



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

December 13, 2022 Government Records Council Meeting

David O'Sullivan
Complainant

Complaint No. 2019-193

v.

Borough of Montvale (Bergen)
Custodian of Record

At the December 13, 2022 public meeting, the Government Records Council ("Council") considered the December 6, 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 the Council should dismiss the complaint because the parties have agreed to a prevailing party fee amount, thereby negating the need for Complainant's Counsel to submit a fee application in accordance with N.J.A.C. 5:105-2.13. Therefore, no further adjudication is required.

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 13th Day of December 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: December 15, 2022



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Prevailing Party Attorney's Fees
Supplemental Findings and Recommendations of the Executive Director
December 13, 2022 Council Meeting

David O'Sullivan¹
Complainant

GRC Complaint No. 2019-193

v.

Borough of Montvale (Bergen)²
Custodial Agency

Records Relevant to Complaint: Electronic copies via e-mail of all closed session meeting minutes from January 2015 to December 2018.

Custodian of Record: Maureen Iarossi-Alwan
Request Received by Custodian: March 28, 2019
Response Made by Custodian: April 16, 2019
GRC Complaint Received: September 18, 2019

Background

September 29, 2022 Council Meeting:

At its September 29, 2022 public meeting, the Council considered the September 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, found that:

1. The Custodian complied with the Council's August 30, 2022 Interim Order because she responded in the prescribed time frame disclosing records consistent with the *In Camera* Examination findings. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.
2. The Custodian's initial response was insufficient. N.J.S.A. 47:1A-5(g). Additionally, the Custodian unlawfully denied access to two (2) redacted paragraphs within the responsive executive session minutes. N.J.S.A. 47:1A-6. However, the *In Camera* Examination revealed that the Custodian lawfully denied access to an overwhelming majority of the redacted executive session paragraphs. Further, the Custodian complied with both the Council's February 23, 2021 and August 30, 2022 Interim Orders. Additionally, the evidence of record does not indicate that the Custodian's violations

¹ Represented by Walter M. Luers, Esq., of Cohn, Lifland, Pearlman, Herrmann & Knopf, LLP. (Saddle Brook, NJ).

² Represented by Joseph W. Voytus, Esq., of Boggia, Boggia, Betesh & Voytus (Ridgefield Park, NJ).

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.

3. Pursuant to the Council's August 30, 2022 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 71 (2008). Specifically, the Complainant prevailed in a limited manner through the ordered disclosure of two (2) paragraphs contained within two (2) of the seventy-two (72) sets of executive session minutes. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Procedural History:

On October 4, 2022, the Council distributed its Interim Order to all parties. On October 26, 2022, Complainant's Counsel e-mailed the Government Records Council ("GRC") seeking an extension of twenty (20) business days to continue settlement discussions, noting that Custodian's Counsel consented to the proposed extension. On October 27, 2022, the GRC responded granting the requested extension of time through December 2, 2022.

On November 8, 2022, the Complainant's Counsel confirmed via e-mail, which was copied to Custodian's Counsel, that the fee issue was amicably resolved, and that the complaint may be withdrawn.

Analysis

Prevailing Party Attorney's Fees

At its September 29, 2022 meeting, the Council determined that the Complainant was a prevailing party entitled to an award of reasonable attorney's fees. The Council thus ordered that the "parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days." The Council further ordered that the parties notify of any settlement prior to the expiration of the twenty (20) business day time frame. Finally, the Council ordered that, should the parties not reach an agreement, the Complainant's Counsel

would be required to “submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.”

On October 4, 2022, the Council distributed its Interim Order to all parties; thus, the Custodian’s response was due by close of business on November 2, 2022. On November 8, 2022, following the granting of an extension of time until December 2, 2022, Complainant’s Counsel e-mailed the GRC advising that the fee issue was resolved, and that the complaint could be withdrawn. Custodian’s Counsel was copied on that confirmation e-mail.

