



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

January 26, 2021 Government Records Council Meeting

Jerusha J. Schulze  
Complainant

Complaint No. 2018-177

v.

City of Newark (Essex)  
Custodian of Record

At the January 26, 2021 public meeting, the Government Records Council (“Council”) considered the January 19, 2021 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 February 26, 2020 Interim Order because he responded in the prescribed time frame providing sufficient copies of the responsive audio recording for *in camera* review. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.
2. **The *In Camera* Examination set forth in the above table reveals the Custodian has lawfully denied access to the audio recording listed in the document index pursuant to N.J.S.A. 47:1A-6.**
3. Because no denial of access occurred, the Council should decline to address whether the Custodian knowingly and willfully violated OPRA under the totality of the circumstances.
4. The Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian’s conduct. Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, no factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Council has found that the Custodian lawfully denied access to the requested executive session audio recording. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney’s fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51.

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 January 2021

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 28, 2021**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director  
January 26, 2021 Council Meeting**

**Jerusha J. Schulze<sup>1</sup>  
Complainant**

**GRC Complaint No. 2018-177**

v.

**City of Newark (Essex)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Pickup of the audio recording or minutes from the City of Newark (“City”) budget hearing, executive session on July 21, 2015.

**Custodian of Record:** Kenneth Louis  
**Request Received by Custodian:** March 1, 2018  
**Response Made by Custodian:** March 1, 2018  
**GRC Complaint Received:** August 13, 2018

**Records Submitted for *In Camera* Examination:** Audio recording of the July 21, 2015 executive session (1:04:24).

**Background**

**February 26, 2020 Council Meeting:**

At its February 26, 2020 public meeting, the 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, found that:

1. The GRC must conduct an *in camera* review of the responsive July 21, 2015 executive session recording withheld from disclosure to determine the validity of the Custodian’s assertion that the record was exempt under OPRA as attorney-privileged and personnel information. 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).

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<sup>1</sup> Represented by Edward H. Kerwin and Lynsey Stehling, Esq., of Law Offices of Daniel J. Zerrith, LLC (Monroe Township, NJ).

<sup>2</sup> Represented by Lori E. Caughman, Esq. (Newark, NJ). Previously represented by Kenyatta Stewart, Esq. (Newark, NJ).

2. **The Custodian shall deliver<sup>3</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see No. 1 above), 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 record provided is the record 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.**
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.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

#### Procedural History:

On February 28, 2020, the Council distributed its Interim Order to all parties. On March 6, 2020, the Custodian responded to the Council's Interim Order. Therein, the Custodian certified that he was providing nine (9) copies of the July 21, 2015 executive session for *in camera* review. The Custodian argued that he denied access to the recording under the attorney-client privilege exemption and due to the discussion of several personnel matters. The Custodian noted that "to provide some context," the recording contains a "small portion" of the public meeting just prior to the Council entering executive session.

#### Analysis

#### Compliance

At its February 26, 2020 meeting, the Council ordered the Custodian to provide for *in camera* review nine (9) copies of the audio recording from the July 21, 2015 executive session. The Council further ordered the Custodian to simultaneously deliver certified confirmation of compliance, in accordance with R. 1:4-4, to the Executive Director. On February 28, 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 March 6, 2020.

On March 6, 2020, the fifth (5<sup>th</sup>) business day after receipt of the Council's Order, the Custodian responded providing the Government Records Council ("GRC") nine (9) copies of the July 21, 2015 executive session recording for an *in camera* review. The Custodian also provided

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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."

certified confirmation of compliance to the Executive Director. Based on the forgoing, the GRC is satisfied that the Custodian properly complied with the Council’s Interim Order.

Therefore, the Custodian complied with the Council’s February 26, 2020 Interim Order because he responded in the prescribed time frame providing sufficient copies of the responsive audio recording for *in camera* review. Further, the 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.

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

<b>Record No.</b>	<b>Record Name/Date  Timestamp (hh:mm:ss)</b>	<b>Description of Record</b>	<b>Custodian’s Explanation/ Citation for Non-disclosure</b>	<b>Findings of the <i>In Camera</i> Examination<sup>6</sup></b>
1.	July 21, 2015 executive session recording (0:00 – 3:19)	End of the Open Session Meeting and white noise as Council prepares for executive session.	N/A	This portion of the recording was added for context and is not part of the <i>in camera</i> review. Thus, the GRC will not address this portion of the recording.

