



State of New Jersey

DEPARTMENT OF COMMUNITY AFFAIRS

101 SOUTH BROAD STREET

PO Box 819

TRENTON, NJ 08625-0819

PHILIP D. MURPHY
Governor

TAHESHA L. WAY
Lieutenant Governor

JACQUELYN A. SUÁREZ
Acting Commissioner

FINAL DECISION

April 30, 2024 Government Records Council Meeting

Joseph Holzli
Complainant

Complaint No. 2021-113

v.

City of Clifton (Passaic)
Custodian of Record

At the April 30, 2024 public meeting, the Government Records Council (“Council”) considered the April 23, 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. The Custodian did not comply with the Council’s January 30, 2024 Interim Order because she failed to deliver to the Council copies of the unredacted record and failed to provide certified confirmation of compliance, as specified in said Order.
2. An *in camera* examination of the requested Palma Report has determined that the record constitutes advisory, consultative, or deliberative material; therefore, it is not a government record subject to access. N.J.S.A. 47:1A-1.1; In re the Liquidation of Integrity Ins. Co., 165 N.J. 75, (2000). Thus, the Custodian did not unlawfully deny access to the responsive record. N.J.S.A. 47:1A-6. Because the record is exempt from access as advisory, consultative, or deliberative material, it is unnecessary for the Council to determine if the record was lawfully denied as attorney-client privileged or as a personnel record.

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 30th Day of April 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: May 2, 2024

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
April 30, 2024 Council Meeting**

**Joseph Holzli¹
Complainant**

GRC Complaint No. 2021-113

v.

**City of Clifton (Passaic)²
Custodial Agency**

Records Relevant to Complaint:

OPRA Request Agency Number 543 dated April 27, 2021 A copy via regular mail of “the report the city council had a local attorney investigate the harassment of officers serving in the military. The report had been completed in sometime 2019 (sic).”

OPRA Request Agency Number 544 dated April 27, 2021 A copy via regular mail of “Mr (sic) Joseph Kunz the CCFO letter in Nov 2018 (sic) police officers in the military to submit pay stubs for excused military leave of absences (sic) from the Clifton Police during the period from 2011 November 2018.”

Custodian of Record: Nancy Ferrigno

Requests Received by Custodian: April 28, 2021

Responses Made by Custodian: May 10, 2021

GRC Complaint Received: June 2, 2021

Record Submitted for *In Camera* Examination: A thirty-two (32) page independent investigation report prepared by Nicholas J. Palma, Esq. dated March 23, 2020 (“Palma Report”). The report was submitted in redacted form.

Background

January 30, 2024 Council Meeting:

At its January 30, 2024 public meeting, the Government Records Council (“Council”) considered the January 23, 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, found that:

¹ No legal representation listed on record.

² Represented by Scott J. DeRosa, Esq. (Clifton, NJ).

1. The GRC must conduct an *in camera* review of the requested report dated March 23, 2020, prepared by Nicholas J. Palma, Esq., to validate the Custodian's contention that it consists of advisory, consultative, or deliberative material, and/or is a personnel record, and/or is attorney-client privileged and therefore exempt from access under OPRA. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-10. See Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).
2. **The Custodian must deliver to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see conclusion number 1 above), a document or redaction index, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4, 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 ten (10) business days from receipt of the Council's Interim Order.**
3. Although the Custodian's May 10, 2021 response to the Complainant's April 28, 2021 OPRA request (Agency Number 544) seeking personnel records is no longer a lawful denial pursuant to Libertarians for Transparent Gov't v. Cumberland Cty., 250 N.J. 46 (2022), her response was nonetheless lawful at that time because it was consistent with the prevailing case law prior to the Supreme Court's ruling. N.J.S.A. 47:1A-6; Libertarians for Transparent Gov't v. Cumberland Cty., 465 N.J. Super. 11 (App. Div. 2020), GRC 2009-144. Thus, the Council declines to order disclosure.

