



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

Krzysztof Golas
Complainant

Complaint No. 2018-12

v.

Essex County Department of Corrections
Custodian of Record

At the February 26, 2020 public meeting, the Government Records Council (“Council”) considered the January 21, 2020 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The current Custodian complied with the Council’s January 7, 2020 Interim Order. Specifically, the current Custodian responded in the prescribed time frame disclosing to the Complainant responsive records in conformance with the Council’s *In Camera* Examination. The current Custodian also simultaneously provided certified confirmation of compliance to the Executive Director.
2. The Custodian unlawfully denied access to portions of the responsive e-mails. N.J.S.A. 47:1A-6. However, the Custodian also lawfully denied access to certain portions of the responsive e-mails. Also, the current Custodian twice complied with the Council’s Orders. 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**

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

**Krzysztof Golas¹
Complainant**

GRC Complaint No. 2018-12

v.

**Essex County Department of Corrections²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of e-mails between the County of Essex (“County”) and the County Department of Corrections (“ECDOC”) related to Symbol PC2077R and Symbol PC2077U from September 1, 2017 through December 31, 2017.³

Custodian of Record: Valentina Smoot Palchetti⁴

Request Received by Custodian: January 10, 2018

Response Made by Custodian: January 17, 2018

GRC Complaint Received: January 25, 2018

Background

January 7, 2020 Council Meeting:

At its January 7, 2020 public meeting, the Council considered the December 10, 2019 *In Camera* Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted said findings and recommendations. The Council, therefore, found that:

1. The current Custodian complied with the Council’s September 24, 2019 Interim Order because she responded in the prescribed time frame providing sufficient copies of the unredacted records for *in camera* review. Further, the current Custodian simultaneously provided certified confirmation of compliance to the Executive Director.

2. **On the basis of the Council’s determination in this matter, the current Custodian shall comply with the Council’s Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order. Further,**

¹ No legal representation listed on record.

² Represented by Courtney Gaccione, Esq. (Newark, NJ).

³ The Complainant requested additional records not at issue in this complaint.

⁴ The current Custodian of Record is Olivia Schumann, Esq.

the current Custodian shall simultaneously deliver⁵ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁶ to the Executive Director.⁷

3. The current Custodian must disclose all other portions of the responsive e-mails to the Complainant (*i.e.*, sender, recipients, date, time, subject, and salutations where applicable). This disclosure should take into account that only certain information from the Xerox multifunction e-mail (dated December 14, 2017 at 3:11 p.m.) should be disclosed as discussed in the *In Camera* Examination above. As to those portions of the requested e-mails, the Custodian has unlawfully denied access. See Ray v. Freedom Acad. Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010).
4. **The current Custodian shall comply with conclusion No. 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the current Custodian shall simultaneously deliver⁸ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Executive Director.**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the current Custodian's compliance with the Council's Interim Order.

Procedural History:

On January 8, 2020, the Council distributed its Interim Order to all parties. On January 9, 2020, the current Custodian e-mailed the Complainant disclosing the responsive e-mails with redactions and a document index. The current Custodian noted that said disclosure conformed with the Council's *In Camera* Examination Findings.

On January 13, 2020, the Government Records Council ("GRC") received current Custodian's response to the Council's Interim Order. Therein, the current Custodian certified that she received the Council's Order on January 8, 2020. The current Custodian certified that on January 9, 2020, she disclosed to the Complainant via e-mail the responsive e-mails in

⁵ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

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."

⁷ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

⁸ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

conformance with the *In Camera* Examination as well as a document index indicating the relevant redactions.

Analysis

Compliance

At its January 7, 2020 meeting, the Council ordered the current Custodian to comply with its *In Camera* Examination findings. The Council further ordered the current Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Executive Director. On January 8, 2020, 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 January 15, 2020.

On January 13, 2020, the third (3rd) business day after receipt of the Council's Order, the GRC received the current Custodian's response. Therein, the current Custodian certified that on January 9, 2020, she disclosed to the Complainant the responsive records in conformance with the Council's Order. Based on this, the GRC is satisfied that the current Custodian adequately responded to the Council's Order.

