



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

January 7, 2020 Government Records Council Meeting

James Mullin
Complainant

Complaint No. 2017-102

v.

Bergen County Sheriff's Office
Custodian of Record

At the January 7, 2020 public meeting, the Government Records Council ("Council") considered the December 10, 2019 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 November 12, 2019 Interim Order because he responded in the prescribed time frame providing the responsive records at issue. The Custodian also simultaneously provided certified confirmation of compliance to the Executive Director.
2. Although the Custodian unlawfully denied access to the Complainant request, he fully complied with the Council's November 12, 2019 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 7th Day of January 2020

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: January 9, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
January 7, 2020 Council Meeting**

**James Mullin¹
Complainant**

GRC Complaint No. 2017-102

v.

**Bergen County Sheriff's Office²
Custodial Agency**

Records Relevant to Complaint: "Copy of the 2017 County Law Service Review Plan (LSRP)."

Custodian of Record: Captain Gene Kolich

Request Received by Custodian: April 17, 2017

Response Made by Custodian: April 26, 2017

GRC Complaint Received: May 4, 2017

Background

November 12, 2019 Council Meeting:

At its November 12, 2019 public meeting, the Council considered the October 30, 2019 *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 GRC must conduct an *in camera* review of the record to validate the Custodian's contention that the record is exempt information protected by OPRA's advisory, consultative, or deliberative material exemption. See Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005) and N.J.S.A. 47:1A-1.1.
2. **The Custodian shall deliver³ to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see conclusion No. 1 above), a document or redaction index⁴, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,⁵ that the record provided is the record requested**

¹ No legal representation listed on record.

² Represented by John McCann, Esq.

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 the GRC physically receives them 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."

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 November 14, 2019, the Council distributed its Interim Order to all parties. On November 15, 2019, the Custodian responded to the Council's Interim Order. Therein, the Custodian certified that on November 15, 2019, he released the requested LSRP to the Complainant in accordance with the Interim Order.

Analysis

Compliance

At its November 12, 2019 meeting, the Council ordered the Custodian to disclose the LSRP and to submit certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Executive Director. On November 14, 2019 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 November 21, 2019.

On November 15, 2019, the first (1st) business day after receipt of the Council's Order, the Custodian responded in writing certifying that a copy of the LSRP was being provided to the Complainant that same day.

Therefore, the Custodian complied with the Council's November 12, 2019 Interim Order because he responded in the prescribed time frame providing the responsive records at issue. The Custodian also 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)).

Although the Custodian unlawfully denied access to the Complainant’s OPRA request, he fully complied with the Council’s November 12, 2019 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 November 12, 2019 Interim Order because he responded in the prescribed time frame providing the responsive records at issue. The Custodian also simultaneously provided certified confirmation of compliance to the Executive Director.
2. Although the Custodian unlawfully denied access to the Complainant request, he fully complied with the Council’s November 12, 2019 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: Samuel A. Rosado
Staff Attorney

December 10, 2019

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
January 7, 2020 Council Meeting**

**James Mullin¹
Complainant**

GRC Complaint No. 2017-102

v.

**Bergen County Sheriff's Office²
Custodial Agency**

Records Relevant to Complaint: "Copy of the 2017 County Law Service Review Plan (LSRP)."

Custodian of Record: Captain Gene Kolich

Request Received by Custodian: April 17, 2017

Response Made by Custodian: April 26, 2017

GRC Complaint Received: May 4, 2017

Background

November 12, 2019 Council Meeting:

At its November 12, 2019 public meeting, the Council considered the October 30, 2019 *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 GRC must conduct an *in camera* review of the record to validate the Custodian's contention that the record is exempt information protected by OPRA's advisory, consultative, or deliberative material exemption. See Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005) and N.J.S.A. 47:1A-1.1.
2. **The Custodian shall deliver³ to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see conclusion No. 1 above), a document or redaction index⁴, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,⁵ that the record provided is the record requested**

¹ No legal representation listed on record.

² Represented by John McCann, Esq.

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 the GRC physically receives them 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."

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 November 14, 2019, the Council distributed its Interim Order to all parties. On November 15, 2019, the Custodian responded to the Council's Interim Order. Therein, the Custodian certified that on November 15, 2019, he released the requested LSRP to the Complainant in accordance with the Interim Order.

