



State of New Jersey

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Lieutenant Governor

JACQUELYN A. SUÁREZ
Acting Commissioner

FINAL DECISION

November 8, 2023 Government Records Council Meeting

Marc Liebeskind
Complainant

Complaint No. 2021-327

v.

Borough of Highland Park (Middlesex)
Custodian of Record

At the November 8, 2023 public meeting, the Government Records Council (“Council”) considered the October 31, 2023 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 original Custodian did not bear her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the original Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The original Custodian unlawfully denied access to the data responsive to OPRA request item No. 1. N.J.S.A. 47:1A-1.1. Specifically, the Custodian determined that same should have been disclosed because it was raw, factual data not subject to the “inter-agency or intra-agency advisory, consultative, or deliberative material” exemption. However, the GRC declines to order any further action because the Custodian responded on January 7, 2022 disclosing the responsive data and the SOI submission supports such a conclusion.
3. The requested traffic study was still in draft form at the time of the subject OPRA request and thus was exempt as “inter-agency or intra-agency advisory, consultative, or deliberative [(“ACD”)] material.” N.J.S.A. 47:1A-1.1; Libertarians for Transparent Gov’t v. Gov’t Records Council, 453 N.J. Super. 83 (App. Div. 2018). Thus, the original Custodian lawfully denied access to OPRA request item No. 2. N.J.S.A. 47:1A-6.
4. The Custodian has borne her burden of proof that she did not unlawfully deny access to OPRA request item No. 3. Specifically, the Custodian certified, and the record

reflects, that no records responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

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 8th Day of November 2023

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 13, 2023

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
November 8, 2023 Council Meeting**

**Marc Liebeskind¹
Complainant**

GRC Complaint No. 2021-327

v.

**Borough of Highland Park (Middlesex)²
Custodial Agency**

Records Relevant to Complaint: Copies of:

1. Data collected by CME Associates (“CME”) for its traffic study related to the permanent closure of N. 4th and S. 3rd Avenues.
2. The traffic study produced by CME.
3. “All records” in CME’s possession regarding the Borough of Highland Park’s (“Borough”) “pre-application meeting” with the New Jersey Department of Transportation (“NJDOT”), “including but not limited to memos, notes, correspondence, applications, calendar entries, and studies.”

Custodian of Record: Jennifer Santiago³
Request Received by Custodian: November 29, 2021
Response Made by Custodian: December 13, 2021
GRC Complaint Received: December 13, 2021

Records Submitted for *In Camera* Examination: E-mail Chain dated December 7, 2021 (2 pages)

Background⁴

Request:

On November 29, 2021, the Complainant submitted an Open Public Records Act (“OPRA”) request to the original Custodian seeking the above-mentioned records.

¹ No legal representation listed on record.

² Represented by Edwin W. Schmierer, Esq. and Lucille E. Davy, Esq., of Mason, Griffin & Pierson, P.C. (Princeton, NJ).

³ The original Custodian of Record was Joan M. Hullings, who retired effective January 1, 2022.

⁴ 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.

Denial of Access Complaint:

On December 13, 2021, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the original Custodian failed to respond to the subject OPRA request.

Response:

On December 13, 2021, the tenth (10th) business day after receipt of the OPRA request, the Custodian responded in writing advising that she identified an e-mail chain between Kevin Chen, Teri Jover, Bruce Koch, and Jim Watson dated December 7, 2021, which was a communication regarding the draft traffic study and pre-application meeting. The Custodian stated that the responsive e-mail chain and draft attachments was not disclosable under the “inter-agency or intra-agency advisory, consultative, or deliberative [“ACD”] material” exemption. N.J.S.A. 47:1A-1.1; Parave-Fogg v. Lower Alloways Creek Twp., GRC Complaint No. 2006-51 (August 2006).

Amended Denial of Access Complaint:

On December 22, 2021, the Complainant filed an amended Denial of Access Complaint. Therein, the Complainant stating that after filing his complaint, the original Custodian responded in writing providing “an unintelligible response.” The Complainant stated that he asked the original Custodian to send him a document index, which he received on December 14, 2021. The Complainant argued that the index only identified a single e-mail for which access was denied and did not address item Nos. 1 or 2.

