



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

**PHILIP D. MURPHY**  
*Governor*

**LT. GOVERNOR SHEILA Y. OLIVER**  
*Commissioner*

**FINAL DECISION**

**November 10, 2020 Government Records Council Meeting**

Joyce Blay  
Complainant

Complaint No. 2018-29

v.

Township of Lakewood (Ocean)  
Custodian of Record

At the November 10, 2020 public meeting, the Government Records Council (“Council”) considered the October 27, 2020 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The current Custodian complied with the Council’s September 29, 2020 Interim Order because she responded in the extended time frame providing records and simultaneously provided certified confirmation of compliance to the Executive Director.
2. Although the Custodian unlawfully denied access to some of the requested records, she lawfully denied access to the remainder. N.J.S.A. 47:1A-6. Additionally, the current Custodian cured the error by providing redacted records in accordance with the Council’s September 29, 2020 Interim Order. 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 10<sup>th</sup> Day of November 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: November 13, 2020**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
November 10, 2020 Council Meeting**

**Joyce Blay<sup>1</sup>  
Complainant**

**GRC Complaint No. 2018-29**

v.

**Township of Lakewood (Ocean)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies of:<sup>3</sup>

1. Supporting documents for the February 8, 2018 Lakewood Township (“Lakewood”) Committee Executive/Workshop Meeting Agenda.
2. Signed contract with DataMap Intelligence (“DataMap”) for the 2016 year.

**Custodian of Record:** Kathryn Hutchinson<sup>4</sup>

**Request Received by Custodian:** February 9, 2018

**Response Made by Custodian:** February 9, 2018; February 13, 2018

**GRC Complaint Received:** February 26, 2018

**Background**

September 29, 2020 Council Meeting:

At its September 29, 2020 public meeting, the Council considered the September 22, 2020 *In Camera* Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The current Custodian complied with the Council’s February 26, 2020 Interim Order because she responded in the prescribed time frame providing nine (9) unredacted copies of responsive 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**

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

<sup>2</sup> Represented by Steven Secare, Esq., of Secare & Hensel Law Firm (Toms River, NJ).

<sup>3</sup> The Complainant requested additional records that are not the subject of this Denial of Access Complaint.

<sup>4</sup> The current Custodian of Record is Lauren Kirkman.

**in the above table within five (5) business days from receipt of this Order. Further, the current Custodian shall simultaneously deliver<sup>5</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>6</sup> to the Executive Director.<sup>7</sup>**

3. The current Custodian must disclose all other portions of the responsive e-mails and correspondence to the Complainant (*i.e.*, sender, recipients, date, time, subject, and salutations where applicable). As to those portions of the requested records, 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 deliver<sup>8</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>9</sup> to the Council Staff.<sup>10</sup>**
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 October 1, 2020, the Council distributed its Interim Order to all parties. That same day, the current Custodian requested an extension of time to respond to the Council's Order. The GRC responded that same day granting an extension until October 19, 2020 to respond.

On October 8, 2020, the current Custodian responded to the Council's Interim Order. The current Custodian provided the Complainant with copies of the redacted records in accordance

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<sup>5</sup> 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.

<sup>6</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>7</sup> 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.

<sup>8</sup> 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.

<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> 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.

with the Council's Order. The current Custodian also simultaneously provided certified confirmation of compliance to the Executive Director.

## Analysis

### Compliance

At its September 29, 2020 meeting, the Council ordered the current Custodian to provide the Complainant with responsive records containing redactions in accordance with the GRC's *in camera* review. The Council also 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 October 1, 2020, the Council distributed its Interim Order to all parties, providing the current Custodian five (5) business days to comply with the terms of said Order. Thus, the current Custodian's response was due by close of business on October 8, 2020.

On October 1, 2020, the date of receipt, the Custodian requested an extension of time to respond to the Council's Order. That same day, the GRC provided an extension of time until October 19, 2020 to respond. On October 8, 2020, the current Custodian responded to the Council's Order, provided responsive records containing redactions in accordance with the GRC's *in camera* review. The current Custodian also simultaneously provided a certified confirmation of compliance to the Executive Director.