Procedural History:

On February 1, 2024, the Council distributed its January 30, 2024 Interim Order to all parties. On February 14, 2024, the Custodian's Counsel responded to the Council's Interim Order by submitting to the GRC a "request for a stay and/or reconsideration" of the Council's Interim Order. The stay was requested pending appeal of a trial court decision which permitted disclosure of the Palma Report. Reconsideration³ was requested asserting error by the GRC in ordering an *in camera* examination of the Palma Report.

On February 16, 2024, the Executive Director reviewed the request for a stay and/or reconsideration and denied said request. The GRC directed the Custodian to comply with the terms of the Interim Order on or before March 1, 2024.

On February 28, 2024, the Custodian's Counsel submitted nine (9) copies of the Palma Report in redacted form, a document index, and a certification prepared by Matthew T. Priore, Esq., that the records provided are ". . . true and accurate copies of the report authored by Nicholas Palma with no alterations or redactions other than the name of the Target of the investigation[.]"⁴

³ The GRC notes that Custodian's Counsel did not include in their submission the "request for reconsideration" form required under N.J.A.C. 5:105-10(d).

⁴ The document index was a reprint of Item 9 from the Statement of Information.

Analysis

Compliance

At its January 30, 2024 public meeting, the Council ordered the Custodian to deliver to the Council nine (9) copies of the requested unredacted record (i.e., the Palma Report), a document or redaction index, as well as a legal certification from the Custodian that the records provided are the records requested by the Council for the *in camera* inspection. On February 1, 2024, the Council distributed its Interim Order to all parties, providing the Custodian ten (10) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on February 15, 2024.

On February 14, 2024, the ninth (9th) business day after receipt of the Council's Order, the Custodian's Counsel responded to the Council's Interim Order by submitting to the GRC a request for a stay and/or reconsideration of the Council's Order. On February 16, 2024, the GRC denied the Custodian's request for a stay and/or reconsideration of the Order and directed the Custodian to comply with the terms of the Order by March 1, 2024.

On February 28, 2024, the Custodian's Counsel submitted nine (9) copies of the Palma Report in redacted form, a document index, and a certification prepared by Matthew T. Priore, Esq., that the records provided are true copies of the Palma Report with redactions made to delete the name of the target of the investigation. However, the Custodian failed to respond to the Council's Order.⁵

Therefore, the Custodian did not comply with the Council's January 30, 2024 Interim Order because she failed to deliver to the Council copies of the unredacted record and failed to provide certified confirmation of compliance, as specified in said Order.

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 excludes from the definition of a government record ". . . inter-agency or intra-agency advisory, consultative or deliberative material." N.J.S.A. 47:1A-1.1. It is evident that this phrase is intended to exclude from the definition of a government record the types of documents that are the subject of the "deliberative process privilege."

In O'Shea v. W. Milford Bd. of Educ., GRC Complaint No. 2004-93 (April 2006), the Council stated that:

⁵"'Custodian of a government record' or 'custodian' means in the case of a municipality, the municipal clerk . . ." N.J.S.A. 47:1A-1.1. The GRC never received notice from the municipality that the Custodian was on leave or otherwise unable to comply with the Council's Order.

[N]either the statute nor the courts have defined the terms . . . “advisory, consultative, or deliberative” in the context of the public records law. The Council looks to an analogous concept, the deliberative process privilege, for guidance in the implementation of OPRA’s ACD exemption. Both the ACD exemption and the deliberative process privilege enable a governmental entity to shield from disclosure material that is pre-decisional and deliberative in nature. Deliberative material contains opinions, recommendations, or advice about agency policies. In re the Liquidation of Integrity Ins. Co., 165 N.J. 75, (2000); In re Readoption With Amendments of Death Penalty Regulations, 182 N.J.149 (2004).

The deliberative process privilege is a doctrine that permits government agencies to withhold documents that reflect advisory opinions, recommendations and deliberations submitted as part of a process by which governmental decisions and policies are formulated. NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975). Specifically, the New Jersey Supreme Court has ruled that a record that contains or involves factual components is entitled to deliberative-process protection under the exemption in OPRA when it was used in the decision-making process *and* its disclosure would reveal deliberations that occurred during that process. Educ. Law Ctr. v. N.J. Dep’t of Educ., 198 N.J. 274 (2009). This long-recognized privilege is rooted in the concept that the sovereign has an interest in protecting the integrity of its deliberations. The earliest federal case adopting the privilege is Kaiser Alum. & Chem. Corp. v. United States, 157 F. Supp. 939 (1958). The privilege and its rationale were subsequently adopted by the federal district courts and circuit courts of appeal. United States v. Farley, 11 F.3d 1385, 1389 (7th Cir.1993).

