



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

February 26, 2020 Government Records Council Meeting

Gavin C. Rozzi
Complainant

Complaint No. 2017-167

v.

Township of Lacey (Ocean)
Custodian of Record

At the February 26, 2020 public meeting, the Government Records Council (“Council”) considered the January 21, 2020 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 July 30, 2019 Interim Order because she responded in the prescribed time frame providing nine (9) redacted and unredacted copies of responsive records for *in camera* review, and simultaneously provided certified confirmation of compliance to the GRC.
2. **The *In Camera* Examination set forth in the above table reveals the Custodian has lawfully denied access to, or redacted portions of, the records listed in the document index pursuant to N.J.S.A. 47:1A-6.**
3. The Custodian provided an insufficient response to the Complainant’s OPRA request. However, the Custodian fully complied with the Council’s July 30, 2019 Interim Order. Furthermore, the Custodian lawfully denied access to the redaction portions of the responsive records upon *in camera* review. 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 26th Day of February 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: March 3, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
February 26, 2020 Council Meeting**

**Gavin C. Rozzi¹
Complainant**

GRC Complaint No. 2017-167

v.

**Township of Lacey (Ocean)²
Custodial Agency**

Records Relevant to Complaint:³

1. “Copies of any correspondence between Malcolm’s attorneys and Lacey Township attorneys regarding his Zoning Board litigation and/or the Zoning Letter of Approval.”
2. “Copies of all email correspondence sent to Community Development Director Chris Reid regarding “Malcolm” sent from June 1st, 2016 to June 6th, 2017. Please search subject and body.”

Custodian of Record: Veronica Laureigh
Request Received by Custodian: June 6, 2017
Response Made by Custodian: June 9, 2017
GRC Complaint Received: August 7, 2017

Records Submitted for *In Camera* Examination: Correspondence redacted pursuant to N.J.S.A. 47:1A-9(b) and N.J.R.E. 408.

Background

July 30, 2019 Council Meeting:

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

1. The Custodian’s response to the Complainant’s June 6, 2017 OPRA request was legally insufficient because she failed to cite a specific lawful basis for the redactions made to the responsive correspondence. Therefore, the Custodian violated OPRA pursuant to

¹ No legal representation listed on record.

² Represented by Lauren Staiger, Esq. (Toms River, NJ).

³ The Complainant requested additional records that are not at issue in this matter.

N.J.S.A. 47:1A-5(g) and Paff v. Borough of Lavallette, GRC Complaint No. 2007-209 (Interim Order dated June 25, 2008).

2. The GRC must conduct an *in camera* review of the redacted correspondence to determine the validity of the Custodian's assertion that the redactions are valid under N.J.R.E. 408 and N.J.S.A. 47:1A-9(b). See Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).
3. **The Custodian shall deliver⁴ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 2 above), nine (9) copies of the redacted records, a document or redaction index⁵, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,⁶ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
4. The 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 August 1, 2019, the Council distributed its Interim Order to all parties. On August 8, 2019, the Custodian responded to the Council's Interim Order. The Custodian provided nine (9) redacted and unredacted copies of three (3) e-mails for *in camera* review. The Custodian also provided a document index and a certified confirmation of compliance to the Executive Director.

Analysis

Compliance

At its July 30, 2019 meeting, the Council ordered the Custodian to provide nine (9) redacted and unredacted copies of the responsive records for *in camera* review. Further, the Council ordered the Custodian to provide a document index and to submit certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the GRC. On August 1, 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 August 8, 2019.

On August 8, 2019, the fifth (5th) business day after receipt of the Council's Order, the

⁴ 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.

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

⁶ "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."

Custodian delivered nine (9) redacted and unredacted copies of responsive records to the GRC for an *in camera* review. Additionally, the Custodian provided a document index, as well as a certified confirmation of compliance to the GRC.

Therefore, the Custodian complied with the Council's July 30, 2019 Interim Order because she responded in the prescribed time frame providing nine (9) redacted and unredacted copies of responsive records for *in camera* review, and 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 "with certain exceptions." N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful. N.J.S.A. 47:1A-6.

