



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**

**November 9, 2022 Government Records Council Meeting**

Edwin Sheppard  
Complainant

Complaint No. 2017-180

v.

NJ Department of Law and Public Safety,  
Division of Law  
Custodian of Record

At the November 9, 2022 public meeting, the Government Records Council (“Council”) considered the October 27, 2022 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. Custodian’s Counsel has failed to establish in his request for reconsideration of the Council’s July 26, 2022 Interim Order 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. Custodian’s Counsel failed to establish that the complaint should be reconsidered based on a mistake. Custodian’s Counsel has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Specifically, the Counsel did not make a mistake when it referred this complaint to the Office of Administrative Law for a fact-finding hearing to address the *in camera* production. Thus, Custodian Counsel’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).
2. The Council should rescind conclusion No. 4, which referred the complaint to the office of Administrative Law for a fact-finding hearing. Referring this complaint to the Office of Administrative Law would not garner any new evidence that would significantly change the outcome of this complaint. Henry, Esq. (O.B.O. Joseph Cordaro) v. Twp. of Hamilton Police Dep’t (Atlantic), GRC Complaint No. 2015-155 (April 2017). Specifically, the evidence of record allows the Council to address the knowing and willful issue without the assistance of a hearing. Thus, the Council should determine whether the Custodian knowingly and willfully violated OPRA under the totality of the circumstances.

3. The GRC reiterates that Custodian timely responded to the Complainant's OPRA request based on a warranted and substantiated extension. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the Custodian lawfully denied access to three (3) of the e-mails contained within the total responsive records under the common interest doctrine. O'Boyle v. Borough of Longport, 218 N.J. 168 (2014). Further, the Custodian has certified that the redacted records provided to the GRC for *in camera* review were mistakenly selected from several versions of those records prepared at the time of her initial responses to the subject OPRA request. Given this evidence, the record does not indicate that the Custodian's mistaken provision of redacted records for *in camera* inspection 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 9<sup>th</sup> Day of November 2022

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: November 15, 2022**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

***Reconsideration***  
**Supplemental Findings and Recommendations of the Executive Director**  
**November 9, 2022 Council Meeting**

**Edwin Sheppard<sup>1</sup>**  
**Complainant**

**GRC Complaint No. 2017-180**

v.

**N.J. Department of Law and Public Safety,**  
**Division of Law<sup>2</sup>**  
**Custodial Agency**

**Records Relevant to Complaint:** Electronic copies via e-mail of all communications between Deputy Attorney General (“DAG”) Labinot BerlaJolli and James Arsenault between April 1, 2016 and December 31, 2016.

**Custodian of Record:** Octavia Baker  
**Request Received by Custodian:** July 6, 2017  
**Response Made by Custodian:** July 21, 2017  
**GRC Complaint Received:** September 11, 2017

**Background**

**July 26, 2022 Council Meeting:**

At its July 26, 2022 public meeting, the Council considered the June 21, 2022 *In Camera* Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian has not complied fully with the Council’s January 25, 2022 Interim Order. Specifically, the Custodian did timely provide nine (9) copies of the required e-mails in redacted and unredacted form, as well as a document index and certified confirmation of compliance to the Executive Director. However, the redacted copies of the e-mails clearly do not match those previously disclosed to the Complainant and subsequently attached to the Statement of Information.

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

<sup>2</sup> Represented by Deputy Attorney General (“DAG”) James A. McGhee. Previously represented by DAG Angela Juneau Bezer.

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 lawfully denied access to the above three (3) e-mails under the attorney-client privilege, attorney work product, and common interest doctrine. N.J.S.A. 47:1A-1.1; O'Boyle v. Borough of Longport, 218 N.J. 168 (2014). Additionally, the GRC declines to order any further disclosures because the evidence of record reveals that the Custodian disclosed to the Complainant on July 26, 2017 every other e-mail body for which access was denied in the Custodian's original response.
4. The Custodian timely responded to the Complainant's OPRA request based on a warranted and substantiated extension. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the Custodian lawfully denied access to three (3) of the e-mails contained within the total responsive records under the common interest doctrine. O'Boyle v. Borough of Longport, 218 N.J. 168 (2014). However, the Custodian also waived the attorney-client privilege through disclosure of the remaining e-mails to the Complainant. Notwithstanding, the Custodian's provision of wholly redacted e-mails in response to the Council's Order seeking *in camera* examination of the e-mails at issue here require a fact-finding hearing as to whether her action may have been intentional and deliberate, with knowledge of its wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint should be referred to the Office of Administrative Law for a fact-finding hearing to determine whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

#### Procedural History:

On July 27, 2022, the Council distributed its Interim Order to all parties. On August 10, 2022, the Custodian's Counsel filed a request for reconsideration of the Council's Interim Order based on a "mistake" and attaching a legal certification from the Custodian. Therein, Counsel argued that the Council erred by referring this complaint to the OAL for a knowing and willful hearing because all records required to be disclosed were provided to the Complainant on July 26, 2017. Cust. Cert. ¶ 9.

Counsel stated that following the settlement of an action brought against HomeCare Specialists by the Division of Consumer Affairs, the Complainant submitted fifty-five (55) OPRA requests to the Division of Law; twenty-three (23) of those requests were received in 2017. Cust. Cert. ¶ 3. Counsel stated that the subject OPRA request was one of many seeking e-mails; thus, the Custodian created various folders for each request for organizational purposes. Cust. Cert. ¶ 4-5. Counsel argued that over four (4) years following the Custodian's response and Complainant's filing of this complaint, the Council ordered the responsive records to be provided to the GRC for an *in camera* review. Counsel stated that upon receipt of the Order, the Custodian reviewed her file containing multiple versions of the same e-mails with varying redactions and located those she believed to be at issue here. Counsel averred that in preparing the *in camera* submission, the Custodian "inadvertently selected" an earlier version of the redacted e-mails and sent them to the

GRC. Cust. Cert. ¶ 16. Counsel stated that the Custodian was not aware of her error until she received the Council’s July 26, 2022 Interim Order. Cust. Cert. ¶ 19.

Counsel suggested that the GRC follows the same standards for reconsideration requests as the New Jersey Superior Court, noting that one reason for reconsideration is that “there is good reason for [the court] to reconsider new information. . .” Phillipsburg v. Block 1508, 380 N.J. Super. 159, 175 (App. Div. 2005). Counsel contended that the Council should reconsider its decision because the *in camera* review revealed that the Custodian disclosed all non-exempt responsive records to the Complainant in July 2017, more than a month before the filing of this complaint. Counsel further argued that no fact-finding hearing is necessary because the Custodian has certified to her inadvertent mistake. Counsel further argued that the Custodian’s statements indicate that there was not a purposeful attempt to “mislead the GRC or taint the *in camera* process” because the correct set of redacted records was already included in the SOI.

