to content contained in the sixteen (16) e-mails and the July, 22, 2011 memorandum in its entirety. Finally, the Custodian

timely complied with the Council's September 28, 2017 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's September 26, 2017 Interim Order because he responded in the prescribed time frame by providing the responsive records to the Complainant in accordance with the Council's *In Camera* Examination. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.
  
2. The Custodian failed to respond timely to the Complainant's OPRA request and did not fully comply with the Council's January 31, 2017 Interim Order. Additionally, the Custodian unlawfully denied access to portions of the records reviewed *in camera* by the Council. However, the Custodian lawfully denied access to requested item Nos. 7-9 because no records existed. He lawfully denied access to content contained in the sixteen (16) e-mails and the July, 22, 2011 memorandum in its entirety. Finally, the Custodian timely complied with the Council's September 28, 2017 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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

October 24, 2017



## State of New Jersey

DEPARTMENT OF COMMUNITY AFFAIRS

101 SOUTH BROAD STREET

PO BOX 819

TRENTON, NJ 08625-0819

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

CHARLES A. RICHMAN  
Commissioner

### INTERIM ORDER

#### September 26, 2017 Government Records Council Meeting

Michael I. Inzelbuch, Esq.  
Complainant

Complaint No. 2015-78

v.

NJ Office of Administrative Law  
Custodian of Record

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

1. The Custodian failed to comply fully with the Council’s January 31, 2017 Interim Order. Specifically, he provided for *in camera* review nine (9) copies of items 11-27 in the SOI document index. However, the Custodian failed to do so in a timely manner and did not provide a sufficient certified confirmation of compliance to the Executive Director.
2. **On the basis of the Council’s determination in this matter, the Custodian shall comply with the Council’s Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.<sup>1</sup>**
3. The Custodian must disclose all other portions of the responsive e-mails to the Complainant (*i.e.*, sender, recipients, date, time, subject, and salutations where applicable or not determined to be exempt). As to these portions of the requested e-mails, the Custodian has unlawfully denied access. *See Ray v. Freedom Acad. Charter Sch. (Camden)*, GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010).
4. **The Custodian must comply with conclusion No. 3 above within five (5) business days from receipt of this Order and simultaneously provide certified**

---

<sup>1</sup> 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.





**confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.**

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 26<sup>th</sup> Day of September, 2017

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: September 28, 2017**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Michael I. Inzelbuch, Esq.<sup>1</sup>  
Complainant**

**GRC Complaint No. 2015-78**

**v.**

**NJ Office of Administrative Law<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Copies of the following (from September 2011 to present):

1. Any and all e-mails, letters, correspondence, notes, documents, etc., authored or received by Administrative Law Judge (“ALJ”) Laura Sanders, as to:
  - a. Michael Inzelbuch, Esq.
  - b. Lakewood Board of Education
  - c. Lewis School
  - d. Unapproved or uncredited schools
  - e. Sectarian placements
2. Same as Item No. 1 but as to ALJ Jeffrey S. Masin (now retired)
3. Any and all documentation, notes, e-mails, correspondence, etc. as to ALJ Sanders’ “Memo” dated 9/22/14 including but not limited to:
  - a. who was consulted as to same
  - b. when same was in fact sent out and a listing of those individuals who were to receive same
  - c. any consultation with USDOE, NJDOE (see attached memo)
4. Any and all memorandum (and/or notes, e-mails, documentation as to same) authored and/or received by ALJ Sanders as to:<sup>3</sup>
  - a. The manner in which cases (special education) are heard
  - b. The assignment of ALJs
  - c. Documentation allowed to be considered
5. Documentation as to any and all ALJs who have conflicts with Robin Ballard, Esq.
6. Same as number 5 but as to Michael Inzelbuch, Esq.

---

<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Sandra DeSarno Hlatky, Esq. (Mercerville, NJ).

<sup>3</sup> Because the Complainant did not raise a denial of access issue regarding this item, the GRC will not address it.

7. Any and all documentation, e-mails, notes, correspondences as to why ALJ Pelios no longer hears special education matters and those ALJs who have asked/inquired as to same
8. Any and all review by the Office of Administrative Law (“OAL”) and/or ALJ Sanders as to the issue of “Schneck, Price, Smith & King, LLP” (law firm) and/or Robin Ballard, Esq., appearing at OAL due to possible conflicts as well as any and all documentation as to same
9. Any and all manuals/protocol/memorandum as to the above issue and/or those that would apply to said issue
10. Any and all memorandum, e-mails, notes, documentation authorized by ALJ Sanders as to the *alleged* inappropriate action(s) by ALJ’s since September 2011 to current
11. Any and all memorandum, notes, e-mails, documentations, etc. as to any and all interactions/meetings between OAL Judges including, but not limited to, ALJ Sanders with:
  - a. any individual employed with OSEP
  - b. John Worthington (OSEP)
  - c. Peggy McDonald (OSEP)
  - d. Delores Walters (OSEP)
12. Any and all documents authored by ALJ Jeffrey Masin as to the Lewis School and/or unapproved/unaccredited placements and/or sectarian placements
13. Any and all documentation received/reviewed, and/or responded to as to ALJ conflicts with Michael I. Inzelbuch, Esq.
14. Same as number 13 but as to Robin Ballard, Esq.
15. A copy of ALJ Sanders schedule from January 2014 through August 2015

**Custodian of Record:** Patrick Mulligan

**Request Received by Custodian:** March 9, 2015

**Response Made by Custodian:** March 20, 2015; March 24, 2015

**GRC Complaint Received:** March 24, 2015

**Records Submitted for *In Camera* Examination:**

1. Memorandum from Deputy Director Jeff S. Masin to all ALJs dated July 22, 2011, entitled “Special Education – Placements in Unaccredited Schools” (4 pages).
2. E-mail from Deputy Director Masin to ALJs dated October 7, 2014 entitled “Special Education: Placement in an unapproved, unaccredited school” (2 pages).
3. E-mail thread from March 20, 2014 through March 25, 2014 discussing internal scheduling problems in Lakewood special education matters (3 pages).