OPRA provides that:

The provisions of [OPRA] shall not abrogate or erode any executive or legislative privilege or grant of confidentiality heretofore established or recognized by the Constitution of this State, statute, court rule or judicial case law, which privilege or grant of confidentiality may duly be claimed to restrict public access to a public record or government record.

[N.J.S.A. 47:1A-9(b).]

N.J.R.E. 408 states that:

When a claim is disputed as to validity or amount, evidence of statements or conduct by parties or their attorneys in settlement negotiations, with or without a mediator present, including offers of compromise or any payment in settlement of a related claim, shall not be admissible to prove liability for, or invalidity of, or amount of the disputed claim. Such evidence shall not be excluded when offered for another purpose; and evidence otherwise admissible shall not be excluded merely because it was disclosed during settlement negotiations.

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

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

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

Record or Redaction Number	Record Name/Date	Description of Record or Redaction	Custodian's Explanation/ Citation for Non-disclosure or Redactions	Findings of the <i>In Camera</i> Examination⁷
1.	E-mail from Sue Connor to members of the Lacey Township Zoning Board ("Board") dated April 26, 2016 (1:44 PM) (with attachment)	Board attorney's assessment and opinions regarding a code enforcement matter.	Redactions were made to protect attorney-client privilege on an unrelated separate matter to the request. <u>N.J.S.A. 47:1A-1.1</u> .	Although unrelated to the current matter, the redaction contained the Board attorney's assessment and advice regarding an upcoming meeting. Therefore, the redaction was properly redacted as attorney-client privileged communications. <u>N.J.S.A. 47:1A-1.1</u> . Thus, the Custodian

⁷ **Unless expressly identified for redaction, everything in the record shall be disclosed.** For purposes of identifying redactions, unless otherwise noted a paragraph/new paragraph begins whenever there is an indentation and/or a skipped space(s). The paragraphs are to be counted starting with the first whole paragraph in each record and continuing sequentially through the end of the record. If a record is subdivided with topic headings, renumbering of paragraphs will commence under each new topic heading. Sentences are to be counted in sequential order throughout each paragraph in each record. Each new paragraph will begin with a new sentence number. If only a portion of a sentence is to be redacted, the word in the sentence which the redaction follows or precedes, as the case may be, will be identified and set off in quotation marks. If there is any question as to the location and/or extent of the redaction, the GRC should be contacted for clarification before the record is redacted. The GRC recommends the redactor make a paper copy of the original record and manually "black out" the information on the copy with a dark colored marker, then provide a copy of the blacked-out record to the requester.

				lawfully denied access. <u>N.J.S.A. 47:1A-6.</u>
2.	E-mail from Stuart Platt to “Bill” (cc’ing Eric Riso and other e-mail addresses) dated May 23, 2017 (11:32 AM)	Confirmation on discussions relating to a litigation settlement.	Redactions were made to protect attorney-client privilege on this matter. <u>N.J.S.A. 47:1A-1.1.</u>	The redaction discussed the motivations and conduct by a party surrounding a settlement agreement. Therefore, the redaction was proper pursuant to <u>N.J.R.E. 408</u> and <u>N.J.S.A. 47:1A-9(b)</u> . Thus, the Custodian lawfully denied access. <u>N.J.S.A. 47:1A-6.</u>
3.	Letter from Mr. Platt to “Hiring, Gannon & McKenna” with attention to Thomas G. Gannon, Esq. and Michael McKenna, Esq, dated April 11, 2017.	Confirmation on discussions relating to a litigation settlement.	Redactions were made to protect attorney-client privilege on this matter. <u>N.J.S.A. 47:1A-1.1.</u>	The redaction discussed the motivations and conduct by a party surrounding a settlement agreement. Therefore, the redaction was proper pursuant to <u>N.J.R.E. 408</u> and <u>N.J.S.A. 47:1A-9(b)</u> . Thus, the Custodian lawfully denied access. <u>N.J.S.A. 47:1A-6.</u>

Thus, the Custodian lawfully denied access to the requested record because the redactions contained attorney-client privileged communications as well as statements and conduct by and between attorneys regarding settlement negotiations.

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)).