Therefore, the current Custodian complied with the Council's September 29, 2020 Interim Order because she responded in the extended time frame providing records and 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)).

Although the Custodian unlawfully denied access to some of the requested records, she lawfully denied access to the remainder. N.J.S.A. 47:1A-6. Additionally, the current Custodian cured the error by providing redacted records in accordance with the Council's September 29, 2020 Interim Order. 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 September 29, 2020 Interim Order because she responded in the extended time frame providing records and simultaneously provided certified confirmation of compliance to the Executive Director.
2. Although the Custodian unlawfully denied access to some of the requested records, she lawfully denied access to the remainder. N.J.S.A. 47:1A-6. Additionally, the current Custodian cured the error by providing redacted records in accordance with the Council's September 29, 2020 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: Samuel A. Rosado  
Staff Attorney

October 27, 2020



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 29, 2020 Government Records Council Meeting**

Joyce Blay  
Complainant

Complaint No. 2018-29

v.

Township of Lakewood (Ocean)  
Custodian of Record

At the September 29, 2020 public meeting, the Government Records Council (“Council”) considered the September 22, 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 current Custodian complied with the Council’s February 26, 2020 Interim Order because she responded in the prescribed time frame providing nine (9) unredacted copies of responsive 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 deliver<sup>1</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>2</sup> to the Executive Director.<sup>3</sup>**
3. The current Custodian must disclose all other portions of the responsive e-mails and correspondence to the Complainant (*i.e.*, sender, recipients, date, time, subject, and salutations where applicable). As to those portions of the requested records, the

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<sup>1</sup> 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.

<sup>2</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>3</sup> 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.

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 deliver<sup>4</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>5</sup> to the Council Staff.<sup>6</sup>**
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 29<sup>th</sup> Day of September 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: September 30, 2020**

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<sup>4</sup> 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.

<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."

<sup>6</sup> 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.



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director  
September 29, 2020 Council Meeting**

**Joyce Blay<sup>1</sup>  
Complainant**

**GRC Complaint No. 2018-29**

v.

**Township of Lakewood (Ocean)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies of:<sup>3</sup>

1. Supporting documents for the February 8, 2018 Lakewood Township (“Lakewood”) Committee Executive/Workshop Meeting Agenda.
2. Signed contract with DataMap Intelligence (“DataMap”) for the 2016 year.

**Custodian of Record:** Kathryn Hutchinson<sup>4</sup>

**Request Received by Custodian:** February 9, 2018

**Response Made by Custodian:** February 9, 2018; February 13, 2018

**GRC Complaint Received:** February 26, 2018

**Records Submitted for *In Camera* Examination:** Nine (9) unredacted copies of supporting documentation responsive to Item No. 1 of the Complainant’s request.

**Background**

**February 26, 2020 Council Meeting:**

At its February 26, 2020 public meeting, the Council considered the February 19, 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 withheld supporting documentation responsive to the Complainant’s OPRA request Item No. 1 to determine the validity of the Custodian’s assertion that the records are exempt from disclosure under OPRA under the deliberative process privilege. 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> No legal representation listed on record.

<sup>2</sup> Represented by Steven Secare, Esq., of Secare & Hensel Law Firm (Toms River, NJ).

<sup>3</sup> The Complainant requested additional records that are not the subject of this Denial of Access Complaint.

<sup>4</sup> The current Custodian of Record is Lauren Kirkman.

2. **The current Custodian shall deliver<sup>5</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 1 above), a document or redaction index<sup>6</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,<sup>7</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.**
3. The Custodian has borne her burden of proof that she lawfully denied access to the Complainant's February 9, 2018 OPRA request Item No. 2, because the Custodian certified, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

#### Procedural History:

On February 28, 2020, the Council distributed its Interim Order to all parties. On March 5, 2020, the current Custodian responded to the Council's Interim Order. The current Custodian certified that she was providing nine (9) copies of responsive records withheld from disclosure for *in camera* review.

