



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

May 31, 2022 Government Records Council Meeting

Marc Liebeskind
Complainant

Complaint No. 2021-79

v.

Borough of Highland Park (Middlesex)
Custodian of Record

At the May 31, 2022 public meeting, the Government Records Council (“Council”) considered the May 24, 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. The current Custodian complied with the Council’s April 26, 2022 Interim Order because she responded in the prescribed time frame providing nine (9) redacted and unredacted copies of the requested October 15, 2020 e-mail and a document index. The current Custodian also simultaneously provided certified confirmation of compliance to the Executive Director.
2. **The *In Camera* Examination set forth in the above table reveals the Custodian has lawfully denied access to the redacted portion of the October 15, 2020 e-mail as “inter-agency or intra-agency advisory, consultative, or deliberative material” pursuant to N.J.S.A. 47:1A-1.1; Educ. Law Ctr. v. Dep’t of Educ., 198 N.J. 274 (2009). N.J.S.A. 47:1A-6.**
3. Because it is determined that the Custodian did not unlawfully deny access to any of the redacted portion of the responsive e-mail here and did not commit any violations of OPRA’s provisions, the GRC declines to address whether a knowing and willful violation occurred.

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 31st Day of May 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: June 2, 2022

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
May 31, 2022 Council Meeting**

**Marc Liebeskind¹
Complainant**

GRC Complaint No. 2021-79

v.

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

Records Relevant to Complaint: Copies of “each and every record that supports” Councilmember Matthew Hersh’s Facebook statement regarding recent street closures and “identifying each and every person that was involved in the vetting process.”

Custodian of Record: Joan Hullings³
Request Received by Custodian: March 24, 2021
Response Made by Custodian: March 24, 2021
GRC Complaint Received: April 19, 2021

Records Submitted for *In Camera* Examination: October 15, 2020 e-mail from Councilmember Matthew Hale to Councilmember Elsie Foster-Dublin, Councilmember Stephany Kim, and Borough of Highland Park (“Borough”) Administrator Teri Jover (3:27 p.m.).

Background

April 26, 2022 Council Meeting:

At its April 26, 2022 public meeting, the 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, found that:

1. The GRC must conduct an *in camera* review of the October 15, 2020 e-mail to determine the validity of the Custodian’s purported assertion that the body of same was exempt under the “inter-agency, or intra-agency advisory, consultative, or deliberative material” exemption. 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 (App. Div. 2005).

¹ No legal representation listed on record.

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

³ The Custodian retired effective January 1, 2022. The current Custodian of Record is Jennifer A. Santiago.
Marc Liebeskind v. Borough of Highland Park (Middlesex), 2021-79 – *In Camera* Findings and Recommendations of the Executive Director

2. **The Custodian shall deliver⁴ to the Council in a sealed envelope nine (9) copies of the requested unredacted October 15, 2020 e-mail (see conclusion No. 1 above), nine (9) copies of the redacted e-mail, a document or redaction index⁵, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,⁶ that the e-mail provided is the e-mail requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council’s Interim Order.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

Procedural History:

On April 27, 2022, the Council distributed its Interim Order to all parties. On May 2, 2022, the current Custodian responded to the Council’s Interim Order. Therein, the current Custodian certified that she was delivering nine (9) redacted and unredacted copies of the requested October 15, 2020 e-mail for an *in camera* review. The current Custodian certified that the redacted portion of the e-mail contained “inter-agency or intra-agency advisory, consultative, or deliberative [“ACD”] material” discussions related to proposed Resolution No. 10-20-284 for outdoor dining. The current Custodian noted that said resolution was an attachment to that e-mail and disclosed to the Complainant as part of the Borough’s initial disclosure.

Analysis

Compliance

At its April 26, 2022 meeting, the Council ordered the Custodian to submit for *in camera* review nine (9) redacted and unredacted copies of the responsive October 15, 2020 e-mail and a document index. The Council also ordered the Custodian to simultaneously provide certified confirmation of compliance, in accordance with R. 1:4-4, to the Executive Director. On April 27, 2022, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian’s response was due by close of business on May 4, 2022.

On May 2, 2022, the third (3rd) business day after receipt of the Council’s Order, the current Custodian certified that she was delivering nine (9) redacted and unredacted copies of the requested e-mail for an *in camera* review. The current Custodian also submitted a document index and certified confirmation of compliance. Thus, the current Custodian has successfully complied with the Council’s Order.

⁴ 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.

⁵ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

⁶ "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."

Therefore, the current Custodian complied with the Council’s April 26, 2022 Interim Order because she responded in the prescribed time frame providing nine (9) redacted and unredacted copies of the requested October 15, 2020 e-mail and a document index. The current Custodian also simultaneously provided certified confirmation of compliance to the Executive Director.

Unlawful Denial of Access

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

OPRA also provides that 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. v. Dep’t of Educ., 198 N.J. 274, 285 (2009) (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.