Accordingly, the Council should dismiss the complaint because the parties have agreed to a prevailing party fee amount, thereby negating the need for Complainant’s Counsel to submit a fee application in accordance with N.J.A.C. 5:105-2.13. Therefore, no further adjudication is required.

Conclusions and Recommendations

The Executive Director respectfully recommends that the Council should dismiss the complaint because the parties have agreed to a prevailing party fee amount, thereby negating the need for Complainant’s Counsel to submit a fee application in accordance with N.J.A.C. 5:105-2.13. Therefore, no further adjudication is required.

Prepared By: Frank F. Caruso
Executive Director

December 6, 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

September 29, 2022 Government Records Council Meeting

David O'Sullivan
Complainant

Complaint No. 2019-193

v.

Borough of Montvale (Bergen)
Custodian of Record

At the September 29, 2022 public meeting, the Government Records Council ("Council") considered the September 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 August 30, 2022 Interim Order because she responded in the prescribed time frame disclosing records consistent with the *In Camera* Examination findings. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.
2. The Custodian's initial response was insufficient. N.J.S.A. 47:1A-5(g). Additionally, the Custodian unlawfully denied access to two (2) redacted paragraphs within the responsive executive session minutes. N.J.S.A. 47:1A-6. However, the *In Camera* Examination revealed that the Custodian lawfully denied access to an overwhelming majority of the redacted executive session paragraphs. Further, the Custodian complied with both the Council's February 23, 2021 and August 30, 2022 Interim Orders. Additionally, the evidence of record does not indicate that the Custodian's violations 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.
3. Pursuant to the Council's August 30, 2022 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 71 (2008). Specifically, the Complainant prevailed in a limited manner through the ordered disclosure of two (2) paragraphs contained within two (2) of the seventy-two (72) sets of executive session minutes. Further, the relief ultimately achieved had a basis in law.



Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Interim Order Rendered by the
Government Records Council
On The 29th Day of September 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: October 4, 2022

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**David O’Sullivan¹
Complainant**

GRC Complaint No. 2019-193

v.

**Borough of Montvale (Bergen)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of all closed session meeting minutes from January 2015 to December 2018.

Custodian of Record: Maureen Iarossi-Alwan
Request Received by Custodian: March 28, 2019
Response Made by Custodian: April 16, 2019
GRC Complaint Received: September 18, 2019

Background

August 30, 2022 Council Meeting:

At its August 30, 2022 public meeting, the Council considered the August 23, 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 February 23, 2021 Interim Order because she responded in the prescribed time frame providing a complete *in camera* package 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**

¹ Represented by Walter M. Luers, Esq., of Cohn, Lifland, Pearlman, Herrmann & Knopf, LLP. (Saddle Brook, NJ).

² Represented by Joseph W. Voytus, Esq., of Boggia, Boggia, Betesh & Voytus (Ridgefield Park, NJ).

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

Procedural History:

On August 31, 2022, the Council distributed its Interim Order to all parties. On September 1, 2022, the Custodian responded to the Council's Interim Order. Therein, the Custodian certified that she was disclosing to the Complainant copies of the April 28, 2015 and June 28, 2016 executive session minutes to include the paragraphs deemed disclosable through the Council's *In Camera* Examination findings.

Analysis

Compliance

At its August 30, 2022 meeting, the Council ordered the Custodian to comply with the results of the Council's *In Camera* Examination findings and to submit certified confirmation of compliance, in accordance with R. 1:4-4, to the Executive Director. On August 31, 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 September 8, 2022.

On September 1, 2022, the first (1st) business day after receipt of the Council's Order, the Custodian certified that she was disclosing to the Complainant two (2) set of executive session minutes without redaction of the paragraphs related to risk training. The Custodian also included certified confirmation of compliance to the Executive Director. Thus, the evidence supports that compliance has been achieved here.