4. E-mail thread dated October 21, 2014 discussing internal scheduling problems in Lakewood special education matters (4 pages).
5. E-mail thread from September 30, 2014 through October 1, 2014 discussing scheduling and assignment of ALJs to Lakewood emergent hearings (2 pages).
6. E-mail from ALJ Cohen to ALJ Sanders dated May 21, 2014 regarding a scheduling issue with the Complainant (with memorandum attachment)(4 pages).
7. E-mail thread from October 29, 2013 through October 31, 2013 discussing conflicts for the Complainant on OAL's calendar (2 pages).
8. E-mail thread between Sandra Hlatky and ALJ Sanders dated September 6, 2013 regarding attorney caseloads (1 page).
9. E-mail from ALJ Kerin dated November 1, 2013 recusing herself from matters involving the Complainant (1 page).
10. E-mail from ALJ Russo dated January 23, 2014 placing the Complainant on his conflict list (1 page).
11. E-mail from ALJ Gorman dated June 27, 2014 placing the Complainant on his conflict list (1 page).
12. E-mail from ALJ Schuster dated August 19, 2013 placing Robin Ballard on his conflict list (1 page).
13. E-mail from ALJ Kerin dated August 19, 2013 placing Ms. Ballard on her conflict list (1 page).
14. E-mail from ALJ Scarola dated August 19, 2013 placing Ms. Ballard on her conflict list (1 page).
15. E-mail from ALJ James-Beavers dated August 20, 2013 placing Ms. Ballard on her conflict list (1 page).
16. E-mail from Carol Berlen, OAL Ethics Officer, to ALJs dated August 29, 2013 discussing their conflict e-mails (1 page).
17. E-mail from ALJ James-Beavers dated October 2, 2013 removing Ms. Ballard from her conflict list (1 page).

### **Background**

#### **January 31, 2017 Council Meeting:**

At its January 31, 2017 public meeting, the Council considered the December 6, 2016 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, by a majority vote, adopted said findings and recommendations. The Council, therefore, found that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i),

and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

2. Without inspecting the withheld records, the GRC cannot conduct the “meaningful review of the basis for [the] agency’s decision to withhold government records” contemplated under OPRA. Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346, 354 (App. Div. 2005). Therefore, the GRC must conduct an *in camera* review of the undisclosed records, consisting of items 11-27 in the document index provided by the Custodian, in order to validate the Custodian’s assertions that the records withheld are, in fact, exempt from disclosure based on N.J.S.A. 47:1A-1.1 and N.J.S.A. 47:1A-10.
3. **The Custodian must deliver<sup>4</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see #2 above), a document or redaction index<sup>5</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,<sup>6</sup> 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.**
4. The Custodian has borne his burden of proof that he lawfully denied access to items 7-9, as described in the Complainant’s March 9, 2015 OPRA request, because he certified that no responsive records were located, and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification. N.J.S.A. 47:1A-6; Pusterhofer v. NJ Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
5. The Custodian certified that he attached a copy of ALJ Sanders’s schedule from January 2014 through August 2015, consisting of 94 pages (responsive to item 15) as well as a copy of an Memorandum of Understanding with the Department of Education regarding Special Education matters, consisting of 3 pages (responsive to item 11). The Custodian redacted the identities of applicants and recipients on the schedule, which he argued was confidential information pursuant to 45 C.F.R. 205.50 and N.J.A.C. 10:70-1.5. He stated that the records include information in which parties would have a reasonable expectation of privacy in accordance with N.J.S.A. 47:1A-1. Additionally, the Complainant did not object to the redactions made by the Custodian. Because the Custodian provided records responsive to these items, the Council declines to order disclosure.

---

<sup>4</sup> 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’s office by the deadline.

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

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

#### Procedural History:

On February 2, 2017, the Council distributed its Interim Order to all parties. On February 24, and March 1, 2017, the Complainant e-mailed the Government Records Council ("GRC") asking if the OAL complied with the Council's Order. On March 2, 2017, the Custodian advised both the GRC and Complainant of the OAL's efforts to gather the records sought, to which the Complainant replied that compliance was overdue. On the same day, the Custodian responded, noting that he is the only person available to prepare his records, among other daily duties, and must do so without the benefit of legal assistance. On the same day, the Complainant advised that, notwithstanding the Custodian's predicament, he would not agree to any extensions.

On March 3, 2017, the GRC e-mailed the Custodian, advising that compliance was due on February 9, 2017. The GRC notes that it received no formal requests for extensions prior to that date. Notwithstanding, the GRC advised that it would allow the Custodian a single extension until March 10, 2017. The GRC also noted that no further extensions would be forthcoming.

On March 10, 2017, the Custodian responded to the Council's Interim Order by providing for *in camera* review nine (9) copies of responsive item Nos. 11-27 identified in the SOI's document index. The Custodian also included in his Statement of Information ("SOI") an explanation for denying access to the records: 1) inter-agency or intra agency advisory, consultative, or deliberative ("ACD"); and 2) the personnel exemption for item Nos. 19 through 27 (or Nos. 9 through 17 as identified above). N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-10. However, the Custodian did not include a sufficient certified confirmation of his compliance because he did not include the language required by R. 1:4-4 as part of his response.

### Analysis

#### Compliance

At its January 31, 2017 meeting, the Council ordered the Custodian to provide to the GRC nine (9) copies of items 11-27 in the SOI document index for an *in camera* review. Further, the Council ordered the Custodian to submit certified confirmation of compliance, in accordance with R. 1:4-4, to the Executive Director. On February 2, 2017, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on February 9, 2017.

At the conclusion of the timeframe to respond, the GRC received no further correspondence from the parties until February 24, 2017, when the Complainant sought a status update on the Custodian's compliance. After several communications between the Custodian and the Complainant on said status, the GRC allowed for an extension until March 10, 2017. In doing so, the GRC also noted that the initial deadline had long passed. On March 10, 2017, the Custodian provided to the GRC nine (9) unredacted copies of the records in question but failed to

provide certified confirmation of compliance to the Executive Director in accordance with R. 1:4-4.

Thus, the Custodian failed to comply fully with the Council's Order. First, the Custodian failed to provide either compliance in the required time frame or a request for extension due to exigent circumstances. Second, the Complainant failed to provide certified confirmation of compliance to the Executive Director in accordance with R. 1:4-4. Instead, the Custodian stated, "I do hereby attest to the documents being provided are the ones noted on the attached copy of the GRC [FR] . . . and are labeled as such" (*sic*). This statement did not conform with R. 1:4-4 because it did not contain the required language provided as part of the Council's Order. Inzelbuch v. Office of Administrative Law, GRC Complaint No. 2015-78 (Interim Order dated January 21, 2017) at 11 (FN 9).<sup>7</sup>

Therefore, the Custodian failed to comply fully with the Council's January 31, 2017 Interim Order. Specifically, he provided nine (9) copies of items 11-27 in the SOI document index for an *in camera* review. However, the Custodian failed to do so in a timely manner and did not provide a sufficient 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.

OPRA provides that the definition of a government record "shall not include . . . inter-agency or intra-agency advisory, consultative, or deliberative [(“ACD”)] material." When the exception is invoked, a governmental entity may "withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated." Educ. Law Center v. N.J. Dep't of Educ., 198 N.J. 274, 285 (2009)(citing NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975)). The New Jersey Supreme Court has also 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 decision-making process *and* its disclosure would reveal deliberations that occurred during that process. Educ. Law Ctr., 198 N.J. 274.

