



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

March 29, 2022 Government Records Council Meeting

Ryan E. Melsky
Complainant

Complaint No. 2019-186

v.

Township of Clinton (Hunterdon)
Custodian of Record

At the March 29, 2022 public meeting, the Government Records Council (“Council”) considered the March 22, 2022 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian complied with the Council’s February 22, 2022 Interim Order because she responded in the prescribed time frame providing records and simultaneously provided certified confirmation of compliance to the Executive Director.
2. Although the Custodian unlawfully denied access to a portion of the requested records, she lawfully denied access to the remainder. Further, the Custodian timely complied with the Council’s January 26, 2021 and February 22, 2022 Interim Orders, ultimately resulting in disclosure of the responsive records with appropriate redactions. 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 29th Day of March 2022

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: March 31, 2022

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
March 29, 2022 Council Meeting**

**Ryan E. Melsky¹
Complainant**

GRC Complaint No. 2019-186

v.

**Township of Clinton (Hunterdon)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of “any and all e-mails to or from the Clinton Township [(“Township”)] Administrator Jess Landon . . . that in any way pertain to [the Complainant] . . . from June 15, 2019 to the present, excluding e-mails to or from [the Complainant] or the Township Attorney. Said request includes e-mails to the Clinton Township Police Department [(“CTPD”)] or to/from Lieutenant Thomas DeRosa, Township Clerk Carla Connor, any member of Mayor/Council, any member of the Hunterdon County Prosecutor’s Office, but shall not be limited to such individuals. [The Complainant] hereby waives any/argument of privilege or similar argument.”

Custodian of Record: Carla Conner
Request Received by Custodian: August 6, 2019
Response Made by Custodian: August 9, 2019
GRC Complaint Received: August 30, 2019

Background

February 22, 2022 Council Meeting:

At its February 22, 2022 public meeting, the Council considered the February 15, 2022 *In Camera* Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian complied with the Council’s January 26, 2021 Interim Order because she responded in the prescribed time frame providing records for *in camera* review, and simultaneously provided certified confirmation of compliance to the Executive Director.

2. **On the basis of the Council’s determination in this matter, the Custodian shall comply with the Council’s Findings of the *In Camera* Examination set forth in the**

¹ No legal representation listed on record.

² Represented by Debra Shannon, Esq., of Trimboli & Prusinowski, LLC (Morristown, NJ).

above table within five (5) business days from receipt of this Order. Further, the Custodian shall simultaneously deliver³ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁴ to the Executive Director.⁵

3. The Custodian must disclose all of these portions of the responsive e-mails to the Complainant (*i.e.*, sender, recipients, date, time, subject, and salutations where applicable). As to those portions of the requested e-mails, the Custodian has unlawfully denied access. See Ray v. Freedom Acad. Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010). The GRC notes that if the Custodian intends to redact certain information in the categories identified above, she must provide a lawful basis for those redactions.
4. **The 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 Custodian shall simultaneously deliver⁶ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Executive Director.**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On February 23, 2022, the Council distributed its Interim Order to all parties. On February 28, 2022, the Custodian responded to the Council's Interim Order, stating that responsive records with appropriate redactions were provided to the Complainant that same day. The Custodian also provided certified confirmation of compliance to the Executive Director.

Analysis

Compliance

At its February 22, 2022 meeting, the Council ordered the Custodian to provide responsive

³ 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.

⁴ "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."

⁵ 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.

⁶ 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.

records in accordance with the findings of the *in camera* review and to submit certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Executive Director. On February 23, 2022, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on March 2, 2022.

On February 28, 2022, the second (2nd) business day after receipt of the Council's Order, the Custodian responded in writing providing the Complainant with responsive records, with redactions in accordance with the Order. The Custodian also provided certified confirmation of compliance to the Executive Director.

