



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**

Russell Smith  
Complainant

Complaint No. 2018-138

v.

Moorestown Township (Burlington)  
Custodian of Record

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

1. The Custodian complied with the Council’s January 7, 2020 Interim Order because the Custodian in a timely manner forwarded to the Executive Director nine (9) copies of the requested unredacted records along with a certification averring that the records provided are the records requested for the *in camera* inspection.
2. The requested record, communications in text message format between Moorestown’s attorney and an attorney representing Fair Share Housing, are not communications between an attorney and his/her client. As such, these are not attorney-client privileged communications and are not exempt from access under the attorney-client privilege exemption set forth in N.J.S.A. 47:1A-1.1.
3. The *in camera* examination of the submitted record reveals that the record is exempt from access as advisory, consultative, or deliberative material pursuant to N.J.S.A. 47:1A-1.1. See Educ. Law Ctr. v. N.J. Dep’t of Educ., 198 N.J. 274 (2009) and In Re the Liquidation of Integrity Ins. Co., 165 N.J. 75, 88 (2000). Accordingly, the Custodian lawfully denied access to said record. N.J.S.A. 47:1A-6.

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 26<sup>th</sup> Day of February 2020

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: March 3, 2020**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Russell Smith<sup>1</sup>  
Complainant**

**GRC Complaint No. 2018-138**

v.

**Moorestown Township (Burlington)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** “[A]ll text messages between Kelly Grant and Kevin Walsh of the Fair Share Housing Center concerning Moorestown’s affordable housing program during the past six months.”<sup>3</sup>

**Custodian of Record:** Patricia L. Hunt  
**Request Received by Custodian:** June 11, 2018  
**Response Made by Custodian:** June 20, 2018  
**GRC Complaint Received:** July 16, 2018

**Record Submitted for *In Camera* Examination:** One (1) page, consisting of screenshot(s) of text messages over three (3) time periods spanning the late afternoon and evening of March 15, 2018.<sup>4</sup>

**Background**

**January 7, 2020 Council Meeting:**

At its January 7, 2020 public meeting, the Government Records Council (“Council”) considered the December 17, 2019 Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. Contrary to the Complainant’s assertion, the Custodian did not violate OPRA by failing to respond in a timely manner, to wit, “as soon as possible,” because the evidence of record reveals that the Custodian responded to the Complainant’s OPRA request within the statutorily mandated seven (7) business day period. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i).

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

<sup>2</sup> Represented by Kelly Grant, Esq., of Capehart & Scatchard, P.A. (Trenton, NJ).

<sup>3</sup> “The past six months” encompasses the period December 11, 2018 to June 11, 2018.

<sup>4</sup> Precise times were indistinct.

2. The Custodian's response was insufficient because she failed to respond in writing to each request item individually setting forth the specific basis for the denial. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008). See also J.C. v. N.J. Dep't of Educ., GRC Complaint No. 2008-91 (February 28, 2012).
3. Pursuant to Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the records relevant to this complaint to determine the validity of the Custodian's assertion that they were lawfully denied because said records contain inter-agency or intra-agency advisory, consultative, or deliberative material exempt from access pursuant to N.J.S.A. 47:1A-1.1.
4. **The Custodian must deliver to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see paragraph 3 above), a document or redaction index, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, 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.**
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 Custodian's compliance with the Council's Interim Order.

#### Procedural History:

On January 8, 2020, the Council distributed its January 7, 2020 Interim Order to all parties. On January 15, 2020, the Custodian responded to the Council's Interim Order by providing to the Executive Director a certification averring that the records provided are the records requested for the *in camera* inspection, together with nine (9) copies of the requested unredacted records.

#### Analysis

#### Compliance

On January 7, 2020, the Council ordered the above-referenced compliance. 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. Therefore, compliance was due on or before January 15, 2020. On January 15, 2020, the fifth (5<sup>th</sup>) business day following receipt of the Council's Interim Order, the Custodian forwarded to the Executive Director a certification averring that the records provided are the records requested for the *in camera* inspection, together with nine (9) copies of the requested unredacted records. The Custodian certified that a document index was not provided because the requested record was denied in its entirety.