The Complainant stated that a pre-application meeting occurred with NJDOT occurred on October 13, 2021 and that the GRC should compel the Borough to disclose all records sought. The Complainant further requested that the GRC conduct an *in camera* review of the withheld e-mail to determine whether the original Custodian properly denied access to it. Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346, 355 (App. Div. 2005); Katon v. NJ Dep’t of Law & Pub. Safety, 2015 N.J. Super. Unpub. LEXIS 256 (App. Div. 2015).

Statement of Information:

On January 7, 2022, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that the original Custodian received the Complainant’s OPRA request on November 29, 2021. The Custodian affirmed that the original Custodian contacted the Borough Administrator and CME to obtain responsive records. The Custodian certified that the record identified as responsive was a December 7, 2021 e-mail chain including a secure link to draft attachments. The Custodian certified that the original Custodian responded in writing on December 13, 2021 denying access to the e-mail chain and draft documents under the ACD exemption. N.J.S.A. 47:1A-1.1; Parave-Fogg, GRC 2006-51. The Custodian further affirmed that in preparing the SOI, she realized that certain factual data collected by CME could be disclosed: she purportedly sent⁵ eighty-three (83) pages of data to the Complainant on January 7, 2022

⁵ The Custodian did not include a copy of this correspondence as part of her SOI submission. The Complainant also did not subsequently dispute the Custodian’s certification.

The Custodian contended that she lawfully denied access to the December 7, 2021 e-mail under the ACD exemption. The Custodian argued that both the New Jersey Supreme Court and GRC have permitted public agencies to deny access to records that reflect advisory opinions, recommendations, and deliberations that are part of their policy formulation. In Re: Liquidation of Integrity Ins. Co., 165 N.J. 75, 84-85 (2000); Educ. Law Ctr. v. Dep't of Educ., 198 N.J. 274, 286 (2009); Eastwood v. Borough of Englewood Cliffs (Bergen), GRC Complaint No. 2012-121 (2013). The Custodian thus requested that the GRC uphold the Borough's right to deny access to ACD communications and documents.

February 28, 2023 Council Meeting:

At its February 28, 2023 public meeting, the Council considered the February 21, 2023 Administrative Order and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said Order holding that:

The GRC must conduct an *in camera* review of the responsive withheld e-mail and attachments, 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. 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 deliver⁶ to the Council in a sealed envelope nine (9) copies of the requested unredacted e-mails, nine (9) copies of the redacted e-mails, a document or redaction index.⁷**

This is an Administrative Order requiring compliance within ten (10) business days after receipt thereof. The Custodian shall also simultaneously deliver⁸ certified confirmation of compliance with this Order, in accordance with N.J. Court Rules, R. 1:4-4,⁹ to the Executive Director.

Procedural History:

On March 2, 2023, the Council distributed its Administrative Order to all parties. On March 9, 2023, the Custodian responded to the Council's Interim Order. Therein, the Custodian certified that she was providing for *in camera* review nine (9) copies of the unredacted December 7, 2021 e-mail identified as responsive to the subject OPRA request. The Custodian noted that although the Order required production of applicable "attachments," there was none withheld: the responsive chain included a link to CME's internal server through which the Borough could access draft applications. The Custodian further argued that the e-mail addressed "a draft letter, draft traffic impact study[,] and appendices that were being prepared by" the CME. The Custodian

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

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

⁸ 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. A copy of the certification and document index must also be sent to the Complainant.

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."

argued that all referenced documents were clearly exempt as ACD material. N.J.S.A. 47:1A-1.1; Parave-Fogg, GRC 2006-51.

The Custodian contended finally contended that “in hindsight, it is now clear that the e-mail chain” withheld from disclosure was not responsive to the subject OPRA request since it was created several days after submission of same. The Custodian certified that the Borough should have responded that no records existed because the Borough had not received any responsive records on or before November 29, 2021. The Custodian noted that the letter referenced in the withheld e-mail requesting a pre-application meeting was not finalized until December 22, 2021. The Custodian averred that neither her nor the original Custodian realized the forgoing facts at the time they completed and submitted the SOI.

Analysis

Timeliness

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Id. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).¹⁰ Thus, a custodian’s failure to respond in writing to a complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

Here, the Complainant submitted his OPRA request to the Borough on November 29, 2021. The Complainant then filed this complaint on December 13, 2021. Later on the same day, the original Custodian responded in writing denying the Complainant’s OPRA request. In the SOI, the Custodian certified that the original Custodian received the Complainant’s OPRA request on November 29, 2021 and did not respond until December 13, 2021, or ten (10) business days after receipt thereof. Based on this, the evidence of record supports that a “deemed” denial of access occurred.