Therefore, the Custodian complied with the Council's February 22, 2022 Interim Order because she responded in the prescribed 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 a portion of the requested records, she lawfully denied access to the remainder. Further, the Custodian timely complied with the Council's January 26, 2021 and February 22, 2022 Interim Orders, ultimately resulting in disclosure of the responsive records with appropriate redactions. 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 Custodian complied with the Council's February 22, 2022 Interim Order because she responded in the prescribed time frame providing records and simultaneously provided certified confirmation of compliance to the Executive Director.
2. Although the Custodian unlawfully denied access to a portion of the requested records, she lawfully denied access to the remainder. Further, the Custodian timely complied with the Council's January 26, 2021 and February 22, 2022 Interim Orders, ultimately resulting in disclosure of the responsive records with appropriate redactions. 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

March 22, 2022



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

February 22, 2022 Government Records Council Meeting

Ryan E. Melsky
Complainant

Complaint No. 2019-186

v.

Township of Clinton (Hunterdon)
Custodian of Record

At the February 22, 2022 public meeting, the Government Records Council (“Council”) considered the February 15, 2022 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian complied with the Council’s January 26, 2021 Interim Order because she responded in the prescribed time frame providing records for *in camera* review, and simultaneously provided certified confirmation of compliance to the Executive Director.
2. **On the basis of the Council’s determination in this matter, the 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 Custodian shall simultaneously deliver¹ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,² to the Executive Director.³**
3. The Custodian must disclose all of these portions of the responsive e-mails to the Complainant (*i.e.*, sender, recipients, date, time, subject, and salutations where applicable). As to those portions of the requested e-mails, the Custodian has unlawfully denied access. See Ray v. Freedom Acad. Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010). The GRC notes that if the Custodian intends to redact certain information in the categories identified above, she must provide a lawful basis for those redactions.

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

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

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

4. **The 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 Custodian shall simultaneously deliver⁴ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Executive Director.**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 22nd Day of February 2022

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: February 23, 2022

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

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
February 22, 2022 Council Meeting**

**Ryan E. Melsky¹
Complainant**

GRC Complaint No. 2019-186

v.

**Township of Clinton (Hunterdon)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of “any and all e-mails to or from the Clinton Township [(“Township”)] Administrator Jess Landon . . . that in any way pertain to [the Complainant] . . . from June 15, 2019 to the present, excluding e-mails to or from [the Complainant] or the Township Attorney. Said request includes e-mails to the Clinton Township Police Department [(“CTPD”)] or to/from Lieutenant Thomas DeRosa, Township Clerk Carla Connor, any member of Mayor/Council, any member of the Hunterdon County Prosecutor’s Office, but shall not be limited to such individuals. [The Complainant] hereby waives any/argument of privilege or similar argument.”

Custodian of Record: Carla Conner
Request Received by Custodian: August 6, 2019
Response Made by Custodian: August 9, 2019
GRC Complaint Received: August 30, 2019

Records Submitted for *In Camera* Examination: E-mail correspondence withheld from disclosure under OPRA’s exemptions for attorney-client privileged communications, deliberative process privilege, and/or personnel records.

Background

January 26, 2021 Council Meeting:

At its January 26, 2021 public meeting, the 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, found that:

1. The GRC must conduct an *in camera* review of the three (3) e-mails withheld from disclosure to determine the validity of the Custodian’s assertion that said e-mails fell under OPRA’s exemptions for attorney-client communications, the deliberative

¹ No legal representation listed on record.

² Represented by Debra Shannon, Esq., of Trimboli & Prusinowski, LLC (Morristown, NJ).

process privilege, and/or personnel records. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-10. See Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).

2. **The Custodian shall deliver³ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 1 above), a document or redaction index⁴, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,⁵ 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 Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On January 27, 2021, the Council distributed its Interim Order to all parties. On February 4, 2021, the GRC inquired as to whether the Custodian submitted the records for review. That same day, the Custodian responded to the GRC stating that the records were mailed via overnight delivery on January 29, 2021 and provided tracking information in support. The GRC replied by stating that if the records were not delivered by the end of business on February 5, 2021, the Custodian could resubmit the records.

On February 8, 2021, the Custodian stated that because they did not get confirmation that the original submission was delivered on February 5, 2021, she re-submitted the records to arrive that day. Thereafter, the GRC confirmed with the Custodian that her response to the Council's Interim Order was received that day, containing nine (9) unredacted copies of three (3) e-mails for *in camera* review.