The deliberative process privilege was discussed at length in Integrity, 165 N.J. 75. There, the Court addressed the question of whether the Commissioner of Insurance, acting in the capacity of liquidator of a regulated entity, could protect certain records from disclosure which she claimed contained opinions, recommendations or advice regarding agency policy. Id. at 81. The Court adopted a qualified deliberative process privilege based upon the holding of McClain v. Coll. Hosp., 99 N.J. 346 (1985). Id. at 88. In doing so, the Court noted that:

A document must meet two requirements for the deliberative process privilege to apply. First, it must have been generated before the adoption of an agency's policy or decision. In other words, it must be pre-decisional . . . Second, the document must be deliberative in nature, containing opinions, recommendations, or advice about agency policies . . . Purely factual material that does not reflect deliberative processes is not protected . . . Once the government demonstrates that the subject materials meet those threshold requirements, the privilege comes into play. In such circumstances, the government's interest in candor is the “preponderating policy” and, prior to considering specific questions of application, the balance is said to have been struck in favor of non-disclosure.

[Id.] at 84-85 (citations omitted).

The Court further set out procedural guidelines based upon those discussed in McClain:

The initial burden falls on the state agency to show that the documents it seeks to shield are pre-decisional and deliberative in nature (containing opinions, recommendations, or advice about agency policies). Once the deliberative nature of the documents is established, there is a presumption against disclosure. The burden then falls on the party seeking discovery to show that his or her compelling or substantial need for the materials overrides the government's interest in non-disclosure. Among the considerations are the importance of the evidence to the movant, its availability from other sources, and the effect of disclosure on frank and independent discussion of contemplated government policies.

[Integrity, 165 N.J. at 88 (citing McClain, 99 N.J. at 361-62).]

Results of the *In Camera* Examination

Here, although the Council ordered the Custodian to deliver unredacted copies of the Palma Report for *in camera* examination, the Custodian's Counsel delivered copies that were redacted to delete the name of the target of the investigation. Ordinarily, a custodian's failure to comply with the terms of the Council's Order by delivering redacted copies of the requested records for *in camera* examination would hinder the GRC's ability to effectively examine the record. However, the names of individuals contained within the Palma Report were inconsequential in view of the Custodian's reasons for denying access to the record. The GRC is conducting this *in camera* examination to validate the Custodian's contention that it consists of advisory, consultative, or deliberative ("ACD") material, and/or is a personnel record, and/or is attorney-client privileged and therefore exempt from access under OPRA. The nature of the record, rather than names that may have been included in the record, was of greater significance to the GRC. Therefore, despite the Custodian's failure to submit unredacted copies of the Palma Report as ordered by the Council, the GRC was nonetheless able to conduct a meaningful *in camera* examination of the record.

The Custodian certified in the SOI that, "[t]he [Palma Report] . . . was intended to provide the City with enough information to determine whether any corrective and/or disciplinary action was needed." Moreover, the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. As such, the GRC is satisfied that the record is pre-decisional. The GRC's *in camera* examination determined that the record contains opinions concerning municipal operations as well as several recommendations proposed for adoption to modify internal policies. Therefore, the record was lawfully denied as ACD material.

Accordingly, an *in camera* examination of the requested Palma Report has determined that the record constitutes ACD material; therefore, it is not a government record subject to access. N.J.S.A. 47:1A-1.1; Integrity, 165 N.J. 75. Thus, the Custodian did not unlawfully deny access to the responsive record. N.J.S.A. 47:1A-6. Because the record is exempt from access as ACD material, it is unnecessary for the Council to determine if the record was lawfully denied as attorney-client privileged or as a personnel record.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not comply with the Council's January 30, 2024 Interim Order because she failed to deliver to the Council copies of the unredacted record and failed to provide certified confirmation of compliance, as specified in said Order.
2. An *in camera* examination of the requested Palma Report has determined that the record constitutes advisory, consultative, or deliberative material; therefore, it is not a government record subject to access. N.J.S.A. 47:1A-1.1; In re the Liquidation of Integrity Ins. Co., 165 N.J. 75, (2000). Thus, the Custodian did not unlawfully deny access to the responsive record. N.J.S.A. 47:1A-6. Because the record is exempt from access as advisory, consultative, or deliberative material, it is unnecessary for the Council to determine if the record was lawfully denied as attorney-client privileged or as a personnel record.

