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State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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JACQUELYN A. SUÁREZ
Commissioner

INTERIM ORDER

June 25, 2024 Government Records Council Meeting

Lisa Andreula-Porto

Complainant

v.

Cape May County

Custodian of Record

Complaint No. 2020-62

At the June 25, 2024 public meeting, the Government Records Council ("Council") considered the June 18, 2024 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. Custodian's Counsel has failed to establish in her request for reconsideration of the Council's February 27, 2024 Administrative Order that either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. Counsel failed to establish that the complaint should be reconsidered based on "mistake." Counsel has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Simply put, the request for reconsideration appears to be a diversion from whether those records identified in the SOI document index were being withheld, redacted, or fully disclosed. Thus, Counsel's request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003). **However, the GRC recommends the Administrative Order be suspended pending the Council's consideration of a legal certification directly advising whether the records (and relevant attachments) identified in the Statement of Information document index were being withheld in their entirety, disclosed with redactions, or disclosed in their entirety. The Custodian shall comply with above within ten (10) business days from receipt of the Council's Interim Order through a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4.¹**

2. To the extent that the Custodian made hard copies of records available for the appropriate per-page copy cost set forth in N.J.S.A. 47:1A-5(b), no violation of OPRA occurred. N.J.S.A. 47:1A-6. Thus, no refund of those appropriate copy costs is warranted here. Further, the Custodian would not be required to waive any copy cost or disclose hard copies of additional records until receipt of payment. Reid v. GRC & N.J. Dep't of Corr., 2013 N.J. Super. Unpub. LEXIS 2625 (App. Div. 2013); Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006).
3. The Custodian unlawfully denied access to the responsive e-mails (and attachments where applicable) by failing to provide them in a "meaningful medium" to the Complainant. N.J.S.A. 47:1A-5(d). Thus, the Custodian has not borne his burden of proving that his actions were appropriate under OPRA. N.J.S.A. 47:1A-6. The Custodian shall complete the conversion of all responsive e-mails (and attachments) to .pdf format and disclose same to the Complainant.
4. **The Custodian shall comply with item No. 3 above within ten (10) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver² certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,³ to the Executive Director.⁴**
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 25th Day of June 2024

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: June 27, 2024

² 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.

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 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**

**Findings and Recommendations of the Executive Director
June 25, 2024 Council Meeting**

**Lisa Andreula-Porto¹
Complainant**

GRC Complaint No. 2020-62

v.

**Cape May County²
Custodial Agency**

Records Relevant to Complaint: Copies via pickup of all e-mails sent and received by Freeholder Will Morey from January 2018 to present.

Custodian of Record: Jeffrey Lindsay, Esq.

Request Received by Custodian: December 10, 2019

Response Made by Custodian: December 10, 2019

GRC Complaint Received: March 11, 2020

Background³

Request and Response:

On December 10, 2019, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On the same day, the Custodian responded in writing stating that the Complainant’s request was overly broad. The Custodian thus asked the Complainant to provide clarification in the form of sender/recipient or subject matter. On December 15, 2019, the Complainant e-mailed the Custodian providing clarification as a list of thirty-one (31) individuals, organizations, and businesses, as well as seventeen (17) individual subject matter terms. On December 16, 2019, the Custodian responded stating that an initial search produced over 17,000 e-mails. The Custodian thus stated that because his office would need to review these e-mails, the response time frame is being extended to January 27, 2020.

On January 26, 2020, the Complainant e-mailed the Custodian seeking an update on her OPRA request. On the same day, the Custodian responded advising that his office had not completed its review and that additional time through February 21, 2020 would be necessary:

¹ No legal representation listed on record.

² Represented by Lauren F. Fogarty, Esq. (Cape May Court House, 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.

“[t]his will be a firm production date.” On February 21, 2020, the Complainant picked up a thumb drive containing the responsive records in .pst format.⁴

On March 3, 2020, the Complainant e-mailed the Custodian asserting that he knowingly obstructed her OPRA request by disclosing the e-mails in .pst format. The Complainant stated that she did not request the records in .pst format and had never heard of it until she received the “encrypted files” the previous week. The Complainant demanded that the Custodian disclose paper copies of the responsive records at no cost to her. On the same day, the Custodian responded stating that he was not “obstructing” access. The Custodian noted that the Complainant did not request the e-mails in a particular format; thus, he disclosed them in the medium which Cape May County (“County”) maintained for ease of access. The Custodian also alleged the extended time frame was reasonable given the number of records that he needed to review. The Custodian offered to walk the Complainant through the process of accessing the .pst files and offered the alternative of 1) printing all records at the prescribed, per-page cost under N.J.S.A. 47:1A-5(b); or 2) exporting them to .pdf files, which would take multiple weeks to complete. The Custodian noted that some hard copy records would be available for pickup at 4:00pm.