Analysis

Compliance

At its January 26, 2021 meeting, the Council ordered the Custodian to produce nine (9) unredacted copies of the requested records for *in camera* review. The Council also ordered the Custodian to simultaneously provide certified confirmation of compliance to the Executive Director. On January 27, 2021, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on February 3, 2021.

³ 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.

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

⁵ "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."

On January 29, 2021, the second (2nd) business day after receipt of the Council's Order, the Custodian provided the GRC with responsive records. Although the GRC received the responsive records on February 8, 2021, the record indicates that the delay in delivery was due to inclement weather.

Therefore, the Custodian complied with the Council's January 26, 2021 Interim Order because she responded in the prescribed time frame providing records for *in camera* review, and 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.

Advisory, Consultative, or Deliberative ("ACD") Material

OPRA provides that the definition of a government record "shall not include . . . [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 Ctr. 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. at 287.

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.

Attorney-Client Communications/Work Product

OPRA provides that a “government record” shall not include “any record within the attorney-client privilege.” N.J.S.A. 47:1A-1.1 (emphasis added). To assert attorney-client privilege, a party must show that there was a confidential communication between lawyer and client in the course of that relationship and in professional confidence. N.J.R.E. 504(1). Such communications are only those “which the client either expressly made confidential or which [one] could reasonably assume under the circumstances would be understood by the attorney to be so intended.” State v. Schubert, 235 N.J. Super. 212, 221 (App. Div. 1989). However, merely showing that “the communication was from client to attorney does not suffice, but the circumstances indicating the intention of secrecy must appear.” Id. at 220-21.

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

In the context of public entities, the attorney-client privilege extends to communications between the public body, the attorney retained to represent it, necessary intermediaries and agents through whom communications are conveyed, and co-litigants who have employed a lawyer to act for them in a common interest. See Tractenberg v. Twp. of W. Orange, 416 N.J. Super. 354, 376 (App. Div. 2010); In re Envtl. Ins. Declaratory Judgment Actions, 259 N.J. Super. 308, 313 (App. Div. 1992).

Personnel Records

OPRA provides that:

Notwithstanding the provisions [OPRA] or any other law to the contrary, the personnel or pension records of any individual in the possession of a public agency, including but not limited to records relating to any grievance filed by or against an individual, shall not be considered a government record and shall not be made available for public access . . .

[N.J.S.A. 47:1A-10.]

OPRA begins with a presumption against disclosure and “proceeds with a few narrow exceptions that . . . need to be considered.” Kovalcik v. Somerset Cnty. Prosecutor’s Office, 206 N.J. 581, 594 (2011). These are:

[A]n individual’s name, title, position, salary, payroll record, length of service, date of separation and the reason therefore, and the amount and type of any pension received shall be government record;

[P]ersonnel or pension records of any individual shall be accessible when required to be disclosed by another law, when disclosure is essential to the performance of official duties of a person duly authorized by this State or the United States, or when authorized by an individual in interest; and

[D]ata contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension, but not including any detailed medical or psychological information, shall be a government record.

[Id. (emphasis added).]

Thus, although N.J.S.A. 47:1A-10 begins with a presumption of nondisclosure, there is certain information that a custodian is required to provide. Thus, to the extent that a requestor seeks access to personnel information that is otherwise disclosable, OPRA is clear that said information must be disclosed. See Barkley v. Essex Cnty. Prosecutor's Office, GRC Complaint No. 2012-34 (Interim Order dated April 30, 2013).

Regarding the emphasized portion of N.J.S.A. 47:1A-10 above, the following is an excerpt from Hewitt v. Longport Police Dep't, GRC Complaint No. 2004-148 (Interim Order dated February 10, 2005) describes an "individual in interest:"

N.J.S.A. 47:1A-10 is a codified version of Executive Order 11 (1974) and has been applied and understood that only individuals who have access to personnel and pension records are specific public officials and the person who is the subject of the personnel file. An "individual in interest" is to mean the person who is the subject of the personnel file, furthermore, that person may accept to waive their privacy right and authorize the disclosure of their personnel records. In considering N.J.S.A. 47:1A-10 in its entirety, the term "individual" refers to the person who is the subject of the personnel or pension record.

[Id.; See also Mapp v. Borough of Roselle (Union), GRC Complaint No. 2009-334 (Interim Order dated November 30, 2010) at 10.]