Therefore, the Custodian complied with the Council's January 7, 2020 Interim Order because the Custodian in a timely manner forwarded to the Executive Director nine (9) copies of the requested unredacted records along with a certification averring that the records provided are the records requested for the *in camera* inspection.

### **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.

On June 20, 2018, the Custodian informed the Complainant that his request was ". . . denied pursuant to the exemption set forth at N.J.S.A. 47:1A-1.1, inter-agency or intra-agency advisory, consultative, or deliberative material and/or attorney/client privilege." In the August 1, 2018 Statement of Information the Custodian narrowed her reason for denial to the advisory, consultative, or deliberative ("ACD") exemption. Then, in her January 15, 2020 certification which accompanied the record submitted for the *in camera* examination, the Custodian again renewed the attorney/client privilege, in addition to the ACD exemption, as the reason for denial.

The requested record, communications in text message format between Moorestown's attorney and an attorney representing Fair Share Housing, are not communications between an attorney and his/her client. As such, these are not attorney-client privileged communications and are not exempt from access under the attorney-client privilege exemption set forth in N.J.S.A. 47:1A-1.1.

However, the communications discuss the status of potential litigation and contain opinions concerning executory actions related to the potential litigation. Therefore, the communications are deliberative in nature.

OPRA excludes from the definition of a government record ". . . inter-agency or intra-agency advisory, consultative or deliberative ("ACD") material." N.J.S.A. 47:1A-1.1. It is evident that this phrase is intended to exclude from the definition of a government record the types of documents that are the subject of the "deliberative process privilege."

The deliberative process privilege is a doctrine that permits government agencies to withhold documents that reflect advisory opinions, recommendations and deliberations submitted as part of a process by which governmental decisions and policies are formulated. NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975). The New Jersey Supreme Court has 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 the decision-making process *and* its disclosure would reveal deliberations that occurred during that process. Educ. Law Ctr. v. N.J. Dep't of Educ., 198 N.J. 274 (2009).

The deliberative process privilege was discussed at length in In Re the Liquidation of Integrity Ins. Co., 165 N.J. 75, 88 (2000). There, the Court addressed the question of whether the Commissioner of Insurance could protect certain records from disclosure claimed to contain opinions, recommendations or advice regarding agency policy. Id. at 81. The Court adopted a qualified deliberative process privilege based upon the holding of McClain v. Coll. Hosp., 99 N.J. 346 (1985). Integrity, 165 N.J. at 88. In doing so, the Court noted that:

A document must meet two requirements for the deliberative process privilege to apply. First, it must have been generated before the adoption of an agency's policy or decision. In other words, it must be pre-decisional . . . Second, the document must be deliberative in nature, containing opinions, recommendations, or advice about agency policies . . . Once the government demonstrates that the subject materials meet those threshold requirements, the privilege comes into play. In such circumstances, the government's interest in candor is the “preponderating policy” and, prior to considering specific questions of application, the balance is said to have been struck in favor of non-disclosure.

Id. at 84-85 (citations omitted).

Here, after conducting an *in camera* examination on the submitted record, the GRC is satisfied that the Custodian lawfully denied access to said record because it meets the two-prong test set forth in Integrity, 165 N.J. at 88. First, the text messages at issue concern *pending* or *potential* litigation, i.e., they were generated before the agency formulated a final decision regarding resolution of the litigation matter. Second, the messages contain opinions of the agency’s attorney with respect to future actions, including strategy that may be followed.

Therefore, the *in camera* examination of the submitted record reveals that the record is exempt from access as ACD material pursuant to N.J.S.A. 47:1A-1.1. See Educ. Law Ctr., 198 N.J. 274 and Integrity, 165 N.J. 75. Accordingly, the Custodian lawfully denied access to said record. N.J.S.A. 47:1A-6.