Counsel further argued that the Custodian’s inadvertent mistake did not amount to a knowing and willful violation under OPRA. Counsel argued that such a violation requires an unlawful denial of access under OPRA; the Council’s Interim Order includes no such finding. Counsel argued that instead, the GRC had sufficient information to overcome the Custodian’s mistake and determine that the Complainant was in possession of all records required to be disclosed under OPRA. Counsel further contended that the Custodian’s mistake “does not form the basis for an OPRA violation.”<sup>3</sup>

## 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, Custodian’s Counsel filed the request for reconsideration of the Council’s July 26, 2022 Interim Order on August 10, 2022, ten (10) business days from the issuance of the Council’s Order.

Applicable case law holds that:

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<sup>3</sup> The Complainant sent an e-mail to Custodian’s Counsel and copying the GRC on September 22, 2022; however, the GRC does not consider same here because: 1) the Complainant sent this e-mail well after the expiration of the ten (10) business day objections deadline set forth in N.J.A.C. 5:105-2.10(d); and 2) the Complainant objects to nonspecific content as “libelous” and “full of lies” while threatening to file an ethics complaint against Counsel if he did not “correct” his submission. Complainant provides no substantive argument or facts for the GRC to take under advisement.

“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 Henry, Esq. (O.B.O. Joseph Cordaro) v. Twp. of Hamilton Police Dep’t (Atlantic), GRC Complaint No. 2015-155 (April 2017), custodian’s counsel filed a request for reconsideration of the Council’s Order referring the complaint to the Office of Administrative Law (“OAL”) for a fact-finding hearing and potential knowing and willful violation alleging that the Council made a mistake. Therein, counsel argued that the complainant was in possession of the records sought and included a supporting legal certification from complainant’s former counsel. The Council rejected the reconsideration request noting that the submission did not support that its decision was arbitrary and capricious. Notwithstanding the reconsideration denial, the Council rescinded its conclusion to refer the complaint to the OAL; reasoning that the parties submitted sufficient evidence during the pendency of the request for reconsideration. Thus, the Council decided on the access, and knowing and willful issues based on that submitted evidence. See also Gordon v. City of Orange (Essex), GRC Complaint No. 2011-336, *et seq.* (May 2013) (holding that although the complainant’s request for reconsideration was denied, she submitted sufficient evidence that warranted rescinding the Council’s Order referring the consolidated complaint to the OAL).

Here, Custodian’s Counsel alleges that the Council made a “mistake” in referring this complaint to the OAL because the record supports that the Custodian mistakenly submitted the wrong version of redacted records, but that ultimately did not impede the GRC from determining that no unlawful denial of access occurred. Counsel further requested that the Council should grant reconsideration because it sought a knowing and willful hearing without appreciating that the Custodian did not commit a violation of OPRA.

The GRC disagrees for the following reasons. First, a custodian’s mistake does not constitute a sufficient reason to grant reconsideration based thereon; a successful reconsideration requires a party to argue the Council made a mistake. No such argument can be made here; the Council’s referral was based on the evidence before it and the potential that the Custodian may have purposely submitted to taint the *in camera* examination.

Second, the Council did not fail to appreciate that the Complainant possessed all records to which he was entitled. On the contrary, in conclusion No. 4 of the Interim Order, the Council clearly set forth all factors it relied on in determining that a fact-finding hearing was necessary. Those factors included the Custodian's timely response based on warranted and substantiated extensions and the lawful denial of access to three (3) e-mails. However, the Council cannot ignore the redacted records provided for the *in camera* review and their significant departure from those actually provided. To this end, OPRA provides that a knowing and willful violation should consider "the totality of the circumstances." N.J.S.A. 47:1A-11. The GRC certainly considers the potential that a custodian purposely submitted misleading records for *in camera* review to be part of that "totality" warranting a knowing and willful hearing. Suggesting that OPRA does not support that such could be considered "knowing and willful" in nature invite others to do so at great detriment to the integrity of the *in camera* process. Thus, reconsideration is not appropriate here because the Council did not make a mistake.

As the moving party, Custodian's Counsel 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. Custodian's Counsel failed to establish that the complaint should be reconsidered based on a mistake. Custodian's Counsel has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. See D'Atria, 242 N.J. Super. at 401. Specifically, the Council did not make a mistake when it referred this complaint to the OAL for a fact-finding hearing to address the *in camera* production. Thus, Custodian Counsel'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.

Notwithstanding the forgoing, the Council should abandon its conclusion referring this complaint to the OAL for a knowing and willful hearing because the Custodian has presented sufficient certified statements addressing the *in camera* submission issue. Based on this certification, the need for a knowing and willful hearing has been rendered moot. The GRC notes that such a determination is consistent with the Council's prior actions in Henry, Esq., GRC 2015-155.

Accordingly, the Council should rescind conclusion No. 4, which referred the complaint to the OAL for a fact-finding hearing. Referring this complaint to the OAL would not garner any new evidence that would significantly change the outcome of this complaint. See Henry, GRC 2015-155. Specifically, the evidence of record allows the Council to address the knowing and willful issue without the assistance of a hearing. Thus, the Council should determine whether the Custodian knowingly and willfully violated OPRA under the totality of the circumstances.

### **Knowing & Willful**

OPRA states that "[a] public official, officer, employee or custodian who knowingly and 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. 1983)); 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 instant matter, the GRC reiterates that Custodian timely responded to the Complainant’s OPRA request based on a warranted and substantiated extension. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the Custodian lawfully denied access to three (3) of the e-mails contained within the total responsive records under the common interest doctrine. O’Boyle, 218 N.J. 168. Further, the Custodian has certified that the redacted records provided to the GRC for *in camera* review were mistakenly selected from several versions of those records prepared at the time of her initial responses to the subject OPRA request. Given this evidence, the record does not indicate that the Custodian’s mistaken provision of redacted records for *in camera* inspection 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. Custodian’s Counsel has failed to establish in his request for reconsideration of the Council’s July 26, 2022 Interim Order 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. Custodian’s Counsel failed to establish that the complaint should be reconsidered based on a mistake. Custodian’s Counsel has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Specifically, the Counsel did not make a mistake when it referred this complaint to the Office of Administrative Law for a fact-finding hearing to address the *in camera* production.. Thus, Custodian Counsel’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).

