



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

PHILIP D. MURPHY  
Governor

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

**FINAL DECISION**

**September 24, 2019 Government Records Council Meeting**

Pamela Macek  
Complainant

Complaint No. 2017-156,  
2017-157 and 2017-158

v.

Bergen County Sheriff's Office  
Custodian of Record

At the September 24, 2019 public meeting, the Government Records Council ("Council") considered the September 17, 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 the Complainant has failed to establish in her request for reconsideration of the Council's July 30, 2019 Final Decision that either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The Complainant failed to establish that the complaint should be reconsidered based on a mistake. The Complainant has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Specifically, the Complainant has failed to provide any evidence to refute the Custodian's multiple certifications in this matter. Also, the Council has not authority over the accuracy or content of disclosed records. N.J.S.A. 47:1A-7(b); Cole v. Twp. of Montague (Sussex), GRC Complaint No. 2011-236 (December 2012). Thus, the Complainant's request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

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 24<sup>th</sup> Day of September 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: September 27, 2019**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

*Reconsideration*  
**Supplemental Findings and Recommendations of the Executive Director  
September 24, 2019 Council Meeting**

**Pamela Macek<sup>1</sup>  
Complainant**

**GRC Complaint No. 2017-156,  
2017-157 & 2017-158**

v.

**Bergen County Sheriff's Office<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:**

March 24, 2017 OPRA request:<sup>3</sup>

Copies of all handwritten and electronic communications (text, voicemail, e-mail, fax) between Captain Michael Russo and Henry Peisch between April 1, 2016 and September 30, 2016.

April 24, 2017 OPRA request:<sup>4</sup>

Copies of all handwritten and electronic communications (text, voicemail, e-mail, fax, "telephone conversations") between Mr. Peisch, Officer Shrewsbury, Sergeant Phillips, and Officer Marro from April 1, 2016 through September 30, 2016 (to include all communications between each other regarding Mr. Peisch).

June 1, 2017 OPRA request:<sup>5</sup>

Copies of:

1. All "records of dates and times [Mr.] Peisch was moved to and from his cell and to and from the community release center from [April 1, 2016] to [September 1, 2016].
2. Any written fax, text, or e-mail from Mr. Peisch that was forwarded to Captain Russo from April 1, 2016 through September 1, 2016.

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

<sup>2</sup> Represented by Daniel E. Zwillenberg, Esq. (Hackensack, NJ). Previously represented by John McCann, Esq. (Hackensack, NJ).

<sup>3</sup> This OPRA request is the subject of GRC Complaint No. 2017-156.

<sup>4</sup> This OPRA request is the subject of GRC Complaint No. 2017-157.

<sup>5</sup> This OPRA request is the subject of GRC Complaint No. 2017-158.

**Custodian of Record:** Captain Ryan King

**Request Received by Custodian:** March 24, 2017; April 24, 2017; June 1, 2017

**Response Made by Custodian:** March 28, 2017; May 8, 2017; June 13, 2017

**GRC Complaint Received:** July 25, 2017

### **Background**

#### **July 30, 2019 Council Meeting:**

At its July 30, 2019 public meeting, the Council considered the July 23, 2019 Supplemental Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian did not fully comply with the Council's June 25, 2019 Interim Order. Specifically, although the Custodian provided certified confirmation of compliance to the Council Staff affirming that no additional records existed, he failed to do so in a timely manner.
2. The Custodian did not timely comply with the Council's June 25, 2019 Interim Order. Notwithstanding, the Custodian did not unlawfully deny access to any of the Complainant's three (3) OPRA requests. Additionally, the evidence of record does not indicate that the Custodian's failure to timely comply with the Council's Order 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.

#### **Procedural History:**

On August 2, 2019, the Council distributed its Final Decision to all parties. On August 13, 2019, filed a request for reconsideration of the Council's July 30, 2019 Final Decision based on a mistake. Therein, the Complainant contended that the Government Records Council ("GRC") made a mistake by failing to "review the documents fully and consider all the facts" prior to deciding on this consolidated complaint.

The Complainant initially took issue with the lack of communications responsive to her three (3) OPRA requests. The Complainant asserted that Mr. Peisch moved in and out of jail over the four (4) months he was incarcerated, especially once he went on work release. The Complainant argued that the previously disclosed e-mails support her position that additional records should have existed.

The Complainant also disputed that the Custodian provided a complete Bergen County Jails Offender Management System ("OMS") printout in response to her June 1, 2017 OPRA request item No. 1. The Complainant argued that it was impossible that only twelve (12) entries could reflect Mr. Peisch's movements while incarcerated over four (4) months. The Complainant

also questioned the listing of Mr. Peisch's housing unit, which did "not all correlate to the findings in the enforcement hearing."