### **Knowing & Willful**

Because there has been no unlawful denial of access here, the Council should decline to address whether a knowing and willful violation occurred.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council’s January 7, 2020 Interim Order because the Custodian in a timely manner forwarded to the Executive Director nine (9) copies of the requested unredacted records along with a certification averring that the records provided are the records requested for the *in camera* inspection.

2. The requested record, communications in text message format between Moorestown's attorney and an attorney representing Fair Share Housing, are not communications between an attorney and his/her client. As such, these are not attorney-client privileged communications and are not exempt from access under the attorney-client privilege exemption set forth in N.J.S.A. 47:1A-1.1.
3. The *in camera* examination of the submitted record reveals that the record is exempt from access as advisory, consultative, or deliberative material pursuant to N.J.S.A. 47:1A-1.1. See Educ. Law Ctr. v. N.J. Dep't of Educ., 198 N.J. 274 (2009) and In Re the Liquidation of Integrity Ins. Co., 165 N.J. 75, 88 (2000). Accordingly, the Custodian lawfully denied access to said record. N.J.S.A. 47:1A-6.
4. Because there has been no unlawful denial of access here, the Council should decline to address whether a knowing and willful violation occurred.

Prepared By: John E. Stewart  
Staff Attorney

January 21, 2020<sup>5</sup>

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<sup>5</sup> 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

Russell Smith  
Complainant

Complaint No. 2018-138

v.

Moorestown Township (Burlington)  
Custodian of Record

At the January 7, 2020 public meeting, the Government Records Council (“Council”) considered the December 17, 2019 Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Contrary to the Complainant’s assertion, the Custodian did not violate OPRA by failing to respond in a timely manner, to wit, “as soon as possible,” because the evidence of record reveals that the Custodian responded to the Complainant’s OPRA request within the statutorily mandated seven (7) business day period. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i).
2. The Custodian’s response was insufficient because she failed to respond in writing to each request item individually setting forth the specific basis for the denial. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008). See also J.C. v. N.J. Dep’t of Educ., GRC Complaint No. 2008-91 (February 28, 2012).
3. Pursuant to Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the records relevant to this complaint to determine the validity of the Custodian’s assertion that they were lawfully denied because said records contain inter-agency or intra-agency advisory, consultative, or deliberative material exempt from access pursuant to N.J.S.A. 47:1A-1.1.
4. **The Custodian must deliver<sup>1</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see paragraph 3 above), a document or redaction index<sup>2</sup>, as well as a legal certification from the Custodian, in accordance**

<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 they arrive at the GRC office 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.



**with N.J. Court Rule 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.**

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 Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the  
Government Records Council  
On The 7<sup>th</sup> 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**

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<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."

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Russell Smith**<sup>1</sup>  
**Complainant**

**GRC Complaint No. 2018-138**

**v.**

**Moorestown Township (Burlington)**<sup>2</sup>  
**Custodial Agency**

**Records Relevant to Complaint:** “[A]ll text messages between Kelly Grant and Kevin Walsh of the Fair Share Housing Center concerning Moorestown’s affordable housing program during the past six months.”<sup>3</sup>

**Custodian of Record:** Patricia L. Hunt  
**Request Received by Custodian:** June 11, 2018  
**Response Made by Custodian:** June 20, 2018  
**GRC Complaint Received:** July 16, 2018

**Background**<sup>4</sup>

**Request and Response:**

On June 11, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On June 20, 2018, the seventh (7<sup>th</sup>) business day following receipt of said request, the Custodian responded in writing informing the Complainant that “[y]our request is denied pursuant to the exemption set forth at N.J.S.A. 47:1A-1.1, inter-agency or intra-agency advisory, consultative, or deliberative material and/or attorney/client privilege.”

**Denial of Access Complaint:**

On July 16, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant stated that the request was provided to the Custodian on June 11, 2018, and that he received the Custodian’s response to the request on

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

<sup>2</sup> Represented by Kelly Grant, Esq., of Capehart & Scatchard, P.A. (Trenton, NJ).

<sup>3</sup> “The past six months” encompasses the period December 11, 2018 to June 11, 2018.

<sup>4</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.