Prepared By: John E. Stewart

April 23, 2024



PHILIP D. MURPHY
Governor

TAHESHA L. WAY
Lieutenant Governor

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

JACQUELYN A. SUÁREZ
Acting Commissioner

INTERIM ORDER

January 30, 2024 Government Records Council Meeting

Joseph Holzli
Complainant

Complaint No. 2021-113

v.

City of Clifton (Passaic)
Custodian of Record

At the January 30, 2024 public meeting, the Government Records Council (“Council”) considered the January 23, 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. The GRC must conduct an *in camera* review of the requested report dated March 23, 2020, prepared by Nicholas J. Palma, Esq., to validate the Custodian’s contention that it consists of advisory, consultative, or deliberative material, and/or is a personnel record, and/or is attorney-client privileged and therefore exempt from access under OPRA. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-10. See Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).
2. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see conclusion number 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 ten (10) business days from receipt of the Council’s Interim Order.**
3. Although the Custodian’s May 10, 2021 response to the Complainant’s April 28, 2021 OPRA request (Agency Number 544) seeking personnel records is no longer a lawful denial pursuant to Libertarians for Transparent Gov’t v. Cumberland Cty., 250 N.J. 46 (2022), her response was nonetheless lawful at that time because it was consistent with the prevailing case law prior to the Supreme Court’s ruling. N.J.S.A. 47:1A-6;

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 they arrive at the GRC office 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.”

Libertarians for Transparent Gov't v. Cumberland Cty., 465 N.J. Super. 11 (App. Div. 2020), GRC 2009-144. Thus, the Council declines to order disclosure.

Interim Order Rendered by the
Government Records Council
On The 30th Day of January 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: February 1, 2024

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 30, 2024 Council Meeting**

**Joseph Holzli¹
Complainant**

GRC Complaint No. 2021-113

v.

**City of Clifton (Passaic)²
Custodial Agency**

Records Relevant to Complaint:

OPRA Request Agency Number 543 dated April 27, 2021 A copy via regular mail of “the report the city council had a local attorney investigate the harassment of officers serving in the military. The report had been completed in sometime 2019 (sic).”

OPRA Request Agency Number 544 dated April 27, 2021 A copy via regular mail of “Mr (sic) Joseph Kunz the CCFO letter in Nov 2018 (sic) police officers in the military to submit pay stubs for excused military leave of absences (sic) from the Clifton Police during the period from 2011 November 2018.”

Custodian of Record: Nancy Ferrigno
Requests Received by Custodian: April 28, 2021
Responses Made by Custodian: May 10, 2021
GRC Complaint Received: June 2, 2021

Background³

Requests and Responses:

On April 28, 2021, the Complainant submitted two (2) Open Public Records Act (“OPRA”) requests to the Custodian seeking the above-mentioned records. On May 10, 2021, the Custodian responded in writing separately to both requests.⁴ The Custodian denied the request assigned Agency Number 543 because (1) it constitutes advisory, consultative, or deliberative (“ACD”) material; therefore, it is not a government record pursuant to N.J.S.A. 47:1A-1.1; (2) it

¹ No legal representation listed on record.

² Represented by Scott J. DeRosa, Esq. (Clifton, 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.

⁴ The Custodian certified that on or about May 6, 2021, the Complainant notified her office that he wanted to personally pick up the responses on May 10, 2021. As such, the Custodian certified that she had the responses prepared for pick up on May 10, 2021.

is a record generated by or on behalf of public employers or public employees in connection with any grievance filed by or against an individual and is therefore exempt from access under N.J.S.A. 47:1A-1.1; (3) it is a personnel record and is exempt from disclosure pursuant to N.J.S.A. 47:1A-10; it is an attorney-client privileged communication. The Custodian denied request assigned Agency Number 544 because the requested records are personnel records exempt from access under N.J.S.A. 47:1A-10.