Therefore, the original Custodian did not bear her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the original Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11.

¹⁰ A custodian’s written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA.

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 also provides that the definition of a government record “shall not include . . . [ACD] material.” When the exception is invoked, a governmental entity may “withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated.” Educ. Law Ctr., 198 N.J. at 285 (citing NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975)). The New Jersey Supreme Court has also ruled that a record that contains or involves factual components is entitled to deliberative-process protection under the exemption in OPRA when it was used in decision-making process *and* its disclosure would reveal deliberations that occurred during that process. Educ. Law Ctr., 198 N.J. 274.

A custodian claiming an exception to the disclosure requirements under OPRA on that basis must initially satisfy two conditions: 1) the document must be pre-decisional, meaning that the document was generated prior to the adoption of the governmental entity's policy or decision; and 2) the document must reflect the deliberative process, which means that it must contain opinions, recommendations, or advice about agency policies. See Educ. Law Ctr., 198 N.J. at 286. The key factor in this determination is whether the contents of the document reflect “formulation or exercise of . . . policy-oriented judgment or the process by which policy is formulated.” Id. at 295 (adopting the federal standard for determining whether material is “deliberative” and quoting Mapother v. Dep't of Justice, 3 F.3d 1533, 1539 (D.C. Cir. 1993)). Once the governmental entity satisfies these two threshold requirements, a presumption of confidentiality is established, which the requester may rebut by showing that the need for the materials overrides the government's interest in confidentiality. Id. at 286-87.

As for draft documents, in Libertarians for Transparent Gov't v. Gov't Records Council, 453 N.J. Super. 83 (App. Div. 2018), the Appellate Division discussed the deliberative process privilege at length regarding a request for draft meeting minutes, stating:

The applicability of the deliberative process privilege is government by a two-prong test. The judge must determine both that a document is (1) “pre-decisional,” meaning it was “generated before the adoption of an agency’s police or decision;” and (2) deliberative, in that it “contain[s] opinions, recommendations, or advice about agency policies.” [Educ. Law Ctr., 198 N.J. at 276 (quoting Integrity, 165 N.J. at 84-85)]. If a document satisfies both prongs, it is exempt from disclosure under OPRA pursuant to the deliberative process privilege.

[Id. at 90-91.]

Regarding the first prong, the court stated that “a draft is not a final document. It has been prepared for another person or persons’ editing and eventual approval.” Id. at 90. Therefore, the court held that by their very nature, draft meeting minutes are pre-decisional since they are subject to revision and not yet approved for public release. Id. at 90-91. Regarding the second prong, the court held that “the document must be shown to be closely related to the ‘the formulation or exercise of . . . policy-oriented judgment or [to] the process by which policy is formulated.’” Ciesla v. N.J. Dep’t of Health & Sr. Servs., 429 N.J. Super. 127, 138 (App. Div. 2012) (quoting McGee v. Twp. of E. Amwell, 416 N.J. Super. 602, 619-20 (App. Div. 2010)). Id. at 91. The court found that the requested draft minutes, as compiled by the writer in attendance at the meeting, were subject to additions, suggestions, and other edits from the members of the public body. Id. Thus, the draft minutes satisfied the second prong of the test. Id. at 92.

Following the original Custodian’s December 13, 2021 denial under the ACD exemption, the Complainant submitted an Amended Denial of Access Complaint. arguing that the Custodian failed to respond to OPRA request item Nos. 1 or 2 and further denied access to an e-mail alleged to be responsive to item No. 3. The Complainant argued that the pre-application meeting took place on October 13, 2021 and Ms. Jover stated at a November 23, 2021 meeting that she expected the traffic study “to be provided to the Boro[ugh]” that week. The Complainant thus requested that the GRC compel disclosure of records and review the withheld e-mail in question.