2. The Council should rescind conclusion No. 4, which referred the complaint to the office of Administrative Law for a fact-finding hearing. Referring this complaint to the Office of Administrative Law would not garner any new evidence that would significantly change the outcome of this complaint. Henry, Esq. (O.B.O. Joseph Cordaro) v. Twp. of Hamilton Police Dep't (Atlantic), GRC Complaint No. 2015-155 (April 2017). Specifically, the evidence of record allows the Council to address the knowing and willful issue without the assistance of a hearing. Thus, the Council should determine whether the Custodian knowingly and willfully violated OPRA under the totality of the circumstances.
3. The GRC reiterates that Custodian timely responded to the Complainant's OPRA request based on a warranted and substantiated extension. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the Custodian lawfully denied access to three (3) of the e-mails contained within the total responsive records under the common interest doctrine. O'Boyle v. Borough of Longport, 218 N.J. 168 (2014). Further, the Custodian has certified that the redacted records provided to the GRC for *in camera* review were mistakenly selected from several versions of those records prepared at the time of her initial responses to the subject OPRA request. Given this evidence, the record does not indicate that the Custodian's mistaken provision of redacted records for *in camera* inspection 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  
Executive Director

October 27, 2022



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 26, 2022 Government Records Council Meeting**

Edwin Sheppard  
Complainant

Complaint No. 2017-180

v.

NJ Department of Law and Public Safety,  
Division of Law  
Custodian of Record

At the July 26, 2022 public meeting, the Government Records Council (“Council”) considered the June 21, 2022 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 has not complied fully with the Council’s January 25, 2022 Interim Order. Specifically, the Custodian did timely provide nine (9) copies of the required e-mails in redacted and unredacted form, as well as a document index and certified confirmation of compliance to the Executive Director. However, the redacted copies of the e-mails clearly do not match those previously disclosed to the Complainant and subsequently attached to the Statement of Information.
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 lawfully denied access to the above three (3) e-mails under the attorney-client privilege, attorney work product, and common interest doctrine. N.J.S.A. 47:1A-1.1; O’Boyle v. Borough of Longport, 218 N.J. 168 (2014). Additionally, the GRC declines to order any further disclosures because the evidence of record reveals that the Custodian disclosed to the Complainant on July 26, 2017 every other e-mail body for which access was denied in the Custodian’s original response.
4. The Custodian timely responded to the Complainant’s OPRA request based on a warranted and substantiated extension. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the Custodian lawfully denied access to three (3) of the e-mails contained within the total responsive records under the common interest doctrine. O’Boyle v. Borough of Longport, 218 N.J. 168 (2014). However, the Custodian also waived the attorney-client privilege through disclosure of the remaining e-mails to the Complainant. Notwithstanding, the Custodian’s provision of wholly redacted e-mails in response to the Council’s Order seeking *in camera* examination of the e-mails at issue here require a fact-finding hearing as to whether her action may have been

intentional and deliberate, with knowledge of its wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint should be referred to the Office of Administrative Law for a fact-finding hearing to determine whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Interim Order Rendered by the  
Government Records Council  
On The 26<sup>th</sup> Day of July 2022

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: July 27, 2022**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director  
July 26, 2022 Council Meeting**

**Edwin Sheppard<sup>1</sup>  
Complainant**

**GRC Complaint No. 2017-180**

v.

**N.J. Department of Law and Public Safety,  
Division of Law<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies via e-mail of all communications between Deputy Attorney General (“DAG”) Labinot Berljajolli and James Arsenault between April 1, 2016 and December 31, 2016.

**Custodian of Record:** Octavia Baker  
**Request Received by Custodian:** July 6, 2017  
**Response Made by Custodian:** July 21, 2017  
**GRC Complaint Received:** September 11, 2017

**Records Submitted for *In Camera* Examination:** 161 pages of redacted e-mails (and attachments) between DAG Labinot Berljajolli and Mr. Arsenault between April 16, 2016 and August 11, 2016.

**Background**

**January 25, 2022 Council Meeting:**

At its January 25, 2022 public meeting, the Council considered the January 18, 2022 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 has borne her burden of proof that she timely responded to the Complainant’s OPRA request based on a warranted and substantiated extension. N.J.S.A. 47:1A-6; Ciccarone v. N.J. Dep’t of Treasury, GRC Complaint No. 2013-280 (Interim Order dated July 29, 2014). See Libertarians for Transparent Gov’t v. Summit Pub. Sch. (Union), GRC Complaint No. 2016-193 (March 2018). Therefore, no

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

<sup>2</sup> Represented by Deputy Attorney General (“DAG”) James A. McGhee. Previously represented by DAG Angela Juneau Bezer.

“deemed” denial occurred in the instant matter. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i).

2. The GRC must conduct an *in camera* review of the 161 pages of e-mails to determine the validity of the Custodian’s purported assertion that they were exempt in part under the attorney-client privilege or other asserted exemptions. N.J.S.A. 47:1A-1.1. See Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).
3. **The Custodian shall deliver<sup>3</sup> 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 index<sup>4</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,<sup>5</sup> that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council’s Interim Order.**
4. The 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 January 26, 2022, the Council distributed its Interim Order to all parties. On January 31, 2022, the Custodian responded to the Council’s Interim Order. Therein, the Custodian certified that she received the Order requiring provision of 161 pages of redacted e-mails for an *in camera* review. The Custodian noted that the redactions covered information exempt under the common-interest, attorney-client, and attorney work product privileges. N.J.S.A. 47:1A-1.1; O’Boyle v. Borough of Longport, 218 N.J. 168 (2014). The Custodian noted that only two (2) e-mail chains dated May 9, 2016 were left unredacted; the remainder were properly redacted to remove information falling under the above exemptions. The Custodian also noted that an attachment to an April 15, 2016 e-mail included redactions for personal financial information. The Custodian certified that she has provided nine (9) “true and correct” copies of the redacted and unredacted e-mails and a document index along with her certification.

#### Analysis

#### Compliance

At its January 25, 2022 meeting, the Custodian to submit for *in camera* review nine (9) redacted and unredacted copies of the responsive 161 pages of e-mails and a document index. The

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<sup>3</sup> The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives them by the deadline.

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

<sup>5</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."

Council also ordered the Custodian to simultaneously provide certified confirmation of compliance, in accordance with R. 1:4-4, to the Executive Director. On January 26, 2022, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on February 2, 2022.

On January 31, 2022, the third (3<sup>rd</sup>) business day after receipt of the Council's Order, the Custodian submitted to the GRC nine (9) copies of 161 pages of e-mails and attachments, both redacted and unredacted, as well as a document index and certified confirmation of compliance. Therein, the Custodian certified to providing "true and correct" copies of the e-mails. The Custodian further certified that two (2) May 9, 2016 e-mail chains were left unredacted.

While the GRC does not doubt that the unredacted e-mails are "true and correct," the same cannot be said about the redacted copies. That is, a direct comparison to the 161 pages that the e-mails disclosed to the Complainant and attached to the Statement of Information ("SOI") contain few redactions. However, the copies provided to the GRC as part of the compliance package include redactions for nearly every e-mail body save one: a May 9, 2016 e-mail from Deputy Attorney General BerlaJolli to Mr. Arsenault stating "[t]hank you." The forgoing is also contrary to the Custodian's certification that two (2) May 9, 2016 were unredacted; the GRC could not locate a second chain without redactions. Based on the forgoing, it cannot be said that the Custodian fully complied here due to the above discrepancies, which the GRC will address further later in the analysis.