Denial of Access Complaint:

On June 2, 2021, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant stated that on April 27, 2021, he delivered two (2) OPRA requests (Agency Numbered 543 and 544) to a female employee of the City of Clifton (“City”) at the front door of the municipal building because the building was not open to the public. The Complainant stated that the Custodian responded on May 10, 2021, denying his requests.

The Complainant further stated that with respect to request assigned Agency Number 543, the report was to investigate if Clifton Police in the military were harassed and told they had to choose whether to serve as members of the military or as police officers. The Complainant stated that with respect to request assigned Agency Number 544, he is not seeking disclosure of any names of police officers excused for military leave.

Statement of Information:

On June 21, 2021, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA requests on April 28, 2021. The Custodian certified that she responded on May 7, 2021, and the Complainant picked up the responses on May 10, 2021. The Custodian determined that the records listed in the following table, together with the reasons for denial, are responsive to the Complainant’s request:⁵

Record No.	Description	Reason for Denial
1	Report prepared by Nicholas J. Palma, Esq. regarding his investigation into claims of harassment and discrimination in the workplace involving city employees dated March 23, 2020 (32 pages).	<p>The Custodian certified in the SOI that the record is exempt from access because it:</p> <ul style="list-style-type: none"> Contains ACD material; therefore, it is not a government record pursuant to <u>N.J.S.A. 47:1A-1.1</u>. Constitutes a personnel record and is exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-10</u>. Contains attorney-client privileged

⁵ Record number 1 is responsive to the Complainant’s request assigned agency number 543. Records numbered 2 through 26 are responsive to the Complainant’s request assigned agency number 544.

		material pursuant to <u>N.J.S.A. 47:1A-1.1.</u>
2	Letter from the Chief Financial Officer (“CFO”) dated November 27, 2018, to Police Officer S.A. regarding pay stubs for military leave.	Constitutes a personnel record and is exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-10.</u>
3	Letter from the CFO dated November 15, 2018, to Police Officer S.A. regarding pay stubs for military leave.	Constitutes a personnel record and is exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-10.</u>
4	Letter from the CFO dated November 27, 2018, to Police Officer V.A. regarding pay stubs for military leave.	Constitutes a personnel record and is exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-10.</u>
5	Letter from the CFO dated November 15, 2018, to Police Officer V.A. regarding pay stubs for military leave.	Constitutes a personnel record and is exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-10.</u>
6	Letter from the CFO dated November 27, 2018, to Police Officer B.B. regarding pay stubs for military leave.	Constitutes a personnel record and is exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-10.</u>
7	Letter from the CFO dated November 19, 2018, to Police Officer B.B. regarding pay stubs for military leave.	Constitutes a personnel record and is exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-10.</u>
8	Letter from the CFO dated November 27, 2018, to Police Officer E.D. regarding pay stubs for military leave.	Constitutes a personnel record and is exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-10.</u>
9	Letter from the CFO dated November 19, 2018, to Police Officer E.D. regarding pay stubs for military leave.	Constitutes a personnel record and is exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-10.</u>
10	Letter from the CFO dated November 15, 2018, to Police Officer E.D. regarding pay stubs for military leave.	Constitutes a personnel record and is exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-10.</u>
11	Letter from the CFO dated November 27, 2018, to Police Officer L.G. regarding pay stubs for military leave.	Constitutes a personnel record and is exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-10.</u>
12	Letter from the CFO dated November 19, 2018, to Police	Constitutes a personnel record and is exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-</u>

