



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
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PHILIP D. MURPHY  
Governor

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

**FINAL DECISION**

**April 26, 2022 Government Records Council Meeting**

Gerald A. Buccafusco  
Complainant

Complaint No. 2021-56

v.

Berkeley Township (Ocean)  
Custodian of Record

At the April 26, 2022 public meeting, the Government Records Council (“Council”) considered the April 19, 2022 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Although the Custodian responded in writing to the Complainant’s OPRA request within statutorily mandated time frame to respond, said written response was insufficient pursuant to N.J.S.A. 47:1A-5(i) and Papiez v. Cnty. of Mercer, Office of Cnty. Counsel, GRC Complaint No. 2012-59 (March 2013) because she failed to provide a date certain upon which he would respond to the Complainant providing any responsive records. See also Bentz v. Borough of Paramus (Bergen), GRC Complaint No. 2008-89 (June 2011).
2. The requested Agreement constitutes “inter-agency or intra-agency advisory, consultative or deliberative material” because it was in draft form at the time of the subject OPRA request and thus exempt from disclosure under OPRA. N.J.S.A. 47:1A-1.1; Educ. Law Ctr. v. Dep’t of Educ., 198 N.J. 274 (2009); Libertarians for Transparent Gov’t v. Gov’t Records Council, 453 N.J. Super. 83, 90-91 (App. Div.) (certif. denied, 233 N.J. 484 (2018)). Therefore, the Custodian did not unlawfully deny access to these records. N.J.S.A. 47:1A-6.
3. The Custodian’s February 24, 2021 response to the subject OPRA request was insufficient because she failed to include a date certain on which the Borough would respond. N.J.S.A. 47:1A-5(i). However, the Custodian lawfully denied access to the responsive Agreement. N.J.S.A. 47:1A-6. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk's Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the  
Government Records Council  
On The 26<sup>th</sup> Day of April 2022

Robin Berg Tabakin, Esq., Chair  
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: April 28, 2022**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
April 26, 2022 Council Meeting**

**Gerald A. Buccafusco<sup>1</sup>  
Complainant**

**GRC Complaint No. 2021-56**

v.

**Borough of Belmar (Monmouth)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Copy of Andrew Huisman’s employment agreement (“Agreement”).

**Custodian of Record:** April Claudio

**Request Received by Custodian:** February 13, 2021

**Response Made by Custodian:** February 24, 2021

**GRC Complaint Received:** March 3, 2021

**Background<sup>3</sup>**

**Request and Response:**

On February 13, 2021,<sup>4</sup> the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On the same day, the Borough of Belmar’s OPRA Portal sent a receipt acknowledgment e-mail to the Complainant. On February 24, 2021, the seventh (7<sup>th</sup>) business day after receipt of the OPRA request, the Custodian responded in writing stating that the Complainant’s OPRA request “requires additional time beyond the [statutory time frame] to fulfill.” The Complainant responded “reluctantly” agreeing to the extension “provided that [the Custodian] advise [him] when the record will be made available upon receiving this e-mail response.”

**Denial of Access Complaint:**

On March 3, 2021, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted beyond an extension of time request on February 24, 2021, the Custodian has failed to respond to the subject OPRA request.

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Jerry Dasti, Esq. of Dasti, Murphy, McGuckin, Ulaky, Koutsouris & Connors, P.C. (Forked River, NJ).

<sup>3</sup> 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.

<sup>4</sup> This date fell on a Saturday.

The Complainant contended that this failure to provide an “immediate” access record for a current Borough employee after twelve (12) business days resulted in a violation of OPRA.

Supplemental Response:

On March 3, 2021, the Custodian responded in writing stating that the record sought “is not complete and therefore is not releasable.” The Custodian stated that once the Agreement was complete, she would disclose it to the Complainant.