In the SOI, the Custodian argued that in preparing the SOI, she determined that raw traffic data responsive to OPRA request item No. 1 was not ACD material. The Custodian certified that based on this, she disclosed eighty-three (83) pages of data to the Complainant via e-mail on January 7, 2022. The Custodian also maintained the Borough’s position that any additional responsive records were in draft form and thus exempt as ACD material. In response to the Council’s February 28, 2023 Administrative Order, the Custodian produced the withheld e-mail to the GRC for an *in camera* review. However, the Custodian also acknowledged that the e-mail came into existence after submission of the OPRA request and that the Borough should have properly responded that no records to the remainder of the request existed. The Custodian further noted that there were not attachments to the e-mail, but a link to CME’s internal server through which the Borough could access draft documents. The Custodian finally certified that pre-application meeting request letter was not finalized until December 22, 2021.

OPRA request item No. 1:

The Complainant’s OPRA request item No. 1 sought traffic data collected by CME and he argued that the Borough failed to disclose same. In the SOI, the Custodian argued that the Borough initially denied access to said data under the ACD exemption. The Custodian then noted that during the preparation of the SOI, she determined that the data should have been disclosed because it was factual. The Custodian affirmed that she sent said data to the Complainant on January 7, 2022.

While the original Custodian initially denied access to the request under the ACD exemption, the Borough has since reversed said denial. Specifically, the Custodian admitted that the data should have been disclosed because it was raw, factual data and she did so on January 7, 2022. While there may be a question as to whether the data could still be considered ACD based

on Educ. Law Ctr., 198 N.J. 274, the Custodian has effectively admitted to an unlawful denial of access and the GRC holds accordingly.

Thus, the original Custodian unlawfully denied access to the data responsive to OPRA request item No. 1. N.J.S.A. 47:1A-1.1. Specifically, the Custodian determined that same should have been disclosed because it was raw, factual data not subject to the ACD exemption. However, the GRC declines to order any further action because the Custodian responded on January 7, 2022 disclosing the responsive data and the SOI submission supports such a conclusion.

OPRA request item No. 2:

The Complainant's OPRA request item No. 2 sought CME's traffic study and he again argued that the Borough failed to disclose same. The Complainant contended that Ms. Jover stated at a November 23, 2021 meeting that she expected the Borough would receive the study within a week of that meeting. In the SOI, the Custodian maintained the Borough's position that the traffic study was a draft document not subject to disclosure under the ACD exemption. N.J.S.A. 47:1A-1.1; Parave-Fogg, GRC 2006-51.

The December 7, 2021 e-mail submitted for *in camera* review (which will be addressed below) provides compelling evidence that supports the original Custodian's denial of access to the traffic study under the ACD exemption. Specifically, CME clearly states in the e-mail that the traffic study as in "draft" form. There is no evidence in the record to suggest that the traffic study was final regardless of Ms. Jover's alleged representation as to when the Borough would receive same. Further, and regardless of when the Borough received the study, there is no indication that the traffic study was a finalized document prior to the Complainant's OPRA request. Finally, the draft traffic study meets both prongs of the Libertarians test to remain exempt under the ACD exemption because it is 1) clearly in draft form; and 2) relates to directly to the Borough's deliberative process regarding the permanent closure of N. 4th and S. 3rd Avenues.

Accordingly, the traffic study was still in draft form at the time of the subject OPRA request and thus was exempt as ACD material. N.J.S.A. 47:1A-1.1; Libertarians, 453 N.J. Super. 83. Thus, the original Custodian lawfully denied access to OPRA request item No. 2. N.J.S.A. 47:1A-6.

OPRA request item No. 3:

Initially, the GRC notes that the Council has determined that a custodian was under no obligation to provide a record that had not been created at the time of an OPRA request. Blau v. Union Cnty., GRC Complaint No. 2003-75 (January 2005); Paff v. v. Neptune Twp. Hous. Auth. (Monmouth), GRC Complaint No. 2010-307 (Interim Order dated April 25, 2012); Delbury v. Greystone Park Psychiatric Hosp. (Morris), GRC Complaint No. 2013-240 (Interim Order dated April 29, 2014).

Here, the Complainant's OPRA request item No. 3 sought "[a]ll records"¹¹ in CME's possession regarding the Borough's pre-application meeting with NJDOT including memoranda,

¹¹ The GRC notes that portions of OPRA request item No. 3 could be considered invalid for a failure to identify specific records and lack of proper criteria to seek correspondence. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Marc Liebeskind v. Borough of Highland Park (Middlesex), 2021-327 – Findings and Recommendations of the Executive Director

notes, correspondence, applications, calendar entries, and studies and that he did not receive any responsive records. The Complainant also asserted that the Borough met with NJDOT on October 13, 2021. In the SOI, the Custodian identified a December 7, 2021 e-mail with attachments as responsive to the OPRA request item, but that same was not disclosable under the ACD exemption. The Council issued an Administrative Order seeking production of the e-mail for an *in camera* review and the Custodian provided same. However, as part of her response to the Order, the Custodian noted that the e-mail came into existence after submission of the OPRA request and that the appropriate response would have been that no records existed.