Analysis

Compliance

At its November 12, 2019 meeting, the Council ordered the Custodian to disclose the LSRP and to submit certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Executive Director. On November 14, 2019 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 November 21, 2019.

On November 15, 2019, the first (1st) business day after receipt of the Council's Order, the Custodian responded in writing certifying that a copy of the LSRP was being provided to the Complainant that same day.

Therefore, the Custodian complied with the Council's November 12, 2019 Interim Order because he responded in the prescribed time frame providing the responsive records at issue. The Custodian also 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)).

Although the Custodian unlawfully denied access to the Complainant’s OPRA request, he fully complied with the Council’s November 12, 2019 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 November 12, 2019 Interim Order because he responded in the prescribed time frame providing the responsive records at issue. The Custodian also simultaneously provided certified confirmation of compliance to the Executive Director.
2. Although the Custodian unlawfully denied access to the Complainant request, he fully complied with the Council’s November 12, 2019 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: Samuel A. Rosado
Staff Attorney

December 10, 2019



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

November 12, 2019 Government Records Council Meeting

James Mullin
Complainant

Complaint No. 2017-102

v.

Bergen County Sheriff's Office
Custodian of Record

At the November 12, 2019 public meeting, the Government Records Council ("Council") considered the October 30, 2019 Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian complied with the Council's June 25, 2019 Interim Order because he responded in the prescribed time frame providing to the Council the appropriate record ordered for an *in camera* review. Additionally, the Custodian simultaneously provided certified confirmation of compliance to the GRC.
2. The Custodian unlawfully denied access to the Complainant's April 17, 2017 OPRA request. N.J.S.A. 47:1A-6. Specifically, the requested record did not satisfy the elements required to qualify under the deliberative process privilege. N.J.S.A. 47:1A-1.1; Educ. Law Center v. N.J. Dep't of Educ., 198 N.J. 274, 285 (2009). Additionally, the Custodian failed to show that release of the record "would create a risk to the safety of persons, property, electronic data or software." N.J.S.A. 47:1A-1.1. Therefore, the Custodian shall release the record to the Complainant.
3. **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 conclusion No. 2 above within five (5) business days from receipt of this Order. Further, the Custodian shall simultaneously deliver¹ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,² to the Executive Director.³**

¹ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

² "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

³ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the

4. 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 12th Day of November 2019

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 14, 2019

record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
November 12, 2019 Council Meeting**

**James Mullin¹
Complainant**

GRC Complaint No. 2017-102

v.

**Bergen County Sheriff's Office²
Custodial Agency**

Records Relevant to Complaint: "Copy of the 2017 County Law Service Review Plan (LSRP)."

Custodian of Record: Captain Gene Kolich
Request Received by Custodian: April 17, 2017
Response Made by Custodian: April 26, 2017
GRC Complaint Received: May 4, 2017

Records Submitted for *In Camera* Examination: Nine (9) unredacted copies of the 2017 LSRP withheld from access as comprising advisory, consultative, or deliberative material ("ACD"). N.J.S.A. 47:1A-1.1.

Background

June 25, 2019 Council Meeting:

At its June 25, 2019 public meeting, the Council considered the June 18, 2019 Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The GRC must conduct an *in camera* review of the record to validate the Custodian's contention that the record is exempt information protected by OPRA's advisory, consultative, or deliberative material exemption. See Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005) and N.J.S.A. 47:1A-1.1.
2. **The Custodian shall deliver³ to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see conclusion No. 1 above), a document or**

¹ No legal representation listed on record.

² Represented by John McCann, Esq.

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 the GRC physically receives them by the deadline.

redaction index⁴, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,⁵ that the record provided is the record 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 27, 2019, the Council distributed its Interim Order to all parties. On July 5, 2019, the Custodian responded to the Council's Interim Order. The Custodian provided nine (9) unredacted copies of the 2017 LSRP. The Custodian also provided a certified confirmation of compliance to the Council Staff.

Analysis

Compliance

At its June 25, 2019 meeting, the Council ordered the Custodian to provide nine (9) unredacted copies of the withheld responsive record for *in camera* review. Further, the Council ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the GRC. On June 27, 2019, 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 5, 2019.

On July 5, 2019, the fifth (5th) business day after receipt of the Council's Order, the Custodian delivered nine (9) copies of the requested record to the GRC for an *in camera* review. Additionally, the Custodian simultaneously provided certified confirmation of compliance to the GRC. Thus, the Custodian complied with the Council's Order.