	Officer L.G. regarding pay stubs for military leave.	10.
13	Letter from the CFO dated November 27, 2018, to Police Officer R.M. regarding pay stubs for military leave.	Constitutes a personnel record and is exempt from disclosure pursuant to <u>N.J.S.A.</u> 47:1A-10.
14	Letter from the CFO dated November 19, 2018, to Police Officer R.M. regarding pay stubs for military leave.	Constitutes a personnel record and is exempt from disclosure pursuant to <u>N.J.S.A.</u> 47:1A-10.
15	Letter from the CFO dated November 15, 2018, to Police Officer R.M. regarding pay stubs for military leave.	Constitutes a personnel record and is exempt from disclosure pursuant to <u>N.J.S.A.</u> 47:1A-10.
16	Letter from the CFO dated November 27, 2018, to Police Officer E.P. regarding pay stubs for military leave.	Constitutes a personnel record and is exempt from disclosure pursuant to <u>N.J.S.A.</u> 47:1A-10.
17	Letter from the CFO dated November 19, 2018, to Police Officer E.P. regarding pay stubs for military leave.	Constitutes a personnel record and is exempt from disclosure pursuant to <u>N.J.S.A.</u> 47:1A-10.
18	Letter from the CFO dated November 15, 2018, to Police Officer E.P. regarding pay stubs for military leave.	Constitutes a personnel record and is exempt from disclosure pursuant to <u>N.J.S.A.</u> 47:1A-10.
19	Letter from the CFO dated November 27, 2018, to Police Officer D.P. regarding pay stubs for military leave.	Constitutes a personnel record and is exempt from disclosure pursuant to <u>N.J.S.A.</u> 47:1A-10.
20	Letter from the CFO dated November 15, 2018, to Police Officer D.P. regarding pay stubs for military leave.	Constitutes a personnel record and is exempt from disclosure pursuant to <u>N.J.S.A.</u> 47:1A-10.
21	Letter from the CFO dated November 27, 2018, to Police Officer D.R. regarding pay stubs for military leave.	Constitutes a personnel record and is exempt from disclosure pursuant to <u>N.J.S.A.</u> 47:1A-10.
22	Letter from the CFO dated November 19, 2018, to Police Officer D.R. regarding pay stubs for military leave.	Constitutes a personnel record and is exempt from disclosure pursuant to <u>N.J.S.A.</u> 47:1A-10.
23	Letter from the CFO dated November 15, 2018, to Police Officer D.R. regarding pay stubs for military leave.	Constitutes a personnel record and is exempt from disclosure pursuant to <u>N.J.S.A.</u> 47:1A-10.

24	Letter from the CFO dated November 27, 2018, to Police Officer M.Z. regarding pay stubs for military leave.	Constitutes a personnel record and is exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-10</u> .
25	Letter from the CFO dated November 19, 2018, to Police Officer M.Z. regarding pay stubs for military leave.	Constitutes a personnel record and is exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-10</u> .
26	Letter from the CFO dated November 15, 2018, to Police Officer M.Z. regarding pay stubs for military leave.	Constitutes a personnel record and is exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-10</u> .

With respect to the request assigned Agency Number 543, the Custodian certified that in January of 2019, the City was served with a Tort Claims Notice, which put the City on notice of potential litigation regarding alleged discrimination and harassment of various members of the Clifton Police Department based on their military status. The Custodian certified that the City then retained the Law Offices of Nicholas J. Palma, Esq. to investigate the discrimination and harassment claims made by the police officers. The Custodian certified that the requested report contains recommendations intended to provide the City with enough information to determine whether any corrective and/or disciplinary action was needed. The Custodian further certified that the report is pre-decisional and encompasses advisory opinions and recommendations containing policy issues. As such, the Custodian certified that the report was lawfully withheld from disclosure as ACD material. The Custodian certified that in addition to being denied as ACD material, it is also exempt from access as a personnel record and an attorney-client privileged document.

With respect to the request assigned Agency Number 544, the Custodian certified that the City performed an audit of its records and realized that various police officers who also served in the military may have been over compensated because they failed to produce a copy of their military pay stubs, which would have reduced the pay that was provided by the City. The Custodian certified that to recoup money that may have been improperly issued, the CFO delivered a letter to each such officer and requested their military paystubs. The letter also contained information related to each such employee's military status, accumulated military leave, amount of money owed to the City and potential remedial action if the employee failed to provide the information requested by the CFO. The Custodian certified that, due to their content, the requested letters are personnel records.