Denial of Access Complaint:

On March 11, 2020, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian unlawfully denied her access to the requested records by disclosing them in .pst format. The Complainant contended that upon trying to access the files, she received an error message stating that she was “not granted permission” to the responsive e-mails. The Complainant noted that as of this date, she still has not been able to access the thumb drive files. The Complainant further argued that she was waiting on “an unknown future date for the remainder of [her] request, which is now [ninety (90)] days old.” The Complainant also noted that she was not provided access to attachments identified in the responsive e-mails.

The Complainant also argued that she paid \$46.10 for copies of certain records, which she is now seeking reimbursement for the Custodian’s failure to comply with OPRA.

Statement of Information:⁵

On August 6, 2020, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on December 10, 2019. The Custodian affirmed that he initially responded on the same day stating that the original OPRA request was invalid and seeking clarification of same. The Custodian affirmed that he received the Complainant’s clarification on December 15, 2019. The Custodian certified that his search included performing a “Boolean search” of the individuals and terms provided by the Complainant. The Custodian averred that this search yielded over 17,000 e-mails. The Custodian certified that following two (2) extensions of time, he responded in writing on February 21, 2020 disclosing a

⁴ The file format in which the e-mails were provided is Microsoft proprietary format notably utilized for e-mails in Microsoft Outlook®.

⁵ On May 7, 2020, this complaint was referred to mediation. On July 23, 2020, this complaint was referred back to the GRC for adjudication.

thumb drive to the Complainant via pickup. The Custodian also included a 93-page document index identifying e-mails and/or attachments with an asserted exemption.

The Custodian averred that following disclosure, the Complainant contacted him disputing the disclosure because she could not access records on the thumb drive. The Custodian certified that the County's Information Technology ("IT") Department was contacted, which resulted in the Complainant receiving an e-mail on how to open the files. The Custodian alleged that the Complainant responded on March 1, 2020 demanding paper copies of the records at no cost; he refused. The Custodian further alleged that both him and Custodian's Counsel made attempts to assist the Complainant that were rebuffed on multiple occasions.

The Custodian alleges that on March 2, 2020, the Complainant asked the County to produce e-mails only between "[Mr.] Morey and Tim Donahue, Pete Lomax, and Fred Langford," which the County disclosed on the same day.⁶ The Custodian averred that on March 3, 2020, the Complainant demanded that all e-mails be disclosed in hardcopy without cost. The Custodian asserted that he again denied the demand, advised that the Complainant would have to pay \$0.05 per page, and renewed his offer to assist in accessing the jump drive files, up to and including providing a new thumb drive with .pdf versions of the responsive records. The Custodian argued that the Complainant continued to deny all offered solutions and demanded the responsive records in hard copy without cost.⁷

The Custodian contended that at present, the County is prepared to disclose those e-mails for which access has been granted in .pdf format. The Custodian contended that alternatively, the Custodian could assist the Complainant in accessing the .pst files. The Custodian argued that the Complainant has rejected both because she wants records in paper form without cost.

February 27, 2024 Council Meeting:

At its February 27, 2024 public meeting, the Council considered the February 20, 2024 Administrative Order of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said Administrative Order. The Council, therefore, found that:

The GRC must conduct an *in camera* review of all responsive e-mails including attachments where applicable) to determine the validity of the Custodian's assertion that those records were exempt under the cited exemptions. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-10. See Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346, 355 (App. Div. 2005). **Thus, The Custodian shall deliver⁸ to the Council in a sealed envelope**

⁶ The GRC notes that this statement conflicts with a March 3, 2020 e-mail from the Custodian offering pickup of the responsive records after 4:00pm on that day.

⁷ The GRC notes that neither the Complainant nor the Custodian attached copies of some of the alleged correspondence occurring in March 2020.

