



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

November 9, 2021 Government Records Council Meeting

John J. Fano
Complainant

Complaint No. 2019-242

v.

NJ Department of Human Services Police
Custodian of Record

At the November 9, 2021 public meeting, the Government Records Council (“Council”) considered the October 26, 2021 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 September 28, 2021 Interim Order because he 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 e-mail correspondence, he complied with the Council’s September 28, 2021 Interim Order by providing records in accordance with the Council’s *in camera* review. 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 9th Day of November 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: November 15, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
November 9, 2021 Council Meeting**

**John J. Fano¹
Complainant**

GRC Complaint No. 2019-242

v.

**New Jersey Department of Human Services Police²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of:

1. “[A]ll e-mails regarding myself (John Fano) between Lieutenant Jeff Lannon and Director Timothy Gallagher [(“Director Gallagher”)] for the dates of 10/24/19 through 10/28/19.”
2. “[A]ll e-mails between Sherri Eure-Washington and Director Timothy Gallagher for the dates of 10/24/19 through 11/24/19.”
3. “[A]ll e-mails regarding myself (John Fano) between Lieutenant Jeff Lannon and Detective/SGT Robert Negron or Internal Affairs/Human Services Police for the dates of 10/24/19 through 10/28/19.”
4. “[A]ll e-mails regarding myself (John Fano) between Director Timothy Gallagher and Detective/SGT Robert Negron or Internal Affairs/Human Services Police for the dates of 10/24/19 through 11/12/19.”

Custodian of Record: James Patterson

Request Received by Custodian: November 12, 2019

Response Made by Custodian: November 21, 2019

GRC Complaint Received: December 2, 2019

Background

September 28, 2021 Council Meeting:

At its September 28, 2021 public meeting, the Council considered the September 21, 2021 *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 did not fully comply with the Council’s March 30, 2021 Interim Order. Specifically, although Custodian’s Counsel responded in the extended time frame

¹ Represented by Stuart J. Alterman, Esq. of Alterman & Associates, LLC (Marlton, NJ).

² Represented by Deputy Attorney General Jeanette M. Barnard and DAG Jessica A. Sampoli.

- providing records for *in camera* review, Counsel, not the Custodian, 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 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 other portions of the responsive e-mails and correspondence to the Complainant (i.e., sender, recipients, date, time, subject, and salutations where applicable). As to those portions of the requested records, the Custodian has unlawfully denied access. See Ray v. Freedom Acad. Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010).
 4. **The Custodian shall comply with conclusion No. 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the current Custodian shall simultaneously deliver⁶ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁷ to the Executive Director.⁸**
 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 September 29, 2021, the Council distributed its Interim Order to all parties. On October 5, 2021, the Custodian responded to the Council's Interim Order. The Custodian certified that 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.

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.

⁷ "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."

⁸ 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.

accordance with the Order, he provided the Complainant with the responsive records that same day with redactions therein.

Analysis

Compliance

At its September 28, 2021 meeting, the Council ordered the Custodian to provide the Complainant the responsive records with redactions consistent with the Council's *in camera* review. The Council also ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Executive Director. On September 29, 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 October 6, 2021.

On October 5, 2021, the fourth (4th) business day after receipt of the Council's Order, the Custodian responded in writing, providing certified confirmation of compliance to the Executive Director. The Custodian certified that he provided the Complainant with responsive records that day, with redactions made in accordance with the Council's *in camera* review.

Therefore, the Custodian complied with the Council's September 28, 2021 Interim Order because he 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 e-mail correspondence, he complied with the Council's September 28, 2021 Interim Order by providing records in accordance with the Council's *in camera* review. 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 September 28, 2021 Interim Order because he 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 e-mail correspondence, he complied with the Council's September 28, 2021 Interim Order by providing records in accordance with the Council's *in camera* review. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: Samuel A. Rosado
Staff Attorney

October 26, 2021



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

September 28, 2021 Government Records Council Meeting

John J. Fano
Complainant

Complaint No. 2019-242

v.