In closing, the Complainant argued that the Custodian knowingly and willfully withheld responsive records from her. The Complainant further contended that the GRC had an obligation to obtain "sworn and notarized statements" from other Sheriff's Office employees she identified in her OPRA requests.

On August 13, 2019, Custodian's Counsel sought an extension of time to submit objections to the Complainant's request for reconsideration. On August 19, 2019, the GRC granted an extension through September 11, 2019. On September 11, 2019, Custodian's Counsel submitted objections to the request for reconsideration attaching a legal certification from the Custodian. Therein, Counsel argued that the Complainant's request did not rise to the standard necessary for a successful reconsideration. N.J.A.C. 5:105-2.10; New Jersey Court Rules, R. 4:49-2; McGee v. Twp. of East Amwell, 416 N.J. Super. 602, 611 (App. Div. 2010). Counsel argued that the Complainant failed to submit any documentary evidence that the Council's decision was "palpably incorrect or irrational." Counsel further argued that the Complainant did not submit any new evidence.

Counsel asserted that regarding the overall allegation that the Custodian withheld responsive records, such an insinuation is untrue. See Custodian's Cert. at ¶ 6-8, 14. Counsel also argued that the Custodian reasonably determined that the OMS printout was the proper record to disclose in response to the Complainant's June 1, 2017 OPRA request item No. 1. Counsel described the printout and alleged that the Complainant challenged the veracity of same based on "unspecified 'enforcement proceedings' to which the Sheriff's Office was neither party nor witness." Counsel addressed each of the Complainant's alleged statements and described how the OMS printout addressed each of those allegations. See Custodian's Cert. at ¶ 11-13.

On September 12, 2019, the Complainant e-mailed the GRC disputing Custodian Counsel's objections. The Complainant again disputed that such a small amount of communications could exist. Further, the Complainant argued that Counsel failed to address the lack of records regarding Mr. Peisch's movements during his incarceration. The Complainant argued that the GRC had to consider the significance of evidence, as opposed to engaging in a game of "he said – she said."

## Analysis

### Reconsideration

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

In the matter before the Council, the Complainant filed the request for reconsideration of the Council's July 30, 2019 Final Decision on August 13, 2019, seven (7) business days from the issuance of the Council's Order.

Applicable case law holds that:

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

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

In her request for reconsideration, the Complainant argued that the Council made a mistake by not considering all documents and facts present in this complaint. The Complainant also questioned the veracity of the OMS printout. Custodian's Counsel filed objections arguing that the Complainant failed to meet the standard for reconsideration, provided counter arguments regarding the OMS printout, and provided another legal certification from the Custodian.

A review of the submissions, as well as the Council's past decisions in this matter warrant that the Complainant's request for reconsideration should be rejected.

Regarding the Complainant's continued allegations that additional communications must exist, the GRC addressed this issue in its June 25, 2019 Interim Order. Therein, the Council required the Custodian to perform a new search and certify to the results of that search, notwithstanding that he had already certified in the SOI that he disclosed all records that existed. Thus, the Council did its due diligence by requiring the Custodian to perform another search after initially reviewing all of the parties' submissions. Further, the Complainant has failed to provide any evidence to refute either certification; rather, she based her claims on unsubstantiated allegations and suppositions.

Regarding the veracity of the OMS printout, the GRC first notes that the Council has long held that it has no authority over the accuracy or content of records disclosed in response to an OPRA request. N.J.S.A. 47:1A-5(b); Cole v. Twp. of Montague (Sussex), GRC Complaint No. 2011-236 (December 2012). Whether Bergen County jail employees were properly entering data, or omitting same, into its OMS system is of no moment in this adjudication. Notwithstanding,

Custodian's Counsel provided a detailed accounting of each entry on the OMS printout to address the Complainant's concerns which was supported by an additional legal certification from the Custodian.

As the moving party, the Complainant was required to establish either of the necessary criteria set forth above: either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. See Cummings, 295 N.J. Super. at 384. The Complainant failed to establish that the complaint should be reconsidered based on a mistake. The Complainant has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. See D'Atria, 242 N.J. Super. at 401. Specifically, the Complainant has failed to provide any evidence to refute the Custodian's multiple certifications in this matter. Also, the Council has not authority over the accuracy or content of disclosed records. N.J.S.A. 47:1A-7(b); Cole, GRC 2011-236. Thus, the Complainant's request for reconsideration should be denied. Cummings, 295 N.J. Super. at 384; D'Atria, 242 N.J. Super. at 401; Comcast, 2003 N.J. PUC at 5-6.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that the Complainant has failed to establish in her request for reconsideration of the Council's July 30, 2019 Final Decision that either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The Complainant failed to establish that the complaint should be reconsidered based on a mistake. The Complainant has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Specifically, the Complainant has failed to provide any evidence to refute the Custodian's multiple certifications in this matter. Also, the Council has not authority over the accuracy or content of disclosed records. N.J.S.A. 47:1A-7(b); Cole v. Twp. of Montague (Sussex), GRC Complaint No. 2011-236 (December 2012). Thus, the Complainant's request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