Therefore, the Custodian has not complied fully with the Council's January 25, 2022 Interim Order. Specifically, the Custodian did timely provide nine (9) copies of the required e-mails in redacted and unredacted form, as well as a document index and certified confirmation of compliance to the Executive Director. However, the redacted copies of the e-mails clearly do not match those previously disclosed to the Complainant and subsequently attached to the SOI.

### **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 a "government record" shall not include "any record within the attorney-client privilege." N.J.S.A. 47:1A-1.1 (emphasis added). 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, but the circumstances indicating the intention of secrecy must appear." Id. at 220-21.

Further, “[t]he provisions of [OPRA] shall not abrogate or erode any . . . grant of confidentiality . . . recognized by . . . court rule.” N.J.S.A. 47:1A-9(b). As such, OPRA does not allow for the disclosure of attorney work product, consisting of “the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.” R. 4:10-2(c).

In Laporta v. Gloucester Cnty. Bd. of Chosen Freeholders, 340 N.J. Super. 245 (App. Div. 2001), the Appellate Division explained that “[t]he work-product doctrine was first recognized by the Supreme Court of the United States . . . and protects from disclosure those documents and other tangible things that a party or a party's representative prepares in anticipation of litigation.” Id. at 259 (internal citation omitted). The court went on to determine that a memorandum composed by the County and sent to a Freeholder still fell under the attorney work product exemption because it was “prepared in the context of [County Counsel’s] preparation for the defense of the litigation brought by plaintiff against the County for reinstatement and damages.” Id. at 260.

Additionally, in O’Boyle, 218 N.J. at 168, the Supreme Court addressed whether the “common interest” doctrine could effectively shield attorney-client privileged and attorney work product documents from disclosure when shared with third parties in interest. In reaching the conclusion that it could, the Court

The common interest rule is designed to permit the free flow of information between or among counsel who represent clients with a commonality of purpose. It offers all parties to the exchange the real possibility for better representation by making more information available to craft a position and inform decision-making in anticipation of or in the course of litigation. [In re Grand Jury Subpoenas, 902 F.2d 244 (4th Cir. 1990)] . . . Thus, as recognized in the [Restatement 3d of the Law Governing Lawyers, § 76], sharing of privileged information of several, even many, commonly interested clients will remain inviolate as long as a stranger does not intrude. Restatement, supra, § 76(1) cmt. c. In other words, the actions of the commonly interested clients and their attorneys must reflect the privileged status of the communications, including taking measures to prevent disclosure to an adversary.

[Id. at 197-198.]

Intrinsic in common interest doctrine conversation is the contemplation of an effective waiver of the attorney-client and work product privileges where privileged material is shared outside of either the attorney-client or common interest relationship. On this issue, the Court stated that “[i]n most instances, disclosure by an attorney of his or her work product to a third party functions as a waiver of the protection accorded to an attorney's work product. N.J.S.A. 2A:84A-29; N.J.R.E. 530.” Id. at 189.

In the matter before the Council, the Complainant sought access to e-mails between DAG Berljajolli and Mr. Arsenault over a certain time period. The Custodian originally disclosed a limited number of e-mails with redactions, but supplementally disclosed all 161 pages of e-mails with limited redactions roughly a week later. This complaint followed, wherein the Complainant

argued that the attorney-client privilege did not apply here because there was no such relationship between DAG Berlajolli and Mr. Arsenault. The Complainant also noted that the Custodian disclosed certain previously redacted e-mail bodies in her supplemental response. In the SOI, the Custodian argued that the e-mails were exempt under both exemptions due to the common interest that the Division of Law (“DOL”) and County of Cape May (“County”) shared in enforcement actions involving HomeCare Specialists’ (“HCS”) being conducted by the Division of Consumer Affairs (“DCA”). The Complainant responded to the SOI arguing that Mr. Arsenault was not subpoenaed until months after the responsive e-mails occurred.

The GRC begins by determining that the record contains sufficient evidence that DOL and the County shared a common interest in potential litigation stemming from DCA’s enforcement actions on the matter of HCS, as proven by the eventual hearing. That is, DCA alleged multiple violations committed by HCS that certainly would significantly impact that business’s contractual relationship with the County. The common interest relationship is further solidified by the County’s active role in DCA’s hearing wherein Mr. Arsenault was subpoenaed to a hearing on August 8, 2016.<sup>6</sup> Thus, with LaPorta and O’Boyle as a guidepost on recognizing common interest relationships, the GRC finds that such a relationship between DOL (and DAG Berlajolli) and the County (and Mr. Arsenault) did exist. Thus, the attorney-client and attorney work product privilege could reasonably apply to the e-mail bodies at issue in this complaint.

Notwithstanding, the GRC cannot ignore that the Custodian voluntarily disclosed all but three (3) specific e-mails to the Complainant on two (2) occasions: 1) as part of her supplemental disclosure on July 26, 2017; and 2) as part of the SOI. The GRC’s review of those documents indicates a waiver of the attorney-client privilege through disclosure to the Complainant, a third party and employee from HCS. See O’Boyle, 218 N.J. at 189. Additionally, at no point prior to this review did DOL attempt to rectify the disclosure. The forgoing is notwithstanding that the Complainant highlighted this disclosure in the Denial of Access Complaint and the GRC relied on it as a main factor for ordering an *in camera* review. Thus, it cannot be said that DOL was not given sufficient warning that a waiver occurred here. However, and as previously noted, the provision of the redacted documents for *in camera* review contains redactions for every e-mail body except one.

Ultimately, due to the waiver of the attorney-client privilege here, the GRC was able to identify only the three (3) e-mails referenced above as consistently redacted throughout the disclosure, SOI submission, and *in camera* submission. Those three (3) e-mails will be addressed in the examination table below. As to the remaining e-mails, it is possible that many of them could have fell within the attorney-client privilege under the common interest doctrine. O’Boyle, 218 N.J. 197-198. However, the waiver effectively rendered these e-mails disclosable and DOL never took corrective action to rectify the issue. See e.g. N.J.R.E. 530 (providing the perimeters for attorney-client privilege waivers). Thus, the GRC declines to address the remaining e-mails because same were provided to the Complainant on two occasions.