On March 4, 2021, Custodian’s Counsel sent a letter to the GRC stating that per the Custodian’s March 3, 2021 response, the requested record did not yet exist. Counsel further averred that a full response within thirty (30) business days was appropriate given COVID-19 related and “other” issues. Counsel noted that the Custodian already advised the Complainant that the Agreement would be disclosed once complete. Counsel thus requested that this complaint be dismissed “with prejudice.”

On March 5, 2021, the Custodian responded in writing stating that “additional time beyond” the statutory time frame was required because the requested record was not complete. On March 9, 2021, the Custodian e-mailed Custodian’s Counsel seeking guidance on whether to close the subject OPRA request because the Agreement was “not finalized yet.” On the same day, Counsel responded advising the Custodian to “keep [the OPRA request] opened for now” and advise him when the Agreement was complete.

Statement of Information:

On March 16, 2021, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on February 13, 2021. The Custodian certified that her search included contacting the Chief Financial Officer (“CFO”), Business Administrator (“BA”), the BA’s assistant, and Human Resources (“HR”) Director through the Borough’s OPRA Portal. The Custodian certified that, after not receiving any feedback from those individuals, she responded in writing on February 24, 2021 obtaining an extension of time with no date certain. The Custodian certified that she made additional attempts to made to obtain the requested Agreement but that she was told same remained incomplete. The Custodian noted that she twice extended the deadline thereafter.

The Custodian argued that she lawfully denied access to the requested Agreement because it remained in draft form and was awaiting final approval by the Mayor. The Custodian noted she was advised that the Agreement was nearing completion and needed only signatures, but then the Mayor made last minute revisions that delayed the process. The Custodian asserted that she notified the Complainant that the Agreement was not finalized on multiple occasions. The Custodian stated that as of this date, the Agreement is still in draft form but the subject OPRA request remains “open” until the Agreement is finalized and can be released.

Additional Submissions:

On April 8, 2022, the GRC sent a letter to the Custodian seeking additional information.

The GRC noted that the evidence of record conflicted as to the existence of the Agreement and whether it was in draft form. The GRC thus requested that the Custodian respond to the following:

1. Did a version of the Agreement exist prior to the submission of the Complainant's OPRA request?
  - a. If yes, was the Agreement ultimately made final and if so, please provide a copy of same or other supporting documentation identifying the date same became final.

The GRC requested that the Custodian provide her response in part of a certification by close of business on April 13, 2022.

On April 12, 2022, the Custodian responded to the GRC's request for additional information. Therein, the Custodian recertified to her actions in responding to the Complainant's OPRA request. The Custodian certified that upon receipt of the GRC's request for additional information on April 8, 2022, she again contacted the BA, his assistant, and HR Director to determine 1) if the Agreement ever existed; and 2) the current status. The Custodian certified that she was again told the Agreement was "never finalized and executed by Mr. Huisman [or] the Borough" and remained in draft form. The Custodian noted that she was also told that Mr. Huisman separated from the Borough on March 24, 2022. The Custodian thus affirmed that at the time of the Complainant's OPRA request, the Agreement did exist but was in draft form.

### Analysis

#### Sufficiency of Response

OPRA provides that a custodian may have an extension of time to respond to a complainant's OPRA request, but the custodian must provide a date certain. N.J.S.A. 47:1A-5(i). OPRA further provides that should the custodian fail to provide a response on that specific date, "access shall be deemed denied." N.J.S.A. 47:1A-5(i).

In Papiez v. Cnty. of Mercer, Office of Cnty. Counsel, GRC Complaint No. 2012-59 (March 2013), the custodian responded in a timely manner seeking an extension of time; however, she failed to identify a date certain on which she would respond. The Council determined that, although the custodian timely sought an extension of time, she failed to provide a date certain on which she would respond. N.J.S.A. 47:1A-5(i). Citing Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008).

Here, the Custodian responded in writing on behalf of the Custodian responded on the seventh (7<sup>th</sup>) business day after receipt of same stating that she would need an extension of time "beyond the seven (7) business days." However, the Custodian failed to provide a date certain on which she would respond to the Complainant providing access to any responsive records. Thus, said response was insufficient and a violation of OPRA. N.J.S.A. 47:1A-5(i).