The Custodian certified that pursuant to N.J.S.A. 47:1A-10, except for an individual's name, title, position, salary, payroll record, length of service, date of separation and reason therefor, and amount and type of any pension received, personnel records are not subject to disclosure. The Custodian cited Libertarians for Transparent Gov't v. Cumberland Cty., 465 N.J. Super. 11 (App. Div. 2020), and quoted the Appellate Division's statement that "OPRA does not generally require government agencies to make exempt personnel and pension records accessible in redacted form." Id. at 24. For this reason, the Custodian certified that there was no basis for the City to produce the letters in redacted form. The Custodian certified that, in reliance on the

Appellate Division's decision in Libertarians, 465 N.J. Super. 11, the records responsive to request assigned Agency Number 544 are exempt from access in their entirety.

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.

OPRA Request Agency Number 543

This request is for a report dated March 23, 2020, that the City of Clifton retained Nicholas J. Palma, Esq. to prepare. The report is alleged to be an investigation by Mr. Palma into claims of harassment and discrimination in the workplace involving city employees. The Custodian certified in the SOI that the report is exempt from access upon three (3) grounds. First, the Custodian certified that the report is ACD material and is exempt from access under N.J.S.A. 47:1A-1.1. Second, the Custodian certified that the report is a personnel record, and as such is exempt from access under N.J.S.A. 47:1A-10. Finally, the Custodian certified that the report is exempt from access because it is an attorney-client privileged communication.

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 Council⁶ 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:

⁶ Paff v. N.J. Dep't of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

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.]

Here, the Custodian certified that the requested report dated March 23, 2020, prepared by Nicholas J. Palma, Esq. is exempt from access because it constitutes ACD material exempt from access pursuant to N.J.S.A. 47:1A-1.1. The Custodian also certified that it is exempt from access as a personnel record pursuant to N.J.S.A. 47:1A-10, and as an attorney-client privileged communication. In view of the Custodian's burden to prove a lawful denial of access, the GRC must conduct a "meaningful review of the basis for an agency's decision to withhold government records." Paff, 379 N.J. Super. 346, 354.

Accordingly, the GRC must conduct an *in camera* review of the requested report dated March 23, 2020, prepared by Nicholas J. Palma, Esq., to validate the Custodian's contention that it consists of ACD material, and/or is a personnel record, and/or is attorney-client privileged and therefore exempt from access under OPRA. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-10. See Paff, 379 N.J. Super. 346.

OPRA Request Agency Number 544

The Custodian determined that twenty-five (25) letters from the CFO to various City police officers were personnel records responsive to the request. The Custodian certified that although N.J.S.A. 47:1A-10 provides that personnel records are not government records subject to disclosure, certain information contained in the personnel record is a government record; specifically, an individual's name, title, position, salary, payroll record, length of service, date of separation and reason therefor, and amount and type of any pension received. The Custodian certified in the SOI that the records need not be redacted to remove all but the N.J.S.A. 47:1A-10 information, however, because Libertarians, 465 N.J. Super. 11, held that a custodian is not required to make exempt personnel records accessible in redacted form.

At the time of the Complainant's OPRA request, Libertarians, 465 N.J. Super. 11, was the precedential decision relating to a custodian's obligation when disclosing personnel records under N.J.S.A. 47:1A-10. In that case, the plaintiffs discovered through meeting minutes that a corrections officer was involved in a misconduct investigation along with several other officers. Id. at 13-14. Originally, the officer was to be terminated but was allowed to "retire in good standing" after cooperating with the investigation in accordance with a settlement agreement. Id. The plaintiffs then submitted an OPRA request seeking the settlement agreement referenced in the minutes, and the officer's "name, title, position, salary, length of service, date of separation and the reason therefore" pursuant to N.J.S.A. 47:1A-10. Id. The defendants declined to provide the settlement agreement, claiming it was a personnel record exempt from access. Id.

The plaintiffs challenged the denial of access to the settlement agreement, asserting that the defendants “misrepresent[ed] the ‘reason’ for Ellis’s separation from public employment” and improperly withheld a government record. Id. at 15. The trial court ordered disclosure of the settlement agreement with redactions, and the Appellate Division reversed, finding that the record was exempt as a personnel record under N.J.S.A. 47:1A-10.