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<sup>6</sup> The GRC notes, contrary to the Complainant’s assertions, the subpoena was included in the Custodian’s response and is considered part of the universe of records responsive to the subject OPRA request.  
Edwin Sheppard v. N.J. Department of Law and Public Safety, Division of Law, 2017-180 – *In Camera* Findings and Recommendations of the Executive Director



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

Record No.	Record Name/Date	Description of Redaction	Custodian's Explanation/ Citation for Redactions	Findings of the <i>In Camera</i> Examination <sup>7</sup>
1.	E-mail from Mr. Arsenault to DAG BerlaJolli (cc'ing Kevin Lare and Sarah Maloney dated April 14, 2016 (9:37 p.m.).	E-mail regarding DCA's investigation of HCS.	Attorney-client privilege; attorney work product privilege; common interest doctrine. <u>N.J.S.A. 47:1A-1.1</u> ; <u>O'Boyle</u> , 218 <u>N.J.</u> 168.	This e-mail establishes the common interest need for attorney-client privileged discussions regarding DCA's investigation of HCS and the potential impacts on the County. Thus, the Custodian lawfully denied access to this e-mail body. <u>N.J.S.A. 47:1A-6</u> .
2.	E-mail from Mr. Arsenault to DAG BerlaJolli (cc'ing Mr. Lare and Ms. Maloney) dated April 15, 2016 (11:08 a.m.).	E-mail regarding DCA's investigation of HCS and County involvement there with.	Attorney-client privilege; attorney work product privilege; common interest doctrine. <u>N.J.S.A. 47:1A-1.1</u> ; <u>O'Boyle</u> , 218 <u>N.J.</u> 168.	This e-mail clearly invokes the common interest doctrine and displays attorney-client privileged work product discussions regarding DCA's investigation of HCS and the potential impacts on

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

				the County. Thus, the Custodian lawfully denied access to this e-mail body. <u>N.J.S.A. 47:1A-6.</u>
9.	E-mail from Ms. Maloney to Mr. Arsenault Mr. Lare, Kristine Gabor, and Gerald Thornton (cc'ing Elizabeth Bozzelli) dated May 4, 2016 at 12:32 p.m.).	E-mail from Ms. Maloney to County employees regarding DCA's investigation into HCS.	Attorney-client privilege; attorney work product privilege; common interest doctrine. <u>N.J.S.A. 47:1A-1.1</u> ; <u>O'Boyle</u> , 218 <u>N.J.</u> 168.	This e-mail shows internal County discussions regarding DCA's investigation and a request for legal work regarding same. Although shared with DOL, this e-mail clearly falls within the common interest doctrine and displays attorney-client privileged work product discussions. Thus, the Custodian lawfully denied access to this e-mail body. <u>N.J.S.A. 47:1A-6.</u>

Thus, the Custodian lawfully denied access to the above three (3) e-mails under the attorney-client privilege, attorney work product, and common interest doctrine. N.J.S.A. 47:1A-1.1; O'Boyle, 218 N.J. 168. Additionally, the GRC declines to order any further disclosures because the evidence of record reveals that the Custodian disclosed to the Complainant on July 26, 2017 every other e-mail body for which access was denied in the Custodian's original response.

### **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 this matter, the Custodian initially denied access to a significant portion of the e-mails responsive to the Complainant's OPRA request. However, days after the initial disclosure, the Custodian again disclosed the total universe of responsive e-mails but with limited redacted. In the Denial of Access Complaint, the Complainant argued that inconsistencies within the two (2) disclosures proved that the Custodian errantly redacted the responsive records. In the SOI, the Custodian maintained her position the portions of the e-mails were exempt from disclosure and included therein sets of both records disclosed to the Complainant.

Following the Council's Order, the Custodian submitted nine (9) copies of the redacted and unredacted e-mails, a document index, and certified confirmation of compliance. Therein, the Custodian certified that she was providing "correct and true" copies of the e-mails both in redacted and unredacted form. While the GRC was able to confirm from prior disclosures that the unredacted e-mails were "correct and true," the same cannot be said for the redacted copies. The nine (9) copies of redacted e-mails essentially identified all but one e-mail as redacted. At best, the redacted e-mails were misleading and could have led to significantly different outcome had the GRC not compared them to the disclosure attached to the SOI. Based on this, the GRC finds that a fact-finding hearing should occur to determine whether the provision of these documents was the result of a mistaken circumstances or amounted to a knowing and willful attempt to taint the *in camera* process.

Accordingly, the Custodian timely responded to the Complainant's OPRA request based on a warranted and substantiated extension. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the Custodian lawfully denied access to three (3) of the e-mails contained within the total responsive records under the common interest doctrine. O'Boyle, 218 N.J. 197-198. However, the Custodian also waived the attorney-client privilege through disclosure of the remaining e-mails to the Complainant. Notwithstanding, the Custodian's provision of wholly redacted e-mails in response to the Council's Order seeking *in camera* examination of the e-mails at issue here require a fact-finding hearing as to whether her action may have been intentional and deliberate, with knowledge of its wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint should be referred to the Office of Administrative Law for a fact-finding hearing to determine whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

## Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian has not complied fully with the Council's January 25, 2022 Interim Order. Specifically, the Custodian did timely provide nine (9) copies of the required e-mails in redacted and unredacted form, as well as a document index and certified confirmation of compliance to the Executive Director. However, the redacted copies of the e-mails clearly do not match those previously disclosed to the Complainant and subsequently attached to the Statement of Information.
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 lawfully denied access to the above three (3) e-mails under the attorney-client privilege, attorney work product, and common interest doctrine. N.J.S.A. 47:1A-1.1; O'Boyle v. Borough of Longport, 218 N.J. 168 (2014). Additionally, the GRC declines to order any further disclosures because the evidence of record reveals that the Custodian disclosed to the Complainant on July 26, 2017 every other e-mail body for which access was denied in the Custodian's original response.
4. The Custodian timely responded to the Complainant's OPRA request based on a warranted and substantiated extension. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the Custodian lawfully denied access to three (3) of the e-mails contained within the total responsive records under the common interest doctrine. O'Boyle v. Borough of Longport, 218 N.J. 168 (2014). However, the Custodian also waived the attorney-client privilege through disclosure of the remaining e-mails to the Complainant. Notwithstanding, the Custodian's provision of wholly redacted e-mails in response to the Council's Order seeking *in camera* examination of the e-mails at issue here require a fact-finding hearing as to whether her action may have been intentional and deliberate, with knowledge of its wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint should be referred to the Office of Administrative Law for a fact-finding hearing to determine whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Prepared By: Frank F. Caruso  
Executive Director

June 21, 2022<sup>8</sup>

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<sup>8</sup> This complaint was prepared for adjudication at the Council's the June 28, 2022 meeting, but was table for one month with the expectation of receiving advice from Counsel.



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
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PHILIP D. MURPHY  
Governor

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

**INTERIM ORDER**

**January 25, 2022 Government Records Council Meeting**

Edwin Sheppard  
Complainant

Complaint No. 2017-180

v.