Prepared By: Frank F. Caruso  
Executive Director

September 17, 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*

**FINAL DECISION**

**July 30, 2019 Government Records Council Meeting**

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Complainant

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Bergen County Sheriff's Office  
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At the July 30, 2019 public meeting, the Government Records Council ("Council") considered the July 23, 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 did not fully comply with the Council's June 25, 2019 Interim Order. Specifically, although the Custodian provided certified confirmation of compliance to the Council Staff affirming that no additional records existed, he failed to do so in a timely manner.
2. The Custodian did not timely comply with the Council's June 25, 2019 Interim Order. Notwithstanding, the Custodian did not unlawfully deny access to any of the Complainant's three (3) OPRA requests. Additionally, the evidence of record does not indicate that the Custodian's failure to timely comply with the Council's Order 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 30<sup>th</sup> Day of July 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: August 2, 2019**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Council Staff  
July 30, 2019 Council Meeting**

**Pamela Macek<sup>1</sup>  
Complainant**

**GRC Complaint No. 2017-156,  
2017-157 & 2017-158**

v.

**Bergen County Sheriff's Office<sup>2</sup>  
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June 1, 2017 OPRA request:<sup>5</sup>

Copies of:

1. All "records of dates and times [Mr.] Peisch was moved to and from his cell and to and from the community release center from [April 1, 2016] to [September 1, 2016].
2. Any written fax, text, or e-mail from Mr. Peisch that was forwarded to Captain Russo from April 1, 2016 through September 1, 2016.

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

<sup>2</sup> Represented by Daniel E. Zwillenberg, Esq. (Hackensack, NJ). Previously represented by John McCann, Esq. (Hackensack, NJ).

<sup>3</sup> This OPRA request is the subject of GRC Complaint No. 2017-156.

<sup>4</sup> This OPRA request is the subject of GRC Complaint No. 2017-157.

<sup>5</sup> This OPRA request is the subject of GRC Complaint No. 2017-158.

**Custodian of Record:** Captain Ryan King

**Request Received by Custodian:** March 24, 2017; April 24, 2017; June 1, 2017

**Response Made by Custodian:** March 28, 2017; May 8, 2017; June 13, 2017

**GRC Complaint Received:** July 25, 2017

### 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. Handwritten communications are exempt from disclosure under OPRA as “inter-agency or intra-agency advisory, consultative or deliberative material.” O’Shea v. West Milford Bd. of Educ., 391 N.J. Super. 534, 538 (App. Div. 2007); Sage v. Freehold Reg’l High Sch. Dist. (Monmouth), GRC Complaint No. 2010-108 (Final Decision dated November 29, 2011). The Custodian has thus lawfully denied access to this portion of the Complainant’s March 24, and April 24, 2017 OPRA requests. N.J.S.A. 47:1A-1.1.
2. The Custodian may have unlawfully denied access to e-mails responsive to the Complainant’s three (3) OPRA requests. N.J.S.A. 47:1A-6. Specifically, the evidence of record indicates that additional e-mails may exist. Thus, the Custodia must conduct a new search for responsive records and either 1) disclose those new e-mails located, 2) provide a lawful basis for any new e-mails located that the Custodian believes are exempt from disclosure; and/or 3) certify if no additional e-mails responsive to each of the three (3) OPRA requests exist.
3. **The Custodian shall comply with conclusion No. 2 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver<sup>6</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>7</sup> to the Council Staff.<sup>8</sup>**

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<sup>6</sup> 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.

<sup>7</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>8</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.

4. The Custodian has borne his burden of proof that he lawfully denied access to texts, faxes, and/or voicemails sought in each of the Complainant's three (3) OPRA requests because he certified in the Statement of Information, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
5. The Custodian did not unlawfully deny access to the record responsive to the Complainant's June 1, 2017 OPRA request item No. 1. N.J.S.A. 47:1A-6. Specifically, the Custodian certified, and the record reflects, that he disclosed the record responsive to said request item. See also Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint Nos. 2009-156, *et seq.* (Interim Order dated April 28, 2010) (citing Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005)).
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 June 27, 2019, the Council distributed its Interim Order to all parties. On July 3 and 9, 2019, the Complainant sought status updates as to whether the Custodian responded to the Council's Order.

On July 9, 2019, the Custodian responded to the Council's Interim Order. Therein, the Custodian certified that he caused a new search for responsive records to be performed. The Custodian affirmed that the new search did not yield any records beyond those already provided to the Complainant. The Custodian thus certified that no additional e-mails responsive to each of the three (3) subject OPRA requests existed.

On July 10, 2019, the Complainant e-mailed the GRC disputing the Custodian's compliance. The Complainant argued that she did not believe the Custodian's response comported with the Council's Order. The Complainant urged the GRC to not accept the Custodian's response.