<sup>6</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.

2.	July 21, 2015 executive session recording (03:20 – 1:03:35)	Council discusses personnel actions occurring within the Clerk’s Office, the Clerk’s obligations as it relates to those personnel transactions, personnel and complaint related processes, and overarching policies and procedures of the City with regard to personnel transactions.	Attorney-client privilege. <u>N.J.S.A. 47:1A-1.1.</u>  Personnel. <u>N.J.S.A. 47:1A-10.</u>	The record contains clear personnel discussions and an array of impacts resulting from certain personnel transactions. These discussions also include deliberation on proper processes and procedures for personnel actions, as well as addressing certain types of internal grievances and complaints. Thus, the GRC is satisfied that the recording is exempt from disclosure pursuant to OPRA and the Open Public Meetings Act. <u>N.J.S.A. 47:1A-10;</u> <u>N.J.S.A. 47:1A-9(a);</u> <u>N.J.S.A. 10:4-12(b).</u>
3.	July 21, 2015 executive session recording (01:03:36 – 1:04:24)	White noise/indiscernible conversations after conclusion of the executive session.	Attorney-client privilege. <u>N.J.S.A. 47:1A-1.1.</u>  Personnel. <u>N.J.S.A. 47:1A-10.</u>	There is no content in this final portion of the recording, which is still running after the conclusion of the executive session. Thus, as with Record No. 1 above, the GRC declines to address disclosure here due to the nonexistence of actual content.

Thus, the Custodian lawfully denied access to the requested recording because it wholly involves personnel issues being discussed by the Council in an executive session meeting. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-10; N.J.S.A. 47:1A-9(a); N.J.S.A. 10:4-12(b).

Further, because no denial of access occurred, the Council should decline to address whether the Custodian knowingly and willfully violated OPRA under the totality of the circumstances.

### **Prevailing Party Attorney's Fees**

OPRA provides that:

A person who is denied access to a government record by the custodian of the record, at the option of the requestor, may: institute a proceeding to challenge the custodian's decision by filing an action in Superior Court . . .; or in lieu of filing an action in Superior Court, file a complaint with the Government Records Council . . . A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.

[N.J.S.A. 47:1A-6.]

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Court held that a complainant is a “prevailing party” if he achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct. Id. at 432. Additionally, the Court held that attorney’s fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. Id.

Additionally, the New Jersey Supreme Court has ruled on the issue of “prevailing party” attorney’s fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the Supreme Court discussed the catalyst theory, “which posits that a plaintiff is a ‘prevailing party’ if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant’s conduct.” Mason, 196 N.J. at 71, (quoting Buckhannon Bd. & Care Home v. West Virginia Dep’t of Health & Human Res., 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court stated that the phrase “prevailing party” is a legal term of art that refers to a “party in whose favor a judgment is rendered.” (quoting Black’s Law Dictionary 1145 (7<sup>th</sup> ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because “[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties . . .” Id. at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863. Further, the Supreme Court expressed concern that the catalyst theory would spawn extra litigation over attorney's fees. Id. at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

However, the Court noted in Mason, that Buckhannon is binding only when counsel fee provisions under federal statutes are at issue. 196 N.J. at 72, citing Teeters, 387 N.J. Super. at 429; see, e.g., Baer v. Klagholz, 346 N.J. Super. 79 (App. Div. 2001) (applying Buckhannon to the

federal Individuals with Disabilities Education Act), certif. denied, 174 N.J. 193 (2002). “But in interpreting New Jersey law, we look to state law precedent and the specific state statute before us. When appropriate, we depart from the reasoning of federal cases that interpret comparable federal statutes.” 196 N.J. at 73 (citations omitted).

The Mason Court accepted the application of the catalyst theory within the context of OPRA, stating that:

OPRA itself contains broader language on attorney's fees than the former RTKL did. OPRA provides that “[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.” N.J.S.A. 47:1A-6. Under the prior RTKL, “[a] plaintiff in whose favor such an order [requiring access to public records] issues . . . may be awarded a reasonable attorney's fee not to exceed \$500.00.” N.J.S.A. 47:1A-4 (repealed 2002). The Legislature's revisions therefore: (1) mandate, rather than permit, an award of attorney's fees to a prevailing party; and (2) eliminate the \$500 cap on fees and permit a reasonable, and quite likely higher, fee award. Those changes expand counsel fee awards under OPRA.