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.

nine (9) copies of the requested unredacted record and a document or redaction index.⁹

This is an Administrative Order requiring compliance within ten (10) business days after receipt thereof. The Custodian shall also simultaneously deliver certified confirmation of compliance with this Order, in accordance with N.J. Court Rules, R. 1:4-4,¹⁰ to the Executive Director that the records provided are the records requested by the Council for the *in camera* inspection.

Procedural History:

On February 29, 2024, the Council distributed its Administrative Order to all parties.

On March 14, 2024, Custodian's Counsel filed a request for reconsideration of the Council's February 27, 2024 Administrative Order based on a "mistake." Therein, Counsel contended that the Council made a mistake in seeking an *in camera* review. Counsel contended that the basis of this complaint is not for records the Custodian asserted were exempt; rather, the sole issue is that the Complainant could not access records disclosed electronically and wanted the copying cost waived. Counsel stated that the responsive records numbered 72,000 pages of e-mails and attachments. Counsel contended that the Custodian provided the Complainant three (3) options for curing the access issue, but that the Complainant refused to accept any response beyond paper copies without a copying cost. Counsel noted that the Custodian continues to offer disclosure through the options already provided to the Complainant. Counsel requested that the Complainant "indicate in which medium she would like" to receive the responsive records.

Additional Submissions:

On March 16, 2024, the Complainant e-mailed the parties noting that if the County was willing to provide the responsive records, it has had four (4) years to convert the files. The Complainant argued that it is unreasonable to expect to receive additional time or other considerations to disclose the responsive records. On March 18, 2024, Custodian's Counsel e-mailed the parties advising that the Complainant was offered the responsive records in .pdf format and that she already converted a portion of the records in March 2020. Counsel asserted that because the Complainant did not confirm she wanted the records in .pdf format, no further conversion occurred. Counsel asserted that the options for disclosure remain, including a walkthrough on how to access the files already provided, but that conversion of the remaining records would take time.

On March 28, 2024, the GRC sought additional information from the Complainant. Therein, the GRC stated that the evidence contained in the record presented conflicting evidence on whether the Complainant received records she could access, whether she paid \$46.10 for those

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."

disclosed, and whether she intended to challenge the denial of additional records identified in the SOI. The GRC thus asked for responses to the following:

1. Were the records you allege you received and were able to access provided in response to your December 10, 2019 OPRA request as clarified on December 15, 2019 which is the subject of GRC 2020-62
 - a. If no, please advise whether that disclosure related to a separate OPRA request and whether the \$46.10 you paid was associated with that separate request.
 - b. If yes, please advise whether you paid the fee (\$46.10) for paper copies of those e-mails.
2. Is the question of access to those e-mails in .pst format you were initially unable to access the sole basis of your complaint?

The GRC requested that the Complainant provide her response in the form of a certification by April 3, 2024.

On March 28, 2024, the Complainant responded to the GRC's request for additional information. Therein, the Complainant confirmed that she paid \$46.10 for "some of the requested documents but did not receive all requested documents." The Complainant further asserted that she filed the instant complaint because she was unable to access the .pst formatted records and believed that additional records existed that were not disclosed. The Complainant affirmed that she would accept unredacted records (unless redactions are lawful) in .pdf format and is not willing to review item at the County or pay additional fees. The Complainant noted that she would not withdraw her complaint but would consider the OPRA request satisfied if she received all responsive records. The Complainant further noted that she would exchange the CDs in her possession for a ".pdf formatted device."¹¹

Analysis

Reconsideration

Pursuant to N.J.A.C. 5:105-2.10, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. Requests must be in writing, delivered to the Council and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. N.J.A.C. 5:105-2.10(a) – (e).

In the matter before the Council, Custodian's Counsel filed a request for reconsideration of the Council's February 27, 2024 Administrative Order on March 14, 2024, ten (10) business days from the issuance of the Council's Order.

¹¹ The parties engaged each other in several subsequent e-mails in an attempt to ensure disclosure of the responsive records as .pdf documents on a thumb drive. As of June 10, 2024, Custodian's Counsel offered the Complainant a portion of the responsive records on a thumb drive. There has been no indication on whether the Complainant picked them up as of June 18, 2024.