To this end, in McGee v. Twp. of East Amwell (Hunterdon), GRC Complaint No. 2007-305 (March 2011), the GRC was instructed on remand by the Appellate Division to determine whether the complainant waived her right of confidentiality regarding four (4) records withheld from disclosure under N.J.S.A. 47:1A-10. The GRC found that "[a]n effective waiver requires a party to have full knowledge of his legal rights and intend to surrender those rights. McGee, GRC 2007-305 (citing W. Jersey Title & Guar. Co. v. Indus. Trust Co., 27 N.J. 144, 153 (1958)). "The party waiving a known right must do so clearly, unequivocally, and decisively." McGee, GRC 2007-305 (citing Merchs. Indem. Corp. of N.Y. v. Eggleston, 68 N.J. Super. 235, 254 (App. Div. 1961)). The GRC held that there was no evidence in the record demonstrating that the complainant knew of her confidentiality rights and intended to waive them at the time she submitted her OPRA request. McGee, GRC 2007-305. Therefore, the custodian lawfully denied access to the records. Id.

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

Record or Redaction Number	Record Name/Date	Description of Record or Redaction	Custodian's Explanation/ Citation for Non-disclosure or Redactions	Findings of the <i>In Camera</i> Examination⁶
1.	E-mail dated July 26, 2019 from Jesse Landon to John Higgins and Brian Mullay.	Contains an opinion of counsel.	<u>N.J.S.A. 47:1A-1.1</u> ; attorney-client privilege and deliberative process.	The body of the e-mail contains the opinions and advice of counsel regarding a personnel action. Therefore, that portion of the e-mail was properly withheld under <u>N.J.S.A. 47:1A-1.1</u> .
2.	E-mail chain dated July 26, 2019 from John Higgins to Jesse Landon.	Non-responsive as it pertained to another employee.	<u>N.J.S.A. 47:1A-10</u> ; personnel matter and non-responsive.	The body of the second (2 nd) e-mail (the first three (3) lines after the salutations) pertained to a disciplinary matter of an unrelated employee. Therefore, the Custodian properly withheld that portion of the e-mail chain. <u>N.J.S.A. 47:1A-10</u> .

⁶ **Unless expressly identified for redaction, everything in the record shall be disclosed.** For purposes of identifying redactions, unless otherwise noted a paragraph/new paragraph begins whenever there is an indentation and/or a skipped space(s). The paragraphs are to be counted starting with the first whole paragraph in each record and continuing sequentially through the end of the record. If a record is subdivided with topic headings, renumbering of paragraphs will commence under each new topic heading. Sentences are to be counted in sequential order throughout each paragraph in each record. Each new paragraph will begin with a new sentence number. If only a portion of a sentence is to be redacted, the word in the sentence which the redaction follows or precedes, as the case may be, will be identified and set off in quotation marks. If there is any question as to the location and/or extent of the redaction, the GRC should be contacted for clarification before the record is redacted. The GRC recommends the redactor make a paper copy of the original record and manually "black out" the information on the copy with a dark colored marker, then provide a copy of the blacked-out record to the requester.

				The body of the first (1 st) e-mail does not contain confidential personnel information. Thus, the Custodian must disclose this portion of the e-mail chain.
3.	E-mail dated July 30, 2019 from Jesse Landon to John Higgins, Brian Mullay, Amy Switlyk, Marc Strauss, Thomas Kochanowski, and Trishka Cecil. Copied to Stephen E. Trimboli.	Addressed to and concerning multiple staff.	<u>N.J.S.A. 47:1A-1.1</u> ; intended as a personnel matter and deliberative process.	Because the Complainant explicitly waived his confidentiality rights, the portion of the first sentence in the e-mail body referencing the Complainant (“Lt. Melsky will take over”) was improperly withheld under the personnel records exemption. <u>See McGee</u> , GRC 2007-305. Thus, the Custodian must disclose this portion of the e-mail chain. The remainder of the e-mail body was properly withheld under OPRA’s personnel records exemption. <u>N.J.S.A. 47:1A-10.</u>

Thus, the Custodian unlawfully denied access to the requested records in part because the Complainant explicitly waived his confidentiality rights in accordance with McGee, and portions of another e-mail did not contain personnel information protected under OPRA’s personnel records exemption.