#### Analysis

#### Compliance

At its February 26, 2020 meeting, the Council ordered the current Custodian to provide nine (9) unredacted copies of the records withheld from disclosure along with a document index for *in camera* inspection. The Council further ordered the Custodian to simultaneously provide certified confirmation of compliance in accordance with N.J. Court Rules, R. 1:4-4, to the Executive Director. On February 28, 2020 the Council distributed its Interim Order to all parties, providing the current Custodian five (5) business days to comply with the terms of said Order. Thus, the current Custodian's response was due by close of business on March 6, 2020.

On March 5, 2020, the fourth (4<sup>th</sup>) business day after receipt of the Council's Order, the current Custodian responded in writing providing nine (9) unredacted copies of records responsive to the Complainant's OPRA request Item No. 1 withheld from disclosure. Additionally, the current Custodian provided a document index as well as a certified confirmation of compliance

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<sup>5</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>6</sup> The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

<sup>7</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."

to the Executive Director. Based on the foregoing, the GRC is satisfied that the current Custodian properly complied with the Council's Order.

Therefore, the current Custodian complied with the Council's February 26, 2020 Interim Order because she responded in the prescribed time frame providing nine (9) unredacted copies of responsive 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 some of the records listed in the document index were marked as "No record on file" by the current Custodian. For the purposes of completeness, they will be included in the following table. The current Custodian also raised the additional defense of attorney-client privilege for some of the listed records.

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 or Redaction Number</b>	<b>Record Name/Date</b>	<b>Description of Record or Redaction</b>	<b>Custodian's Explanation/ Citation for Non-disclosure or Redactions</b>	<b>Findings of the <i>In Camera</i> Examination<sup>8</sup></b>
1.	Discussion: Infrastructure	No record on file.	N/A	N/A
2.	Discussion: County Transportation Model - E-mail chain between Susie Beck, Thomas Henshaw, and Jeff Staiger (cc'ing several other parties) dated January 23 and 24, 2018	Ms. Beck forwards "Ocean County Transportation Model 2017 Model Update Ocean County Model Update 2017 – Draft 10-23-2017.pdf" (not included) to multiple parties, with discussion on certain parts of the draft document.	<u>N.J.S.A. 47:1A-1.1.</u> Inter-agency or intra-agency advisory, consultative or deliberative material.	The bodies of each e-mail in the chain 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.	Discussion: Tax Bill – E-mail chain between Mr. Henshaw and Yehoshua Birnhack and Edward Seeger dated January 18, 2018 (9:54	Mr. Henshaw acknowledges receipt of Mr. Birnhack's e-mail and thanks him.	<u>N.J.S.A. 47:1A-1.1.</u> Inter-agency or intra-agency advisory, consultative or deliberative material.	The bodies of each e-mail in the chain do not contain any ACD discussions warranting nondisclosure. <b>Thus, the Custodian must</b>

<sup>8</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.

	a.m. to 1:32 p.m.)			<b>disclose the record.</b>
4.	Discussion: Block 443 Lot 1 – E-mail chain between Raymond Coles, Meir Lichtenstein, Mr. Henshaw, Menashe Miller, Steven Secare, and Ari Berkowitz dated August 3, 2017 to January 24, 2018	Discussion regarding placing a piece of land up for auction.	<u>N.J.S.A. 47:1A-1.1.</u> Inter-agency or intra-agency advisory, consultative or deliberative material. <u>N.J.S.A. 47:1A-1.1.</u> Any record within the attorney-client privilege.	The body of the first e-mail does not contain any ACD discussions warranting nondisclosure. <b>Thus, the Custodian must disclose this portion of the e-mail chain.</b>  The remaining e-mail bodies contain discussions reasonably defined as ACD material and were properly withheld as ACD material. <u>N.J.S.A. 47:1A-1.1.</u>
5.	Discussion: Road Opening – Letter from David Donner to Mr. Henshaw dated January 28, 2018.  E-mail from Mr. Donner to Mr. Henshaw dated January 29, 2018.	Mr. Donner requesting permission to disconnect gas supply to allow for construction.  Includes e-mail from Ally Morris to Mr. Henshaw and Terry Vogt dated February 7, 2018.  Also includes maps and site plans of the relevant property.	<u>N.J.S.A. 47:1A-1.1.</u> Inter-agency or intra-agency advisory, consultative or deliberative material.	The body of the letter and e-mail, as well as the maps and site plans do not contain any ACD discussions warranting nondisclosure. <b>Thus, the Custodian must disclose this portion of the record.</b>  The body of the e-mail from Ms. Morris was properly withheld as ACD material. <u>N.J.S.A. 47:1A-1.1.</u>
6.	Discussion: Planning Board – E-mail chain	Discussion regarding zoning and site plan	<u>N.J.S.A. 47:1A-1.1.</u> Inter-agency or intra-agency	The bodies of the e-mails do not contain any ACD