Here, during the pendency of this complaint, the New Jersey Supreme Court reversed the Appellate Division and ordered disclosure of the settlement agreement with redactions. Libertarians for Transparent Gov’t v. Cumberland Cty., 250 N.J. 46 (2022). The Court found that under OPRA, custodians were required to disclose the actual records containing the information required to be disclosed under N.J.S.A. 47:1A-10. Id. at 56. The Court thus held that because the requested settlement agreement contained Section 10 information, the defendants were obligated to disclose the record with appropriate redactions. Id. at 57.

It is the practice of the GRC not to retroactively apply court decisions to complaints pursuant to Gibbons v. Gibbons, 86 N.J. 515 (1981). There the Court held that “it is a fundamental principle of jurisprudence that retroactive application of new laws involves a high risk of being unfair.” Id. at 522. In Moore v. N.J. Dep’t of Corr., GRC Complaint No. 2009-144 (Interim Order dated October 26, 2010), the custodian denied access to responsive records based upon a then existing Executive Order, the custodial agency’s proposed regulations, and prior Council decisions relying on same. During the pendency of the complaint, the Appellate Division in 2010 reversed a separate Council decision relying on the Executive Order and proposed regulations. The Council held that while the custodian’s basis for denial was no longer valid, the denial was not unlawful since at the time the response was consistent with prior GRC case law. See also Biss v. Borough of New Providence Police Dep’t (Union), GRC Complaint No. 2009-21 (February 2010); Sallie v. N.J. Dep’t of Law & Public Safety, Div. of Criminal Justice, GRC Complaint No. 2008-21 (Interim Order dated June 23, 2009).

Here, because this complaint was filed before the Supreme Court’s decision in Libertarians, 250 N.J. 46, the GRC must determine the applicable law at the time of the Custodian’s May 10, 2021 response. The Custodian argued in the SOI that the records need not be redacted to remove all but the N.J.S.A. 47:1A-10 information because Libertarians, 465 N.J. Super. 11, held that a custodian is not required to make exempt personnel records accessible in redacted form. Because the Custodian responded prior to the Supreme Court’s decision, the Custodian was not obligated to disclose the records with appropriate redactions. See Libertarians, 465 N.J. Super. 11; Moore, GRC 2009-144.

Therefore, although the Custodian’s May 10, 2021 response to the Complainant’s April 28, 2021 OPRA request (Agency Number 544) seeking personnel records is no longer a lawful denial pursuant to Libertarians, 250 N.J. at 46, her response was nonetheless lawful at that time because it was consistent with the prevailing case law prior to the Supreme Court’s ruling. N.J.S.A. 47:1A-6; Libertarians, 465 N.J. Super. 11; Moore, GRC 2009-144. Thus, the Council declines to order disclosure.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The GRC must conduct an *in camera* review of the requested report dated March 23, 2020, prepared by Nicholas J. Palma, Esq., to validate the Custodian's contention that it consists of advisory, consultative, or deliberative material, and/or is a personnel record, and/or is attorney-client privileged and therefore exempt from access under OPRA. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-10. See Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).
2. **The Custodian must deliver⁷ to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see conclusion number 1 above), a document or redaction index⁸, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,⁹ 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 ten (10) business days from receipt of the Council's Interim Order.**
3. Although the Custodian's May 10, 2021 response to the Complainant's April 28, 2021 OPRA request (Agency Number 544) seeking personnel records is no longer a lawful denial pursuant to Libertarians for Transparent Gov't v. Cumberland Cty., 250 N.J. 46 (2022), her response was nonetheless lawful at that time because it was consistent with the prevailing case law prior to the Supreme Court's ruling. N.J.S.A. 47:1A-6; Libertarians for Transparent Gov't v. Cumberland Cty., 465 N.J. Super. 11 (App. Div. 2020), GRC 2009-144. Thus, the Council declines to order disclosure.

Prepared By: John E. Stewart

January 23, 2024

⁷ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

⁸ The document or redaction index should identify the record, and/or each redaction asserted and the lawful basis for the denial.

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."