[Mason at 73-76.]

The Court in Mason, further held that:

[R]equestors are entitled to attorney’s fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) “a factual causal nexus between plaintiff’s litigation and the relief ultimately achieved”; and (2) “that the relief ultimately secured by plaintiffs had a basis in law.” Singer v. State, 95 N.J. 487, 495, *cert denied* (1984).

[Id. at 76.]

In the matter before the Council, the Complainant filed the instant complaint stating that contending that she was unlawfully denied access to the requested audio recording of the July 21, 2015 meeting. The Custodian argued that his denial was lawful as the meeting involved personnel matters and included both the City and City Council attorneys. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-10. The Council determined it was necessary to perform an *in camera* review and ordered the Custodian to produce copies for same in its February 26, 2020 Interim Order. Upon review by the Council, it is determined that the Custodian lawfully denied access to the requested recording. Thus, the Complainant is not a prevailing party because she has not achieved the desired relief in this complaint.

Therefore, the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian’s conduct. Teeters, 387 N.J. Super. 432. Additionally, no factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, the Council has found that the Custodian lawfully denied access to the requested executive session audio recording. Therefore, the Complainant is not a prevailing party entitled to an award of a

reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's February 26, 2020 Interim Order because he responded in the prescribed time frame providing sufficient copies of the responsive audio recording for *in camera* review. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.
2. **The *In Camera* Examination set forth in the above table reveals the Custodian has lawfully denied access to the audio recording listed in the document index pursuant to N.J.S.A. 47:1A-6.**
3. Because no denial of access occurred, the Council should decline to address whether the Custodian knowingly and willfully violated OPRA under the totality of the circumstances.
4. The Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Council has found that the Custodian lawfully denied access to the requested executive session audio recording. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51.

Prepared By: Frank F. Caruso  
Executive Director

January 19, 2021



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

February 26, 2020 Government Records Council Meeting

Jerusha J. Schulze  
Complainant

Complaint No. 2018-177

v.

City of Newark (Essex)  
Custodian of Record

At the February 26, 2020 public meeting, the Government Records Council (“Council”) considered the January 21 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 July 21, 2015 executive session recording withheld from disclosure to determine the validity of the Custodian’s assertion that the record was exempt under OPRA as attorney-privileged and personnel information. 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 deliver<sup>1</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see No. 1 above), 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 record provided is the record 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.**
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.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian’s compliance with 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."

Interim Order 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: February 28, 2020**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Jerusha J. Schulze<sup>1</sup>  
Complainant**

**GRC Complaint No. 2018-177**

**v.**

**City of Newark (Essex)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Pickup of the audio recording or minutes from the City of Newark (“City”) budget hearing, executive session on July 21, 2015.

**Custodian of Record:** Kenneth Louis

**Request Received by Custodian:** March 1, 2018

**Response Made by Custodian:** March 1, 2018

**GRC Complaint Received:** August 13, 2018

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

**Request and Response:**

On February 28, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On March 1, 2018, the Custodian responded in writing advising that he received the Complainant’s OPRA request and forwarded it to the Archives for review. The Custodian noted that a response was anticipated on or before March 20, 2018.

On March 14, 2018, the Custodian responded in writing obtaining a time extension to respond through March 27, 2018. The Custodian noted that additional time was needed for conversion of the executive session recording from FTR Gold format into a Windows media file so that it could be reviewed by the Law Department. The Custodian further noted that the Law Department was currently reviewing the recording. On April 5, 2018, the Custodian responded extending the time frame through April 11, 2018 to allow the Law Department further review. On April 10, 2018, the Custodian responded advising the Complainant that a response would be forthcoming on April 11, 2018. On April 11, 2018, the Custodian responded in writing again

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<sup>1</sup> Represented by Edward H. Kerwin and Lynsey Stehling, Esq., of Law Offices of Daniel J. Zerrith, LLC (Monroe Township, NJ).

<sup>2</sup> Represented by Lori E. Caughman, Esq. (Newark, NJ). Previously represented by Kenyatta Stewart, Esq. (Newark, NJ).