### Analysis

#### Compliance

At its June 25, 2019 meeting, the Council ordered the Custodian to conduct a new search for responsive records and either 1) disclose those located, 2) identify whether any new records were exempt, or 3) certify that no additional records were located. Further, the Council ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rule R. 1:4-4, to the Council Staff. 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 9, 2019, the seventh (7<sup>th</sup>) business day after receipt of the Council's Order, the Custodian submitted certified confirmation of compliance. Therein, the Custodian certified that a new search yielded no additional records responsive to the Complainant's three (3) OPRA requests. The Complainant subsequently disputed the Custodian's response, arguing that it did not comply with the Council's Order.

Contrary to the Complainant's assertions, the Custodian's certified confirmation of compliance comported with the third (3<sup>rd</sup>) option available in conclusion No. 3 of the Order. Specifically, the Custodian was required to conduct a search and advise if no additional records were located: he certified that he did just that in his July 9, 2019 response. Further, while the GRC pointed to certain excerpts from the record indicating that additional correspondence may exist, the Custodian nonetheless continues to certify that all records located were disclosed to the Complainant. The Custodian certifies now that no additional records existed. See Holland v. Rowan Univ., GRC Complaint No. 2014-63, *et seq.* (March 2015) (citing Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005) in holding that the custodian produced all responsive records and there is no credible evidence in the record to refute this certification). However, the Custodian did not timely provide his response to the GRC. For this reason, the Custodian ultimately did not comply entirely with the Council's Order.

Therefore, the Custodian did not fully comply with the Council's June 25, 2019 Interim Order. Specifically, although the Custodian provided certified confirmation of compliance to the Council Staff affirming that no additional records existed, he failed to do so in a timely manner.

### **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 before the Council, the Custodian did not timely comply with the Council's June 25, 2019 Interim Order. Notwithstanding, the Custodian did not unlawfully deny access to any of the Complainant's three (3) OPRA requests. Additionally, the evidence of record does not indicate that the Custodian's failure to timely comply with the Council's Order had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

### **Conclusions and Recommendations**

The Council Staff respectfully recommends the Council find that:

1. The Custodian did not fully comply with the Council's June 25, 2019 Interim Order. Specifically, although the Custodian provided certified confirmation of compliance to the Council Staff affirming that no additional records existed, he failed to do so in a timely manner.
  
2. The Custodian did not timely comply with the Council's June 25, 2019 Interim Order. Notwithstanding, the Custodian did not unlawfully deny access to any of the Complainant's three (3) OPRA requests. Additionally, the evidence of record does not indicate that the Custodian's failure to timely comply with the Council's Order 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  
Acting Executive Director

July 23, 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**

**June 25, 2019 Government Records Council Meeting**

Pamela Macek  
Complainant

Complaint No. 2017-156, 2017-157 and 2017-158

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. Handwritten communications are exempt from disclosure under OPRA as "inter-agency or intra-agency advisory, consultative or deliberative material." O'Shea v. West Milford Bd. of Educ., 391 N.J. Super. 534, 538 (App. Div. 2007); Sage v. Freehold Reg'l High Sch. Dist. (Monmouth), GRC Complaint No. 2010-108 (Final Decision dated November 29, 2011). The Custodian has thus lawfully denied access to this portion of the Complainant's March 24, and April 24, 2017 OPRA requests. N.J.S.A. 47:1A-1.1.
2. The Custodian may have unlawfully denied access to e-mails responsive to the Complainant's three (3) OPRA requests. N.J.S.A. 47:1A-6. Specifically, the evidence of record indicates that additional e-mail's may exist. Thus, the Custodia must conduct a new search for responsive records and either 1) disclose those new e-mails located, 2) provide a lawful basis for any new e-mails located that the Custodian believes are exempt from disclosure; and/or 3) certify if no additional e-mails responsive to each of the three (3) OPRA requests exist.
3. **The Custodian shall comply with conclusion No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver<sup>1</sup>**

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<sup>1</sup> 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.

**certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>2</sup> to the Council Staff.<sup>3</sup>**

4. The Custodian has borne his burden of proof that he lawfully denied access to texts, faxes, and/or voicemails sought in each of the Complainant's three (3) OPRA requests because he certified in the Statement of Information, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
5. The Custodian did not unlawfully deny access to the record responsive to the Complainant's June 1, 2017 OPRA request item No. 1. N.J.S.A. 47:1A-6. Specifically, the Custodian certified, and the record reflects, that he disclosed the record responsive to said request item. See also Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint Nos. 2009-156, *et seq.* (Interim Order dated April 28, 2010) (citing Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005)).
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 25<sup>th</sup> 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**

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<sup>2</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>3</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.



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Pamela Macek<sup>1</sup>  
Complainant**

**GRC Complaint No. 2017-156,  
2017-157 & 2017-158**

v.