	between Raymond Coles, Mr. Henshaw, Mr. Secare, Mr. Vogt, John Jackson, and Angela Zografos dated January 25 and 29, 2020.	designs and amending an ordinance. Includes a memo from John Jackson.	advisory, consultative or deliberative material. <u>N.J.S.A. 47:1A-1.1</u> . Any record within the attorney-client privilege.	discussions warranting nondisclosure. <b>Thus, the Custodian must disclose these portions of the e-mail chain.</b>  The included memo from Mr. Jackson was properly withheld as ACD material. <u>N.J.S.A. 47:1A-1.1</u> .
7.	Executive: Lease Contract Extension	No record on file.	N/A	N/A
8.	Executive: Tax Map (maintenance & Digital Oversight)	Proposal submitted by firm to provide tax map services.	<u>N.J.S.A. 47:1A-1.1</u> . Inter-agency or intra-agency advisory, consultative or deliberative material.	The proposal does not contain any ACD discussions warranting nondisclosure. <b>Thus, the Custodian must disclose this record.</b>
9.	Executive: Property Bids	No record on file.	N/A	N/A
10.	Executive: SOA and Chief Contract	No record on file.	N/A	N/A
11.	Executive T&M Bills	No record on file.	N/A	N/A
12.	Executive: Change Order – Maser Consulting	No record on file.	N/A	N/A
13.	Property Request: Block 5, Lot 2 – Memo from Ally Morris to Mr. Henshaw (cc'ing Mr. Seeger) dated	Ms. Morris provided her opinion and value assessment on the potential public sale of a parcel of land. Includes relevant	<u>N.J.S.A. 47:1A-1.1</u> . Inter-agency or intra-agency advisory, consultative or deliberative material.	The body of the memo contains discussions reasonably defined as ACD material. Thus, body of the memo and accompanying

	January 24, 2018	maps of the property and valuation document.		documents were properly withheld as ACD material. <u>N.J.S.A. 47:1A-1.1.</u>
14.	Property Request: Block 1043, Lot 3 - Memo from Ally Morris to Mr. Henshaw (cc'ing Mr. Seeger) dated January 24, 2018	Ms. Morris provided her opinion and value assessment on the potential public sale of a parcel of land. Includes relevant maps of the property.	<u>N.J.S.A. 47:1A-1.1.</u> Inter-agency or intra-agency advisory, consultative or deliberative material.	The body of the memo contains discussions reasonably defined as ACD material. Thus, body of the memo and accompanying documents were properly withheld as ACD material. <u>N.J.S.A. 47:1A-1.1.</u>
15.	Property Request: Block 536, Lot 100 - Memo from Ally Morris to Mr. Henshaw (cc'ing Mr. Seeger) dated January 23, 2018	Ms. Morris provided her opinion and value assessment on the potential public sale of a parcel of land. Includes relevant maps of the property.	<u>N.J.S.A. 47:1A-1.1.</u> Inter-agency or intra-agency advisory, consultative or deliberative material.	The body of the memo contains discussions reasonably defined as ACD material. Thus, body of the memo and accompanying documents were properly withheld as ACD material. <u>N.J.S.A. 47:1A-1.1.</u>
16.	Property Request: Aaron Perlow – Letter from Mr. Perlow to Mr. Henshaw dated January 28, 2018	Mr. Perlow provided opinion on a proposed vacation and planned development. Includes relevant maps of the property.	<u>N.J.S.A. 47:1A-1.1.</u> Inter-agency or intra-agency advisory, consultative or deliberative material.	The body of the letter does not contain any ACD discussions warranting nondisclosure. <b>Thus, the Custodian must disclose the letter and accompanying maps.</b>
17.	Property Request: Street Vacation – Letter from Miriam B. Weinstein to Mr. Henshaw	Ms. Weinstein formally requests vacation of a portion of property on behalf of a client. Includes	<u>N.J.S.A. 47:1A-1.1.</u> Inter-agency or intra-agency advisory, consultative or deliberative material.	The body of the letter does not contain discussions reasonably defined as ACD material. <b>Thus, the Custodian must</b>