Therefore, the current Custodian complied with the Council's January 7, 2020 Interim Order. Specifically, the current Custodian responded in the prescribed time frame disclosing to the Complainant responsive records in conformance with the Council's *In Camera* Examination. The current Custodian also simultaneously provided certified confirmation of compliance to the Executive Director.

Knowing & Willful

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

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

271, 294-95 (Law Div. 1993)); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

In the matter before the Council, the Custodian unlawfully denied access to portions of the responsive e-mails. N.J.S.A. 47:1A-6. However, the Custodian also lawfully denied access to certain portions of the responsive e-mails. Also, the current Custodian twice complied with the Council's Orders. 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 current Custodian complied with the Council's January 7, 2020 Interim Order. Specifically, the current Custodian responded in the prescribed time frame disclosing to the Complainant responsive records in conformance with the Council's *In Camera* Examination. The current Custodian also simultaneously provided certified confirmation of compliance to the Executive Director.
2. The Custodian unlawfully denied access to portions of the responsive e-mails. N.J.S.A. 47:1A-6. However, the Custodian also lawfully denied access to certain portions of the responsive e-mails. Also, the current Custodian twice complied with the Council's Orders. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: Frank F. Caruso
Executive Director

January 21, 2020⁹

⁹ This complaint was prepared for adjudication at the Council's January 28, 2020 meeting, but could not be adjudicated due to 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

January 7, 2020 Government Records Council Meeting

Krzysztof Golas
Complainant

Complaint No. 2018-12

v.

Borough of Bogota (Bergen)
Custodian of Record

At the January 7, 2020 public meeting, the Government Records Council (“Council”) considered the December 10, 2019 Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council, by a unanimous vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The current Custodian complied with the Council’s September 24, 2019 Interim Order because she responded in the prescribed time frame providing sufficient copies of the unredacted records for *in camera* review. Further, the current Custodian simultaneously provided certified confirmation of compliance to the Executive Director.
2. **On the basis of the Council’s determination in this matter, the current Custodian shall comply with the Council’s Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order. Further, the current Custodian shall simultaneously deliver¹ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,² to the Executive Director.³**
3. The current Custodian must disclose all other portions of the responsive e-mails to the Complainant (*i.e.*, sender, recipients, date, time, subject, and salutations where applicable). This disclosure should take into account that only certain information from the Xerox multifunction e-mail (dated December 14, 2017 at 3:11 p.m.) should be disclosed as discussed in the *In Camera* Examination above. As to those portions of the requested e-mails, the Custodian has unlawfully denied access. See Ray v. Freedom

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

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

³ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

Acad. Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010).

4. **The current Custodian shall comply with conclusion No. 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the current Custodian shall simultaneously deliver⁴ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Executive Director.**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the current Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 7th Day of January 2020

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: January 8, 2020

⁴ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Krzysztof Golas¹
Complainant**

GRC Complaint No. 2018-12

v.

**Essex County Department of Corrections²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of e-mails between the County of Essex (“County”) and the County Department of Corrections (“ECDOC”) related to Symbol PC2077R and Symbol PC2077U from September 1, 2017 through December 31, 2017.³

Custodian of Record: Valentina Smoot Palchetti⁴
Request Received by Custodian: January 10, 2018
Response Made by Custodian: January 17, 2018
GRC Complaint Received: January 25, 2018

Records Submitted for *In Camera* Examination: Five (5) pages comprising e-mail chains and an e-mail attachment.

Background

September 24, 2019 Council Meeting:

At its September 24, 2019 public meeting, the Council considered the September 17, 2019 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted said findings and recommendations. The Council, therefore, found that:

1. The GRC must conduct an *in camera* review of the responsive e-mails withheld from disclosure to determine the validity of the Custodian’s assertion that the record was exempt under OPRA as “inter-agency or intra-agency advisory, consultative, or deliberative material.” 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).

¹ No legal representation listed on record.

² Represented by Courtney Gaccione, Esq. (Newark, NJ).

³ The Complainant requested additional records not at issue in this complaint.

⁴ The current Custodian of Record is Olivia Schumann, Esq.