Applicable case law holds that:

“A party should not seek reconsideration merely based upon dissatisfaction with a decision.” D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a “palpably incorrect or irrational basis;” or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D'Atria, . . . 242 N.J. Super. at 401. “Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement.” *Ibid.*

[In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).]

Here, Custodian’s Counsel has contended that the Council made a “mistake” in ordering an *in camera* review of records identified in the 93-page document index included in the SOI. Council argued that instead the Complainant only took issue with not being able to access the disclosed records in .pst format and that she should not be required to pay copying costs for hardcopies thereof. After receiving the request for reconsideration, the GRC attempted to seek clarification from the Complainant as to the direct issue it was intended to address through this complaint. In response, the Complainant certified that the .pst access issue was part of the complaint and also argued that she did not receive additional records she believed existed.

In determining whether to accept the request for reconsideration, the GRC first notes that the party submissions have formulated an unclear picture of what issue is being presented for adjudication. Specifically, the Complainant’s arguments in the Denial of Access Complaint are disorganized and unclear. As for the SOI, the Custodian chose to provide a timeline of correspondence between the parties, the 93-page document index, and no legal arguments addressing what they believed was the issue at the center of this complaint. Instead, it was only after the Administrative Order that the County attempted to frame the issue currently before the GRC in the request for reconsideration. Absent from that submission is a clear statement as to whether the records identified in the document index were being disclosed as part of the 72,000 pages of available records. Unfortunately, the Complainant’s response did little to further clarify her complaint beyond the .pst conversion issue.

Based on the above, the GRC was forced to take the evidence before it and seek to conduct an *in camera* review. This Order was due to the lack of cogent arguments presented by the parties and not due to a “mistake” as asserted by Custodian’s Counsel. Further, the request for reconsideration appears to be an attempt to divert the GRC from the Complainant’s assertion that she believed she was not provided with additional records that existed. While not entirely fleshed out due to the technological issue, the Complainant does in multiple instances assert that she did

not believe she received all records that existed. Such an assertion is hard to assess because the Complainant could not access the records received in the first instance.

For these reasons, the GRC is persuaded that rejection of the request for reconsideration should occur. However, now that the Council has at least a slightly clearer picture of the issues, it should consider suspending the Administrative Order pending an additional certification from the County on whether the records identified in the SOI document index were being disclosed.

As the moving party, Custodian's Counsel was required to establish either of the necessary criteria set forth above: either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. See Cummings, 295 N.J. Super. at 384. Custodian's Counsel failed to establish that the complaint should be reconsidered based on a "mistake." Counsel has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. See D'Atria, 242 N.J. Super. at 401. Simply put, the request for reconsideration appears to be a diversion from whether those records identified in the SOI document index were being withheld, redacted, or fully disclosed. Thus, Counsel's request for reconsideration should be denied. Cummings, 295 N.J. Super. at 384; D'Atria, 242 N.J. Super. at 401; Comcast, 2003 N.J. PUC at 5-6. **However, the GRC recommends the Administrative Order be suspended pending the Council's consideration of a legal certification directly advising whether the records (and relevant attachments) identified in the SOI document index were being withheld in their entirety, disclosed with redactions, or disclosed in their entirety. The Custodian shall comply with above within ten (10) business days from receipt of the Council's Interim Order through a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4.**

Copying Costs

OPRA provides that "the fee assessed for the duplication of a government record embodied in the form of printed matter shall be \$0.05 per letter size page or smaller, and \$0.07 per legal size page or larger" N.J.S.A. 47:1A-5(b). Moreover, OPRA provides that providing access to records electronically "shall be provided free of charge, but the public agency may charge for the actual costs of any needed supplies such as computer discs." Id. Further, the Council has previously held that a custodian is not required to disclose responsive records until after receiving the assessed fee. Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006); see also Ross, Sr. v. N.J. Dep't of Corr., GRC Complaint No. 2018-202 (April 2020). Finally, the Council has held that OPRA does not contain a provision requiring public agencies to waive fees on certain bases. See Reid v. GRC & N.J. Dep't of Corr., 2013 N.J. Super. Unpub. LEXIS 2625 (App. Div. 2013).¹²