The Custodian provided an insufficient response to the Complainant’s OPRA request. However, the Custodian fully complied with the Council’s July 30, 2019 Interim Order. Furthermore, the Custodian lawfully denied access to the redaction portions of the responsive records upon *in camera* review. 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 July 30, 2019 Interim Order because she responded in the prescribed time frame providing nine (9) redacted and unredacted copies of responsive records for *in camera* review, and simultaneously provided certified confirmation of compliance to the GRC.
2. **The *In Camera* Examination set forth in the above table reveals the Custodian has lawfully denied access to, or redacted portions of, the records listed in the document index pursuant to N.J.S.A. 47:1A-6.**
3. The Custodian provided an insufficient response to the Complainant’s OPRA request. However, the Custodian fully complied with the Council’s July 30, 2019 Interim Order. Furthermore, the Custodian lawfully denied access to the redaction portions of the responsive records upon *in camera* review. 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

January 21, 2020⁸

⁸ This complaint was prepared for adjudication at the Council's January 28, 2020 meeting, but could not be adjudicated due to a lack of quorum.



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

July 30, 2019 Government Records Council Meeting

Gavin C. Rozzi
Complainant

Complaint No. 2017-167

v.

Township of Lacey (Ocean)
Custodian of Record

At the July 30, 2019 public meeting, the Government Records Council (“Council”) considered the July 23, 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’s response to the Complainant’s June 6, 2017 OPRA request was legally insufficient because she failed to cite a specific lawful basis for the redactions made to the responsive correspondence. Therefore, the Custodian violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and Paff v. Borough of Lavallette, GRC Complaint No. 2007-209 (Interim Order dated June 25, 2008).
2. The GRC must conduct an *in camera* review of the redacted correspondence to determine the validity of the Custodian’s assertion that the redactions are valid under N.J.R.E. 408 and N.J.S.A. 47:1A-9(b). See Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).
3. **The Custodian shall deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 2 above), nine (9) copies of the redacted records, 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 records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council’s Interim Order.**

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."

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 30th 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 1, 2019

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Gavin C. Rozzi¹
Complainant**

GRC Complaint No. 2017-167

v.

**Township of Lacey (Ocean)²
Custodial Agency**

Records Relevant to Complaint:³

- 1) “Copies of any correspondence between Malcolm’s attorneys and Lacey Township attorneys regarding his Zoning Board litigation and/or the Zoning Letter of Approval.”

- 2) “Copies of all email correspondence sent to Community Development Director Chris Reid regarding “Malcolm” sent from June 1st, 2016 to June 6th, 2017. Please search subject and body.”

Custodian of Record: Veronica Laureigh
Request Received by Custodian: June 6, 2017
Response Made by Custodian: June 9, 2017
GRC Complaint Received: August 7, 2017

Background⁴

Request and Response:

On June 6, 2017, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On June 9, 2017, Lisa Monbleau (“Ms. Monbleau”) on behalf of the Custodian responded in writing, providing responsive records with some documents containing redactions. On August 2, 2017, the Complainant responded to the Ms. Monbleau, stating that the response did not include a lawful basis for the redactions made in accordance with OPRA. N.J.S.A. 47:1A-6. The Complainant requested that he be provided with a lawful basis for the redactions so that he would be able to independently determine whether they were valid.

¹ No legal representation listed on record.

² Represented by Lauren Staiger, Esq. (Toms River, NJ).

³ The Complainant requested additional records that are not at issue in this matter.

⁴ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Council Staff the submissions necessary and relevant for the adjudication of this complaint.

Denial of Access Complaint:

On August 7, 2017, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian failed to provide the lawful basis for the redactions made to the responsive records as required under OPRA. N.J.S.A. 47:1A-6; see also Paff v. Borough of Lavallette (Ocean), GRC Complaint No. 2007-209. The Complainant also asserted that the Custodian did not respond to his August 2, 2017 correspondence noting the omission. The Complainant contended that because no lawful basis was provided, each redaction was arbitrary, capricious, and unreasonable

The Complainant added that after notifying the Custodian that lawful reasons had not been provided, a second, identical OPRA request was submitted by a third party to the Custodian. The Complainant asserted that the Custodian provided the same response, yet still failed to provide a lawful basis for the redactions. The Complainant contended that this second omission is evidence of the Custodian’s willful noncompliance.