2. **The Custodian shall deliver⁵ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see Conclusion No. 1 above), a document or redaction index⁶, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,⁷ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the Executive Director within five (5) business days from receipt of the Council's Interim Order.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On September 26, 2019, the Council distributed its Interim Order to all parties on. On October 1, 2019, the Government Records Council ("GRC") received the current Custodian's response to the Council's Interim Order. Therein, the current Custodian certified that she was not the custodian of record at the time of the response or Statement of Information filing. The current Custodian certified that notwithstanding, she reviewed the file and was able to locate the five (5) pages of records at issue in this complaint. The current Custodian certified that she attached copies of those unredacted records in response to the Interim Order.

Analysis

Compliance

At its September 24, 2019 meeting, the Council ordered the Custodian to deliver nine (9) unredacted copies of the responsive e-mails for an *in camera* review. The Council further ordered the Custodian to simultaneously provide certified confirmation of compliance to the Executive Director. On September 26, 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 October 3, 2019.

On October 1, 2019, the third (3rd) business day after receipt of the Council's Order, the current Custodian provided to the GRC ten (10) copies of the unredacted e-mails required for an *in camera* review. Additionally, the current Custodian provided certified confirmation of compliance to the Executive Director. Based on the forgoing, the GRC is satisfied that the current Custodian properly complied with the Council's Order.

Therefore, the current Custodian complied with the Council's September 24, 2019 Interim

⁵ 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.

⁶ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

⁷ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

Order because she responded in the prescribed time frame providing sufficient copies of the unredacted records for *in camera* review. Further, the current Custodian simultaneously provided certified confirmation of compliance to the Executive Director.

Unlawful Denial of Access

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful. N.J.S.A. 47:1A-6.

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

A custodian claiming an exception to the disclosure requirements under OPRA on that basis must initially satisfy two conditions: 1) the document must be pre-decisional, meaning that the document was generated prior to the adoption of the governmental entity's policy or decision; and 2) the document must reflect the deliberative process, which means that it must contain opinions, recommendations, or advice about agency policies. Id. at 286 (internal citations and quotations omitted). The key factor in this determination is whether the contents of the document reflect “formulation or exercise of . . . policy-oriented judgment or the process by which policy is formulated.” Id. at 295 (adopting the federal standard for determining whether material is “deliberative” and quoting Mapother v. Dep’t of Justice, 3 F.3d 1533, 1539 (D.C. Cir. 1993)). Once the governmental entity satisfies these two threshold requirements, a presumption of confidentiality is established, which the requester may rebut by showing that the need for the materials overrides the government's interest in confidentiality. Id. at 286-87.

Initially, the GRC notes that the e-mail chains comprised of eleven (11) individual e-mails. However, the first (1st) and ninth (9th) e-mails were dated January 17, 2018, which is after the Complainant’s identified time frame. Each of these e-mails appears to forward e-mails that are within the time frame identified in the subject OPRA request. Further, neither of these e-mails contains a message. Thus, the GRC will not include the first (1st) and ninth (9th) e-mails in its review. However, the GRC stresses that the fact that these e-mails were not responsive to the subject OPRA request does not mean they are exempt from disclosure as part of the whole record. See ACLU v. N.J. Div. of Criminal Justice, 435 N.J. Super. 533, 540-41 (App. Div. 2014) (holding that no exemption contained in OPRA allows a custodian to deny access to information in a record on the basis that same is not responsive to the subject OPRA request).

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 Record	Custodian's Explanation/ Citation for Non-disclosure	Findings of the <i>In Camera</i> Examination⁸
1.	E-mail from Gus Folinas to Robert McFarland dated December 14, 2017 (1:42 p.m.)	Mr. Folinas requests that Mr. McFarland contact him.	ACD material. <u>N.J.S.A. 47:1A-1.1.</u>	The body of the e-mail does not contain any ACD discussions warranting nondisclosure. Thus, the Custodian must disclose this portion of the e-mail chain.
2.	E-mail chain between from Michael Fera to Mr. Folinas (cc'ing Charles Green and David Boyd) dated December 14, 2017 (1:45 p.m. through 3:42 p.m.)	Mr. Fera and Mr. Folinas discuss the actions involving the Sergeant Certification list.	ACD material. <u>N.J.S.A. 47:1A-1.1.</u>	The body of the e-mail includes discussion reasonably defined as ACD material. Thus, the body of each e-mail in this chain was properly withheld as ACD material. <u>N.J.S.A. 47:1A-1.1.</u>
3.	E-mail from Mr. Fera to Mr. Folinas, Mr. Green, and Mr. Boyd dated December 14, 2017 (3:11 p.m.) (with attachment)	Mr. Fera forwards Sergeant Certification list to parties in connection with the conversation in Record No. 2.	ACD material. <u>N.J.S.A. 47:1A-1.1.</u>	Within the confines of the above discussion, the body of the e-mail and attachment reasonably fall within the ACD material exemption. Thus, the body of each e-mail in this chain was properly withheld as