Here, the Complainant sought to pick up responsive records in hard copy. Acknowledging the volume of records sought, the Custodian offered the responsive records electronically on a thumb drive. Potentially on or about March 3, 2020, the Complainant appears to have paid \$46.10 for hard copies of responsive records. This complaint followed, wherein the Custodian argued in part that she was seeking a refund of the forgoing payment. In the SOI, the Custodian argued that he offered to disclose the records in hardcopy with an assessed fee, which the Complainant

¹² Affirming Reid, GRC 2010-83 wherein the Council held that OPRA did not require the custodian to waive copy costs due to the complainant's alleged indigency status.

rejected. In response to the GRC's request for additional information, the Complainant again confirmed that she paid \$46.10 for some of the responsive records but did not address whether those disclosed were in hardcopy. The Complainant further demanded that she receive all remaining records and that she would not pay an additional fee.

The GRC has already addressed the parties confusing arguments presented here highlighted by the payment issue. Specifically, the Complainant argued that records at issue here were provided in .pst format on a thumb drive. However, the Complainant also argued she received records upon payment of \$46.10, which appears to comport with the Custodian's March 3, 2020 offer to retrieve hard copies of certain records after 4:00pm. The GRC subsequently asked the Complainant to clarify whether she paid the fee for hard copies of records responsive to the subject OPRA request. The Complainant responded but did not provide a clear answer other than that she paid the fee.

OPRA is clear that an agency can charge a fixed, per-page fee to disclose hard copies of records. N.J.S.A. 47:1A-5(b). Further, the Council's case law supports that agencies are not required to waive said fee upon request or for cause. Reid, 2013 N.J. Super. Unpub. LEXIS 2625. Based on this, the Custodian would not have violated OPRA by requiring the Complainant to pay a per-page fee for any hard copy records she received. Notwithstanding the confusion caused by the parties' submissions, the GRC is persuaded that the copy cost paid by the Complainant was allowed by law and is thus not refundable. Further, the County was under no obligation to provide hard copies without imposition of appropriate per-page copy costs. Thus, the Custodian did not violate OPRA to the extent that the Complainant received hard copies of some of the responsive records for a fee.

Therefore, to the extent that the Custodian made hard copies of records available for the appropriate per-page copy cost set forth in N.J.S.A. 47:1A-5(b), no violation of OPRA occurred. N.J.S.A. 47:1A-6. Thus, no refund of those appropriate copy costs is warranted here. Further, the Custodian would not be required to waive any copy cost or disclose hard copies of additional records until receipt of payment. Reid, 2013 N.J. Super. Unpub. LEXIS 2625; Paff, GRC 2006-54.

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.

OPRA further provides that:

A custodian shall permit access to a government record and provide a copy thereof in the medium requested if the public agency maintains the record in that medium. If the public agency does not maintain the record in the medium requested, the

custodian shall either convert the record to the medium requested or provide a copy in some other meaningful medium.

[N.J.S.A. 47:1A-5(d).]

Here, the Complainant, Custodian, and Custodian's Counsel all appear to agree that voluminous responsive records disclosed in .pst exist and that disclosure is warranted. In fact, the Custodian already disclosed them on a thumb drive in February 2020. However, the Complainant was unable to access same and has demanded disclosure in hard copy with a fee waiver prior to filing this complaint, wherein she reiterated her inability to access the disclosed records. In the SOI, the Custodian argued that he offered multiple access options, and that the County was able to disclose the e-mails in .pdf on a thumb drive. The County, through Custodian's Counsel, continues to repeatedly assert that records could be disclosed in .pdf on a thumb drive. Counsel has also advised that she has already converted a portion of the records. Yet, the evidence of record supports that no such disclosure has occurred to this point.

Based on the above, the threshold issue amounts to a "medium conversion" question governed under N.J.S.A. 47:1A-5(d). The Custodian correctly notes that the Complainant did not identify a specific file format in her OPRA request. However, the Complainant made it clear prior to the filing of this complaint that she could not access the records produced in .pst format. In keeping with OPRA, the Custodian had an obligation at that point to convert and disclose the records in "some other meaningful medium" to the Complainant. Id. The Custodian offered to do just that in March 2020 and the conversion concurrently began according to Counsel. Thus, there is not evidence in the record that would support the Custodian's interruption of the conversion process or failure to re-disclose those records in the "other meaningful medium."