NJ Department of Human Services Police
Custodian of Record

At the September 28, 2021 public meeting, the Government Records Council (“Council”) considered the September 21, 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 did not fully comply with the Council’s March 30, 2021 Interim Order. Specifically, although Custodian’s Counsel responded in the extended time frame providing records for *in camera* review, Counsel, not the Custodian, 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 other portions of the responsive e-mails and correspondence to the Complainant (*i.e.*, sender, recipients, date, time, subject, and salutations where applicable). As to those portions of the requested records, the Custodian has unlawfully denied access. See Ray v. Freedom Acad. Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010).
4. **The Custodian shall comply with conclusion No. 3 above within five (5) business**

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.

days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the current Custodian shall simultaneously deliver⁴ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁵ to the Executive Director.⁶

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 28th Day of September 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: September 29, 2021

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.

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."

⁶ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
September 28, 2021 Council Meeting**

**John J. Fano¹
Complainant**

GRC Complaint No. 2019-242

v.

**New Jersey Department of Human Services Police²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of:

1. “[A]ll e-mails regarding myself (John Fano) between Lieutenant Jeff Lannon and Director Timothy Gallagher [(“Director Gallagher”)] for the dates of 10/24/19 through 10/28/19.”
2. “[A]ll e-mails between Sherri Eure-Washington and Director Timothy Gallagher for the dates of 10/24/19 through 11/24/19.”
3. “[A]ll e-mails regarding myself (John Fano) between Lieutenant Jeff Lannon and Detective/SGT Robert Negron or Internal Affairs/Human Services Police for the dates of 10/24/19 through 10/28/19.”
4. “[A]ll e-mails regarding myself (John Fano) between Director Timothy Gallagher and Detective/SGT Robert Negron or Internal Affairs/Human Services Police for the dates of 10/24/19 through 11/12/19.”

Custodian of Record: James Patterson

Request Received by Custodian: November 12, 2019

Response Made by Custodian: November 21, 2019

GRC Complaint Received: December 2, 2019

Records Submitted for *In Camera* Examination: Nine (9) unredacted copies of e-mails withheld under OPRA’s personnel records exemption and/or the Attorney General’s Internal Affairs Policy & Procedures (“IAPP”).

Background

March 30, 2021 Council Meeting:

At its March 30, 2021 public meeting, the Council considered the March 23, 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 Represented by Stuart J. Alterman, Esq. of Alterman & Associates, LLC (Marlton, NJ).

² Represented by Deputy Attorney General Jeanette M. Barnard and DAG Jessica A. Sampoli.

1. The GRC must conduct an *in camera* review of the responsive e-mails withheld in their entirety to determine the validity of the Custodian's assertion that the denial was valid under OPRA's exemptions for personnel records, and/or under the IAPP. N.J.S.A. 47:1A-10; N.J.S.A. 47:1A-9(b). 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 March 31, 2021, the Council distributed its Interim Order to all parties. That same day, Custodian's Counsel requested an extension of time until April 26, 2021, to submit a response. The GRC granted the extension that same day. On April 26, 2021, Counsel responded to the Council's Interim Order. Counsel provided nine (9) unredacted copies of six (6) e-mails between various parties, including the Complainant. Counsel also provided a certified confirmation of compliance to the Executive Director.

On September 15, 2021, the GRC requested a certified confirmation of compliance from the Custodian as per the Interim Order.

Analysis

Compliance

At its March 30, 2021 meeting, the Council ordered the Custodian to submit nine (9) unredacted copies of e-mail correspondence withheld from disclosure for *in camera* review. The Council also ordered the Custodian to simultaneously provide certified confirmation of compliance to the Executive Director. On March 31, 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.

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."

Thus, the Custodian's response was due by close of business on April 8, 2021, accounting for the Good Friday holiday.⁶

On March 31, 2021, the date of receipt of the Council's Order, Custodian's Counsel requested an extension of time until April 26, 2021 to respond to the Order. The GRC granted the request that same day. On April 26, 2021, Counsel responded to the Council's Order, providing nine (9) unredacted copies of the requested e-mails for *in camera* review. However, while Counsel provided certified confirmation of compliance, the Council's Order required the certification to be signed by the Custodian, which did not occur.