The custodian claiming an exception to the disclosure requirements under OPRA on that basis must initially satisfy two conditions: 1) the document must be pre-decisional, meaning that the document was generated prior to the adoption of the governmental entity's policy or decision; and 2) the document must reflect the deliberative process, which means that it must contain opinions, recommendations, or advice about agency policies. Id. at 286 (internal citations and quotations omitted). The key factor in this determination is whether the contents of the document reflect "formulation or exercise of . . . policy-oriented judgment or the process by which policy is

---

<sup>7</sup> This language was also provided to the Custodian as part of the Council's Order sent to the parties on February 2, 2017.

formulated.” Id. at 295 (adopting the federal standard for determining whether material is “deliberative” and *quoting* Mapother v. Dep't of Justice, 3 F.3d 1533, 1539 (D.C. Cir. 1993)). Once the governmental entity satisfies these two threshold requirements, a presumption of confidentiality is established, which the requester may rebut by showing that the need for the materials overrides the government's interest in confidentiality. Id. at 286-87.

Further, OPRA begins with a presumption against disclosure of personnel records and “proceeds with a few narrow exceptions that . . . need to be considered.” Kovalcik v. Somerset Cnty. Prosecutor's Office, 206 N.J. 581, 594 (2011). These are:

[A]n individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefore, and the amount and type of any pension received shall be government record;

[P]ersonnel or pension records of any individual shall be accessible when required to be disclosed by another law, when disclosure is essential to the performance of official duties of a person duly authorized by this State or the United States, or when authorized by an individual in interest; and

[D]ata contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension, but not including any detailed medical or psychological information, shall be a government record.

Id.

The Council has previously addressed whether “personnel records” not specifically identified in OPRA's personnel exceptions should be disclosed. For example, in Dusenberry v. New Jersey City Univ., GRC Complaint No. 2009-101, the complainant sought access to an “Outside Activity Questionnaire” (“OAQ”) for several employees. The custodian denied access under N.J.S.A. 47:1A-10, stating that the OAQs were personnel records. In the Denial of Access Complaint, the complainant disputed the custodian's denial, arguing that he found no legitimate reason for it. In the Statement of Information, the custodian contended that he lawfully denied access based on the Appellate Division's decision in N. Jersey Media Grp. v. Bergen Cnty. Prosecutor's Office, 405 N.J. Super. 386 (App. Div. 2009). There, the Appellate Division determined that OAQs were exempt from disclosure as personnel records. The Council agreed with the custodian, reasoning that there was “no reason why it would not enforce the Appellate Division's decision on the issue of whether outside activity questionnaires are personnel records exempt from disclosure under OPRA.” (*citing* N.J.S.A. 47:1A-10; N. Jersey Media Grp., 405 N.J. Super. at 390). Dusenberry, GRC 2009-101 at 5. The Council therefore held that the custodian lawfully denied access to the responsive OAQs as, among other reasons, personnel records. *See also* Rodriguez v. Kean Univ., GRC Complaint No. 2013-197 (December 2013) (holding that a report related to an ethics investigation was the equivalent of a “personnel record” and exempt from disclosure under N.J.S.A. 47:1A-10).



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

<b>Record No.</b>	<b>Record Name/Date</b>	<b>Description of Record</b>	<b>Custodian's Explanation/ Citation for Non-disclosure</b>	<b>Findings of the <i>In Camera</i> Examination<sup>8</sup></b>
1.	Memorandum from Deputy Director Masin to all ALJs, dated July 22, 2011 (4 pages).	Deputy Director Mason provided a recommendation on how to address cases involving placement of special education students in unaccredited schools.	ACD exemption. <u>N.J.S.A. 47:1A-1.1.</u>	The memo falls within the ACD exemption because it includes opinions and recommendations of Deputy Director Masin on prospective placement policy. Thus, the Custodian lawfully denied access to the record. <u>N.J.S.A. 47:1A-6.</u>
2.	E-mail from Deputy Director Masin to ALJs, dated October 7, 2014 (2 pages).	Deputy Director Masin addressed a recent issue with a case involving placement of a child at an unapproved, unaccredited school.	ACD exemption. <u>N.J.S.A. 47:1A-1.1.</u>	The body of the e-mail falls within the ACD exemption because it contains opinions and recommendations of Deputy Director Masin on prospective placement policy. Thus, the Custodian lawfully denied access to the body of the e-mail. <u>N.J.S.A. 47:1A-1.1.</u>
3.	E-mail chain between Ms. Hlatky and ALJ Robert Giordano between March 20, 2014, and March 25, 2014 (copying ALJ	Ms. Hlatky and ALJ Giordano discuss internal scheduling issues.	ACD exemption. <u>N.J.S.A. 47:1A-1.1.</u>	The bodies of each e-mail in the chain clearly fall within the ACD exemption. Each e-mail addresses the OAL's attempts to schedule hearings internally and contains the opinions, recommendations, and deliberations of both Ms.

<sup>8</sup> **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.

	Sanders and Kurt Schwartz) (3 pages),			Hlatky and ALJ Giordano. Thus, the Custodian lawfully denied access to the bodies of each e-mail in the chain. <u>N.J.S.A. 47:1A-1.1.</u>
4.	E-mail chain between multiple ALJs and Ms. Hlatky, dated October 21, 2014 (4 pages).	The ALJs and Ms. Hlatky attempt to devise a viable plan for internal scheduling issues arising from Lakewood special education matters.	ACD exemption. <u>N.J.S.A. 47:1A-1.1.</u>	The “Subject” line and bodies of each e-mail in the chain clearly fall within the ACD exemption. Each e-mail addresses the OAL’s attempts to schedule hearings internally and contains the opinions, recommendations, and deliberations of Ms. Hlatky and the ALJs. Thus, the Custodian lawfully denied access to the “Subject” line and bodies of each e-mail in the chain. <u>N.J.S.A. 47:1A-1.1.</u>
5.	E-mail chain between Ms. Hlatky and multiple ALJs between September 30, 2014, and October 1, 2014 (2 pages).	Ms. Hlatky and the ALJs attempt to schedule Lakewood emergent hearings	ACD exemption. <u>N.J.S.A. 47:1A-1.1.</u>	The bodies of each e-mail in the chain clearly fall within the ACD exemption. Each e-mail addresses the OAL’s attempts to schedule hearings internally and contains the opinions, recommendations, and deliberations of Ms. Hlatky and the ALJs. Thus, the Custodian lawfully denied access to the bodies of each e-mail in the chain. <u>N.J.S.A. 47:1A-1.1.</u>
6.	E-mail from ALJ Cohen to ALJ Sanders (attaching a memorandum) dated May 21, 2014 (4 pages).	ALJ Cohen addresses a scheduling issue with the Complainant and provides a memorandum detailing those issues.	ACD exemption. <u>N.J.S.A. 47:1A-1.1.</u>	The body of the e-mail and the attached memo fall within the ACD exemption. Both address internal scheduling issues and contain ALJ Cohen’s opinions, recommendations, and deliberations. Thus, the Custodian lawfully denied access to the e-mail and attached memo. <u>N.J.S.A. 47:1A-1.1.</u>
7.	E-mail chain between Ms. Hlatky and	Ms. Hlatky sought guidance on possible conflicts present on	ACD exemption. <u>N.J.S.A. 47:1A-</u>	The bodies of the first four (4) e-mails in the chain clearly fall within the ACD exemption.