	dated February 7, 2018.	memo and e-mail from Ms. Morris to the May and Lakewood Township Committee.		<b>disclose this portion of record.</b>  The bodies of the attached memo and e-mail chain and accompany maps were properly withheld as ACD material. <u>N.J.S.A. 47:1A-1.1.</u>
18.	Property Request: Charity Tull Road – Partial Vacation – Letter from Ms. Weinstein to Mr. Henshaw dated October 19, 2017.	Ms. Weinstein formally requests a previously rescinded vacation to be renewed. Includes copy of Site Plan and “Description of Property Right of Way Vacation Charity Tull Avenue.”	<u>N.J.S.A. 47:1A-1.1.</u> Inter-agency or intra-agency advisory, consultative or deliberative material.	The body of the letter and attached documents do not contain discussions reasonably defined as ACD material. <b>Thus, the Custodian must disclose this record.</b>

In accordance with the *In Camera* Examination, the Custodian lawfully denied access in part to the requested records under the ACD exemption. N.J.S.A. 47:1A-1.1. 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 and correspondence to the Complainant (*i.e.*, sender, recipients, date, time, subject, and salutations where applicable). As to those portions of the requested records, 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 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 February 26, 2020 Interim Order because she responded in the prescribed time frame providing nine (9) unredacted copies of responsive 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 deliver<sup>9</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>10</sup> to the Executive Director.<sup>11</sup>**
3. The current Custodian must disclose all other portions of the responsive e-mails and correspondence to the Complainant (*i.e.*, sender, recipients, date, time, subject, and salutations where applicable). As to those portions of the requested records, 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 deliver<sup>12</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>13</sup> to the Council Staff.<sup>14</sup>**

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<sup>9</sup> 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.

<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."

<sup>11</sup> 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.

<sup>12</sup> 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.

<sup>13</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>14</sup> 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.



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PHILIP D. MURPHY  
Governor

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

INTERIM ORDER

February 26, 2020 Government Records Council Meeting

Joyce Blay  
Complainant

Complaint No. 2018-29

v.

Township of Lakewood (Ocean)  
Custodian of Record

At the February 26, 2020 public meeting, the Government Records Council (“Council”) considered the February 19, 2020 Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The GRC must conduct an *in camera* review of the withheld supporting documentation responsive to the Complainant’s OPRA request Item No. 1 to determine the validity of the Custodian’s assertion that the records are exempt from disclosure under OPRA under the deliberative process privilege. 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 current Custodian shall deliver<sup>1</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion 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 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.**
3. The Custodian has borne her burden of proof that she lawfully denied access to the Complainant’s February 9, 2018 OPRA request Item No. 2, because the Custodian certified, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).

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

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

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

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

Interim Order Rendered by the  
Government Records Council  
On The 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**

**Joyce Blay<sup>1</sup>  
Complainant**

**GRC Complaint No. 2018-29**

v.

**Township of Lakewood (Ocean)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies of:<sup>3</sup>

1. Supporting documents for the February 8, 2018 Lakewood Township (“Lakewood”) Committee Executive/Workshop Meeting Agenda.
2. Signed contract with DataMap Intelligence (“DataMap”) for the 2016 year.

**Custodian of Record:** Kathryn Hutchinson<sup>4</sup>

**Request Received by Custodian:** February 9, 2018

**Response Made by Custodian:** February 9, 2018; February 13, 2018

**GRC Complaint Received:** February 26, 2018

**Background**<sup>5</sup>

**Request and Response:**

On February 9, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. That same day, Kelly Coles, on behalf of the Custodian, responded in writing providing records and acknowledging the request for DataMap contracts. The Complainant replied that same day, stating that contracts are considered immediate access records under OPRA and should be provided “upon receipt.” The Complainant then stated that an extension of time could be requested if needed.