Therefore, the Custodian complied with the Council's August 30, 2022 Interim Order because she responded in the prescribed time frame disclosing records consistent with the *In*

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.

Camera Examination findings. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.

Knowing & Willful

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

Certain legal standards must be considered when making the determination of whether the Custodian’s actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian’s actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian’s actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian’s actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (*id.*; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); the Custodian’s actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

In the matter before the Council, the Custodian’s initial response was insufficient. N.J.S.A. 47:1A-5(g). Additionally, the Custodian unlawfully denied access to two (2) redacted paragraphs within the responsive executive session minutes. N.J.S.A. 47:1A-6. However, the *In Camera* Examination revealed that the Custodian lawfully denied access to an overwhelming majority of the redacted executive session paragraphs. Further, the Custodian complied with both the Council’s February 23, 2021 and August 30, 2022 Interim Orders. Additionally, the evidence of record does not indicate that the Custodian’s violations 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.

Prevailing Party Attorney’s Fees

OPRA provides that:

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

. A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.

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

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

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

However, the Court noted in Mason, that Buckhannon is binding only when counsel fee provisions under federal statutes are at issue. 196 N.J. at 72, citing Teeters, 387 N.J. Super. at 429; see, e.g., Baer v. Klagholz, 346 N.J. Super. 79 (App. Div. 2001) (applying Buckhannon to the federal Individuals with Disabilities Education Act), certif. denied, 174 N.J. 193 (2002). “But in interpreting New Jersey law, we look to state law precedent and the specific state statute before us. When appropriate, we depart from the reasoning of federal cases that interpret comparable federal statutes.” 196 N.J. at 73 (citations omitted).

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

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

[Mason at 73-76.]

The Court in Mason, further held that:

[R]equestors are entitled to attorney’s fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) “a factual causal nexus between plaintiff’s litigation and the relief ultimately achieved”; and (2) “that the relief ultimately secured by plaintiffs had a basis in law.” Singer v. State, 95 N.J. 487, 495, *cert denied*, New Jersey v. Singer, 469 U.S. 832 (1984).

[Id. at 76.]

Here, the Complainant contended that the Custodian’s redactions were unlawful and asked that the Council perform an *in camera* review. The Complainant also requested that upon review, the Council order disclosure of the responsive minutes without redactions and determine that he is a prevailing party. Thereafter, the Council performed the requested *in camera* review and determined that a majority of the redactions contained in the seventy-two (72) sets of minutes were lawful, with the exception of two (2) paragraphs. The Council thus ordered disclosure of those paragraphs at its August 30, 2022 meeting. On September 1, 2022, the Custodian complied with the Council’s *in Camera* Examination by disclosing the minutes containing those two (2) paragraphs without redaction thereof. In reviewing these facts, the applicable test confirms that the Complainant is a prevailing party, albeit that relief was limited. That is, the requested relief was partially granted by Council based on the filing of this complaint and subsequent *in camera* review.

Therefore, pursuant to the Council’s August 30, 2022 Interim Order, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” Teeters, 387 N.J. Super. 432. Additionally, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, the Complainant prevailed in a limited manner through the ordered disclosure of two (2) paragraphs contained within two (2) of the seventy-two (72) sets of executive session minutes. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney’s fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney’s fees, Complainant’s Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council’s August 30, 2022 Interim Order because she responded in the prescribed time frame disclosing records consistent with the *In*

Camera Examination findings. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.

2. The Custodian's initial response was insufficient. N.J.S.A. 47:1A-5(g). Additionally, the Custodian unlawfully denied access to two (2) redacted paragraphs within the responsive executive session minutes. N.J.S.A. 47:1A-6. However, the *In Camera* Examination revealed that the Custodian lawfully denied access to an overwhelming majority of the redacted executive session paragraphs. Further, the Custodian complied with both the Council's February 23, 2021 and August 30, 2022 Interim Orders. Additionally, the evidence of record does not indicate that the Custodian's violations 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.
3. Pursuant to the Council's August 30, 2022 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 71 (2008). Specifically, the Complainant prevailed in a limited manner through the ordered disclosure of two (2) paragraphs contained within two (2) of the seventy-two (72) sets of executive session minutes. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Prepared By: Frank F. Caruso
Executive Director

September 22, 2022



State of New Jersey
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

August 30, 2022 Government Records Council Meeting

David O'Sullivan
Complainant

Complaint No. 2019-193

v.