Therefore, the Custodian did not fully comply with the Council's March 30, 2021 Interim Order. Specifically, although Custodian's Counsel responded in the extended time frame providing records for *in camera* review, Counsel, not the Custodian, simultaneously provided certified confirmation of compliance to the Executive Director.

Unlawful Denial of Access

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request "with certain exceptions." N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful. N.J.S.A. 47:1A-6.

OPRA also provides that its provisions ". . . shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to [OPRA]; any other statute; resolution of either or both Houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law; federal regulation; or federal order." N.J.S.A. 47:1A-9(a).

The Appellate Division has held that Attorney General Guidelines have the force of law for police entities. See O'Shea v. Twp. of West Milford, 410 N.J. Super. 371, 382 (App. Div. 2009). In particular, the IAPP is bound upon all law enforcement agencies in New Jersey pursuant to statute. See N.J.S.A. 40A:14-181. Further, the IAPP explicitly provides that "[t]he nature and source of internal allegations, the progress of internal affairs investigations, and the resulting materials are confidential information." IAPP at 9.6.1 (August 2020). See also Rivera v. Borough of Keansburg Police Dep't (Monmouth), GRC Complaint No. 2007-222 (June 2010) (accepting an Initial Decision of the Office of Administrative Law that internal affairs reports are confidential records); Camarata v. Essex Cnty. Prosecutor's Office, GRC Complaint No. 2014-127 (June 2015) (holding that the custodian lawfully denied access to internal affairs investigation records).

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

⁶ Good Friday was observed on April 2, 2021.

Record or Redaction Number (DHS #)	Record Name/Date	Description of Record or Redaction	Custodian's Explanation/ Citation for Non-disclosure or Redactions	Findings of the <i>In Camera</i> Examination⁷
1. DHS0001	E-Mail from Lt. Jeffrey Michael Lannon to DHS-Internal Affairs dated October 26, 2019	States that the attachment contains a request for administrative action.	Pertains to an internal affairs matter. <u>N.J.S.A. 47:1A-9(b)</u> ; <u>N.J.S.A. 40A:14-181</u> ; <u>Gannett Satellite Info. Network, LLC v. Twp. of Neptune, 467 N.J. Super. 385 (App. Div. 2021)</u> ; <u>O'Shea, 410 N.J. Super. 371.</u>	The body of the e-mail as well as the attachment clearly pertain to an internal affairs matter. Thus, the GRC is satisfied that the e-mail and attachment was exempt from disclosure pursuant to OPRA. <u>N.J.S.A. 47:1A-9(a)</u> ; <u>N.J.S.A. 40A:14-181</u> ; <u>Gannett Satellite Info. Network, LLC v. Twp. of Neptune, 467 N.J. Super. 385 (App. Div. 2021)</u> ; <u>O'Shea, 410 N.J. Super. 371.</u>
2. DHS0002	E-Mail from Sherri Eure-Washington to James Patterson dated November 13, 2019.	States, "FYI."	Pertains to an internal affairs matter. <u>N.J.S.A. 47:1A-9(b)</u> ; <u>N.J.S.A. 40A:14-181</u> ; <u>Gannett Satellite Info. Network, LLC v. Twp. of Neptune,</u>	The body of the e-mail does not contain information exempt as internal affairs information. Thus, the Custodian shall disclose this

⁷ **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.