	multiple ALJs between October 29, 2013 and October 31, 2013 (2 pages).	the Complainant's OAL calendar.	1.1.	<p>Each e-mail addresses the OAL's attempts to schedule hearings internally and contains the opinions, recommendations, and deliberations of Ms. Hlatky and the ALJs. Thus, the Custodian lawfully denied access to the bodies of those e-mails in the chain. <u>N.J.S.A. 47:1A-1.1.</u></p> <p>However, the last e-mail from Ms. Rogers to Ms. Hlatky, ALJ Giordano, and Mr. Schwartz (3:32 pm) does not similarly contain ACD material. <b>For this e-mail in the chain, the Custodian unlawfully denied access.</b></p>
8.	E-mail chain between Ms. Hlatky and ALJ Sanders, dated September 6, 2013 (1 page).	Ms. Hlatky and ALJ Sanders discuss the Complainant's pending case load before the OAL.	ACD exemption. <u>N.J.S.A. 47:1A-1.1.</u>	The "Subject" line and bodies of each e-mail in the chain clearly fall within the ACD exemption. Each e-mail addresses the OAL's attempts to schedule hearings internally and contains the opinions, recommendations, and deliberations of Ms. Hlatky and ALJ Sanders. Thus, the Custodian lawfully denied access to the "Subject" line and bodies of each e-mail in the chain. <u>N.J.S.A. 47:1A-1.1.</u>
9.	E-mail from ALJ Kerins to multiple recipients, dated November 1, 2013 (1 page).	ALJ Kerins advised that she would recuse herself from cases involving two (2) individuals.	ACD and personnel record exemption. <u>N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-10.</u>	The body of the e-mail is a request from ALJ Kerins to memorialize a recusal. Based on the GRC's review, however, the e-mail does not appear to be the official recusal record, which is a list maintained by the OAL. Actually, the e-mail appears to be a simple notification to update the official recusal list. For that reason, the GRC

				agrees that the content is essentially pre-decisional (or prior to the updating of the official recusal record) and also had the “indicia” of a personnel record in its base form. <u>N. Jersey Media Grp.</u> , 405 <u>N.J. Super.</u> at 390). <u>Dusenberry</u> , GRC 2009-101. Thus, the Custodian lawfully denied access to the body of this e-mail. <u>N.J.S.A.</u> 47:1A-6; <u>N.J.S.A.</u> 47:1A-1.1; <u>N.J.S.A.</u> 47:1A-10.
10.	E-mail from ALJ Russo to multiple recipients, dated January 23, 2014 (1 page).	ALJ Russo requested that an individual be added to his recusal list, with explanation.	ACD and personnel record exemption. <u>N.J.S.A.</u> 47:1A-1.1; <u>N.J.S.A.</u> 47:1A-10.	For the reasons indicated above in No. 9, the Custodian lawfully denied access to the body of this e-mail. <u>N.J.S.A.</u> 47:1A-6; <u>N.J.S.A.</u> 47:1A-1.1; <u>N.J.S.A.</u> 47:1A-10.
11.	E-mail from ALJ Gorman to multiple recipients, dated June 27, 2014 (1 page).	ALJ Gorman requested that his recusal list be updated.	ACD and personnel record exemption. <u>N.J.S.A.</u> 47:1A-1.1; <u>N.J.S.A.</u> 47:1A-10.	For the reasons indicated above in No. 9, the Custodian lawfully denied access to the body of the e-mail. <u>N.J.S.A.</u> 47:1A-6; <u>N.J.S.A.</u> 47:1A-1.1; <u>N.J.S.A.</u> 47:1A-10.
12.	E-mail from ALJ Schuster to multiple recipients dated August 19, 2013 (1 page).	ALJ Schuster requested that her recusal list be updated, with explanation.	ACD and personnel record exemption. <u>N.J.S.A.</u> 47:1A-1.1; <u>N.J.S.A.</u> 47:1A-10.	Including the reasons above, the GRC also notes that the recusal explanation contains opinions and deliberations on the recusal question that clearly fall within the ACD exemption. For those reasons, the Custodian lawfully denied access to the body of the e-mail. <u>N.J.S.A.</u> 47:1A-6; <u>N.J.S.A.</u> 47:1A-1.1; <u>N.J.S.A.</u> 47:1A-10.
13.	E-mail from ALJ Kerins to multiple recipients, dated August 19, 2013 (1 page).	ALJ Kerins requested that her recusal list be updated based on ALJ Shuster’s explanation.	ACD and personnel record exemption. <u>N.J.S.A.</u> 47:1A-1.1; <u>N.J.S.A.</u>	For the reasons indicated above in No. 9, the Custodian lawfully denied access to the body of this e-mail. <u>N.J.S.A.</u> 47:1A-6; <u>N.J.S.A.</u> 47:1A-1.1; <u>N.J.S.A.</u> 47:1A-10.

	<b>*Note: In Camera Item No. 12 is included in this e-mail chain.</b>		47:1A-10.	
14.	E-mail from ALJ Russo to multiple recipients, dated August 19, 2013 (1 page).  <b>*Note: In Camera Item No. 12 is included in this e-mail chain.</b>	ALJ Scarola also requested an update to her recusal list based on ALJ Schuster's reasoning. ALJ Scarola contemplated an additional issue related to that individual.	ACD and personnel record exemption. <u>N.J.S.A. 47:1A-1.1</u> ; <u>N.J.S.A. 47:1A-10</u> .	For the reasons indicated above in No. 9, the Custodian lawfully denied access to the body of this e-mail. <u>N.J.S.A. 47:1A-6</u> ; <u>N.J.S.A. 47:1A-1.1</u> ; <u>N.J.S.A. 47:1A-10</u> .
15.	E-mail from ALJ James-Beavers to multiple recipients, dated August 20, 2013 (1 page).  <b>*Note: In Camera Item No. 12 is included in this e-mail chain.</b>	ALJ James-Beavers also requested an update to her recusal list based on ALJ Schuster's reasoning but includes her own explanation.	ACD and personnel record exemption. <u>N.J.S.A. 47:1A-1.1</u> ; <u>N.J.S.A. 47:1A-10</u> .	Including the reasons above, the GRC also notes that the recusal explanation contains opinions and deliberations on the recusal question that clearly fall within the ACD exemption. For those reasons, the Custodian lawfully denied access to the body of this e-mail. <u>N.J.S.A. 47:1A-6</u> ; <u>N.J.S.A. 47:1A-1.1</u> ; <u>N.J.S.A. 47:1A-10</u> .
16.	E-mail from Ms. Berlen to all ALJs, dated August 29, 2013 (1 page).  <b>*Note: In Camera Item No. 17 is included in e-mail chain.</b>	Ms. Berlen provides ethics advice on recusals to ALJs (per her position as OAL Ethics Officer) in response to multiple recusals of the same attorney.	ACD and personnel record exemption. <u>N.J.S.A. 47:1A-1.1</u> ; <u>N.J.S.A. 47:1A-10</u> .	The body of the e-mail falls within the ACD exemption because it contains opinions and recommendations of Ms. Berlen on recusal issues. Thus, the Custodian lawfully denied access to the body of this e-mail. <u>N.J.S.A. 47:1A-1.1</u> .
17.	E-mail from ALJ James-Beavers to Ms. Berlen, dated October 2, 2013 (1 page).	ALJ James-Beavers reversed her recusal of the individual based on Ms. Berlen's advice and	ACD and personnel record exemption. <u>N.J.S.A. 47:1A-</u>	Including the reasons above, the GRC also notes that the recusal explanation contains opinions and deliberations on the recusal question that