On February 9, 2018, the Custodian directly responded to the Complainant, stating that she was out of the office that day and another staff member was out sick. Therefore, the Custodian sought an extension of time to until February 13, 2018 for the requested contracts.

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

<sup>2</sup> Represented by Steven Secare, Esq., of Secare & Hensel Law Firm (Toms River, NJ).

<sup>3</sup> The Complainant requested additional records that are not the subject of this Denial of Access Complaint.

<sup>4</sup> The current Custodian of Record is Lauren Kirkman.

<sup>5</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.

On February 13, 2018, Florence Ochs, on behalf of the Custodian, responded in writing providing contracts between DataMap and Lakewood for the years requested by the Complainant. That same day, the Complainant responded to Ms. Ochs stating that the contract for the 2016 year was with a different vendor and not with DataMap. That same day, Ms. Ochs replied to the Complainant stating that the contract was misfiled and stated that no contract between DataMap and Lakewood existed for the 2016 year. Shortly after, the Complainant responded to Ms. Ochs, stating that according to Lakewood's Resolution L-28 ("Resolution L-28"), DataMap has been contracting with Lakewood each year since 2012.

On February 14, 2018, the Custodian responded to the Complainant, resubmitting Lakewood's contracts with DataMap for the years 2012-2013, 2014-2015, and 2017-2018. The Custodian restated that Lakewood Clerk's Office does not have a contract between DataMap and Lakewood for the 2016 year. The Complainant responded that same day, quoting a line from Lakewood's January 1, 2016 Reorganization Meeting Agenda ("2016 Agenda"), which referenced a resolution authorizing a contract award to DataMap for the year. The Custodian responded that day, stating that she possessed a copy of said resolution, and restated that she does not have a 2016 contract. The Custodian also added that at some point there was a clerical error.

On February 15, 2018, the Complainant replied to the Custodian stating that she has not received all DataMap contracts as requested. That same day, the Custodian responded to the Complainant, stating that she had already provided all contracts in Lakewood's possession, but attached them to the e-mail for convenience. The Custodian also restated that due to a clerical error, no contract exists for the 2016 year. The Complainant replied that day, stating that the Custodian has also failed to provide DataMap contract for the 2018 year in addition to 2016. The Custodian responded that day, asserting that she provided a DataMap contract for the 2017-2018 year, and attached a copy of same to the response.

#### Denial of Access Complaint:

On February 26, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted initially that while she received a copy of the February 8, 2018 Lakewood Executive Committee Meeting Agenda ("2018 Agenda") as requested, she never received the accompanying supporting documents. The Complainant noted that neither the Custodian nor the other Lakewood employees mentioned this part of the request before filing her complaint.

Regarding Item No. 2, the Complainant asserted that part of her OPRA request sought contracts between Lakewood and DataMap for the years 2012-2018. The Complainant argued that in response to her request, she received from Ms. Ochs contracts for all years except 2016. The Complainant disputed the claim that no contract with DataMap exists for that year, asserting that several DataMap invoices she received from Lakewood were dated from 2016. The Complainant also contended that the 2016 Agenda referenced a resolution authorizing a contract award to DataMap for 2016.

### Additional Correspondence:

On March 5, 2018, the Complainant sent an e-mail to the Custodian, stating that she had yet to receive the 2016 DataMap contract, as well as the supporting documents for the 2018 Agenda.

On March 6, 2018, the Custodian responded to the Complainant, stating that the requested supporting documents are not given out until they have been finalized, as they are part of the deliberative process. The Custodian also stated that she told the Complainant several times that due to a clerical error no contract with DataMap exists for 2016.

On March 7, 2018, the Complainant e-mailed the GRC. The Complainant stated that the Custodian and her staff failed to provide a copy of the 2016 DataMap contract and instead provided a contract with a different vendor. The Complainant stated that the 2016 Agenda and 2016 DataMap invoices confirm the existence of a contract for that year. The Complainant asserted that the Custodian and Custodian's Counsel were attempting to create a paper trail of compliance under OPRA before the GRC requested a Statement of Information ("SOI") from them. The Complainant maintained that the request record was an authorization to spend public dollars, and that no public official should be permitted to withhold access to same.