NJ Department of Law and Public Safety,  
Division of Law  
Custodian of Record

At the January 25, 2022, public meeting, the Government Records Council (“Council”) considered the January 18, 2022, 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 has borne her burden of proof that she timely responded to the Complainant’s OPRA request based on a warranted and substantiated extension. N.J.S.A. 47:1A-6; Ciccarone v. N.J. Dep’t of Treasury, GRC Complaint No. 2013-280 (Interim Order dated July 29, 2014). See Libertarians for Transparent Gov’t v. Summit Pub. Sch. (Union), GRC Complaint No. 2016-193 (March 2018). Therefore, no “deemed” denial occurred in the instant matter. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i).
2. The GRC must conduct an *in camera* review of the 161 pages of e-mails to determine the validity of the Custodian’s purported assertion that they were exempt in part under the attorney-client privilege or other asserted exemptions. N.J.S.A. 47:1A-1.1. See Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).
3. **The Custodian shall deliver<sup>1</sup> 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 index<sup>2</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,<sup>3</sup> that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council’s Interim Order.**

<sup>1</sup> The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives them by the deadline.

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

<sup>3</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

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 25<sup>th</sup> Day of January 2022

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: January 26, 2022**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
January 25, 2022 Council Meeting**

**Edwin Sheppard<sup>1</sup>  
Complainant**

**GRC Complaint No. 2017-180**

v.

**N.J. Department of Law and Public Safety,  
Division of Law<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies via e-mail of all communications between Deputy Attorney General (“DAG”) Labinot Berljajolli and James Arsenault between April 1, 2016 and December 31, 2016.

**Custodian of Record:** Octavia Frias  
**Request Received by Custodian:** July 6, 2017  
**Response Made by Custodian:** July 21, 2017  
**GRC Complaint Received:** September 11, 2017

**Background<sup>3</sup>**

**Request and Response:**

On July 6, 2017, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On July 17, 2017, the seventh (7<sup>th</sup>) business day after receipt of the OPRA request, the Custodian requested an extension of time through July 24, 2017 to respond to the Complainant’s OPRA request. The Complainant responded asking for an explanation on the extension. On July 18, 2017, the Custodian responded stating that responsive records were being reviewed and that a response should occur sooner than the deadline date. On the same day, the Complainant denied the extension request because the Custodian “twice failed to provide an acceptable reason for an extension.” The Custodian responded stating that she would disclose records by the end of the business day on July 19, 2017.

Late on July 19, 2017, and subsequently on July 21, 2017, the Complainant e-mailed the Custodian noting that she failed to disclose records and demanding a response. The Complainant

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

<sup>2</sup> Represented by Deputy Attorney General (“DAG”) James A. McGhee. Previously represented by DAG Angela Juneau Bezer.

<sup>3</sup> The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

Edwin Sheppard v. N.J. Department of Law and Public Safety, Division of Law, 2017-180 – Findings and Recommendations of the Executive Director

further noted that he “expect[ed]” that the Custodian would fulfill his OPRA request by 12:00 p.m. on July 22, 2017. On July 21, 2017, the Custodian responded in writing disclosing six (6) pages of e-mails and attachments with redactions and denying access to 161 additional pages of records under the attorney-client privilege, common interest privilege, and attorney work-product exemptions. O’Boyle v. Borough of Longport, 218 N.J. 168 (2014). Later that day, the Complainant e-mailed the Custodian disputing the response because it failed to include a Vaughn Index. The Complainant also disputed the cited exemptions, arguing that DAG Berlajolli was not representing the County.

On July 24, 2017, and again on July 25, 2017, the Complainant e-mailed the Custodian demanding a Vaughn Index. On July 25, 2017, the Custodian e-mailed the Complainant stating that she would provide an amended response by close of business on July 26, 2017. On July 26, 2017, the Custodian responded disclosing the remaining 161 pages of records with redactions under the previously identified exemptions, as well as the “inter-agency or intra-agency advisory, consultative, or deliberative (“ACD”) material” exemption.

#### Denial of Access Complaint:

On September 11, 2017, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant noted that the subject OPRA request was the result of a “Provisional Order of Revocation and Discipline” (“PORD”) delivered to HomeCare Specialists (“HCS”), his employer, who contracted with the County of Cape May (“County”) on April 6, 2016. The Complainant contended that notwithstanding the process set forth to challenge that PORD, the County moved to terminate HCS’s contract at a County meeting on April 26, 2016. The Complainant contended that this move coincided with the alleged dissemination of “false and extralegal” notifications and instructions to multiple government agencies. The Complainant alleged that the forgoing included multiple e-mail communications between DAG Berlajolli and Mr. Arsenault. The Complainant contended that it was these communications that he believes led to the termination being placed on the meeting agenda and that both parties intended to keep those communications confidential.

The Complainant first contended that the Custodian failed to timely respond to the subject OPRA request by not providing an acceptable reason for extending the original response time frame.

The Complainant next disputed redactions applied to records disclosed by the Custodian, with the exception of minor redactions for personal information contained in “the RFP portion of the response.” The Complainant stated that on July 21, 2017 the Custodian originally disclosed only six (6) pages of records with redaction of six (6) e-mail bodies and withheld 161 additional pages of records under the common interest and attorney-client privilege exemptions. The Complainant noted that on July 26, 2017, the Custodian disclosed the previously denied 161 pages of e-mails with redactions; however, five (5) of the six (6) e-mail bodies from the July 21, 2017 disclosure included therein were left unredacted. The Complainant argued that a review of these e-mails proves that the Custodian erroneously redacted the remaining passages in an effort to “cover up [DAG Berlajolli’s] actions” with willfully false statements.



The Complainant also contended that the attorney-client privilege did not apply here because no such relationship exists between DAG Berajolli and Mr. Arsenault. The Complainant further argued that the Division of Law (“DOL”) could not claim a common interest exemption as discussed in O’Boyle, 218 N.J. 168. The Complainant argued that the failed application of the exemption only exemplifies both parties’ attempts to knowingly withhold disclosable records. The Complainant also noted that Mr. Arsenault waived the attorney-client privilege when he copied DAG Berajolli on e-mails between himself and other County employees. Alpha Painting & Const., Inc. v. Delaware River Port Auth. of Pa., 208 F.Supp. 3d 607 (D.N.J. 2016) (citing Westinghouse Elec. Corp. v. Republic of the Philippines, 951 F.2d 1414, 1424 (3d Cir. 1991)).

The Complainant further disputed that the ACD exemption applied to redactions within the disclosed e-mails. The Complainant asserted that the Custodian failed to provide any proof that this exemption applied, despite ample opportunity to do so.

The Complainant noted in closing that he would withdraw this complaint if the Custodian disclosed the responsive e-mails without redactions; however, he demanded that several certifications addressing various issues be submitted should this not occur. The Complainant also requested that: 1) the GRC require the Custodian to disclose to him all 161 pages of e-mails without redactions; 2) the GRC find that the Custodian be found to have knowingly and willfully violated OPRA; 3) the GRC award “renumeration to [the Complainant] for the time” expended on this complaint;<sup>4</sup> and 4) DOL provide him a “written apology . . . for the conduct of its employees” handling the subject OPRA request and “condemn[ing] the same conduct.”