	<p><b>*Note: In Camera Item No. 16 included in e-mail chain.</b></p>	<p>provides an explanation for the reversal.</p>	<p>1.1; <u>N.J.S.A. 47:1A-10.</u></p>	<p>clearly fall within the ACD exemption. For those reasons, the Custodian lawfully denied access to the body of this e-mail. <u>N.J.S.A. 47:1A-6</u>; <u>N.J.S.A. 47:1A-1.1</u>; <u>N.J.S.A. 47:1A-10.</u></p>
--	--	--	---------------------------------------	---

Additionally, 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 responsive e-mails to the Complainant (*i.e.*, sender, recipients, date, time, subject, and salutations where applicable or not determined to be exempt). As to those portions of the requested e-mails, the Custodian has unlawfully denied access. *See Ray v. Freedom Acad. Charter Sch. (Camden)*, GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010).

**Knowing & Willful**

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

**Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian failed to comply fully with the Council’s January 31, 2017 Interim Order. Specifically, he provided for *in camera* review nine (9) copies of items 11-27 in the SOI document index. However, the Custodian failed to do so in a timely manner and did not provide a sufficient certified confirmation of compliance to the Executive Director.
2. **On the basis of the Council’s determination in this matter, the Custodian shall comply with the Council’s Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.<sup>9</sup>**

---

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

3. The Custodian must disclose all other portions of the responsive e-mails to the Complainant (*i.e.*, sender, recipients, date, time, subject, and salutations where applicable or not determined to be exempt). As to these portions of the requested e-mails, the Custodian has unlawfully denied access. *See* Ray v. Freedom Acad. Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010).
4. **The Custodian must comply with conclusion No. 3 above within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

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

September 19, 2017



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

CHRIS CHRISTIE  
*Governor*

KIM GUADAGNO  
*Lt. Governor*

CHARLES A. RICHMAN  
*Commissioner*

**INTERIM ORDER**

**January 31, 2017 Government Records Council Meeting**

Michael I. Inzelbuch, Esq.  
 Complainant

Complaint No. 2015-78

v.

NJ Office of Administrative Law  
 Custodian of Record

At the January 31, 2017 public meeting, the Government Records Council (“Council”) considered the December 6, 2016 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. Without inspecting the withheld records, the GRC cannot conduct the “meaningful review of the basis for [the] agency’s decision to withhold government records” contemplated under OPRA. Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346, 354 (App. Div. 2005). Therefore, the GRC must conduct an *in camera* review of the undisclosed records, consisting of items 11-27 in the document index provided by the Custodian, in order to validate the Custodian’s assertions that the records withheld are, in fact, exempt from disclosure based on N.J.S.A. 47:1A-1.1 and N.J.S.A. 47:1A-10.
3. **The Custodian must deliver<sup>1</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted record(s) (see #2 above), a document or redaction index<sup>2</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,<sup>3</sup> that the records provided are the records requested by**

<sup>1</sup> 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’s office by the deadline.

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

<sup>3</sup> "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."





**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.**

4. The Custodian has borne his burden of proof that he lawfully denied access to items 7-9, as described in the Complainant's March 9, 2015 OPRA request, because he certified that no responsive records were located, and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. N.J.S.A. 47:1A-6; Pusterhofer v. NJ Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
5. The Custodian certified that he attached a copy of ALJ Sanders's schedule from January 2014 through August 2015, consisting of 94 pages (responsive to item 15) as well as a copy of an Memorandum of Understanding with the Department of Education regarding Special Education matters, consisting of 3 pages (responsive to item 11). The Custodian redacted the identities of applicants and recipients on the schedule, which he argued was confidential information pursuant to 45 C.F.R. 205.50 and N.J.A.C. 10:70-1.5. He stated that the records include information in which parties would have a reasonable expectation of privacy in accordance with N.J.S.A. 47:1A-1. Additionally, the Complainant did not object to the redactions made by the Custodian. Because the Custodian provided records responsive to these items, the Council declines to order disclosure.
6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the  
Government Records Council  
On The 31<sup>st</sup> Day of January, 2017

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: February 2, 2017**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Michael I. Inzelbuch, Esq.<sup>1</sup>  
Complainant**

**GRC Complaint No. 2015-78**

v.

**NJ Office of Administrative Law<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Copies of the following (from September 2011 to present):

- 1) Any and all e-mails, letters, correspondence, notes, documents, etc., authored or received by Administrative Law Judge (“ALJ”) Laura Sanders, as to:
  - a. Michael Inzelbuch, Esq.
  - b. Lakewood Board of Education
  - c. Lewis School
  - d. Unapproved or uncredited schools
  - e. Sectarian placements
- 2) Same as Item No. 1 but as to ALJ Jeffrey S. Masin (now retired)
- 3) Any and all documentation, notes, e-mails, correspondence, etc. as to ALJ Sanders’ “Memo” dated 9/22/14 including but not limited to:
  - a. who was consulted as to same
  - b. when same was in fact sent out and a listing of those individuals who were to receive same
  - c. any consultation with USDOE, NJDOE (see attached memo)
- 4) Any and all memorandum (and/or notes, e-mails, documentation as to same) authored and/or received by ALJ Sanders as to:<sup>3</sup>
  - a. The manner in which cases (special education) are heard
  - b. The assignment of ALJs
  - c. Documentation allowed to be considered
- 5) Documentation as to any and all ALJs who have conflicts with Robin Ballard, Esq.
- 6) Same as number 5 but as to Michael Inzelbuch, Esq.

---

<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Sandra DeSarno Hlatky, Esq. (Mercerville, NJ).

<sup>3</sup> Because the Complainant did not raise a denial of access issue regarding this item, the GRC will not address it.