			467 <u>N.J. Super.</u> 385 (App. Div. 2021); <u>O’Shea</u> , 410 <u>N.J. Super.</u> 371.	<p>portion of the record. <u>N.J.S.A. 47:1A-6.</u></p> <p>However, the subject heading pertains to an internal affairs matter and remains exempt from disclosure. <u>N.J.S.A. 47:1A-9(a); N.J.S.A. 40A:14-181; Gannett Satellite Info. Network, LLC v. Twp. of Neptune</u>, 467 <u>N.J. Super.</u> 385 (App. Div. 2021); <u>O’Shea</u>, 410 <u>N.J. Super.</u> 371.</p>
3. DHS0002	E-mail from Sherri Eure-Washington to Director Timothy Gallagher. Copied to Edward Fuller. Dated November 6, 2019.	States, “FYI – we can discuss next week.”	Pertains to an internal affairs matter. <u>N.J.S.A. 47:1A-9(b); N.J.S.A. 40A:14-181; Gannett Satellite Info. Network, LLC v. Twp. of Neptune</u> , 467 <u>N.J. Super.</u> 385 (App. Div. 2021); <u>O’Shea</u> , 410 <u>N.J. Super.</u> 371.	<p>The body of the e-mail does not contain information exempt under OPRA. Thus, the Custodian shall disclose this portion of the record. <u>N.J.S.A. 47:1A-6.</u></p> <p>However, the subject heading pertains to an internal affairs matter and remains exempt from disclosure. <u>N.J.S.A. 47:1A-9(a); N.J.S.A. 40A:14-181; Gannett Satellite Info. Network, LLC v. Twp. of Neptune</u>, 467 <u>N.J. Super.</u> 385</p>

				(App. Div. 2021); <u>O’Shea, 410 N.J. Super. 371.</u>
4. DHS0002	E-mail from Christopher Smith to Sherri Eure-Washington and David Beckett dated November 2, 2019.	Discusses embedded image of a correspondence pertaining to an internal affairs notice.	Pertains to an internal affairs matter. <u>N.J.S.A. 47:1A-9(b); N.J.S.A. 40A:14-181; Gannett Satellite Info. Network, LLC v. Twp. of Neptune, 467 N.J. Super. 385 (App. Div. 2021); O’Shea, 410 N.J. Super. 371.</u>	The subject heading, body of the e-mail, as well as the embedded image clearly pertain to an internal affairs matter. Thus, the GRC is satisfied that the subject heading, e-mail body, and attachment are exempt from disclosure pursuant to OPRA. <u>N.J.S.A. 47:1A-9(a); N.J.S.A. 40A:14-181; Gannett Satellite Info. Network, LLC v. Twp. of Neptune, 467 N.J. Super. 385 (App. Div. 2021); O’Shea, 410 N.J. Super. 371.</u>
5. DHS0003	E-mail from Sgt. John James Fano to DHS-Internal Affairs. Copied to Stuart Alterman. Dated November 8, 2019.	Discusses scheduling and attendance to an upcoming interview.	Pertains to an internal affairs matter. <u>N.J.S.A. 47:1A-9(b); N.J.S.A. 40A:14-181; Gannett Satellite Info. Network, LLC v. Twp. of Neptune, 467 N.J. Super. 385 (App. Div. 2021); O’Shea, 410 N.J. Super. 371.</u>	The subject heading and body of the e-mail clearly pertain to an internal affairs matter. Thus, the GRC is satisfied that the subject heading and e-mail body are exempt from disclosure pursuant to OPRA. <u>N.J.S.A. 47:1A-9(a); N.J.S.A. 40A:14-181; Gannett Satellite Info. Network, LLC v. Twp. of Neptune,</u>