Borough of Montvale (Bergen)
Custodian of Record

At the August 30, 2022 public meeting, the Government Records Council ("Council") considered the August 23, 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 February 23, 2021 Interim Order because she responded in the prescribed time frame providing a complete *in camera* package 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 Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

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.

Interim Order Rendered by the
Government Records Council
On The 30th Day of August 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: August 31, 2022

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
August 30, 2022 Council Meeting**

**David O’Sullivan¹
Complainant**

GRC Complaint No. 2019-193

v.

**Borough of Montvale (Bergen)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of all closed session meeting minutes from January 2015 to December 2018.

Custodian of Record: Maureen Iarossi-Alwan
Request Received by Custodian: March 28, 2019
Response Made by Custodian: April 16, 2019
GRC Complaint Received: September 18, 2019

Records Submitted for *In Camera* Examination: Seventy-two (72) sets of executive session minutes from 2015 through 2018.

Background

February 23, 2021 Council Meeting:

At its February 23, 2021 public meeting, the Council considered the February 16, 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 Custodian’s failure to provide a specific lawful basis for denying access to the redacted portions of the responsive executive session meeting minutes was insufficient. N.J.S.A. 47:1A-5(g); Paff v. Borough of Lavallette, GRC Complaint No. 2007-209 (Interim Order dated June 25, 2008).
2. The GRC must conduct an *in camera* review of the executive session minutes responsive to the Complainant’s OPRA request to determine the validity of the Custodian’s assertion that the [meeting minutes] were exempt under the attorney-client privilege, “inter-agency, or intra-agency advisory, consultative, or deliberative material,” and personnel exemptions under OPRA. N.J.S.A. 47:1A-1.1; N.J.S.A.

¹ Represented by Walter M. Luers, Esq., of Cohn, Lifland, Pearlman, Herrmann & Knopf, LLP. (Saddle Brook, NJ).

² Represented by Joseph W. Voytus, Esq., of Boggia, Boggia, Betesh & Voytus (Ridgefield Park, NJ).

47:1A-10; N.J.S.A. 10:4-12(b)(7); Executive Order No. 26 (Gov. McGreevey, 2002); Attorney General's Internal Affairs Policy and Procedures. See Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346, 355 (App. Div. 2005).

3. **The Custodian shall deliver³ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 2 above), nine (9) copies of the redacted records, 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.**
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.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On February 24, 2021, the Council distributed its Interim Order to all parties. On March 1, 2021, the Government Records Council ("GRC") received the Custodian's response to the Council's Interim Order. Therein, the Custodian certified that she was disclosing redacted and unredacted copies of all responsive executive session minutes for an *in camera* review and a document index.

Analysis

Compliance

At its February 23, 2021 meeting, the Council ordered the Custodian to submit nine (9) redacted and unredacted copies of the responsive executive session minutes at issue in this complaint for *in camera* review. The Council also ordered the Custodian to simultaneously provide certified confirmation of compliance, in accordance with R. 1:4-4, to the Executive Director. On February 24, 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 March 1, 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 March 1, 2021, the fifth (5th) business day after receipt of the Council’s Order, the GRC received the Custodian’s compliance package. Therein, the Custodian provided nine (9) copies of the executive session minutes sought for *in camera* review both redacted and unredacted. Additionally, the Custodian provided a document index and certified confirmation of compliance. Thus, the evidence of record supports that compliance was achieved here.