As a comparison, the Appellate Division previously reversed the Council's decision finding an unlawful denial of access because a custodian failed to convert a digital recording from one file format to another. Wolosky v. Twp. of Sparta, 2012 N.J. Super. Unpub. LEXIS 2717, 7-8 (App. Div. 2012). In reaching that conclusion, the court reasoned that the custodian disclosed the recording on a CD with the client software needed to play the recording. The court found that this disclosure "afforded [the complainant] full access to the requested information." Id. at 8. The opposite can be said here, where the Complainant advised the Custodian multiple times that she could not access the .pst files. While there was an offer to assist the Complainant, the Custodian also offered the records in .pdf, but for reasons unknown to the GRC never endeavored to simply convert and disclose them.

Accordingly, the Custodian unlawfully denied access to the responsive e-mails (and attachments where applicable) by failing to provide them in a "meaningful medium" to the Complainant. N.J.S.A. 47:1A-5(d). Thus, the Custodian has not borne his burden of proving that his actions were appropriate under OPRA. N.J.S.A. 47:1A-6. The Custodian shall complete the conversion of all responsive e-mails (and attachments) to .pdf format and disclose same to the Complainant.

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. Custodian's Counsel has failed to establish in her request for reconsideration of the Council's February 27, 2024 Administrative Order that either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. Counsel failed to establish that the complaint should be reconsidered based on "mistake." Counsel has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Simply put, the request for reconsideration appears to be a diversion from whether those records identified in the SOI document index were being withheld, redacted, or fully disclosed. Thus, Counsel's request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003). **However, the GRC recommends the Administrative Order be suspended pending the Council's consideration of a legal certification directly advising whether the records (and relevant attachments) identified in the Statement of Information document index were being withheld in their entirety, disclosed with redactions, or disclosed in their entirety. The Custodian shall comply with above within ten (10) business days from receipt of the Council's Interim Order through a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4.**¹³
2. To the extent that the Custodian made hard copies of records available for the appropriate per-page copy cost set forth in N.J.S.A. 47:1A-5(b), no violation of OPRA occurred. N.J.S.A. 47:1A-6. Thus, no refund of those appropriate copy costs is warranted here. Further, the Custodian would not be required to waive any copy cost or disclose hard copies of additional records until receipt of payment. Reid v. GRC & N.J. Dep't of Corr., 2013 N.J. Super. Unpub. LEXIS 2625 (App. Div. 2013); Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006).
3. The Custodian unlawfully denied access to the responsive e-mails (and attachments where applicable) by failing to provide them in a "meaningful medium" to the Complainant. N.J.S.A. 47:1A-5(d). Thus, the Custodian has not borne his burden of proving that his actions were appropriate under OPRA. N.J.S.A. 47:1A-6. The

¹³ "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."

Custodian shall complete the conversion of all responsive e-mails (and attachments) to .pdf format and disclose same to the Complainant.

4. **The Custodian shall comply with item No. 3 above within ten (10) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver¹⁴ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,¹⁵ to the Executive Director.¹⁶**
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: Frank F. Caruso
Executive Director

June 18, 2024

¹⁴ 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.

¹⁵ "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."

¹⁶ 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.



NEW JERSEY GOVERNMENT RECORDS COUNCIL
Administrative Order – *In Camera* Review

Lisa Andreula-Porto
Complainant

GRC Complaint No. 2020-62

v.

Cape May County
Custodial Agency

Custodian of Record: Jeffrey Lindsay
Request Received by Custodian: December 10, 2019
GRC Complaint Received: March 11, 2020

Order: The GRC must conduct an *in camera* review of all responsive e-mails including attachments where applicable) to determine the validity of the Custodian's assertion that those records were exempt under the cited exemptions. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-10. See Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346, 355 (App. Div. 2005). **Thus, The Custodian shall deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted record and a document or redaction index.²**

This is an Administrative Order requiring compliance within ten (10) business days after receipt thereof. The Custodian shall also simultaneously deliver certified confirmation of compliance with this Order, in accordance with N.J. Court Rules, R. 1:4-4,³ to the Executive Director that the record(s) provided is(are) the record(s) requested by the Council for the *in camera* inspection.

Effective Date of Disposition: February 27, 2024

Prepared By: Frank F. Caruso
Executive Director

Date: February 20, 2024

Distribution Date: February 29, 2024

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."