June 20, 2018. The Complainant alleged that the Custodian committed four (4) violations of OPRA:

1. The Custodian improperly cited multiple exemptions by using “and/or” without identifying the specific exemptions that apply.
2. The Custodian did not respond as soon as possible but rather waited until the end of the statutory period in order to introduce a delay.
3. The communications between Moorestown Township and the Fair Share Housing Center are not inter-agency or intra-agency because the Fair Share Housing Center is a private entity.
4. The communications between Moorestown Township and the Fair Share Housing Center are not attorney-client privileged. The Fair Share Housing Center is a plaintiff in a lawsuit against Moorestown Township and Kelly Grant represents Moorestown Township.

Statement of Information:

On August 1, 2018, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on June 11, 2018 and responded in writing on June 20, 2018. The Custodian certified that the records were denied because they constitute inter-agency or intra-agency advisory, consultative, or deliberative (“ACD”) material pursuant to N.J.S.A. 47:1A-1.1.

The Custodian certified that pursuant to the court’s decision in In Re Liquidation of Integrity Insurance Co., 165 N.J. 75, 83 (2000), a record must meet two requirements for the deliberative process privilege to apply. First, it must have been generated before the adoption of an agency’s policy or decision. Second, the document must be deliberative in nature, containing opinions, recommendations, or advice about agency policies. The Custodian certified that in the instant complaint the requested communications between the Township Solicitor and counsel for the Fair Share Housing Center, as part of the Township’s ongoing settlement negotiations related to the litigation in Docket No. BUR-L-1605-15, are undoubtedly consultative and deliberative. The Custodian certified that the communications occurred prior to the governing body’s policy decision regarding how to resolve the litigation, thereby satisfying the first prong of the test set forth in In Re Liquidation. The Custodian further certified that the communication between legal counsel contain opinions of the Township Solicitor and recommendations related to the litigated matter, thereby satisfying the second prong of the test. As such, the Custodian asserted, she properly denied the Complainant’s OPRA request.<sup>5</sup>

Additional Submissions:

On August 1, 2018, the Complainant responded to the Custodian’s SOI. The Complainant stated that the ACD exemption has nothing to do with communications between adversarial parties in a lawsuit. The Complainant asserted that whether the material was ACD is therefore not relevant.

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<sup>5</sup> The Custodian also discussed application of the common law right of access which is not within the purview of the GRC.

## Analysis

### Timeliness

Unless a shorter time period is otherwise provided, a custodian must grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian's failure to respond accordingly results in a "deemed" denial. Id. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).<sup>6</sup> Thus, a custodian's failure to respond in writing to a complainant's OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

In the instant complaint the Complainant alleged that the Custodian violated OPRA because she did not respond "as soon as possible," but instead waited until the end of the statutory period "in order to introduce a delay." There is no dispute between the parties that the request was received by the Custodian on June 11, 2018, and the Custodian responded on June 20, 2018, which was the seventh (7<sup>th</sup>) business day following the Custodian's receipt of the request.

OPRA provides that "[a] custodian shall promptly comply with a request . . ." N.J.S.A. 47:1A-5(g). OPRA further provides that "[u]nless a shorter time period is otherwise provided . . . a custodian of a government record shall [grant or deny access] as soon as possible, but not later than seven business days after receiving the request[.]" N.J.S.A. 47:1A-5(i). A "shorter time period" for example applies to immediate access records listed under N.J.S.A. 47:1A-5(e). A shorter time period does not apply to text messages, which are the records contained in the request which formed the basis of the instant complaint. Although OPRA urges custodians to act promptly when responding to a records request, the statute does not *require* a custodian to respond to a request for text messages until the seventh (7<sup>th</sup>) business day following receipt of the request. Here, the Custodian responded to the Complainant's request on the seventh (7<sup>th</sup>) business day following receipt of the request; therefore, the Custodian did not violate OPRA.

Therefore, contrary to the Complainant's assertion, the Custodian did not violate OPRA by failing to respond in a timely manner, to wit, "as soon as possible," because the evidence of record reveals that the Custodian responded to the Complainant's OPRA request within the statutorily mandated seven (7) business day period. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i).