				467 <u>N.J. Super.</u> 385 (App. Div. 2021); <u>O’Shea</u> , 410 <u>N.J. Super.</u> 371.
6. DHS0003	E-mail from DHS-Internal Affairs to Sgt. John James Fano dated November 8, 2019.	Discusses interview announcement pertaining to an internal affairs case.	Pertains to an internal affairs matter. <u>N.J.S.A.</u> 47:1A-9(b); <u>N.J.S.A.</u> 40A:14-181; <u>Gannett Satellite Info. Network, LLC v. Twp. of Neptune</u> , 467 <u>N.J. Super.</u> 385 (App. Div. 2021); <u>O’Shea</u> , 410 <u>N.J. Super.</u> 371.	The subject heading, and the body of the e-mail clearly pertain to an internal affairs matter. Thus, the GRC is satisfied that the subject heading and e-mail body are exempt from disclosure pursuant to OPRA. <u>N.J.S.A.</u> 47:1A-9(a); <u>N.J.S.A.</u> 40A:14-181; <u>Gannett Satellite Info. Network, LLC v. Twp. of Neptune</u> , 467 <u>N.J. Super.</u> 385 (App. Div. 2021); <u>O’Shea</u> , 410 <u>N.J. Super.</u> 371.
7. DHS0004 – DHS0006	E-mail chain between Cristin Morris, Det. Sgt. Roberto Negron, Sgt. John James Fano, Stuart Alterman, and Timothy Prol dated November 12, 2019.	Discussions pertaining to legal representation in advance of an interview pertaining to an administrative investigation.	Pertains to an internal affairs matter. <u>N.J.S.A.</u> 47:1A-9(b); <u>N.J.S.A.</u> 40A:14-181; <u>Gannett Satellite Info. Network, LLC v. Twp. of Neptune</u> , 467 <u>N.J. Super.</u> 385 (App. Div. 2021); <u>O’Shea</u> , 410 <u>N.J. Super.</u> 371.	The bodies of the first and second e-mail pertain to an internal affairs matter. Further, the subject headings of all three (3) e-mails pertain to an internal affairs matter. Thus, the GRC is satisfied that the e-mail bodies and subject headings are exempt from disclosure pursuant to OPRA. <u>N.J.S.A.</u> 47:1A-9(a); <u>N.J.S.A.</u> 40A:14-181; <u>Gannett</u>

				<p><u>Satellite Info. Network, LLC v. Twp. of Neptune</u>, 467 <u>N.J. Super.</u> 385 (App. Div. 2021); <u>O’Shea</u>, 410 <u>N.J. Super.</u> 371.</p> <p>However, the third e-mail body does not contain internal affairs information exempt from OPRA. Thus, the Custodian shall disclose this portion of the record. <u>N.J.S.A. 47:1A-6.</u></p>
8. DHS0007 – DHS0009	<p>E-mail chain between Det. Sgt. Roberto Negron, DHS-Internal Affairs, Stuart Alterman, Sgt. John James Fano, and Cristin Morris. Dated November 12, 2019.</p> <p>(Contains 2nd and 3rd e-mails from Record No. 7)</p>	<p>First e-mail body contains discussion between Mr. Alterman and Det. Sgt. Negron regarding representation during administrative proceedings.</p>	<p>Pertains to an internal affairs matter. <u>N.J.S.A. 47:1A-9(b)</u>; <u>N.J.S.A. 40A:14-181</u>; <u>Gannett Satellite Info. Network, LLC v. Twp. of Neptune</u>, 467 <u>N.J. Super.</u> 385 (App. Div. 2021); <u>O’Shea</u>, 410 <u>N.J. Super.</u> 371.</p>	<p>The body of the first e-mail as well as the subject heading clearly pertain to an internal affairs matter. Thus, the GRC is satisfied that the e-mail body and subject heading are exempt from disclosure pursuant to OPRA. <u>N.J.S.A. 47:1A-9(a)</u>; <u>N.J.S.A. 40A:14-181</u>; <u>Gannett Satellite Info. Network, LLC v. Twp. of Neptune</u>, 467 <u>N.J. Super.</u> 385 (App. Div. 2021); <u>O’Shea</u>, 410 <u>N.J. Super.</u> 371.</p> <p>The remainder of the e-mail chain shall be disclosed</p>