⁸ **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.

				<p>ACD material. <u>N.J.S.A. 47:1A-1.1.</u></p> <p>The GRC should also note that original message in the chain came from a particular Xerox multifunction machine and includes information specific to that machine. The GRC is thus satisfied this e-mail, save the “Sent,” “To,” and “Subject” as discussed later, is exempt from disclosure under the computer security exemption. <u>N.J.S.A. 47:1A-1.1.</u> That exemption applies to “administrative or technological information regarding computer hardware, software and networks which, if disclosed, would jeopardize computer security.” <u>Id.</u></p>
4.	E-mail chain between Mr. Folinas and Mr. Fera dated December 19, 2017 (8:49 a.m. through 9:39 a.m.)	Mr. Fera and Mr. Folinas discuss the Sergeant Certification list issue.	ACD material. <u>N.J.S.A. 47:1A-1.1.</u>	The body of the e-mail includes discussion reasonably defined as ACD material. Thus, the body of each e-mail in this chain was properly withheld as ACD material. <u>N.J.S.A. 47:1A-1.1.</u>

Thus, the Custodian unlawfully denied access to the body of the first e-mail reviewed but has lawfully denied access to the remaining e-mail bodies (and attachment) under the ACD exemption.

However, and consistent with N.J.S.A. 47:1A-5(g), if the custodian of a government record asserts that part of a particular record is exempt from public access pursuant to OPRA, the custodian must delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and must promptly permit access to the remainder of the record.

Thus, the current Custodian must disclose all other portions of the responsive e-mails to the Complainant (*i.e.*, sender, recipients, date, time, subject, and salutations where applicable). This disclosure should take into account that only certain information from the Xerox multifunction e-mail (dated December 14, 2017 at 3:11 p.m.) should be disclosed as discussed in the *In Camera* Examination above. As to those portions of the requested e-mails, the Custodian has unlawfully denied access. See Ray v. Freedom Acad. Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010).

Knowing & Willful

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The current Custodian complied with the Council's September 24, 2019 Interim Order because she responded in the prescribed time frame providing sufficient copies of the unredacted records for *in camera* review. Further, the current Custodian simultaneously provided certified confirmation of compliance to the Executive Director.
2. **On the basis of the Council's determination in this matter, the current Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order. Further, the current Custodian shall simultaneously deliver⁹ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,¹⁰ to the Executive Director.¹¹**
3. The current Custodian must disclose all other portions of the responsive e-mails to the Complainant (*i.e.*, sender, recipients, date, time, subject, and salutations where applicable). This disclosure should take into account that only certain information from the Xerox multifunction e-mail (dated December 14, 2017 at 3:11 p.m.) should be disclosed as discussed in the *In Camera* Examination above. As to those portions of the requested e-mails, the Custodian has unlawfully denied access. See Ray v. Freedom Acad. Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010).

⁹ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

¹⁰ "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."

¹¹ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

4. **The current Custodian shall comply with conclusion No. 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the current Custodian shall simultaneously deliver¹² certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Executive Director.**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the current Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Executive Director

December 10, 2019

¹² The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.



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

September 24, 2019 Government Records Council Meeting

Krzysztof Golas
Complainant

Complaint No. 2018-12

v.