Therefore, the Custodian complied with the Council's June 25, 2019 Interim Order because he responded in the prescribed time frame providing to the Council the appropriate record ordered for an *in camera* review. Additionally, the Custodian simultaneously provided certified confirmation of compliance to the GRC.

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

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.

ACD Material

OPRA provides that the definition of a government record “shall not include . . . [ACD] material.” 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.” See O’Shea v. West Milford Bd. of Educ., GRC Complaint No. 2004-93 (April 2006). 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 Ctr. 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. at 297.

A custodian claiming an exception to the disclosure requirements under OPRA on that basis must initially satisfy two conditions: 1) the document must be pre-decisional, meaning that the document was generated prior to the adoption of the governmental entity's policy or decision; and 2) the document must reflect the deliberative process, which means that it must contain opinions, recommendations, or advice about agency policies. Id. at 286 (internal citations and quotations omitted). The key factor in this determination is whether the contents of the document reflect “formulation or exercise of . . . policy-oriented judgment or the process by which policy is formulated.” Id. at 295 (adopting the federal standard for determining whether material is “deliberative” and quoting Mapother v. Dep’t of Justice, 3 F.3d 1533, 1539 (D.C. Cir. 1993)). Once the governmental entity satisfies 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.

The Council has also repeatedly held that draft records of a public agency fall within the deliberative process privilege. In Dalesky v. Borough of Raritan (Somerset), GRC Complaint No. 2008-61 (November 2009), the Council, in upholding the custodian’s denial as lawful, determined that the requested record was a draft document and that draft documents in their entirety are ACD material pursuant to N.J.S.A. 47:1A-1.1. Subsequently, in Shea v. Village of Ridgewood (Bergen), GRC Complaint No. 2010-79 (February 2011), the custodian certified that a requested letter was a draft that had not yet been reviewed by the municipal engineer. The Council, looking to relevant case law, concluded that the requested letter was exempt from disclosure under OPRA as ACD material. See also Libertarians for Transparent Gov’t v. Gov’t Records Council, 453 N.J. Super. 83 (App. Div. 2018) (draft meeting minutes exempt from disclosure); Ciesla v. N.J. Dep’t of Health and Senior Serv., GRC Complaint No. 2010-38 (May 2011), aff’d Ciesla v. N.J. Dep’t of Health & Senior Serv., 429 N.J. Super. 127 (App. Div. 2012) (draft staff report).

Security Measures and Techniques

OPRA also provides that “security measures and surveillance techniques which, if disclosed, would create a risk to the safety of persons, property, electronic data or software” are not government records. N.J.S.A. 47:1A-1.1. In Burton v. N.J. Dep’t of Law & Pub. Safety, Div. of State Police, GRC Complaint No. 2010-330 (May 2011), the Council held that:

The Custodian has lawfully denied access to the requested payroll records because said records are exempt from public access under N.J.S.A. 47:1A-9(a), which upholds exemptions contained in an Executive Order of the Governor or any regulation promulgated pursuant to an Executive Order of the Governor. Executive Order No. 47 (Christie 2010) permits rules proposed by the N.J. Department of Law & Public Safety to remain in full effect. N.J.A.C. 13:1E-3-2(a)3 exempts records which may reveal an agency’s surveillance, security, or investigative techniques or procedures, and N.J.A.C. 13:1E-3.2(a)7 exempts ‘[t]he duty assignment of an individual law enforcement officer or any personally identifiable information that may reveal or lead to information that may reveal such duty assignment, including, but not limited to, overtime data pertaining to an individual law enforcement officer.’ Despite payroll records being public records under N.J.S.A. 47:1A-10, the release of said records in this instance leaves the Executive Protection Bureau vulnerable to how heavy of a security level it places on protecting various dignitaries and are therefore exempt under the regulations cited above.

[Id. at 12-13.]

Additionally, in Rivera v. City of Plainfield Police Dep’t (Union), GRC Complaint No. 2009-317 (May 2011), the Council held that, “[b]ecause request Items No. 3 and 10 sought police daily duty logs, which records necessarily include details regarding surveillance techniques and staffing levels which, if disclosed, could pose a risk to the safety of police personnel as well as civilians employed by the Plainfield Police Department, such records are exempt from the definition of a government record pursuant to N.J.S.A. 47:1A-1.1.”