Therefore, the Custodian complied with the Council’s February 23, 2021 Interim Order because she responded in the prescribed time frame providing a complete *in camera* package 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.

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.

OPRA also 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. 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. See Educ. Law Ctr., 198 N.J. at 286. 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.

OPRA further provides that a “government record” does not include any information generated by or on behalf of public employers or public employees in connection with collective negotiations, including documents and statements of strategy or negotiating position. N.J.S.A. 47:1A-1.1. OPRA also exempts access to “information which is a communication between a public agency and its insurance carrier, administrative service organization or risk management office.” Id.

Moreover, OPRA provides that it shall not abrogate any exemptions of a public record or government record from public access made pursuant to any other statute. N.J.S.A. 47:1A-9(a). To the extent that the Open Public Meetings Act (“OPMA”) provides that public bodies may “exclude the public” portions of a public meeting where those bodies discuss:

- (4) collective bargaining agreement, or the terms and conditions which are proposed for inclusion in any collective bargaining agreement, including the negotiation of the terms and conditions thereof with employees or representatives of employees of the public body;
- (5) matter involving the purchase, lease, or acquisition of real property with public funds, the setting of banking rates, or investment of public funds, if it could adversely affect the public interest if discussion of the matters were disclosed;
- (6) tactics and techniques utilized in protecting the safety and property of the public, provided that their disclosure could impair that protection, or investigations of violations or possible violations of the law;
- (7) pending or anticipated litigation or contract negotiation other than in subsection b.(4) herein in which the public body is, or may become, a party, or matters falling within the attorney-client privilege, to the extent that confidentiality is required in order for the attorney to exercise his ethical duties as a lawyer;

[N.J.S.A. 10:4-12(b).]

Finally, OPRA provides that:

[P]ersonnel 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, except that: an individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefor, and the amount and type of any pension received shall be a government record . . .

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

The GRC conducted an *in camera* examination on the submitted executive session minutes. Upon review, the GRC has confirmed that a majority of the redacted portions thereof contain an amalgamation of attorney-client privileged and deliberative discussions related to an array of issues from litigation and affordable housing to employee contract negotiations and personnel changes. These types of discussions are exactly those for which both OPRA and OPMA exempt from disclosure to the public. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9(a); N.J.S.A. 10:4-12(b); N.J.S.A. 47:1A-10. Further, precedential case law supports the upholding of such redactions from executive session minutes. See *e.g.* Paff v. Harrison Twp. Fire Dist. (Gloucester), GRC Complaint No. 2014-402 (Interim Order dated September 29, 2015); Zahler v. Ocean Cnty. Coll., GRC Complaint No. 2013-266 (Interim Order dated November 17, 2015); Chichester v. Cinnaminson Twp. (Burlington), GRC Complaint No. 2018-74 (February 26, 2020). Thus, a vast majority of all redacted portions of the minutes are exempt from disclosure on the bases cited by the Custodian. N.J.S.A. 47:1A-6.

However, the GRC has identified a few of the redacted paragraphs that contain content that would not be considered exempt under the above exemptions. The GRC lists paragraphs requiring disclosure in the following table:

Redaction No.	Record Name/Date	Description of Redaction	Custodian’s Explanation/ Citation for Redactions	Findings of the <i>In Camera</i> Examination⁶
1.	April 28, 2015 Executive Session Minutes, Section 3: “Elected Officials Training.”	This section briefly describes the training provided by the Borough’s Risk Manager to the Borough Council regarding risk management.	<u>N.J.S.A. 47:1A-1.1</u> (“risk manager discussion), noting that this portion of the meeting was “not a meeting under OPMA.”	The redacted section provides a generic description of the topics covered during the training, as well as some supplemental training aides presented by the Risk Manager. It cannot be said, however, that identification of a training conducted by the Risk Manager reasonably falls within the confines of the

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.