				or withheld as stated in Record No. 7 above.
9. DHS0010 – DHS0012	E-mail chain between Det. Sgt. Roberto Negron, DHS-Internal Affairs, Stuart Alterman, Sgt. John James Fano, and Cristin Morris. Dated November 12, 2019. (Contains all e-mails from Record No. 7)	First e-mail body contains additional clarification from Mr. Alterman regarding representation in an administrative proceeding.	Pertains to an internal affairs matter. <u>N.J.S.A. 47:1A-9(b)</u> ; <u>N.J.S.A. 40A:14-181</u> ; <u>Gannett Satellite Info. Network, LLC v. Twp. of Neptune</u> , 467 <u>N.J. Super.</u> 385 (App. Div. 2021); <u>O’Shea</u> , 410 <u>N.J. Super.</u> 371.	The body of the first e-mail as well as the subject heading clearly pertain to an internal affairs matter. Thus, the GRC is satisfied that the e-mail body and subject heading are exempt from disclosure pursuant to OPRA. <u>N.J.S.A. 47:1A-9(a)</u> ; <u>N.J.S.A. 40A:14-181</u> ; <u>Gannett Satellite Info. Network, LLC v. Twp. of Neptune</u> , 467 <u>N.J. Super.</u> 385 (App. Div. 2021); <u>O’Shea</u> , 410 <u>N.J. Super.</u> 371. The remainder of the e-mail chain shall be disclosed or withheld as stated in Record No. 7 above.

In accordance with the *In Camera* Examination, the Custodian lawfully denied access in part to the requested e-mails as pertaining to an internal affairs investigation. N.J.S.A. 47:1A-9(a); N.J.S.A. 40A:14-181. See also O’Shea, 410 N.J. Super. at 382; Gannett, 467 N.J. Super. 385; Rivera v. Union Cnty. Prosecutor’s Office, 2020 N.J. Super. Unpub. LEXIS 1192 (App. Div. 2020); Camarata, GRC 2014-127. However, and consistent with N.J.S.A. 47:1A-5(g), if the custodian of a government record asserts that part of a particular record is exempt from public access pursuant to OPRA, the custodian must delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and must promptly permit access to the remainder of the record.

Thus, the Custodian must disclose all other portions of the responsive e-mails and correspondence to the Complainant (*i.e.*, sender, recipients, date, time, subject, and salutations where applicable). As to those portions of the requested records, the Custodian has unlawfully denied access. See Ray v. Freedom Acad. Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010).

Knowing & Willful

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not fully comply with the Council's March 30, 2021 Interim Order. Specifically, although Custodian's Counsel responded in the extended time frame providing records for *in camera* review, Counsel, not the Custodian, 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 deliver⁸ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁹ to the Executive Director.¹⁰**
3. The Custodian must disclose all other portions of the responsive e-mails and correspondence to the Complainant (*i.e.*, sender, recipients, date, time, subject, and salutations where applicable). As to those portions of the requested records, the Custodian has unlawfully denied access. See Ray v. Freedom Acad. Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010).
4. **The Custodian shall comply with conclusion No. 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the current Custodian shall simultaneously**

⁸ 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.

⁹ "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."

¹⁰ 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.

deliver¹¹ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,¹² to the Executive Director.¹³

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

September 21, 2021

¹¹ 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.

¹² "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."

¹³ 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
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

March 30, 2021 Government Records Council Meeting

John J. Fano
Complainant

Complaint No. 2019-242

v.

NJ Department of Human Services Police
Custodian of Record

At the March 30, 2021 public meeting, the Government Records Council (“Council”) considered the March 23, 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 responsive e-mails withheld in their entirety to determine the validity of the Custodian’s assertion that the denial was valid under OPRA’s exemptions for personnel records, and/or under the Internal Affairs Policy & Procedures. N.J.S.A. 47:1A-10; N.J.S.A. 47:1A-9(b). 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 30th Day of March 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: March 31, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
March 30, 2021 Council Meeting**

**John J. Fano¹
Complainant**

GRC Complaint No. 2019-242

v.