<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.

extending the time frame through April 13, 2018 so that he may obtain a complete response from the Law Department.

On April 12, 2018, the Custodian responded in writing denying access to the responsive audio recording based on advice of previous Custodian's Counsel. The Custodian attached a copy previous Counsel's letter to his response, citing the attorney-client privilege and personnel exemptions. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-10; K.L. v. Evesham Twp. Bd. of Educ., 423 N.J. Super. 337, 352-353 (App. Div. 2011) (certif. denied 210 N.J. 108 (2011)); McGee v. Twp. of East Amwell, 416 N.J. Super. 602, 617 (App. Div. 2010). On April 13, 2018, the Custodian again responded in writing denying access to the audio recording but added that responsive minutes did not exist.

#### Denial of Access Complaint:

On August 13, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant disputed the City's denial of access to the requested executive session records. The Complainant argued that in the denial, previous Custodian's Counsel failed to state whether he reviewed the recording. The Complainant further argued that previous Counsel failed to provide information regarding the discussions that occurred in executive session. The Complainant asserted that the record could have been redacted while still providing her with the portion of the recording related to her employment.<sup>4</sup>

#### Statement of Information:

On September 28, 2018, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on March 1, 2018. The Custodian certified that he responded in writing on multiple occasions between March 1, and April 11, 2018 extending the time frame to respond. The Custodian certified that he responded in writing on April 12, 2018 denying access to the responsive audio recording. The Custodian affirmed that he sent a clarified response on April 13, 2018 noting that no responsive minutes existed.

The Custodian argued that he properly denied access to the requested audio recording because was not a "government record[]" under OPRA. The Custodian contended that well-settled case law supported that the responsive recording was exempt as a memory aid for the composition of minutes. The Custodian stated that in O'Shea v. West Milford Twp. Bd. of Educ., 391 N.J. Super. 534, 540 (App. Div. 2007), the Appellate Division affirmed the GRC's finding that the custodian lawfully denied access to handwritten notes from an executive session. The Custodian further noted that the court reasoned that minutes could be available to the extent that they did not "subvert the purpose of the particular exception" warranting an executive session. Id. The Custodian argued that here, disclosure would discourage the "kind of free and frank exchange of views" that OPMA protects. Id.

The Custodian next argued that the responsive recording was exempt under the attorney-client privilege exemption. N.J.S.A. 47:1A-1.1. The Custodian argued that the recording was made

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<sup>4</sup> The Complainant also asserted potential violations of the Open Public Meetings Act ("OPMA"). However, the GRC does not address these issues because it does not have authority to do so. N.J.S.A. 47:1A-7(b).

in the presence of attorneys representing the City. The Custodian asserted that this justified nondisclosure. N.J.S.A. 47:1A-1.1; K.L., 423 N.J. Super. at 352-353. The Custodian argued that because lawyers for the Council were listening by phone and the City's Corporation Counsel was present in the meeting, the executive session conversations were exempt.

The Custodian finally argued that the recording was exempt because it contained a personnel discussion, which was the reason for said session. N.J.S.A. 47:1A-10. The Custodian noted that while OPRA presumes that personnel records are exempt from disclosure, with certain exceptions. Kovalcik v. Somerset Cnty. Prosecutor's Office, 206 N.J. 581, 588 (2011). The Custodian argued that the courts have interpreted the exemption in favor of nondisclosure. McGee, 416 N.J. Super. at 615. The Custodian argued that the recording at issue here involved personnel discussions about several City employees. The Custodian argued that none of the recording contained any information otherwise disclosable under N.J.S.A. 47:1A-10. The Custodian further argued that the Complainant failed to identify any statute or regulation overcoming the personnel exemption.

#### Additional Submissions:

On November 23, 2018, Complainant's Counsel submitted a letter brief refuting the Custodian's SOI. Therein, Counsel stated that the Complainant's transfer to the City Clerk's Office was discussed at length during the City's July 21, 2015 executive session.<sup>5</sup> Counsel argued that the Complainant was not privy to those discussions and that the City never RICE noticed her. Counsel thus argued that the City should not be allowed to avoid the Open Public Meetings Act by having the instant denial upheld.