Therefore, although the Custodian responded in writing to the Complainant's OPRA request within statutorily mandated time frame to respond, said written response was insufficient pursuant to N.J.S.A. 47:1A-5(i) and Papiez, GRC 2012-59 because she failed to provide a date

certain upon which he would respond to the Complainant providing any responsive records. See also Bentz v. Borough of Paramus (Bergen), GRC Complaint No. 2008-89 (June 2011).

In closing, the GRC notes that the record sought, which reasonably could be considered an employment contract by description, fell within the definition of an “immediate access” record. N.J.S.A. 47:1A-5(e). However, the GRC declines to find that a violation of the aforementioned provision occurred pursuant to N.J.S.A. 47:1A-5(i)(2), which waived the applicable response time frame during the COVID-19 public health emergency.

### **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 excludes from the definition of a government record “inter-agency or intra-agency advisory, consultative or deliberative [(“ACD”)] 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. West Milford Bd. of Educ., GRC Complaint No. 2004-93 (April 2006), the Council stated that:

[N]either the statute nor the courts have defined the terms . . . ACD 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, 88 (2000); In re Readoption With Amendments of Death Penalty Regulations, 182 N.J. 149 (App. Div. 2004).

In Libertarians for Transparent Gov’t v. Gov’t Records Council, 453 N.J. Super. 83 (App. Div.) (certif. denied, 233 N.J. 484 (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. v. Dep’t of Educ., 198 N.J. 274, 276 (2009) (quoting Integrity, 165 N.J. at 83)]. If a document stratifies both prongs, it is exempt from disclosure under OPRA pursuant to the deliberative process privilege.

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.

Turning to other types of “draft” records, in Dalesky v. Borough of Raritan (Somerset), GRC Complaint No. 2008-61 (November 2009), the Council, in upholding the custodian’s denial as lawful, determined that the requested study of the local police department was a draft document and that draft documents in their entirety are ACD material pursuant to N.J.S.A. 47:1A-1.1. Subsequently, in Shea v. Village of Ridgewood (Bergen), GRC Complaint No. 2010-79 (February 2011), the custodian certified that a requested letter was in draft form and had not yet been reviewed by the municipal engineer. The Council, looking to relevant case law, concluded that the requested letter was exempt from disclosure under OPRA as ACD material. See also Ciesla v. N.J. Dep’t of Health and Senior Serv., GRC Complaint No. 2010-38 (May 2011) (aff’d Ciesla, 429 N.J. Super. 127 (holding that a draft staff report was exempt from disclosure as ACD material)).

As for unexecuted agreements, in Paff v. City of Union City (Hudson), GRC Complaint No. 2012-262 (August 2013), the Council declined to require disclosure of the requested settlement agreement because same was not finalized and completed until November 26, 2012. More specifically, plaintiffs signed the subject agreement on October 10, 2012, but the settlement agreement was not final and subject to disclosure until November 26, 2012, when a representative from the City’s insurance carrier executed the form. Thus, at the point that both parties’ signatures appeared on the form, the GRC was satisfied that the agreement was finalized. The Council’s reinforced its position on unexecuted agreements in Paff v. City of Union City (Hudson), GRC Complaint No. 2013-195 (Interim Order dated January 28, 2014). There, the complainant filed after being denied access to a resubmitted request for the same agreement at issue in Paff, GRC 2012-262. The Council ultimately determined that the custodian unlawfully denied access to the settlement agreement because it was “finalized and executed” on November 26, 2012.