**Bergen County Sheriff's Office<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:**

March 24, 2017 OPRA request:<sup>3</sup>

Copies of all handwritten and electronic communications (text, voicemail, e-mail, fax) between Captain Michael Russo and Henry Peisch between April 1, 2016 and September 30, 2016.

April 24, 2017 OPRA request:<sup>4</sup>

Copies of all handwritten and electronic communications (text, voicemail, e-mail, fax, "telephone conversations") between Mr. Peisch, Officer Shrewsbury, Sergeant Phillips, and Officer Marro from April 1, 2016 through September 30, 2016 (to include all communications between each other regarding Mr. Peisch).

June 1, 2017 OPRA request:<sup>5</sup>

Copies of:

1. All "records of dates and times [Mr.] Peisch was moved to and from his cell and to and from the community release center from [April 1, 2016] to [September 1, 2016].
2. Any written fax, text, or e-mail from Mr. Peisch that was forwarded to Captain Russo from April 1, 2016 through September 1, 2016.

**Custodian of Record:** Captain Ryan King

**Request Received by Custodian:** March 24, 2017; April 24, 2017; June 1, 2017

**Response Made by Custodian:** March 28, 2017; May 8, 2017; June 13, 2017

**GRC Complaint Received:** July 25, 2017

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

<sup>2</sup> Represented by John McCann, Esq. (Hackensack, NJ).

<sup>3</sup> This OPRA request is the subject of GRC Complaint No. 2017-156.

<sup>4</sup> This OPRA request is the subject of GRC Complaint No. 2017-157.

<sup>5</sup> This OPRA request is the subject of GRC Complaint No. 2017-158.

## Background<sup>6</sup>

### Request and Response:

On March 24, 2017, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On March 27, 2017, the Custodian e-mailed Captain Russo requesting that he advise whether he had any communications with Mr. Peisch during the relevant time frame. On the same day, Captain Russo responded advising that he “never communicated with [Mr. Peisch] in that form.”

On March 27, 2017, the Custodian responded in writing denying the Complainant’s OPRA request on the basis that no records existed. On April 5, 2017, the Complainant sought clarification of the response, to which the Custodian again stated that the Bergen County Sheriff’s Office (“BCSO”) did not possess any responsive records. The Custodian and Complainant engaged in additional communications regarding this request, wherein the Custodian maintained that no responsive records existed.

On April 5, 2017, following a telephone call, the Complainant e-mailed the Custodian expressing concern that Captain Russo, “who deals with hundreds, if not thousands of inmates can remember he had only ONE conversation with [Mr.] Peisch” during his incarceration. (Emphasis in original). The Complainant further alleged that Mr. Peisch testified that he communicated with Captain Russo and “everyone knows Mr. Peisch always keeps a record of his conversations and communications.” The Complainant asserted that she would provide Captain Russo an additional day to locate responsive records. The Complainant averred that should the Custodian’s response be the same, she would submit additional OPRA requests and Denial of Access Complaints. The Custodian responded advising again that no responsive records existed.

On April 24, 2017, the Complainant submitted an OPRA request to the Custodian seeking the above-mentioned records. On April 25, 2017, at the request of the Custodian, the Complainant e-mailed clarification in the form of four (4) e-mail addresses and five (5) telephone numbers. On the same day, the Custodian asked IT Technician Mike Holguin to search for records responsive to the OPRA request based on the addresses and numbers. On May 8, 2017, the Custodian responded in writing disclosing twenty-one (21) pages of e-mails. On May 9, 2017, the Complainant e-mailed the Custodian advising that she would review the records. Additionally, the Complainant asserted she was “putting [the Custodian] on notice” that he appeared to be withholding records. The Complainant asserted that she would be filing a complaint if “that is the case.”

On June 1, 2017, the Complainant submitted an OPRA request to the Custodian seeking the above-mentioned records. On the same day, the Custodian sought e-mail addresses, phone numbers, *etc.* to conduct a search, which the Complainant provided. The Custodian forwarded this information to Chief Information Officer Philip Lisk and asked him to search for responsive e-mails, faxes, or phone calls responsive to the request. On June 2, 2017, Mr. Lisk responded

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<sup>6</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 Council Staff the submissions necessary and relevant for the adjudication of this complaint.

advising that a phone log was ordered and attaching multiple e-mails deemed to be responsive to the Complainant's OPRA request. Additional communications between multiple BCSO staff ensued via e-mail regarding Mr. Lisk's search. On June 5, 2017, Mr. Lisk e-mailed the Custodian advising that no phone records existed. On June 13, 2017, the Custodian responded in writing disclosing records responsive to each request item. The Custodian also noted that no faxes or text messages existed.

#### Denial of Access Complaint:

On July 25, 2017, the Complainant filed a three (3) Denial of Access Complaints with the Government Records Council ("GRC").