				risk management exemption. Instead, this basic description (regardless of whether it qualified as a meeting for OPMA’s purpose) does not provide substantive information specifically for a particular Borough issue. Thus, the Custodian unlawfully denied access to this section and must disclose same. N.J.S.A. 47:1A-6.
2.	June 28, 2016 Executive Session Minutes, Section 1: “Elected Officer Training”	This section briefly describes the “mandatory” training provided by the Borough’s Risk Manager to the Borough Council regarding risk management.	<u>N.J.S.A. 47:1A-1.1</u> (“risk manager discussion).	The redacted section provides a generic description of the topics covered during the training, as well as some supplemental training aides presented by the Risk Manager. It cannot be said, however, that identification of mandatory training conducted by the Risk Manager reasonably falls within the confines of the risk management exemption. Instead, this basic description does not provide substantive information specifically for a particular Borough issue. Thus, the Custodian unlawfully denied access to this section and must disclose same. N.J.S.A. 47:1A-6.

Thus, the Custodian lawfully denied access to a majority of the redacted portions of the responsive executive session minutes under the exemptions cited with the exception of those identified in the above table. N.J.S.A. 47:1A-6.

Knowing & Willful

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

Prevailing Party Attorney's Fees

The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's February 23, 2021 Interim Order because she responded in the prescribed time frame providing a complete *in camera* package 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 Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Executive Director

August 23, 2022

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.



State of New Jersey
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

February 23, 2021 Government Records Council Meeting

David O'Sullivan
Complainant

Complaint No. 2019-193

v.

Borough of Montvale (Bergen)
Custodian of Record

At the February 23, 2021 public meeting, the Government Records Council ("Council") considered the February 16, 2021 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian's failure to provide a specific lawful basis for denying access to the redacted portions of the responsive executive session meeting minutes was insufficient. N.J.S.A. 47:1A-5(g); Paff v. Borough of Lavallette, GRC Complaint No. 2007-209 (Interim Order dated June 25, 2008).
2. The GRC must conduct an *in camera* review of the executive session minutes responsive to the Complainant's OPRA request to determine the validity of the Custodian's assertion that the e-mails were exempt under the attorney-client privilege, "inter-agency, or intra-agency advisory, consultative, or deliberative material," and personnel exemptions under OPRA. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-10; N.J.S.A. 10:4-12(b)(7); Executive Order No. 26 (Gov. McGreevey, 2002); Attorney General's Internal Affairs Policy and Procedures. See Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346, 355 (App. Div. 2005).
3. **The Custodian shall deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 2 above), nine (9) copies of the redacted records, 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.**

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."

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.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 23rd Day of February 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: February 24, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 23, 2021 Council Meeting**

**David O’Sullivan¹
Complainant**

GRC Complaint No. 2019-193

v.

**Borough of Montvale (Bergen)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of all closed session meeting minutes from January 2015 to December 2018.

Custodian of Record: Maureen Iarossi-Alwan
Request Received by Custodian: March 28, 2019
Response Made by Custodian: April 16, 2019
GRC Complaint Received: September 18, 2019

Background³

Request and Response:

On March 28, 2019, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On April 16, 2019, the Custodian responded in writing disclosing all approved closed session minutes for the applicable time frame with redactions made by the Borough of Montvale’s (“Borough”) “[a]ttorney.”

Denial of Access Complaint:

On September 18, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant first asserted that there is no dispute that the records in question are “government records” for purposes of OPRA. The Complainant further contended that those minutes should have been disclosed without redactions because the Open Public Meetings Act (“OPMA”) requires them to be readily available. N.J.S.A. 10:4-14; S. Jersey Pub. Co. v. N.J. Expressway Auth., 124 N.J. 478, 493 (1991). The Complainant argued that disclosure of meeting minutes is regardless of the topics discussed therein. Id.

¹ Represented by Walter M. Luers, Esq., of Cohn, Lifland, Pearlman, Herrmann & Knopf, LLP. (Saddle Brook, NJ).