**N.J. Department of Human Services Police²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of:

1. “[A]ll e-mails regarding myself (John Fano) between Lieutenant Jeff Lannon and Director Timothy Gallagher [(“Director Gallagher”)] for the dates of 10/24/19 through 10/28/19.”
2. “[A]ll e-mails between Sherri Eure-Washington and Director Timothy Gallagher for the dates of 10/24/19 through 11/24/19.”
3. “[A]ll e-mails regarding myself (John Fano) between Lieutenant Jeff Lannon and Detective/SGT Robert Negron or Internal Affairs/Human Services Police for the dates of 10/24/19 through 10/28/19.”
4. “[A]ll e-mails regarding myself (John Fano) between Director Timothy Gallagher and Detective/SGT Robert Negron or Internal Affairs/Human Services Police for the dates of 10/24/19 through 11/12/19.”

Custodian of Record: James Patterson

Request Received by Custodian: November 12, 2019

Response Made by Custodian: November 21, 2019

GRC Complaint Received: December 2, 2019

Background³

Request and Response:

On November 12, 2019, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On November 21, 2019, the Custodian responded in writing stating that a search for responsive records located a handful of e-mails pertaining to an internal affairs investigation. The Custodian stated that Internal affairs records were confidential from public disclosure, and that to the extent they describe specific

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Jeanette M. Barnard.

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.

individual employees were personnel records. N.J.S.A. 2A:84-27; N.J.S.A. 47:1A-10; N.J.A.C. 13:1E-3.2(a)(4); N.J.R.E. 515; Groark v. Timek, 989 F. Supp.2d 378 (D.N.J. 2013); G-69 v. Degan, 130 F.R.D. 326 (D.N.J. 1990); Loigman v. Kimmelman, 102 N.J. 98, 107 (1986); Nero v. Hyland 76 N.J. 213 (1978); River Edge Sav. & Loan Assoc. v. Hyland, 165 N.J. Super. 540 (App. Div. 1979); Executive Order No. 48 (Governor Hughes, 1968) (“E.O. 48”).

Denial of Access Complaint:⁴

On December 2, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that while communications pertaining to internal affairs could be considered confidential to the public, he should be allowed to view records pertaining to an investigation regarding himself.

The Complainant also asserted that Ms. Eure-Washington and Director Gallagher were civilians, and therefore their communications should not be privileged under the Attorney General Guidelines. The Complainant added that the same should be for communications between Director Gallagher and Lt. Lannon. The Complainant argued that at the time he submitted his request, there was no active investigation, and argued that the communications pertained to Director Gallagher ordering Lt. Lannon to take “corrective action” against the Complainant.

The Complainant asserted that a civilian director must refrain from the directing the investigation of criminal activity and may not have access to internal affairs investigative files absent a court order. The Complainant also asserted that in Jordan v. Harvey, Docket No. MER-L-0801-04 (Law Div. June 11, 2004), the court held that the City of Asbury Park had no authority to authorize its police director to perform law enforcement duties.

Statement of Information:

On December 20, 2019, the Custodian filed a Statement of Information (“SOF”). The Custodian certified that he received the Complainant’s OPRA request on November 12, 2019. The Custodian certified that he responded in writing on November 21, 2019, stating that the responsive records were exempt from disclosure as they pertained to an internal affairs investigation.

The Custodian argued that New Jersey and Federal courts have consistently upheld the privileges supporting the confidentiality of internal law enforcement records. See State v. Marshall, 148 N.J. 89, 273 (certif. denied Marshall v. N.J., 522 U.S. 850, 118 S. Ct. 140 (1997)); N. Jersey Media Grp., Inc. v. Bergen Cnty. Prosecutor’s Office, 447 N.J. Super. 203 (App. Div. 2016). The Custodian further argued that State and Federal judicial privileges favor the confidentiality of internal investigations. Groark, 989 F. Supp.2d 378; G-69, 130 F.R.D. 326; N.J.S.A. 2A:84A-27; N.J.R.E. 515. The Custodian asserted that the privileges provide a vital interest in protecting witnesses, informants, prevent interference with investigations, and avoid a chilling effect on communications between the public, law enforcement, and other agencies. Nero, 76 N.J. 213; River Edge, 165 N.J. Super. 540.

⁴ The Complainant included a related, but separate OPRA request in the complaint. However, the GRC declines to address same since the Complainant did not list the request items as among those at issue in the matter.