The GRC conducted an *in camera* examination of the submitted record entitled, “Bergen County Law Enforcement Services Review Board Plan,” or LSRP, for the year 2017. The LSRP itself is ten (10) pages, and included a one (1) page cover letter dated March 23, 2017.

The GRC first addresses whether the record is protected under the deliberative process privilege. The evidence in the record demonstrates that the LSRP does not satisfy the two-pronged test. The Custodian asserted that the LSRP was part of an annual deliberative process between police agencies and the prosecutor to assign the duties and responsibilities for all agencies involved within Bergen County. The Custodian also argued that the process was subject to change throughout the year and mandated by the Attorney General’s Executive Directive 92-1. The accompanying cover letter announced that the enclosed LSRP has been “adopted” by the Bergen County Law Enforcement Service Review Board with an effective date of January 1, 2017 through December 31, 2017. Additionally, on page ten (10) of the LSRP, the signature line states, “APPROVED DATE: MARCH 23, 2017” and signed by the Bergen County Prosecutor. These

pieces of evidence indicate that the LSRP was not pre-decisional at the time of the request. Therefore, in accordance with Educ. Law Ctr., the LSRP does not fall under the deliberative process privilege. 198 N.J. at 285.

Next, the GRC addresses whether the LSRP falls under OPRA's security measures exemption. Upon review, the GRC finds that the exemption inapplicable. The LSRP outlines the core law enforcement functions and duties for various agencies of and within Bergen County, as well as the New Jersey State Police's roles within the County. While the Custodian notes that some of the functions identified for certain against include "Counter-Terrorism/Intelligence, Regional Intelligence Center and the construction of the deployment of SWAT and other sensitive cooperative measures," the LSRP does not go into any further detail. The LSRP does not describe how or where each agency conducts its listed functions. Therefore, the Custodian failed to show release of the LSRP "would create a risk to the safety of persons, property, electronic data or software." N.J.S.A. 47:1A-1.1.

Accordingly, the Custodian unlawfully denied access to the Complainant's April 17, 2017 OPRA request. N.J.S.A. 47:1A-6. Specifically, the requested record did not satisfy the elements required to qualify under the deliberative process privilege. N.J.S.A. 47:1A-1.1; Educ. Law Ctr., 198 N.J. at 285. Additionally, the Custodian failed to show that release of the record "would create a risk to the safety of persons, property, electronic data or software." N.J.S.A. 47:1A-1.1. Therefore, the Custodian shall release the record to the Complainant.

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 complied with the Council's June 25, 2019 Interim Order because he responded in the prescribed time frame providing to the Council the appropriate record ordered for an *in camera* review. Additionally, the Custodian simultaneously provided certified confirmation of compliance to the GRC.
2. The Custodian unlawfully denied access to the Complainant's April 17, 2017 OPRA request. N.J.S.A. 47:1A-6. Specifically, the requested record did not satisfy the elements required to qualify under the deliberative process privilege. N.J.S.A. 47:1A-1.1; Educ. Law Center v. N.J. Dep't of Educ., 198 N.J. 274, 285 (2009). Additionally, the Custodian failed to show that release of the record "would create a risk to the safety of persons, property, electronic data or software." N.J.S.A. 47:1A-1.1. Therefore, the Custodian shall release the record to the Complainant.

3. **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 conclusion No. 2 above within five (5) business days from receipt of this Order. Further, the Custodian shall simultaneously deliver⁶ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁷ to the Executive Director.⁸**
4. 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

October 30, 2019

⁶ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

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."

⁸ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

June 25, 2019 Government Records Council Meeting

James Mullin
Complainant

Complaint No. 2017-102

v.

Bergen County Sheriff's Office
Custodian of Record

At the June 25, 2019 public meeting, the Government Records Council ("Council") considered the June 18, 2019 Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The GRC must conduct an *in camera* review of the record to validate the Custodian's contention that the record is exempt information protected by OPRA's advisory, consultative, or deliberative material exemption. See Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005) and N.J.S.A. 47:1A-1.1.
2. **The Custodian shall deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see conclusion No. 1 above), a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,³ that the record provided is the record 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 the GRC physically receives them 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 25th Day of June 2019

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 27, 2019

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
June 25, 2019 Council Meeting**

**James Mullin¹
Complainant**

GRC Complaint No. 2017-102

v.

**Bergen County Sheriff's Office²
Custodial Agency**

Records Relevant to Complaint: "Copy of the 2017 County Law Service Review Plan (LSRP)."