Initially, the Custodian is correct that the December 7, 2021 e-mail came into existence after submission of the subject OPRA request, which was on November 29, 2021. To continue forward with the *in camera* where the record in question is not responsive to the OPRA request would present a misuse of the GRC's resources. Thus, it is unnecessary for the Council to perform an *in camera* review of the e-mail because same is not responsive to the request per Blau, GRC 2003-75 and Delbury, GRC 2013-240.

Turning to the Custodian's affirmation that no records to this item existed, the Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. See Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005). However, should a complainant provide competent, credible evidence to refute a legal certification, the Council held that a custodian violated OPRA. See Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-76 (Interim Order dated June 26, 2012).

In this matter, the Complainant contended that records exist because the Borough had a meeting with NJDOT on October 13, 2021. Alternatively, the Custodian has certified in her response to the Administrative Order that no records existed was the proper response to OPRA request item No. 3. The Custodian further certified that pre-application meeting request letter was not finalized until December 22, 2021.

In comparing the responses to the facts in both Pusterhofer and Carter, the GRC is persuaded that this complaint is like the former and distinguished from the latter. Specifically, and like in Pusterhofer, the Custodian certified that no responsive records existed. Support for this position is found in the December 7, 2021 e-mail provided for *in camera* review (and now determined to not be responsive here), where the Borough was working on a "Pre-Application Meeting Request" letter meant for NJDOT. Further support is garnered from the Custodian's certified statements in response to the Administrative Order. The e-mail also refutes the Complainant's unverified assertion that an October 13, 2021 meeting occurred, especially where there is no evidence to support the such meeting took place. Given the above, the GRC applies Pusterhofer accordingly and finds that no unlawful denial occurred.

Therefore, the Custodian has borne her burden of proof that she did not unlawfully deny access to OPRA request item No. 3. Specifically, the Custodian certified, and the record reflects, that no records responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer, GRC 2005-49.

Super. 534, 549 (App. Div. 2005); Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010).

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The original Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the original Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The original Custodian unlawfully denied access to the data responsive to OPRA request item No. 1. N.J.S.A. 47:1A-1.1. Specifically, the Custodian determined that same should have been disclosed because it was raw, factual data not subject to the "inter-agency or intra-agency advisory, consultative, or deliberative material" exemption. However, the GRC declines to order any further action because the Custodian responded on January 7, 2022 disclosing the responsive data and the SOI submission supports such a conclusion.
3. The requested traffic study was still in draft form at the time of the subject OPRA request and thus was exempt as "inter-agency or intra-agency advisory, consultative, or deliberative [(“ACD”)] material." N.J.S.A. 47:1A-1.1; Libertarians for Transparent Gov't v. Gov't Records Council, 453 N.J. Super. 83 (App. Div. 2018). Thus, the original Custodian lawfully denied access to OPRA request item No. 2. N.J.S.A. 47:1A-6.
4. The Custodian has borne her burden of proof that she did not unlawfully deny access to OPRA request item No. 3. Specifically, the Custodian certified, and the record reflects, that no records responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

Prepared By: Frank F. Caruso
Executive Director

October 31, 2023



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

Marc Liebeskind
Complainant

GRC Complaint No. 2021-327

v.

Borough of Highland Park (Middlesex)
Custodial Agency

Custodian of Record: Joan M. Hullings
Request Received by Custodian: November 29, 2021
GRC Complaint Received: December 13, 2021

Order: The GRC must conduct an *in camera* review of the responsive withheld e-mail and attachments, 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. 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 e-mails, nine (9) copies of the redacted e-mails, 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 deliver³ certified confirmation of compliance with this Order, in accordance with N.J. Court Rules, R. 1:4-4,⁴ to the Executive Director.

Effective Date of Disposition: February 28, 2023

Prepared By: Frank F. Caruso
Executive Director

Date: February 21, 2023

Distribution Date: March 2, 2023

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 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. A copy of the certification and document index must also be sent to the Complainant.

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."