- 7) Any and all documentation, e-mails, notes, correspondences as to why ALJ Pelios no longer hears special education matters and those ALJs who have asked/inquired as to same
- 8) Any and all review by the Office of Administrative Law (“OAL”) and/or ALJ Sanders as to the issue of “Schneck, Price, Smith & King, LLP” (law firm) and/or Robin Ballard, Esq., appearing at OAL due to possible conflicts as well as any and all documentation as to same
- 9) Any and all manuals/protocol/memorandum as to the above issue and/or those that would apply to said issue
- 10) Any and all memorandum, e-mails, notes, documentation authorized by ALJ Sanders as to the *alleged* inappropriate action(s) by ALJ’s since September 2011 to current
- 11) Any and all memorandum, notes, e-mails, documentations, etc. as to any and all interactions/meetings between OAL Judges including, but not limited to, ALJ Sanders with:
  - a. any individual employed with OSEP
  - b. John Worthington (OSEP)
  - c. Peggy McDonald (OSEP)
  - d. Delores Walters (OSEP)
- 12) Any and all documents authored by ALJ Jeffrey Masin as to the Lewis School and/or unapproved/unaccredited placements and/or sectarian placements
- 13) Any and all documentation received/reviewed, and/or responded to as to ALJ conflicts with Michael I. Inzelbuch, Esq.
- 14) Same as number 13 but as to Robin Ballard, Esq.
- 15) A copy of ALJ Sanders schedule from January 2014 through August 2015

**Custodian of Record:** Patrick Mulligan

**Request Received by Custodian:** March 9, 2015

**Response Made by Custodian:** March 20, 2015; March 24, 2015

**GRC Complaint Received:** March 24, 2015

### **Background**<sup>4</sup>

#### **Request and Response:**

---

<sup>4</sup> 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.

On March 9, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On March 20, 2015, the Custodian responded in writing and advised the Complainant that the responsive documents were available for pick up at the OAL’s offices in Quakerbridge Plaza. That same day, the Complainant replied and asked whether he had in fact requested pick up and additionally inquired as to the number of pages and cost of the responsive documents. The Custodian responded that same day, informing the Complainant that he had marked the “pick up” option and saying, “No cost and don’t have a page count.”

Later that same day, March 20, 2015, after the Complainant’s messenger picked up the materials, the Complainant wrote to the Custodian and alleged that the provided records did not fully satisfy the request. He wrote, “Before I consider taking the next steps please confirm in writing that what was attached is all what was provided. Also – while I appreciate no charge being assessed I insist upon paying whatever the cost is. Please advise.”

On March 20, 2015, the Complainant filed a Denial of Access Complaint. On March 24, 2015, the Custodian responded to the Complainant’s March 20, 2015 e-mail, informing him that a second set of documents had been prepared and was ready for pick-up. With respect to the new set of documents, the Custodian stated that he “overlooked it as being part of the file” when he was compiling the information.

That same day, the Complainant responded to the Custodian’s e-mail and requested that the Custodian fax the additional documents. The Complainant additionally inquired as to the amount of additional documents. The Custodian responded minutes later and stated that the additional documents consisted of one hundred (100) additional pages. That same day, the Complainant responded to this e-mail and inquired as to why those pages were not included in the original package. The Custodian responded later that same day, stating that it was his “oversight” and “nothing more.” The Custodian then inquired as to whether the Complainant would accept a .pdf document. The Complainant responded minutes later and stated that he would accept a .pdf form and “the original” via certified mail. The Custodian responded via e-mail that same day and attached the additional documents.

To that e-mail, the Custodian attached a document titled “OAL Response to OPRA Request,” where he responded line-by-line to the original request. With respect to item 1(a), he wrote, “[a]ssuming that the requestor isn’t requesting correspondence exchanged between ALJ Sanders and himself, none found other than intra-agency, consultative, and/or deliberative [“ACD”] material which are exempt from disclosure.”

With respect to item 1(b), the Custodian noted that he had attached an e-mail from October 21, 2014, and that other responsive e-mails were exempt as ACD material. The Custodian responded to items 1(c) and 1(d) by noting, “[n]one located other than answer to 12.” He further stated that any responsive documents to item 1(e) were ACD material and therefore exempt from disclosure.

With respect to item 2(a), the Custodian stated that no records were located other than records containing ACD material, which are exempt from disclosure. The Custodian responded to item 2(b) by attaching e-mails from September 26, 2014, and October 21, 2014, and noting that other responsive records were ACD material and therefore exempt from disclosure. The Custodian's responses to items 2(c) and 2(d) advised the Complainant to "see answer to 12." With respect to item 2(e), the Custodian attached an e-mail from October 22, 2014, and advised that other responsive records were ACD material and therefore exempt from disclosure.

The Custodian responded to item 3 by noting that "any and all" documents, notes, e-mails, correspondence, etc. "preceding the issuance" of the September 22, 2014 memo are ACD material and therefore exempt from disclosure. The Custodian responded to item 3(b) by noting that the memo was mailed to an attached list and took place "as best records reflect, the second week of November 2014."

The Custodian responded to item 5 by listing ALJ Delanoy, ALJ Kerins, ALJ Scarola, ALJ Schuster, and ALJ Pelios as those who wished to have Robin Ballard added to their respective conflict list. The Custodian's response to item 6 listed ALJ Gorman, ALJ Kerins, and ALJ Russo as those who asked that Michael Inzelbuch be added to their respective conflict list "or otherwise recused themselves from hearing his matters."

The Custodian's responses to items 7, 8, and 9 stated that no responsive records were located. With respect to item 10, the Custodian requested clarification. He did note that, "to the extent that the requestor seeks personnel records of the ALJs," such records were exempt from disclosure under OPRA. The Custodian responded to item 11 by attaching a copy of the annual "MOU with the Department of Education" regarding special education matters.

The Custodian's response to item 12 stated that any and all documents authored by ALJ Masin regarding the Lewis School, which were not contained in an order or final decision, are ACD material and therefore exempt from disclosure. The Custodian stated that "specifically, [the] memo dated 7/22/11 and [the] e-mail dated 10/7/14" are ACD material. He noted that the only decision or order that he located is W.G. o/b/o J.M. v. Wall Township BOE, EDS 7506-11, which he attached.

With respect to item 13, the Custodian wrote "Same as #6" and noted that "letters from judges requesting [that] someone be placed on their conflict list . . ." are personnel records and ACD and are therefore exempt from disclosure. The Custodian's response to item 14 stated, "[s]ame as #5" and reiterated the response in item 13. The Custodian's response to item 15 consisted of a copy of ALJ Sanders' schedule from January 2014 through August 2015.

On March 25, 2015, the Complainant responded, thanking the Custodian for the .pdf file and adding, "I expect the documents I requested." The Complainant thereafter attached a copy of the Custodian's line-by-line response, on which the Complainant hand-wrote objections to the Custodian's responses. With respect to item 1(a), the Complainant wrote "[n]o such limitation – please provide." The Complainant then noted that the Custodian did not attach the October 22, 2014 e-mail from item 1(b). He further noted that he disagreed with the Custodian's responses to items 1(c)-1(e).