The Complainant requested that the GRC order the Custodian to disclose the redacted portions of the records upon the completion of an *in camera* review, or in the alternative order the Custodian to provide a lawful basis for the redactions pursuant to N.J.S.A. 47:1A-5(g). The Complainant also requested that the GRC find that the Custodian knowingly and willfully violated OPRA, as well as any other relief deemed equitable and just.

Statement of Information:

On August 22, 2017, the Custodian filed a Statement of Information (“SOP”). The Custodian certified that she received the Complainant’s OPRA request on June 6, 2017. The Custodian certified that her search included sending the request to Community Development and IT to locate responsive e-mails. The Custodian also certified that the request was sent to the Township Attorney and Joint Insurance Fund Attorney for additional letters and correspondence. The Custodian certified that she responded in writing on June 9, 2017, providing responsive records, with certain e-mails containing redactions.

The Custodian argued that in accordance with the review conducted by the Township Attorney, the responsive correspondence was redacted in accordance with N.J.R.E. 408, which protects statements made pertaining to settlement negotiations in litigation.

Analysis

Insufficient Response

OPRA requires that, when providing access to redacted records, a custodian shall provide a specific lawful basis for redactions. In Paff v. Borough of Lavallette, GRC Complaint No. 2007-209 (Interim Order dated June 25, 2008), the custodian responded in a timely manner providing redacted records to the complainant; however, the custodian failed to provide a specific legal basis for said redactions. The Council held that “[t]he Custodian’s response was legally insufficient under OPRA because he failed to provide a written response setting forth a detailed and lawful

basis for each redaction” Id. at 4. See also Schwarz v. N.J. Dep’t of Human Serv., GRC Complaint No. 2004-60 (February 2005) (setting forth the proposition that specific citations to the law that allows a denial of access are required at the time of the denial); Renna v. Union Cnty. Improvement Auth., GRC Complaint No. 2008-86 (May 2010) (noting that N.J.S.A. 47:1A-5(g) requires a custodian of record to indicate the specific basis for noncompliance).

Here, the Custodian timely responded to the Complainant’s June 6, 2017 OPRA request. However, while the Custodian provided correspondence, she failed to cite a specific lawful basis for the redactions contained therein. It was not until she submitted her SOI on August 7, 2017 that provided the basis for the redactions.

Accordingly, the Custodian’s response to the Complainant’s June 6, 2017 OPRA request was legally insufficient because she failed to cite a specific lawful basis for the redactions made to the responsive correspondence. Therefore, the Custodian violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and Paff, GRC 2007-209.

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 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:

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

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 asserted that the redacted portions of correspondence referenced settlement negotiations and are therefore not subject to access under N.J.R.E. 408 and N.J.S.A. 47:1A-9(b). As part of the SOI, the Custodian provided general descriptions of the redacted sections.

Notwithstanding the Custodian’s description, a “meaningful review” is necessary to determine whether all redacted portions of the provided correspondence reference settlement negotiations. The GRC must therefore review same in order to determine the full applicability of exemption.

Therefore, the GRC must conduct an *in camera* review of the redacted correspondence to determine the validity of the Custodian’s assertion that the redactions are valid under N.J.R.E. 408 and N.J.S.A. 47:1A-9(b). See Paff, 379 N.J. Super. at 346.

Knowing & Willful

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

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. The Custodian’s response to the Complainant’s June 6, 2017 OPRA request was legally insufficient because she failed to cite a specific lawful basis for the redactions made to the responsive correspondence. Therefore, the Custodian violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and Paff v. Borough of Lavallette, GRC Complaint No. 2007-209 (Interim Order dated June 25, 2008).
2. The GRC must conduct an *in camera* review of the redacted correspondence to determine the validity of the Custodian’s assertion that the redactions are valid under N.J.R.E. 408 and N.J.S.A. 47:1A-9(b). See Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).

3. **The Custodian shall deliver⁶ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 2 above), nine (9) copies of the redacted records, 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 records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
4. The 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

July 23, 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.

⁷ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

⁸ "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."