In GRC 2017-156, the Complainant disputed that no records responsive to her March 24, 2017 OPRA request existed.

In GRC 2017-157, the Complainant contended that only a few e-mails responsive to her April 24, 2017 OPRA request were disclosed. The Complainant contended that the Custodian was "withholding information."

In GRC 2017-158, the Complainant again alleged that the Custodian was not disclosing records responsive to her June 1, 2017 OPRA request. The Complainant asserted that the Custodian disclosed what appeared to be the same e-mails he disclosed in response to her April 24, 2017 OPRA request.

#### Statement of Information:

On August 18, 2017, the Custodian filed a Statement of Information ("SOI") for each complaint.

Regarding GRC 2017-156, the Custodian certified that he received the Complainant's OPRA request on March 24, 2017. The Custodian certified that his search included e-mailing Captain Russo asking if he ever communicated with Mr. Peisch. The Custodian affirmed that Captain Russo responded advising that he "never communicated with [Mr. Peisch] in that form." The Custodian certified that he responded in writing on March 28, 2017 advising the Complainant that no records existed. The Custodian thus certified that no records existed.

Regarding GRC 2017-157, the Custodian certified that he received the Complainant's OPRA request on April 24, 2017. The Custodian certified that his search included requesting that BCSO Information Technology ("IT") Unit run a search for all communications between Mr. Peisch and the employees identified in the request. The Custodian certified that Mr. Lisk performed the search and provided him with all records that could be located. The Custodian certified that he responded in writing on May 8, 2017 disclosing twenty-two (22) pages of e-mail correspondence. The Custodian affirmed that the e-mails represented all records located as part of the search.

Regarding GRC 2017-158, the Custodian certified that he received the Complainant's OPRA request on June 1, 2017. The Custodian certified that his search included accessing the Bergen County Jails Offender Management System ("OMS"). The Custodian further certified that BCSO IT conducted another search for responsive correspondence. The Custodian certified that he responded in writing on June 13, 2017 disclosing an OMS printout for the relevant time period, as well as all responsive correspondence that existed.

#### Additional Submissions:

On August 30, 2017, the Complainant sent an e-mail to the GRC attaching four (4) documents she alleged supported her position that the Custodian unlawfully denied her access to responsive records.

### 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.

#### March 24, and April 24, 2017 OPRA requests – "Handwritten communications"

The Council is permitted to raise additional defenses regarding the disclosure of records pursuant to Paff v. Twp. of Plainsboro, 2007 N.J. Super. Unpub. LEXIS 2135 (App. Div. 2007) (certif. denied, 193 N.J. 292 (2007)).<sup>7</sup> In Paff, the complainant challenged the GRC's authority to uphold a denial of access for reasons never raised by the custodian. Specifically, the Council did not uphold the basis for the redactions cited by the custodian. The Council, on its own initiative, determined that the Open Public Meetings Act prohibited the disclosure of the redacted portions to the requested executive session minutes. The Council affirmed the custodian's denial to portions of the executive session minutes but for reasons other than those cited by the custodian. The complainant argued that the GRC did not have the authority to do anything other than determine whether the custodian's cited basis for denial was lawful. The court held that:

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

The court further stated that:

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<sup>7</sup> On appeal from Paff v. Township of Plainsboro, GRC Complaint No. 2005-29 (March 2006).

Aside from the clear statutory mandate to decide if OPRA requires disclosure, the authority of a reviewing agency to affirm on reasons not advanced by the reviewed agency is well established. Cf. Bryant v. City of Atl. City, 309 N.J. Super. 596, 629-30 (App. Div. 1998) (citing Isko v. Planning Bd. of Livingston, 51 N.J. 162, 175 (1968) (lower court decision may be affirmed for reasons other than those given below)); Dwyer v. Erie Inv. Co., 138 N.J. Super. 93, 98 (App. Div. 1975) (judgments must be affirmed even if lower court gives wrong reason), certif. denied, 70 N.J. 142 (1976); Bauer v. 141-149 Cedar Lane Holding Co., 42 N.J. Super. 110, 121 (App. Div. 1956) (question for reviewing court is propriety of action reviewed, not the reason for the action) (aff'd, 24 N.J. 139 (1957)).

OPRA excludes from the definition of a government record “inter-agency or intra-agency advisory, consultative or deliberative [“ACD”] material.” N.J.S.A. 47:1A-1.1.