The above position was recently mirrored in Libertarians for Transparent Gov’t v. William Paterson Univ., 2018 N.J. Super. Unpub. LEXIS 843 (App. Div. 2018). There, the court reversed the trial judge’s decision that defendant unlawfully denied access to an unexecuted settlement agreement. The court reasoned that “[u]ntil a settlement is signed, it remains a draft document subject to continued revision and negotiation.” Id. at 5 (citation omitted); see also Libertarians for Transparent Gov’t v. Borough of Westwood (Bergen), GRC Complaint No. 2016-214 (October 2018).

In the matter before the Council, the Complainant sought access to the Agreement between the Borough and Mr. Huismann. On the same day the Complainant filed the instant complaint, the Custodian denied access to the OPRA request because the requested record “was not complete and therefor not releasable.” The Custodian subsequently certified in the SOI that the requested Agreement remained an unsigned draft, but that she kept the OPRA request open pending finalization of it.<sup>5</sup> The Custodian again certified to the draft nature of the Agreement in her response to the GRC’s request for additional information, noting that Mr. Huismann was no longer with the Borough.

Precedential case law supports the non-disclosure of draft documents as decided in Educ. Law Ctr., as well as Libertarians, 453 N.J. Super. at 90-91 and Libertarians, 2018 N.J. Super. Unpub. LEXIS 843. The GRC is thus compelled to find that a lawful denial of access occurred based Custodian’s multiple responses and certifications indicating the draft nature of the Agreement.

Accordingly, the requested Agreement constitutes ACD material because it was in draft form at the time of the subject OPRA request and thus exempt from disclosure under OPRA. N.J.S.A. 47:1A-1.1; Educ. Law Ctr. 198 N.J. 274; Libertarians, 453 N.J. Super. at 90-91. Therefore, the Custodian did not unlawfully deny access to these records. N.J.S.A. 47:1A-6.

### **Knowing & Willful**

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

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

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<sup>5</sup> Prevailing case law provides that the Custodian was not required to keep the OPRA request open until that time which the draft Agreement was finalized. See Paff v. Neptune Twp. Hous. Auth. (Monmouth), GRC Complaint No. 2010-307 (Interim Order dated April 25, 2012) (holding that the custodian lawfully denied access to draft meeting minutes and that the complainant was “required to submit a new OPRA request” if he wished to obtain them after approval. *Id.* at 20 (citing Blau v. Union Cnty., GRC Complaint No. 2003-75 (January 2005))).



with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

Here, the Custodian's February 24, 2021 response to the subject OPRA request was insufficient because she failed to include a date certain on which the Borough would respond. N.J.S.A. 47:1A-5(i). However, the Custodian lawfully denied access to the responsive Agreement. N.J.S.A. 47:1A-6. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Although the Custodian responded in writing to the Complainant's OPRA request within statutorily mandated time frame to respond, said written response was insufficient pursuant to N.J.S.A. 47:1A-5(i) and Papiez v. Cnty. of Mercer, Office of Cnty. Counsel, GRC Complaint No. 2012-59 (March 2013) because she failed to provide a date certain upon which he would respond to the Complainant providing any responsive records. See also Bentz v. Borough of Paramus (Bergen), GRC Complaint No. 2008-89 (June 2011).
2. The requested Agreement constitutes "inter-agency or intra-agency advisory, consultative or deliberative material" because it was in draft form at the time of the subject OPRA request and thus exempt from disclosure under OPRA. N.J.S.A. 47:1A-1.1; Educ. Law Ctr. v. Dep't of Educ., 198 N.J. 274 (2009); Libertarians for Transparent Gov't v. Gov't Records Council, 453 N.J. Super. 83, 90-91 (App. Div.) (certif. denied, 233 N.J. 484 (2018)). Therefore, the Custodian did not unlawfully deny access to these records. N.J.S.A. 47:1A-6.
3. The Custodian's February 24, 2021 response to the subject OPRA request was insufficient because she failed to include a date certain on which the Borough would respond. N.J.S.A. 47:1A-5(i). However, the Custodian lawfully denied access to the responsive Agreement. N.J.S.A. 47:1A-6. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: Frank F. Caruso  
Executive Director

April 19, 2022