#### Statement of Information:<sup>5</sup>

On June 6, 2018, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on July 6, 2017. The Custodian certified that her search involved DOL’s Information Technology (“IT”) staff searching for responsive records in DAG Berajolli’s e-mail account. The Custodian averred that the resulting e-mails were provided to her for review and redaction. The Custodian certified that following an extension of time, she responded in writing on July 21, 2017 disclosing six (6) pages of e-mails with redactions and denying access to 161 pages of e-mails. The Custodian certified that she responded again on July 26, 2017 providing a revised response wherein she disclosed the previously withheld 161 pages of e-mails with redactions.

The Custodian stated that HCS was audited by the New Jersey Division of Consumer Affairs (“DCA”) in September 2015 that resulted in multiple violation findings and a civil penalty of \$2,000.00. See DCA (2016).<sup>6</sup> The Custodian stated that HCS contested the audit findings and

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<sup>4</sup> The GRC notes that OPRA only supports prevailing party attorney’s fees where a complainant who is represented prevails in OPRA litigation. N.J.S.A. 47:1A-6. OPRA does not provide for general renumeration to a *pro se* party, even if they are a licensed attorney. See Feld v. City of Orange Twp., 2019 N.J. Super. Unpub. LEXIS 903 (App. Div. 2019); Pitts v. N.J. Dep’t of Corr., GRC Complaint No. 2005-71 (April 2006).

<sup>5</sup> On October 6, 2017, this complaint was referred to mediation. On November 20, 2017, this complaint was referred back to the GRC for adjudication.

<sup>6</sup> “New Jersey Division of Consumer Affairs Seeks to Revoke Registration of Cape May County Health Care Service Firm That Allegedly Placed Uncertified Employees with Clients and Falsified Documents” <https://www.nj.gov/oag/newsreleases16/pr20160411a.html> (accessed December 30, 2021).

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requested a hearing. The Custodian noted that DAG Berlajolli, who represented DCA in a hearing against HCS, subpoenaed Mr. Arsenault to testify on behalf of the County due to its contract therewith. The Custodian noted that the matter ultimately settled by consent order on October 28, 2016. The Custodian stated that the Complainant subsequently submitted the subject OPRA request and this complaint contesting redactions made to the responsive e-mails.

The Custodian contended that she lawfully denied access to the redacted portions of the e-mails under the ACD, common interest, attorney-client, and attorney work product exemptions. N.J.S.A. 47:1A-1.1; O'Boyle, 218 N.J. 168. The Custodian contended that the facts here are “virtually identical” to the facts in O'Boyle and that the common interest privilege should apply accordingly. The Custodian noted that Mr. Arsenault contacted DAG Berlajolli after the issuance of DCA’s press release due to the potential impact on the County’s contract with HCS. The Custodian argued that aside from the inherent common interest the County and DCA had regarding the HCS issue, same also existed in the extent enforcement action wherein Mr. Arsenault was called as a witness. The Custodian thus argued that the redacted portions of the responsive e-mails plainly fell within the cited exemptions.

The Custodian further argued that the New Jersey Department of Law & Public Safety’s (“LPS”) regulations also exempted the redacted e-mail passages. N.J.S.A. 47:1A-9. The Custodian asserted that N.J.A.C. 13:1E-3.2(a)(1) exempts access to “[r]ecords concerning background investigations or evaluations for . . . licensing, whether open, closed, or inactive.” Id. The Custodian asserted that because DCA and DOL are divisions within LPS, N.J.A.C. 13:1E-3.2(a)(1) applies to the responsive records as they pertained to an investigation into HCS.

#### Additional Submissions:

On June 6, 2018, the Complainant responded to the SOI taking issue with “very slanderous” remarks against HomeCare Specialists. The Complainant also noted that Mr Arsenault was not subpoenaed until months after the responsive e-mails occurred.

### Analysis

#### Timeliness

OPRA provides that a custodian may request an extension of time to respond to the complainant’s OPRA request, but the custodian must provide a specific date by which he/she will respond. Should the custodian fail to respond by that specific date, “access shall be deemed denied.” N.J.S.A. 47:1A-5(i).

In Rivera v. City of Plainfield Police Dep’t (Union), GRC Complaint No. 2009-317 (May 2011), the custodian responded in writing to the complainant’s request on the fourth (4<sup>th</sup>) business day by seeking an extension of time to respond and providing an anticipated date by which the requested records would be made available. The complainant did not consent to the custodian’s request for an extension of time. The Council stated that:

The Council has further described the requirements for a proper request for an extension of time. Specifically, in Starkey v. N.J. Dep't of Transportation, GRC Complaint Nos. 2007-315, 2007-316 and 2007-317 (February 2009), the Custodian provided the Complainant with a written response to his OPRA request on the second (2<sup>nd</sup>) business day following receipt of said request in which the Custodian requested an extension of time to respond to said request and provided the Complainant with an anticipated deadline date upon which the Custodian would respond to the request. The Council held that “because the Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated deadline date of when the requested records would be made available, the Custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5(g) [and] N.J.S.A. 47:1A-5(i).”

Further, in Criscione v. Town of Guttenberg (Hudson), GRC Complaint No. 2010-68 (November 2010), the Council held that the custodian did not unlawfully deny access to the requested records, stating in pertinent part that:

[B]ecause the Custodian provided a written response requesting an extension on the sixth (6<sup>th</sup>) business day following receipt of the Complainant's OPRA request and providing a date certain on which to expect production of the records requested, and, notwithstanding the fact that the Complainant did not agree to the extension of time requested by the Custodian, the Custodian's request for an extension of time [to a specific date] to respond to the Complainant's OPRA request was made in writing within the statutorily mandated seven (7) business day response time.

Moreover, in Werner v. N.J. Civil Serv. Comm'n, GRC Complaint No. 2011-151 (December 2012), the Council again addressed whether the custodian lawfully sought an extension of time to respond to the complainant's OPRA request. The Council concluded that because the custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated date by which the requested records would be made available, the custodian properly requested the extension pursuant to OPRA. See also Rivera, GRC 2009-317; Criscione, GRC 2010-68; and Starkey, GRC 2007-315, *et seq.*

Although extensions are rooted in well-settled case law, the Council need not find valid every request for an extension containing a clear deadline. In Ciccarone v. N.J. Dep't of Treasury, GRC Complaint No. 2013-280 (Interim Order dated July 29, 2014), the Council found that the custodian could not lawfully exploit the process by repeatedly rolling over an extension once obtained. In reaching the conclusion that the continuous extensions resulted in a “deemed” denial of access, the Council looked to what is “reasonably necessary.”