The Appellant Division held in O’Shea v. West Milford Bd. of Educ., 391 N.J. Super. 534, 538 (App. Div. 2007), that handwritten notes of a meeting were exempt from disclosure as ACD material. Subsequent to the Appellate Division’s decision, in Sage v. Freehold Reg’l High Sch. Dist. (Monmouth), GRC Complaint No. 2010-108 (Final Decision dated November 29, 2011), the Council was tasked with determining whether a student’s handwritten notes were exempt as ACD material. There, the complainant argued that O’Shea did not apply because the notes were not taken during a public meeting and thereafter used as a memory aid. However, the Council conducted an *in camera* review and held that “. . . because the handwritten student note contain[ed] information of an alleged incident . . . and was used in preparation of . . . Final Incident Report.” Id. (Final Decision dated November 29, 2011) at 6; see also Lotito v. N.J. Dep’t of Labor, Div. of Unemployment Ins., GRC Complaint No. 2013-66, *et seq.* (Interim Order dated July 30, 2014).

In this matter, in her March 24, and April 24, 2017 OPRA requests, the Complainant sought access to “handwritten . . . communications” among other records. However, precedential case law supports that if any handwritten communications existed, they would be exempt as ACD material. For this reason, the GRC finds that the Custodian unlawfully denied access to this portion of the two (2) OPRA requests.

Accordingly, handwritten communications are exempt from disclosure under OPRA as ACD material. O’Shea, 391 N.J. Super. at 538; Sage, GRC 2010-108. The Custodian has thus lawfully denied access to this portion of the Complainant’s March 24, and April 24, 2017 OPRA requests. N.J.S.A. 47:1A-1.1.

#### March 24, April 24, and June 1, 2017 OPRA requests – “E-mails”

The Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. See Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005). Further, in Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005), the Council held that a custodian did not unlawfully deny access to a request where they certified, and the record reflected, that they provided all records responsive to a request.

In this matter, the Custodian's response to each of the Complainant's OPRA requests seeking e-mails differed. In response to the March 24, 2017 OPRA request, the Custodian stated no records existed. He later certified to this in the SOI. In response to the April 24, and June 1, 2017 OPRA requests, the Custodian provided access to multiple e-mails. He later certified in each SOI that all records located were provided to the Complainant.

Notwithstanding the forgoing, the Complainant maintained in each Denial of Access Complaint that the Custodian was withholding records. Following submission of the SOIs, on August 30, 2017, the Complainant sent an e-mail to the GRC attaching multiple documents arguing that they supported her position that more records existed. Those attachments comprised of correspondence with the courts from Mr. Peisch making statements as to his communications with the BCSO and other employees.

Having reviewed the submissions of the parties, the GRC is not satisfied that the evidence of record supports a finding as it relates to the e-mail requests that is consistent with Pusterhofer and Burns. Specifically, there is language present in both the August 30, 2017 e-mail attachments and disclosed e-mails that suggest additional e-mails may exist.

First, in a letter to the court dated August 19, 2016, Mr. Peisch advised the Honorable Gary N. Wilcox that he expressed certain concerns "to Work Release staff, sergeants, lieutenants, captains[,] and wardens in writing . . ." Mr. Peisch also stated that these same staff members received a copy of a July 20, 2016 letter. This letter, which the Complainant clearly possesses, was not included in the Custodian's disclosure. Second, a disclosed July 13, 2016 e-mail (08:59 hrs.) contains an attachment for which it does not appear the Custodian either disclosed or asserted was exempt. Third, in a July 18, 2016 e-mail sent to Mr. Peisch, Officer Marro advised that "[t]his is the first e-mail I received from you *today*. In the future[,] you should follow it up with a phone call *like you have done in the past*." (Emphasis added). This excerpt is indicative of additional e-mails beyond those the Custodian already provided the Complainant in response to her requests.

Accordingly, the Custodian may have unlawfully denied access to e-mails responsive to the Complainant's three (3) OPRA requests. N.J.S.A. 47:1A-6. Specifically, the evidence of record indicates that additional e-mails may exist. Thus, the Custodia must conduct a new search for responsive records and either 1) disclose those new e-mails located, 2) provide a lawful basis for any new e-mails located that the Custodian believes are exempt from disclosure; and/or 3) certify if no additional e-mails responsive to each of the three (3) OPRA requests exist.

#### March 24, April 24, and June 1, 2017 OPRA requests – "Texts, faxes, [and/or] voicemail"

As noted above, the Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. See Pusterhofer, GRC 2005-49. Here, the Complainant's three (3) OPRA requests sought, in part, texts, faxes, and/or voicemail between Mr. Peisch and multiple parties. The Custodian performed searches for each request based on e-mail addresses and numbers submitted by the Complainant. The Custodian was able to disclose some e-mail correspondence (as addressed above) in response to the April 24, and June 1, 2017 OPRA requests.