Essex County Department of Corrections
Custodian of Record

At the September 24, 2019 public meeting, the Government Records Council (“Council”) considered the September 17, 2019 Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The GRC must conduct an *in camera* review of the responsive e-mails withheld from disclosure to determine the validity of the Custodian’s assertion that the record was exempt under OPRA as “inter-agency or intra-agency advisory, consultative, or deliberative material.” 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).
2. **The Custodian shall deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see Conclusion No. 1 above), a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,³ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the Executive Director within five (5) business days from receipt of the Council’s Interim Order.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

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

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

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

Interim Order Rendered by the
Government Records Council
On The 24th Day of September 2019

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: September 26, 2019

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Krzysztof Golas¹
Complainant**

GRC Complaint No. 2018-12

v.

**Essex County Department of Corrections²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of e-mails between the County of Essex (“County”) and the County Department of Corrections (“ECDOC”) related to Symbol PC2077R and Symbol PC2077U from September 1, 2017 through December 31, 2017.³

Custodian of Record: Valentina Smoot Palchetti
Request Received by Custodian: January 10, 2018
Response Made by Custodian: January 17, 2018
GRC Complaint Received: January 25, 2018

Background⁴

Request and Response:

On January 10, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On January 17, 2018, the Custodian responded in writing denying access to responsive e-mails between the County and ECDOC under the “inter-agency or intra-agency advisory, consultative, or deliberative [(“ACD”)] material” exemption. On the same day, the Complainant disputed the denial, arguing that the e-mails in question were “PROCEDURAL and relate directly to the processing of a publicly available civil service promotion list.” (Emphasis in original). The Complainant noted that the Custodian’s failure to disclose the e-mails would result in a Denial of Access Complaint filing.

On January 18, 2018, the Custodian responded to the Complainant advising that the responsive e-mails were between two (2) County employees and were “intra-agency” in nature.

¹ No legal representation listed on record.

² Represented by Courtney Gaccione, Esq. (Newark, NJ).

³ The Complainant requested additional records not at issue in this complaint.

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 Executive Director the submissions necessary and relevant for the adjudication of this complaint.

Denial of Access Complaint:

On January 25, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the e-mails responsive to his OPRA request were not exempt from disclosure under OPRA. The Complainant reiterated his reasons for this position as reflected in earlier correspondence with the Custodian.

Statement of Information:

On February 8, 2018, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on January 10, 2018. The Custodian certified that her search included Human Resources and ECDOC locating responsive faxes and e-mails among their records. The Custodian affirmed that the search revealed five (5) pages of e-mails and a two (2) page fax. The Custodian certified that she responded in writing on January 17, 2018 disclosing the fax and denying access to the e-mails.

The Custodian stated that OPRA contained an exemption for ACD material. The Custodian argued that the ACD exemption applied to the responsive e-mails because they contained discussions regarding the promotional lists. The Custodian noted that following the Complainant’s dispute over her denial, she met with Counsel regarding the e-mails. The Custodian asserted that the same conclusion resulted, and she maintained the denial accordingly. The Custodian also certified that no additional records existed.

Analysis

Unlawful Denial of Access

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

In Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the Council⁵ that accepted the custodian’s legal 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

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

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 Complainant sought correspondence between the County and ECDOC, for which the Custodian denied access to five (5) pages of e-mails under the ACD exemption. Prior to, and as part of, the Denial of Access Complaint, the Complainant alleged that the e-mails were “procedural” and thus subject to disclosure. In the SOI, the Custodian argued that she properly denied access to the records under the ACD exemption because they were between employees of the County and ECDOC regarding the promotional list.

Given the vagueness with which the Custodian described the withheld e-mails, a “meaningful review” is necessary to determine same reasonably fell within the ACD exemption. The GRC must thus review same in order to determine the full applicability of ACD exemption. Such an action is not uncommon, 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 responsive e-mails withheld from disclosure to determine the validity of the Custodian’s assertion that the record was exempt under OPRA as ACD material. 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 GRC must conduct an *in camera* review of the responsive e-mails withheld from disclosure to determine the validity of the Custodian's assertion that the record was exempt under OPRA as "inter-agency or intra-agency advisory, consultative, or deliberative material." 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).
2. **The Custodian shall deliver⁶ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see Conclusion No. 1 above), a document or redaction index⁷, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,⁸ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the Executive Director within five (5) business days from receipt of the Council's Interim Order.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Executive Director

September 17, 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."