The Custodian asserted that the privileges were recognized by the Legislature when enacting OPRA, making clear that its provisions did not “abrogate or erode” any pre-existing grant of confidentiality. N.J.S.A. 47:1A-9(b). The Custodian therefore argued that requested internal affairs records fell under these privileges and could not be disclosed under OPRA.

The Custodian also asserted that the Attorney General recognized the confidentiality of internal affairs records via the Internal Affairs Policy & Procedures (“IAPP”),⁵ stating that it specifically requires that the “nature and source of internal allegations, the progress of internal affairs investigations, and the resulting materials” are confidential.⁶ The Custodian asserted that N.J.S.A. 40A:14-181 required that law enforcement agencies adopt and implement guidelines consistent with the IAPP, including that internal affairs records are confidential. The Custodian therefore argued that the requested e-mails were exempt under OPRA pursuant to N.J.S.A. 47:1A-9(b). The Custodian noted that the GRC recently held that internal affairs reports were confidential under the IAPP in Tully v. Borough of Avon-by-the-Sea (Monmouth), GRC Complaint No. 2016-101 (July 2018).

Lastly, the Custodian argued that the requested records were exempt under OPRA’s personnel exemption, N.J.S.A. 47:1A-10. The Custodian asserted that the exemption has been interpreted to provide a broad protection against disclosure with only minor exceptions. Kovalcik v. Somerset Cnty. Prosecutor’s Office, 206 N.J. 581, 594 (2011). The Custodian asserted that courts tend to favor the presumption of employee confidentiality. McGee v. Twp. of East Amwell, 416 N.J. Super. 602, 615 (App. Div. 2010). The Custodian asserted that in the context of law enforcement, internal affairs records often paralleled personnel records, and records relating to complaints or disciplinary actions imposed against the officer would be contained within their internal affairs file.

Additional Submissions:

On December 22, 2019, the Complainant e-mailed the GRC in response to the Custodian’s SOI. The Complainant asserted that the e-mails he sought were not part of an internal affairs investigation. The Complainant asserted that one e-mail was from Director Gallagher to Lt. Lannon, wherein he directed the Lieutenant to take “corrective action” against the Complainant. The Complainant asserted that the e-mail was created prior to the internal affairs investigation.

The Complainant asserted that the other e-mail he sought was between Ms. Eure-Washington and Director Gallagher and would contain information regarding a grievance filed by PBA Local 113. The Complainant asserted that this e-mail was also created before the internal affairs investigation was initiated.

⁵ The IAPP was promulgated via the Division of Criminal Justice in the New Jersey Department of Law and Public Safety.

⁶ 2017 IAPP at 42.

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 Council⁷ 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 the requested e-mails pertained to an internal affairs investigation and were therefore exempt under OPRA as personnel records and/or the IAPP. N.J.S.A. 47:1A-10; N.J.S.A. 47:1A-9(b). The Complainant argued that any responsive e-mails would have been created prior to the internal affairs investigation and therefore would not

⁷ Paff v. N.J. Dep’t of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

fall within the exemptions. Furthermore, the Complainant asserted that since the records pertained to himself, he should be granted access.

Therefore, the GRC must conduct an *in camera* review of the responsive e-mails withheld in their entirety to determine the validity of the Custodian's assertion that the denial was valid under OPRA's exemptions for personnel records, and/or under the IAPP. N.J.S.A. 47:1A-10; N.J.S.A. 47:1A-9(b). 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.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The GRC must conduct an *in camera* review of the responsive e-mails withheld in their entirety to determine the validity of the Custodian's assertion that the denial was valid under OPRA's exemptions for personnel records, and/or under the Internal Affairs Policy & Procedures. N.J.S.A. 47:1A-10; N.J.S.A. 47:1A-9(b). See Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).
2. **The Custodian shall deliver⁸ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 1 above), a document or redaction index⁹, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,¹⁰ 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

March 23, 2021

⁸ 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.

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

¹⁰ "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."