² Represented by Joseph W. Voytus, Esq., of Boggia, Boggia, Betesh & Voytus (Ridgefield Park, 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.

The Complainant further argued that the Custodian failed to provide a specific lawful basis for the redactions but noted that they were made by the Borough's "[a]ttorney." The Complainant argued that because of the Custodian's failure to provide those bases, it is unclear whether the redactions fell within the attorney-client privilege. N.J.S.A. 47:1A-1.1. The Complainant noted that to the extent the attorney-client privilege is at issue, the Custodian must satisfy requirements set forth under N.J.R.E. 504 and N.J.S.A. 2A:84A-20 to withhold records under that exemption. The Custodian thus argued that the Council should require the Custodian to submit a document index and provide unredacted copies of the minutes for an *in camera* review. Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346, 355 (App. Div. 2005).

The Complainant finally argued that should the Council order disclosure of the minutes without redactions, he should be considered a prevailing party subject to attorney's fees. N.J.S.A. 47:1A-6; Mason v. Hoboken, 196 N.J. 51, 79 (2008).

Statement of Information:⁴

On June 19, 2020, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on March 28, 2019. The Custodian certified that following an extension of time, she responded in writing on April 16, 2019 disclosing 173 pages of approved closed session minutes spanning the applicable time frame with redactions.

The Custodian argued that the redacted information fell under three (3) exemptions, with some overlapping one another. The Custodian asserted that the first exemption that applies to the redactions is the attorney-client privilege. N.J.S.A. 47:1A-1.1; N.J.S.A. 10:4-12(b)(7). The Custodian argued that the redacted material related to "pending or anticipated contract negotiations or litigation." The Custodian noted that over "70% of the 173 records . . . included discussions covered by the attorney-client privilege." The Custodian argued that many of the meeting topics contain attorney-client discussions regarding litigation, contracts, and personnel challenges. N.D. v. Rumson Fair-Haven Bd. of Educ., GRC Complaint No. 2003-56 (December 2003) (citing N.J.S.A. 10:4-12(b)(7)); Jones v. Rutgers, The State Univ. of N.J., GRC Complaint No. 2015-202 (Interim Order dated September 27, 2017).

The Custodian argued that the second exemption is for "inter-agency, or intra-agency advisory, consultative, or deliberative [(“ACD”)] material." N.J.S.A. 47:1A-1.1. The Custodian argued that the redactions protected pre-decisional discussions of Council, and other individuals where appropriate. The Custodian argued that a portion of the meeting topics contain ACD information such as appraisal discussions, contract negotiations, and settlement discussions.

The Custodian argued that the third exemption is for personnel information. N.J.S.A. 47:1A-10; N.J.S.A. 10:4-12(b)(8). The Custodian noted that the redactions protected a range of personnel discussions from "Rice" notices to hiring/promotional practices. The Custodian further noted that a few matters included employee privacy issues and internal affairs issues covered under Executive Order No. 26 (Gov. McGreevey, 2002) ("EO 26") and the Attorney General's Internal Affairs Policy and Procedures ("IAPP"). The Custodian argued that contrary to the Court's ruling

⁴ On September 30, 2019, this complaint was referred to mediation. On June 2, 2020, this complaint was referred back to the GRC for adjudication.

in S. Jersey Pub. Co. v. N.J. Expressway Auth., 124 N.J. 478, 493 (1991), the Complainant here did not prove that any of the matters fell within the personnel exceptions in N.J.S.A. 10:4-12(b)(8).

The Custodian finally argued that all redactions were made in a good faith effort to protect executive session discussions by lawfully redacting the responsive minutes. The Custodian noted that the detailed document index submitted as part of the SOI reflects this lawful denial. The Custodian thus argued that this complaint should be dismissed. The Custodian asserted that there is also no credible evidence in the record to support that a knowing and willful violation occurred or that the Complainant is a prevailing party.