Custodian of Record: Captain Gene Kolich
Request Received by Custodian: April 17, 2017
Response Made by Custodian: April 26, 2017
GRC Complaint Received: May 4, 2017

Background³

Request and Response:

On April 14, 2017, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On April 26, 2017, the Custodian responded in writing denying access to the record entirely, asserting that it was exempt from disclosure as comprising inter-agency or intra-agency advisory, consultative or deliberative ("ACD") material. N.J.S.A. 47:1A-1.1.

Denial of Access Complaint:

On May 4, 2017, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that he originally requested the record from his supervisor internally on April 6, 2017. The Complainant contended that his request was initially approved but he was then informed by the Custodian's Counsel that he was not allowed to view the document and had to request it via OPRA.

The Complainant noted that, within his OPRA request, he voiced his disagreement that he should be required to file an OPRA request to gain access to the requested record. The Complainant

¹ No legal representation listed on record.

² Represented by John McCann, Esq.

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 Council Staff the submissions necessary and relevant for the adjudication of this complaint.

stated that as a designated Custodian of Record, he should not have been required to file an OPRA request for records maintained by his own employer. The Complainant also contended that he believed that Counsel's advice was misguided and a violation of the Bergen County Sheriff's Office ("BCSO")'s General Order 00-1.2 Rules and Regulation regarding mutual cooperation and assistance. As part of the complaint, the Complainant included in his complaint copies of the 2015 County LSRP and 2016 County LSRP.

Statement of Information:⁴

On September 6, 2017, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on April 14, 2017. The Custodian also certified that the requested record was in the possession of the General Counsel's Office along with the Sheriff. The Custodian certified that he responded in writing on April 24, 2017.

The Custodian argued that the requested document was not a public record pursuant to N.J.S.A. 47:1A-1.1, as it consisted of a yearly deliberative process between police agencies and the prosecutor. The Custodian stated that the document identifies agreements by police agencies on assignments, duties, and responsibilities for all of Bergen County. The Custodian added that this process is subject to change throughout the year and mandated by Attorney General's Executive Directive 92-1.

The Custodian contended that the document contained sensitive law enforcement information, and that its release would provide bad actors with information that could pose a security risk to the community. The Custodian argued that the "deliberative process privilege permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated." Educ. Law Ctr. v. N.J. Dep't of Educ., 198 N.J. 274, 285 (2009). The Custodian asserted that OPRA's exemption for ACD material provides the same protection for inter-agency and intra-agency material. N.J.S.A. 47:1A-1.1.

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 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 Council⁵ that accepted the custodian's legal

⁴ The Complaint was referred to mediation on May 23, 2017. The Complaint was referred back from mediation on July 25, 2017.

⁵ Paff v. NJ Dep't of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

conclusion for the denial of access without further review. The Appellate Division noted that “OPRA contemplates the GRC’s meaningful review of the basis for an agency’s decision to withhold government records When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers.” Id. The Court stated that:

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

[Id. at 355.]

Further, the Court found that:

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

[Id.]

In the instant matter, the Custodian argued that the record was withheld entirely under OPRA’s ACD exemption. See N.J.S.A. 47:1A-1.1. Notwithstanding the Custodian’s description of the responsive record, a “meaningful review” is necessary to determine whether the record fell within the ACD exemption. The GRC must thus review same in order to determine the full applicability of the exemption. Such an action is not uncommon, as the GRC will routinely perform an *in camera* review in similar circumstances. See Pouliot v. N.J. Dep’t of Educ., GRC Complaint No. 2015-281 (Interim Order dated January 31, 2017).

Accordingly, the GRC must conduct an *in camera* review of the record to validate the Custodian’s contention that the record is exempt information protected by OPRA’s ACD exemption. See Paff, 379 N.J. Super. at 346 and 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 Council Staff respectfully recommends the Council find that:

1. The GRC must conduct an *in camera* review of the record to validate the Custodian's contention that the record is exempt information protected by OPRA's advisory, consultative, or deliberative material exemption. See Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005) and N.J.S.A. 47:1A-1.1.
2. **The Custodian shall deliver⁶ to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see conclusion No. 1 above), a document or redaction index⁷, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,⁸ that the record provided is the record 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
Staff Attorney

June 18, 2019

⁶ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives them by the deadline.

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