With respect to item 2, the Complainant stated that the Custodian did not attach the referenced e-mails and that he disagreed with the Custodian's reasons for denial. He further disagreed with the Custodian's responses to items 3, 7, 8, and 9. With respect to item 6, the Complainant wrote, "[p]lease provide requests." With respect to item 10, seeking clarification, the Complainant wrote, "[a]ny ratings, letters of reprimands, reviews." With respect to item 11, the Complainant wrote, "[n]eed all 'MOUs' and all responses." As to the memo dated July 22, 2011, and e-mail dated October 7, 2014, in item 12, the Complainant circled those items and simply wrote, "Want." With respect to items 13 and 14, the Complainant wrote "as to me."

#### Denial of Access Complaint:

On March 24, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that the Custodian provided neither rationale nor reason for the "delay or denial of any of my requests."

#### Statement of Information:

On April 2, 2015, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on March 9, 2015. The Custodian certified that he responded in writing on March 20, 2015, and March 24, 2015, attaching responsive documents.

The Custodian listed the responsive records as follows. With respect to items disclosed, he certified as to the following items:

1. A copy of ALJ Sanders' schedule from January 2014 to August 2015 (94 pages), containing redactions as to the identities of applicants and recipients. The Custodian asserts that the redacted information is confidential pursuant to 45 C.F.R. 205.50 and N.J.A.C. 10:70-1.5 and because the records contain information in which people have a reasonable expectation of privacy in accordance with N.J.S.A. 47:1A-1.
2. Two e-mails, dated October 21, 2014, from Sandra Hlatky regarding Lakewood day school cases (5 pages).
3. 9/26/14 email from Ms. Hlatky, titled "EDS 12034-14 C.F. and L.F. v. Lakewood BOE" (1 page).
4. 10/22/14 e-mail from Ms. Hlatky, titled "eds 07644-06" (1 page).
5. List of names and law firms/organizations (2 pages).
6. Document dated 2/18/14, titled "Special Education" (6 pages).
7. E-mail dated 2/13/15 from Laura Sanders, titled "procedure for Thursday conferences" with 2 attachments titled "Trenton-Atlantic City Hearings" and "Newark Hearings" (5 pages).
8. Memo dated 9/22/14.
9. Memo dated 3/12/14, titled "Special Education Procedures" (3 pages).
10. Interlocutory Order in EDS 7506-11 (10 pages).

With respect to certain responsive items, the Custodian listed the following items as records located but not provided due to OPRA exemptions:

11. Memo dated 7/22/11 from Deputy Director Jeff S. Masin to ALJs, titled “Special Education-Placements in Unaccredited Schools” (4 pages).
12. E-mail dated 10/7/14 from Deputy Director Masin to ALJs, titled “Special Education: Placement in an unapproved, unaccredited school” (2 pages).
13. E-mail thread discussing internal scheduling problems in special education matters, from 3-20-14 through 3-25-14 (3 pages).
14. E-mail thread discussing internal scheduling problems in Lakewood special education matters dated 3-21-14 (4 pages).
15. E-mail thread discussing scheduling and assignment of ALJs to Lakewood emergent hearings from 3-30-14 to 10-1-14 (2 pages).
16. E-mail dated 5-21-14 from ALJ Cohen to ALJ Sanders and enclosed memo regarding a scheduling issue with Mr. Inzelbuch ( 4 pages).
17. E-mail thread discussing conflicts for Mr. Inzelbuch on OAL’s calendar (2 pages)
18. E-mail regarding attorney caseloads (1 page).
19. ALJ Kerin’s memo recusing herself from matters involving Michael Inzelbuch (1 page).
20. ALJ Russo’s 1-23-14 e-mail placing Mr. Inzelbuch on his conflict list (1 page).
21. ALJ Gorman’s 6-27-14 e-mail placing Mr. Inzelbuch on his conflict list (1 page).
22. ALJ Schuster’s 8-19-13 e-mail placing Robin Ballard on his conflict list (1 page).
23. ALJ Kerin’s 8-19-13 e-mail placing Ms. Ballard on her conflict list (1 page).
24. ALJ Scarola’s 8-19-13 e-mail placing Ms. Ballard on her conflict list (1 page).
25. ALJ James-Beavers e-mail placing Ms. Ballard on her conflict list (1 page).
26. E-mail dated 8-29-13 from Carol Berlen, OAL Ethics Officer, to ALJs, discussing ALJ conflict e-mails.
27. ALJ James-Beavers’ 10-2-13 e-mail removing Ms. Ballard from her conflict list (1 page).

The Custodian asserted that items 11-27 were exempt from disclosure and were therefore not provided to the Complainant, because the records contained material that was Intra-agency advisory, consultative, and/or deliberative material (“ACD”). N.J.S.A. 47:1A-1.1. Additionally, the Custodian argued that items 19-27 were further exempt under the personnel record exemption of N.J.S.A. 47:1A-10.

In the SOI, the Custodian noted that the Complainant suggested that he is aware of documents that the Custodian did not locate. The Custodian additionally stated that the OAL was “continuing to look” for requested records.

The Custodian certified that he provided “specific documents” that he had located and raised appropriate exemptions, specifically that the requested documents contained ACD material (outlined in the above chart). He argued that the exempt documents fall within the ACD exemption outlined in N.J.S.A. 47:1A-1.1 because they are pre-decisional, reflecting opinions, deliberations, and recommendations that were prior to the agency’s decision. *See Bayliss v. NJ State Police*, 2013 U.S. Dist LEXIS 134720 (2013). The Custodian made no additional legal arguments.

### Additional Submissions:

On April 3, 2015, the Complainant wrote to the GRC, responding to the Custodian's SOI. The Complainant noted that the Custodian's SOI stated "the OAL is continuing to look for records requested and upon locating will either provide, or claim an exemption." The Complainant stated that this was the first time he was advised that the OAL is continuing to search for documents and questioned when he would receive an appropriate response.

Additionally, the Complainant argued that the Custodian's initial response, dated March 20, 2015, asserted no exemptions nor indicated that the OAL was continuing to search for responsive records.