In the instant matter, the Custodian sought an extension of time until July 24, 2017 for the Complainant's OPRA request. However, after responding on that day, the Complainant's protest<sup>7</sup> to the response prompted the Custodian to again extend the time frame through July 26, 2017. The

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<sup>7</sup> The Complainant also contended that the Custodian failed to provide a Vaughn Index upon her response. The GRC notes that per Halliwell and Pennant v. Borough of Brooklawn (Camden), GRC Complaint No. 2016-201 (August 2018), custodians are not required to provide a specific Vaughn Index as part of their response to an OPRA request. Edwin Sheppard v. N.J. Department of Law and Public Safety, Division of Law, 2017-180 – Findings and Recommendations of the Executive Director

Custodian thus extended the response time on two (2) occasions for a total of seven (7) business days. As noted above, a requestor's approval is not required for a valid extension. However, it should be noted that the Complainant objected to the extension prior to the filing of this complaint.

To determine if the extended time for a response is reasonable, the GRC must first consider the complexity of the request as measured by the number of items requested, the ease in identifying and retrieving requested records, and the nature and extent of any necessary redactions. Ciccarone, GRC 2013-280. The GRC must next consider the amount of time the custodian already had to respond to the request. Id. Finally, the GRC must consider any extenuating circumstances that could hinder the custodian's ability to respond effectively to the request.<sup>8</sup> Id.

Regarding the subject OPRA request, the Complainant sought all communications between DAG Labinot Berljolli and James Arsenaault between April 1, 2016 and December 31, 2016. In the SOI, the Custodian explained that IT performed a search and identified 161 pages of responsive records that she was required to review and redact them. The Custodian ultimately responded on July 21, 2017, the fourth (4<sup>th</sup>) business day of the extension, disclosing six (6) e-mails and denying the rest. However, upon urging from the Complainant, the Custodian disclosed all 161 pages of responsive records to the Complainant with redactions on July 26, 2017.

From the Custodian's receipt of the Complainant's OPRA request, she sought an additional five (5) business days to respond. Following the Complainant's dispute over the Custodian's July 21, 2017 response, she extended the time frame two (2) additional business days. Thus, the Custodian sought seven (7) total business days in addition to the original seven (7) business days. In determining whether the extension was ultimately unreasonable, the GRC looks to its prior decision in Libertarians for Transparent Gov't v. Summit Pub. Sch. (Union), GRC Complaint No. 2016-193 (March 2018). There, the custodian sought one (1) extension comprising of twelve (12) business days to respond to the subject OPRA request. The Council ultimately found that the extension was warranted and substantiated. In reaching this conclusion, the Council noted that although the request itself was not complex, the underlying circumstances pertaining to the review of the responsive settlement agreement substantiated the extension.

The GRC sees the facts here as more permissive of an extension than in Libertarians, GRC 2016-193. Specifically, the Custodian sought significantly less time than the custodian in Libertarians. Further, the OPRA request here was specific to the records sought, as was the case in Libertarians. Further, the Custodian was required to review and redact, where applicable, the responsive 161 pages of records, which could have taken to considerable time to conduct a careful review. Thus, based on the evidence of record, the GRC finds that extending the response time for the subject OPRA request to the extent demonstrated in the instant matter was not excessive.

Accordingly, the Custodian has borne her burden of proof that she timely responded to the Complainant's OPRA request based on a warranted and substantiated extension. N.J.S.A. 47:1A-

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<sup>8</sup> "Extenuating circumstances" could include, but not necessarily be limited to, retrieval of records that are in storage or archived (especially if located at a remote storage facility), conversion of records to another medium to accommodate the requestor, emergency closure of the custodial agency, or the custodial agency's need to reallocate resources to a higher priority due to *force majeure*.

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6; Ciccarone, GRC 2013-280. See Libertarians, GRC 2016-193. Therefore, no “deemed” denial occurred in the instant matter. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i).

### **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 Council<sup>9</sup> 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:

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.]

Here, the Custodian disclosed to the Complainant 161 pages of e-mails with redactions under attorney-client privilege, common interest privilege, attorney work-product privilege, and

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<sup>9</sup> Paff v. N.J. Dep’t of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).  
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ACD exemptions. O'Boyle, 218 N.J. 168. The Complainant argued in the Denial of Access Complaint that the redactions were unlawful because DAG Berlajolli did not represent County and had no common interest allowing for redaction of the e-mails. The Complainant also noted that the Custodian included in her July 26, 2017 disclosure five (5) e-mail bodies which she previously redacted in her initial July 24, 2017 response. The Custodian maintained her position in the SOI, arguing that DCA and the County had a common interest in the actions being taken against HomeCare Specialists.

Upon review of the evidence of record here, the GRC cannot determine whether the exemptions applied to the redacted portions of the responsive e-mails. The GRC is also compelled to conduct an *in camera* review based on the Custodian's July 26, 2017 disclosure of five (5) e-mail bodies previously redacted as part of her July 21, 2017 disclosure days earlier. Thus, it is evident that a "meaningful review" is necessary to determine whether all withheld and redacted e-mails reasonably fall within the attorney-client privilege or other cited exemptions as purportedly asserted by the Custodian. Thus, the GRC must review all 161 pages of e-mails to determine the full applicability of these exemptions. Such an action is common, as the GRC will routinely perform an *in camera* review in similar circumstances. See e.g. Pouliot v. N.J. Dep't of Educ., GRC Complaint No. 2015-281 (Interim Order dated January 31, 2017).

Therefore, the GRC must conduct an *in camera* review of the 161 pages of e-mails to determine the validity of the Custodian's purported assertion that they were exempt in part under the attorney-client privilege or other asserted exemptions. N.J.S.A. 47:1A-1.1. 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 Executive Director respectfully recommends the Council find that:

1. The Custodian has borne her burden of proof that she timely responded to the Complainant's OPRA request based on a warranted and substantiated extension. N.J.S.A. 47:1A-6; Ciccarone v. N.J. Dep't of Treasury, GRC Complaint No. 2013-280 (Interim Order dated July 29, 2014). See Libertarians for Transparent Gov't v. Summit Pub. Sch. (Union), GRC Complaint No. 2016-193 (March 2018). Therefore, no "deemed" denial occurred in the instant matter. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i).
2. The GRC must conduct an *in camera* review of the 161 pages of e-mails to determine the validity of the Custodian's purported assertion that they were exempt in part under the attorney-client privilege or other asserted exemptions. N.J.S.A. 47:1A-1.1. See Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).

3. **The Custodian shall deliver<sup>10</sup> 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 index<sup>11</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,<sup>12</sup> that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
4. The 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  
Executive Director

January 18, 2022

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<sup>10</sup> The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives them by the deadline.

<sup>11</sup> The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

<sup>12</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."

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