Additionally, 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. In prior decisions, the Council has routinely required disclosure of certain information contained within e-mails, to include sender, recipients, date, time, subject, and salutations (where applicable). See Ray v. Freedom Acad. Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010); Verry v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-287 (Interim Order dated June 30, 2015).

Thus, the Custodian must disclose all of these portions of the responsive e-mails to the Complainant (*i.e.*, sender, recipients, date, time, subject, and salutations where applicable). As to those portions of the requested e-mails, the Custodian has unlawfully denied access. See Ray, GRC 2009-185. The GRC notes that if the Custodian intends to redact certain information in the categories identified above, she must provide a lawful basis for those redactions.

Knowing & Willful

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's January 26, 2021 Interim Order because she responded in the prescribed time frame providing records for *in camera* review, and simultaneously provided certified confirmation of compliance to the Executive Director.
2. **On the basis of the Council's determination in this matter, the 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 Custodian shall simultaneously deliver⁷ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁸ to the Executive Director.⁹**
3. The Custodian must disclose all of these portions of the responsive e-mails to the Complainant (*i.e.*, sender, recipients, date, time, subject, and salutations where

⁷ 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.

⁸ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁹ 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.

applicable). As to those portions of the requested e-mails, the Custodian has unlawfully denied access. See Ray v. Freedom Acad. Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010). The GRC notes that if the Custodian intends to redact certain information in the categories identified above, she must provide a lawful basis for those redactions.

4. **The 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 Custodian shall simultaneously deliver¹⁰ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Executive Director.**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Samuel A. Rosado
Staff Attorney

February 15, 2022

¹⁰ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

January 26, 2021 Government Records Council Meeting

Ryan E. Melsky
Complainant

Complaint No. 2019-186

v.

Township of Clinton (Hunterdon)
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 GRC must conduct an *in camera* review of the three (3) e-mails withheld from disclosure to determine the validity of the Custodian’s assertion that said e-mails fell under OPRA’s exemptions for attorney-client communications, the deliberative process privilege, and/or personnel records. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-10. See Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).
2. **The Custodian shall deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 1 above), a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,³ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the 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.

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

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

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

Interim Order Rendered by the
Government Records Council
On The 26th 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 27, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Ryan E. Melsky¹
Complainant**

GRC Complaint No. 2019-186

v.

**Township of Clinton (Hunterdon)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of “any and all e-mails to or from the Clinton Township [(“Township”)] Administrator Jess Landon . . . that in any way pertain to [the Complainant] . . . from June 15, 2019 to the present, excluding e-mails to or from [the Complainant] or the Township Attorney. Said request includes e-mails to the Clinton Township Police Department [(“CTPD”)] or to/from Lieutenant Thomas DeRosa, Township Clerk Carla Connor, any member of Mayor/Council, any member of the Hunterdon County Prosecutor’s Office, but shall not be limited to such individuals. [The Complainant] hereby waives any/argument of privilege or similar argument.”

Custodian of Record: Carla Conner
Request Received by Custodian: August 6, 2019
Response Made by Custodian: August 9, 2019
GRC Complaint Received: August 30, 2019

Background³

Request and Response:

On August 6, 2019, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On August 9, 2019, the Custodian responded in writing, providing responsive records but withholding access to three (3) e-mails, two (2) of which were dated July 26, 2019 and the third dated July 30, 2019. The Custodian stated that the first e-mail dated July 26, 2019 was denied under OPRA’s deliberative process privilege and attorney-client privilege. N.J.S.A. 47:1A-1.1. The Custodian stated that the second e-mail dated July 26, 2019 pertained to an unrelated personnel matter and was therefore exempt under N.J.S.A. 47:1A-10. The Custodian stated that the July 30, 2019 e-mail was withheld under the deliberative process privilege. N.J.S.A. 47:1A-1.1.

¹ No legal representation listed on record.

² Represented by Debra Shannon, Esq., of Trimboli & Prusinowski, LLC (Morristown, NJ).

³ 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.