### 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.

The Council's precedential case law supports a cursory disclosure of meeting recordings regardless of the approval status of the corresponding minutes. For instance, in Campbell v. Twp. of Downe (Cumberland), GRC Complaint No. 2009-219 (Interim Order dated January 25, 2011), the complainant sought access to among other records, an audio recording of an executive session meeting. The custodian denied access to said recording because the minutes were not approved at that time. Following the Denial of Access Complaint, the custodian argued in the SOI that the responsive recording was exempt from access under N.J.S.A. 47:1A-9(a) and N.J.S.A. 10:4-12. The Council looked to its prior decisions in Burlett v. Monmouth Cnty. Bd. of Freeholders, GRC Complaint No. 2004-75 (August 2004) and Miller v. Westwood Reg'l Sch. Dist. (Bergen), GRC Complaint No. 2009-49 (February 2010) for direction. In those complaints, the Council had held

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<sup>5</sup> Complainant's Counsel advanced multiple arguments regarding the City's obligations under OPMA. See FN No. 4. *Jerusha J. Schulze v. City of Newark (Essex)*, 2018-177 – Findings and Recommendations of the Executive Director

that audio recordings of public session meetings were disclosable because they represented a verbatim account of the meeting. This was, as noted above, regardless of whether minutes had been approved for accuracy and content. However, the Council found both distinguishable to the facts of Campbell:

[S]pecifically, the record requested herein is an audio recording of an executive session, rather than a public meeting. The GRC acknowledges that although an audio record is a verbatim account of a meeting, OPMA provides that “[a] public body may exclude the public only from that portion of a meeting” in which the body discusses certain subjects such as those identified by the original Custodian to be personnel matters, attorney-client privileged matters and collective bargaining agreement matters. See N.J.S.A. 10:4-12.

[Id. at 17.]

Further, 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>6</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.]

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<sup>6</sup> Paff v. NJ Dep’t of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

Here, the Complainant sought a copy of an executive session recording from the City's July 21, 2015 budget hearing. The Custodian responded denying access under N.J.S.A. 47:1A-1.1. In the Denial of Access Complaint, the Complainant contended that recording should have been disclosed with redactions. In the SOI, the Custodian argued that he properly denied access to the records under the attorney-client privilege and personnel exemptions. The Custodian also argued that the recording was not a "government record" based on O'Shea, 391 N.J. Super. at 540 because it was comparable to handwritten notes.

Regarding the Custodian's O'Shea argument, the Council's prior decisions do not support that meeting audio recordings should be treated the same as the handwritten notes at issue in O'Shea. In fact, the Council has held the opposite: meeting recordings are a verbatim account of the meeting and are subject to disclosure regardless of the approval status of corresponding minutes. See Burlett, GRC 2004-75; Miller, GRC 2009-49. However, the Council did not discount the potential for a more nuanced approach to executive session recordings. See Campbell, GRC 2009-219. The GRC is thus not persuaded that the recording falls under the memory-aid analysis proffered by the O'Shea court.

Regarding the remaining asserted exemptions, it is unclear whether the recording, in part or whole, falls within the asserted exemptions. Therefore, a "meaningful review" is necessary to determine the recording reasonably fell under the attorney-client privilege and/or personnel exemptions. The GRC must thus review same in order to determine the full applicability of each exemption. Such an action is not uncommon, as the GRC has previously performed an *in camera* review in a similar circumstance. See *e.g.* Chiappini v. Twp. of Fairfield (Cumberland), GRC Complaint No. 2013-139 (Interim Order dated November 19, 2013).

Therefore, the GRC must conduct an *in camera* review of the responsive July 21, 2015 executive session recording withheld from disclosure to determine the validity of the Custodian's assertion that the record was exempt under OPRA as attorney-privileged and personnel information. 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.

### **Prevailing Party Attorney's Fees**

The Council defers analysis of whether the Complainant is a prevailing party 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 July 21, 2015 executive

session recording withheld from disclosure to determine the validity of the Custodian's assertion that the record was exempt under OPRA as attorney-privileged and personnel information. 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 deliver<sup>7</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see No. 1 above), a document or redaction index<sup>8</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,<sup>9</sup> that the record provided is the record 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.**
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.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso  
Executive Director

January 21, 2020<sup>10</sup>

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<sup>7</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>8</sup> The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

<sup>9</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

<sup>10</sup> This complaint was prepared for adjudication at the Council's January 28, 2020 meeting, but could not be adjudicated due to lack of quorum.