On October 28, 2016, the GRC sent a request for additional information to the Custodian, seeking clarification as to items 11-27 listed in the SOI. The GRC asked that the Custodian specify which responsive records correlated to the items in the Complainant's original OPRA request. On November 21, 2016, the Custodian responded, cross-referencing items 11-27 in the SOI to the Complainant's original 15-item OPRA request as follows:

11. Memo dated 7/22/11, relates to #12 in OPRA request.
12. E-mail dated 10/7/14, relates to #1 and #12 in OPRA request.
13. E-mail thread from 3-20-14 through 3-25-14, relates to #1 and #4 in OPRA request.
14. E-mail thread dated 3-21-14, relates to #1 in OPRA request.
15. E-mail thread from 3-30-14 to 10-1-14, relates to #1 in OPRA request.
16. E-mail dated 5-21-14 and enclosed memo, relates to #1 in OPRA request.
17. E-mail thread discussing conflicts, relates to #1 in OPRA request.
18. E-mail regarding attorney caseloads, relates to #1 in OPRA request.
19. ALJ Kerin's memo recusing herself, relates to #6 in OPRA request.
20. ALJ Russo's 1-23-14 e-mail, relates to #6 in OPRA request.
21. ALJ Gorman's 6-27-14 e-mail, relates to #6 in OPRA request.
22. ALJ Schuster's 8-19-13 e-mail, relates to #5 in OPRA request.
23. ALJ Kerin's 8-19-13 e-mail, relates to #5 in OPRA request.
24. ALJ Scarola's 8-19-13 e-mail, relates to #5 in OPRA request.
25. ALJ James-Beavers e-mail, relates to #5 in OPRA request.
26. E-mail dated 8-29-13 from Carol Berlen, relates to #5 and #6 in OPRA request.
27. ALJ James-Beavers 10-2-13 e-mail, relates to #5 in OPRA request.

### Analysis

#### Timeliness

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian's failure to respond within the required seven (7) business days results in a "deemed" denial. Id. Further, a custodian's response, either granting or denying access, must be in writing pursuant to



N.J.S.A. 47:1A-5(g).<sup>5</sup> Therefore, a custodian's failure to respond in writing to a complainant's OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

In the instant matter, the Custodian received the Complainant's OPRA request on March 9, 2015, therefore making the response deadline March 18, 2015. The Custodian wrote to the Complainant on March 20, 2015, two (2) days after the statutorily mandated response date, advising that the requested records were available for pick up.

Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11.

### **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.

Items 1, 2, 3, 5, 6, 10, 12, 13, 14<sup>6</sup>

In Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the GRC in which the GRC 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.

Paff, 379 N.J. Super. at 354.

---

<sup>5</sup> 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.

<sup>6</sup> In his original response to the OPRA request, the Custodian noted the following: for item 2, see item 12; for item 13, see item 6; for item 14, see item 5.

The court also stated that:

The statute . . . 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 10:4-21, 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 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.

In the instant matter, the Complainant asserted that he disagreed with the Custodian's assertions that some of the responsive records were attorney-client privileged or ACD and therefore not disclosable. Additionally, in the Custodian's SOI, he asserted no other legal arguments, other than reiterating that the records are attorney-client privileged/ACD material pursuant to N.J.S.A. 47:1A-1.1 and/or personnel records pursuant to N.J.S.A. 47:1A-10 and are therefore exempt from disclosure.

While the Custodian disclosed certain records responsive to the above-mentioned items, the Complainant's dispute here concerns the undisclosed records, listed in the Custodian's document index and cross-referenced to the original OPRA request in the Custodian's November 21, 2016 clarification. The Custodian did not provide these undisclosed records to the GRC and asserted that they were exempt pursuant to N.J.S.A. 47:1A-1.1 and N.J.S.A. 47:1A-10.

Without inspecting the withheld records, the GRC cannot conduct the "meaningful review of the basis for [the] agency's decision to withhold government records" contemplated under OPRA. Id. at 354. Therefore, the GRC must conduct an *in camera* review of the undisclosed records, consisting of items 11-27 in the document index provided by the Custodian, in order to validate the Custodian's assertions that the records withheld are, in fact, exempt from disclosure based on N.J.S.A. 47:1A-1.1 and N.J.S.A. 47:1A-10.

### Items 7-9:

The Council has previously found that, in light of a custodian's certification that no records responsive to the request exist, and where no evidence exists in the record to refute the custodian's certification, no unlawful denial of access occurred. *See Pusterhofer v. NJ Dep't of Educ.* (GRC Complaint No. 2005-49) (July 2005). Here, the Custodian's response to items 7-9 stated that no responsive records were located. Although the Complainant stated that he disagreed with that response, he provided no competent, credible evidence to indicate otherwise.

Therefore, the Custodian has borne his burden of proof that he lawfully denied access to items 7-9, as described in the Complainant's March 9, 2015 OPRA request, because he certified that no responsive records were located, and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. N.J.S.A. 47:1A-6; *Pusterhofer*, GRC 2005-49.

### Items 11 and 15

The Custodian certified that he attached a copy of ALJ Sanders's schedule from January 2014 through August 2015, consisting of 94 pages (responsive to item 15) as well as a copy of an MOU with the Department of Education regarding Special Education matters, consisting of 3 pages (responsive to item 11). The Custodian redacted the identities of applicants and recipients on the schedule, which he argued was confidential information pursuant to 45 C.F.R. 205.50 and N.J.A.C. 10:70-1.5. He stated that the records include information in which parties would have a reasonable expectation of privacy in accordance with N.J.S.A. 47:1A-1. Additionally, the Complainant did not object to the redactions made by the Custodian. Because the Custodian provided records responsive to these items, the Council declines to order disclosure.

### **Knowing & Willful**

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

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and *Kelley v. Twp. of Rockaway*, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. Without inspecting the withheld records, the GRC cannot conduct the "meaningful review of the basis for [the] agency's decision to withhold government records"

contemplated under OPRA. Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346, 354 (App. Div. 2005). Therefore, the GRC must conduct an *in camera* review of the undisclosed records, consisting of items 11-27 in the document index provided by the Custodian, in order to validate the Custodian's assertions that the records withheld are, in fact, exempt from disclosure based on N.J.S.A. 47:1A-1.1 and N.J.S.A. 47:1A-10.

3. **The Custodian must deliver<sup>7</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted record(s) (see #2 above), a document or redaction index<sup>8</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,<sup>9</sup> 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.**
4. The Custodian has borne his burden of proof that he lawfully denied access to items 7-9, as described in the Complainant's March 9, 2015 OPRA request, because he certified that no responsive records were located, and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. N.J.S.A. 47:1A-6; Pusterhofer v. NJ Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
5. The Custodian certified that he attached a copy of ALJ Sanders's schedule from January 2014 through August 2015, consisting of 94 pages (responsive to item 15) as well as a copy of an Memorandum of Understanding with the Department of Education regarding Special Education matters, consisting of 3 pages (responsive to item 11). The Custodian redacted the identities of applicants and recipients on the schedule, which he argued was confidential information pursuant to 45 C.F.R. 205.50 and N.J.A.C. 10:70-1.5. He stated that the records include information in which parties would have a reasonable expectation of privacy in accordance with N.J.S.A. 47:1A-1. Additionally, the Complainant did not object to the redactions made by the Custodian. Because the Custodian provided records responsive to these items, the Council declines to order disclosure.
6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Husna Kazmir  
Staff Attorney

December 6, 2016<sup>10</sup>

---

<sup>7</sup> 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's office by the deadline.

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

<sup>9</sup> "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."

<sup>10</sup> This complaint was prepared for adjudication at the Council's December 13, 2016 meeting but required additional legal advice from Counsel.