Analysis

Sufficiency of Response

OPRA provides that “[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor.” N.J.S.A. 47:1A-5(g). OPRA also requires that, when providing access to redacted records, a custodian shall provide a specific lawful basis for redactions. Paff v. Borough of Lavallette, GRC Complaint No. 2007-209 (Interim Order dated June 25, 2008). See also Schwarz v. N.J. Dep’t of Human Serv., GRC Complaint No. 2004-60 (February 2005); Renna v. Union Cnty. Improvement Auth., GRC Complaint No. 2008-86 (May 2010).

Here, the Custodian disclosed 173 pages of redacted executive session minutes to the Complainant with redactions. However, the Custodian failed to include any specific lawful basis for this denial other than that the redactions were made by the Borough’s “attorney.” Factually, there are no exemptions in OPRA that allow for such a denial. Thus, the forgoing evidence of record here is on point with Paff, GRC 2007-209 and supports a finding that the Custodian’s response was insufficient.

Accordingly, the Custodian’s failure to provide a specific lawful basis for denying access to the redacted portions of the responsive executive session meeting minutes was insufficient. N.J.S.A. 47:1A-5(g); Paff, GRC 2007-209.

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, 379 N.J. Super. 346, the complainant appealed a final decision of the Council⁵ that accepted the custodian’s legal conclusion for the denial of access without further review. The Appellate Division noted that “OPRA contemplates the GRC’s meaningful review of the basis for an agency’s decision to withhold government records When the GRC decides to proceed with

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

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 matter before the Council, the Complainant sought access to executive session meeting minutes from January 2015 through December 2018. The Custodian disclosed 173 pages of meeting minutes with redactions and later argued in the SOI that said information was exempt under the attorney-client privilege ACD, and personnel exemptions. The arguments for and against disclosure are discussed above.

Upon review of the evidence of record in the instant complaint, the GRC cannot determine whether the Custodian properly denied access to those redacted portions of the responsive meeting minutes. For this reason, a “meaningful review” is necessary to determine whether the redacted portions of the responsive minutes fall within the asserted exemptions. Paff, 379 N.J. Super. at 355. Further, the GRC has routinely reviewed executive session meeting minutes *in camera* in complaints with facts similar to the present complaint. See e.g. Paff v. Harrison Twp. Fire Dist. (Gloucester), GRC Complaint No. 2014-402 (Interim Order dated July 28, 2015).

Therefore, the GRC must conduct an *in camera* review of the executive session minutes responsive to the Complainant’s OPRA request to determine the validity of the Custodian’s assertion that the e-mails were exempt under the attorney-client privilege, ACD material, and personnel exemptions under OPRA. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-10; N.J.S.A. 10:4-12(b)(7); EO 26; IAPP. See Paff, 379 N.J. Super. at 346.

Knowing & Willful

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

Prevailing Party Attorney's Fees

The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian's failure to provide a specific lawful basis for denying access to the redacted portions of the responsive executive session meeting minutes was insufficient. N.J.S.A. 47:1A-5(g); Paff v. Borough of Lavallette, GRC Complaint No. 2007-209 (Interim Order dated June 25, 2008).
2. The GRC must conduct an *in camera* review of the executive session minutes responsive to the Complainant's OPRA request to determine the validity of the Custodian's assertion that the e-mails were exempt under the attorney-client privilege, "inter-agency, or intra-agency advisory, consultative, or deliberative material," and personnel exemptions under OPRA. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-10; N.J.S.A. 10:4-12(b)(7); Executive Order No. 26 (Gov. McGreevey, 2002); Attorney General's Internal Affairs Policy and Procedures. See Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346, 355 (App. Div. 2005).
3. **The Custodian shall deliver⁶ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 2 above), nine (9) copies of the redacted records, a document or redaction index⁷, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,⁸ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
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.

⁶ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives them by the deadline.

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

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

5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Executive Director

February 16, 2021