However, the responses to the portions of the request seeking texts, voicemail, and faxes are inconsistent. Specifically, regarding the March 24, 2017 OPRA request, the Custodian responded in writing stating that no records existed. He later certified to this in the relevant SOI. Regarding the April 24, 2017 OPRA request, the Custodian received e-mail addresses and telephone numbers by which to conduct a search. Upon completion of the search, he disclosed e-mails but did not specify as to the existence of texts, faxes, or voicemail. The Custodian later certified that he provided all records that existed. Finally, regarding the June 1, 2017 OPRA request, the Custodian utilized the same e-mail addresses and telephone numbers to conduct a search. He ultimately responded stating that no texts or faxes existed, and later certified to this fact in the SOI, including multiple internal e-mails concluding with a finding that no phone records existed.

Based on the evidence of record, notably the e-mail chain between Mr. Lisk and other BCPO employees, the GRC is persuaded that no texts, voicemails, or faxes existed. Further compelling evidence rests in the fact that the Custodian utilized the same search information for both the April 24, and June 1, 2017 OPRA requests in reaching the conclusion that no such records existed. Further, unlike its analysis above regarding the e-mails, the Complainant proffered no evidence to refute the Custodian's SOI certifications and submitted evidence on this point.

Accordingly, the Custodian has borne his burden of proof that he lawfully denied access to texts, faxes, and/or voicemails sought in each of the Complainant's three (3) OPRA requests because he certified in the SOI, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer, GRC 2005-49.

#### June 1, 2017 OPRA request item No. 1 – "Record of dates and times"

In Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint Nos. 2009-156, *et seq.* (Interim Order dated April 28, 2010), the Council found that the custodian did not unlawfully deny access to the requested records based on the custodian's certification that all such records were provided to the complainant. The Council held that the custodian's certification, in addition to the lack of refuting evidence from the complainant, was sufficient to meet the custodian's burden of proof. See also Burns, GRC 2005-68; Holland v. Rowan Univ., GRC Complaint No. 2014-63, *et seq.* (March 2015).

Here, the Complainant's June 1, 2017 OPRA request item No. 1 sought "all 'records of date and times'" Mr. Peisch was moved within his housing unit from April 1, 2016 through September 1, 2016. The GRC notes that this request item was overly broad on its face because it sought generically sought records. See MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005). Notwithstanding the forgoing, the Custodian responded disclosing a one-page printout from the OMS, which he certified to in the SOI.

The Complainant did not specifically address this item in the Denial of Access Complaint, but broadly asserting instead that the Custodian failed to disclose additional records responsive to the OPRA request. However, the OMS printout is responsive to OPRA request item No. 1 and contained entries from April 8, 2016 through August 19, 2016, Mr. Peisch's date of release. Further, the Custodian certified to this disclosure in the SOI, and the Complainant has not provided

any evidence to support that additional records beyond the printout existed. Thus, the GRC is satisfied that the Custodian met his burden of proof that no unlawful denial of access occurred for this request item.

Accordingly, the Custodian did not unlawfully deny access to the record responsive to the Complainant's June 1, 2017 OPRA request item No. 1. N.J.S.A. 47:1A-6. Specifically, the Custodian certified, and the record reflects, that he disclosed the record responsive to said request item. See also Danis, GRC 2009-156, *et seq.* (citing Burns, GRC 2005-68).

### **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. Handwritten communications are exempt from disclosure under OPRA as "inter-agency or intra-agency advisory, consultative or deliberative material." O'Shea v. West Milford Bd. of Educ., 391 N.J. Super. 534, 538 (App. Div. 2007); Sage v. Freehold Reg'l High Sch. Dist. (Monmouth), GRC Complaint No. 2010-108 (Final Decision dated November 29, 2011). The Custodian has thus lawfully denied access to this portion of the Complainant's March 24, and April 24, 2017 OPRA requests. N.J.S.A. 47:1A-1.1.
2. The Custodian may have unlawfully denied access to e-mails responsive to the Complainant's three (3) OPRA requests. N.J.S.A. 47:1A-6. Specifically, the evidence of record indicates that additional e-mail's may exist. Thus, the Custodia must conduct a new search for responsive records and either 1) disclose those new e-mails located, 2) provide a lawful basis for any new e-mails located that the Custodian believes are exempt from disclosure; and/or 3) certify if no additional e-mails responsive to each of the three (3) OPRA requests exist.
3. **The Custodian shall comply with conclusion No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver<sup>8</sup>**

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<sup>8</sup> 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.



**certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>9</sup> to the Council Staff.<sup>10</sup>**

4. The Custodian has borne his burden of proof that he lawfully denied access to texts, faxes, and/or voicemails sought in each of the Complainant's three (3) OPRA requests because he certified in the Statement of Information, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
5. The Custodian did not unlawfully deny access to the record responsive to the Complainant's June 1, 2017 OPRA request item No. 1. N.J.S.A. 47:1A-6. Specifically, the Custodian certified, and the record reflects, that he disclosed the record responsive to said request item. See also Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint Nos. 2009-156, *et seq.* (Interim Order dated April 28, 2010) (citing Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005)).
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: Frank F. Caruso  
Acting Executive Director

June 18, 2019

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<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> 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.