### Sufficiency of Response

OPRA provides that a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g). Further, in Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008), the GRC held that ". . . [t]he Custodian's response

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<sup>6</sup> A custodian's written response, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

was legally insufficient because he failed to respond to each request item individually. Therefore, the Custodian has violated N.J.S.A. 47:1A-5(g).”

In J.C. v. N.J. Dep’t of Educ., GRC Complaint No. 2008-91 (February 28, 2012), the custodian responded denying the complainant’s request on the grounds that the responsive records had been destroyed, were provided during prior discovery requests, or were exempt from disclosure under FERPA. As such, the custodian failed to specifically identify which basis for the denial corresponded to which request item. The Council subsequently determined that the response was insufficient because the custodian failed to respond to each request item individually, pursuant to N.J.S.A. 47:1A-5(g) and Paff, GRC 2007-272.

Here, the Custodian denied the Complainant’s request because it constituted ACD material and/or was attorney/client privileged. Therefore, as in J.C., the Custodian failed to specifically identify which basis or bases for the denial corresponded to which request item.

Accordingly, the Custodian’s response was insufficient because she failed to respond in writing to each request item individually setting forth the specific basis for the denial. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and Paff, GRC 2007-272. See also J.C., GRC 2008-91.

### **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.

Here, the Complainant requested records in the form of text messages. In Verry v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2014-387 (July 2015), the Council determined that “[a] plain reading of OPRA supports that text messages are ‘government records’” so long as they were made, maintained, kept on file, or received in the course of official business. Id. at 4-5.

The Custodian in the SOI certified that she denied access to the requested records because they are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 as inter-agency or intra-agency advisory, consultative, or deliberative material. OPRA defines a government record as:

. . . any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been made, maintained or kept on file . . . or that has been received in the course of his or its official business...[t]he terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material.

[N.J.S.A. 47:1A-1.1.]

The Complainant disputed the Custodian's assertion that the denied records contain ACD material because he stated that the Fair Share Housing Center is a private entity. The Complainant further asserted that the ACD exemption has nothing to do with communications between adversarial parties in a lawsuit; therefore, it is not relevant whether the material was ACD.

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>7</sup> dismissing the complaint by accepting the custodian's legal conclusion for the denial of access without further review. The Court stated 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 also stated that:

The statute 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 stated 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.]

Therefore, pursuant to Paff, 379 N.J. Super. at 346, the GRC must conduct an *in camera* review of the records relevant to this complaint to determine the validity of the Custodian's assertion that they were lawfully denied because said records contain ACD material exempt from access pursuant to N.J.S.A. 47:1A-1.1.

### **Knowing & Willful**

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the

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<sup>7</sup> Paff v. NJ Dep't of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

Custodian's compliance with the Council's Interim Order.

### Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Contrary to the Complainant's assertion, the Custodian did not violate OPRA by failing to respond in a timely manner, to wit, "as soon as possible," because the evidence of record reveals that the Custodian responded to the Complainant's OPRA request within the statutorily mandated seven (7) business day period. N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i).
2. The Custodian's response was insufficient because she failed to respond in writing to each request item individually setting forth the specific basis for the denial. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008). See also J.C. v. N.J. Dep't of Educ., GRC Complaint No. 2008-91 (February 28, 2012).
3. Pursuant to Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the records relevant to this complaint to determine the validity of the Custodian's assertion that they were lawfully denied because said records contain inter-agency or intra-agency advisory, consultative, or deliberative material exempt from access pursuant to N.J.S.A. 47:1A-1.1.
4. **The Custodian must deliver<sup>8</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see paragraph 3 above), a document or redaction index<sup>9</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,<sup>10</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.**
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 Custodian's compliance with the Council's Interim Order.

Prepared By: John E. Stewart  
Staff Attorney

December 17, 2019

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<sup>8</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 they arrive at the GRC office by the deadline.

<sup>9</sup> The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

<sup>10</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."