Ryan E. Melsky v. Township of Clinton (Hunterdon), 2019-186 – Findings and Recommendations of the Executive Director

On August 19, 2019, the Complainant requested that the Custodian reconsider her denial of the e-mail dated July 30, 2019. On August 28, 2019, the Custodian responded stating that the Township would not reconsider its previous determination.

Denial of Access Complaint:

On August 30, 2019 the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that while he was the Public Information Office for the Township, he was scolded for disseminating press releases containing anything police-related occurring at North Hunterdon High School. The Complainant argues that the Custodian’s denial was a retaliation for raising objections to that reprimand.

Statement of Information:

On September 23, 2019, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on August 6, 2019. The Custodian certified that her search included contacting the Township’s technology department and requested all e-mails as described in the request. The Custodian certified that she responded in writing on August 9, 2019, providing responsive e-mails but denying access to three (3) e-mails under the deliberative process privilege, attorney-client privilege, and personnel records exemption.

Regarding the first July 26, 2019 e-mail, the Custodian argued that it contained attorney-client privileged communications as well as information shared for the purposes of decision-making. Thus, the Custodian argued that the record fell under OPRA’s deliberative process privilege exemption. N.J.S.A. 47:1A-1.1.

Regarding the second July 26, 2019 e-mail, the Custodian argued that the Township included the e-mail as a responsive record by mistake. The Custodian asserted that the e-mail did not pertain to the Complainant but to another employee on an unrelated matter. Notwithstanding, the Custodian argued that the record still fell under the personnel records exemption. N.J.S.A. 47:1A-10.

As to the July 30, 2019 e-mail, the Custodian argued that it fell under the deliberative process privilege as well as constituting a personnel record. The Custodian asserted that the contents impacted other employees and advised on possible changes to other positions. See N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-10. However, the Custodian asserted that the record was inadvertently provided to the Complainant on August 9, 2019 within an e-mail chain. The Custodian argued that since this e-mail was already released, the Complainant objection was therefore moot.

Analysis

Unlawful Denial of Access

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise

exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

In Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the Council⁴ 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.]

In the instant matter, the Custodian asserted that three (3) e-mails were withheld from disclosure in responsive to the Complainant’s OPRA request. The Custodian asserted that one (1) of the July 26, 2019 e-mails fell under the deliberative process privilege and contained attorney-client privileged communications. N.J.S.A. 47:1A-1.1. The Custodian asserted that the second e-mail was withheld under the personnel records exemption. N.J.S.A. 47:1A-10. As to the July 30, 2019 e-mail, while the Custodian asserted that it fell under the deliberative process privilege and personnel records exemptions, the record was inadvertently provided to the Complainant on August 9, 2019. However, the Custodian did not provide copies of the records provided on August 9, 2019, and the Complainant did not confirm that he received the e-mail. Thus, notwithstanding the Custodian’s descriptions, the GRC must review the e-mails to determine the full applicability

⁴ Paff v. N.J. Dep’t of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).
Ryan E. Melsky v. Township of Clinton (Hunterdon), 2019-186 – Findings and Recommendations of the Executive Director

of the exemptions. Such an action is not uncommon, as the GRC routinely performs 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); Ehrenreich v. N.J. Dep't of Trans., GRC Complaint No. 2016-192 (Interim Order dated April 24, 2018).

Therefore, the GRC must conduct an *in camera* review of the three (3) e-mails withheld from disclosure to determine the validity of the Custodian's assertion that said e-mails fell under OPRA's exemptions for attorney-client communications, the deliberative process privilege, and/or personnel records. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-10. See Paff, 379 N.J. Super. 346.

Knowing & Willful

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The GRC must conduct an *in camera* review of the three (3) e-mails withheld from disclosure to determine the validity of the Custodian's assertion that said e-mails fell under OPRA's exemptions for attorney-client communications, the deliberative process privilege, and/or personnel records. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-10. See Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).
2. **The Custodian shall deliver⁵ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 1 above), a document or redaction index⁶, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,⁷ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the 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.

Prepared By: Samuel A. Rosado
Staff Attorney

January 19, 2021

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Ryan E. Melsky v. Township of Clinton (Hunterdon), 2019-186 – Findings and Recommendations of the Executive Director