### Statement of Information:

On April 11, 2018, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on February 9, 2018 but was out of the office at the time. The Custodian certified that on her behalf, Ms. Coles responded in writing on February 9, 2018, providing responsive records and acknowledging the request for DataMap contracts. The Custodian certified that she directly sought an extension of time for the requested contracts. The Custodian then certified that on her behalf, Ms. Ochs responded in writing on February 13, 2018, providing copies of DataMap contracts for the requested years.

Regarding Item No. 1, the Custodian asserted that in her response Ms. Coles inadvertently did not address the 2018 Agenda's supporting documentation the Complainant requested. The Custodian contended that notwithstanding the omission, she previously told the Complainant that such records were deliberative in nature and not subject to disclosure until acted upon.

Regarding Item No. 2, the Custodian asserted that the 2016 contract between Lakewood and the other vendor was erroneously sent to the Complainant. The Custodian argued that due to a clerical error, the 2016 contract for DataMap did not exist. The Custodian noted that the DataMap contracts for the other requested years were provided as part of the February 13, 2018 response.

### Additional Submissions:

On April 11, 2018, the Complainant responded to the Complainant's SOI. The Complainant maintained that a contract between DataMap and Lakewood for the 2016 year should exist based upon the 2016 Agenda, as well as invoices from 2016 documenting payments made to

DataMap. The Complainant contended that these documents support the existence of a contract, and that she was unlawfully denied access to same by the Custodian.

## 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.

#### Item No. 1

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

In the instant matter, the Custodian asserted that the “supporting documentation” for the 2018 Agenda were withheld because they were not finalized, and therefore remained part of the deliberative process. N.J.S.A. 47:1A-1.1. Notwithstanding the Custodian’s description of the responsive records, a “meaningful review” is necessary to determine whether the withheld records fell under the deliberative process privilege. The GRC must thus review same in order to determine the full applicability of the exemption. Such an action is not uncommon, as the GRC will routinely perform an *in camera* review in similar circumstances. See 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 withheld supporting documentation responsive to the Complainant’s OPRA request Item No. 1 to determine the validity of the Custodian’s assertion that the records are exempt from disclosure under OPRA under the deliberative process privilege. N.J.S.A. 47:1A-1.1; see Paff, 379 N.J. Super. 346.

### Item No. 2

The Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. See Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005). Here, the Complainant’s OPRA request Item No. 2 sought in part a contract between DataMap and Lakewood for the 2016 year. The Complainant asserted that a contract should exist for that year based upon the 2016 Agenda as well as invoices and receipts by and between DataMap and Lakewood dated that year. The Custodian certified that no contract between DataMap and Lakewood existed for 2016, despite that contracts existed for 2012-13, 2014-15, and 2017-18. The Custodian acknowledged that the 2016 Agenda supports the Complainant’s contention that an agreement existed between Lakewood and DataMap but contends that the written contract did not exist due to the clerical error.

Based upon the evidence, the GRC finds the Custodian’s certification credible. Throughout the request process the Custodian made concerted efforts to provide the Complainant with responsive contracts. The Custodian consistently told the Complainant that it was not disputed that a contract award existed between DataMap and Lakewood for 2016, only that the written agreement between the parties was not filed that year due to a clerical error.

Accordingly, the Custodian has borne her burden of proof that she lawfully denied access to the Complainant’s February 9, 2018 OPRA request Item No. 2, because the Custodian certifies, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer, GRC 2005-49.

### 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 withheld supporting documentation responsive to the Complainant's OPRA request Item No. 1 to determine the validity of the Custodian's assertion that the records are exempt from disclosure under OPRA under the deliberative process privilege. 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 current Custodian shall deliver<sup>7</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion 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 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.**
3. The Custodian has borne her burden of proof that she lawfully denied access to the Complainant's February 9, 2018 OPRA request Item No. 2, because the Custodian certified, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Samuel A. Rosado  
Staff Attorney

February 19, 2020

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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."