The GRC conducted an *in camera* examination of the October 15, 2020 e-mail. The GRC notes that the impetus for conducting this *in camera* review was to clarify “. . . whether the Borough kept reimagining its already decided policy of closing those streets to the extent that the redacted e-mail body could be considered ACD in nature.” Liebeskind v. Borough of Highland Park (Middlesex), GRC Complaint No. 2021-79 (Interim Order dated April 26, 2022) at 3.

Upon review, the GRC finds that the applied redaction covers two (2) sentences that meet the two-prong test necessary to be considered ACD material under OPRA. N.J.S.A. 47:1A-1.1; Educ. Law Ctr., 198 N.J. at 286. Specifically, the e-mail predates an October 20, 2020 Borough Council vote on Resolution No. 10-20-284 regarding outdoor dining on Third and Fourth Avenues.

Therein, Councilmember Hale engages other members of the Council and the Borough Administrator on whether a vote should take place on the proposed resolution attached to the e-mail. Councilman Hale also suggests an alternative recommendation to taking a vote inclusive of his opinion of that alternative. Both sentences: 1) contain opinions and recommendations regarding the most recent outdoor dining resolution; and 2) predate the Council's October 20, 2020 action on the resolution. Thus, in accordance with Educ. Law Ctr., 198 N.J. 274, it is clear that the redacted discussion did correlate to renewing the outdoor dining policy, which was subsequently approved through Resolution 10-20-284.

Accordingly, the *In Camera* Examination reveals that the redacted portion of the responsive October 15, 2020 e-mail was properly denied under the ACD exemption. N.J.S.A. 47:1A-1.1; Educ. Law Ctr., 198 N.J. 274. Thus, the Custodian lawfully denied access to that portion of the e-mail withheld from disclosure. N.J.S.A. 47:1A-6.

Knowing & Willful

Because it is determined that the Custodian did not unlawfully deny access to any of the redacted portion of the responsive e-mail here and did not commit any violations of OPRA's provisions, the GRC declines to address whether a knowing and willful violation occurred.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The current Custodian complied with the Council's April 26, 2022 Interim Order because she responded in the prescribed time frame providing nine (9) redacted and unredacted copies of the requested October 15, 2020 e-mail and a document index. The current Custodian also simultaneously provided certified confirmation of compliance to the Executive Director.
2. **The *In Camera* Examination set forth in the above table reveals the Custodian has lawfully denied access to the redacted portion of the October 15, 2020 e-mail as "inter-agency or intra-agency advisory, consultative, or deliberative material" pursuant to N.J.S.A. 47:1A-1.1; Educ. Law Ctr. v. Dep't of Educ., 198 N.J. 274 (2009). N.J.S.A. 47:1A-6.**
3. Because it is determined that the Custodian did not unlawfully deny access to any of the redacted portion of the responsive e-mail here and did not commit any violations of OPRA's provisions, the GRC declines to address whether a knowing and willful violation occurred.

Prepared By: Frank F. Caruso
Executive Director

May 24, 2022



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

April 26, 2022 Government Records Council Meeting

Marc Liebeskind
Complainant

Complaint No. 2021-79

v.

Borough of Highland Park (Middlesex)
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. The GRC must conduct an *in camera* review of the October 15, 2020 e-mail to determine the validity of the Custodian’s purported assertion that the body of same was exempt under the “inter-agency, or intra-agency advisory, consultative, or deliberative material” exemption. 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 (App. Div. 2005).
2. **The Custodian shall deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted October 15, 2020 e-mail (see conclusion No. 1 above), nine (9) copies of the redacted e-mail, 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 e-mail provided is the e-mail requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council’s Interim Order.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

¹ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives them by the deadline.

² The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

³ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

Interim Order Rendered by the
Government Records Council
On The 26th 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 27, 2022

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Marc Liebeskind¹
Complainant**

GRC Complaint No. 2021-79

v.

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

Records Relevant to Complaint: Copies of “each and every record that supports” Councilmember Matthew Hersh’s Facebook statement regarding recent street closures and “identifying each and every person that was involved in the vetting process.”

Custodian of Record: Joan Hullings³
Request Received by Custodian: March 24, 2021
Response Made by Custodian: March 24, 2021
GRC Complaint Received: April 19, 2021

Background⁴

Request and Response:

On March 24, 2021, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On the same day, on behalf of the Custodian, Deputy Clerk Jennifer Santiago responded in writing seeking clarification as to those street closures for which the Complainant sought records. The Complainant responded advising that Councilmember Hersh’s comments related to a closure on North 4th Avenue, but that he would also like to see similar documents for a closure on South 3rd Avenue and proposed closure for North 3rd Avenue.

On April 13, 2021, Ms. Santiago responded in writing disclosing 59 pages of records including correspondence between the Borough of Highland Park (“Borough”) Police Department and New Jersey State Department of Transportation with a partial redaction of one e-mail dated October 15, 2020 for “inter-agency, or intra-agency advisory, consultative, or deliberative [(“ACD”)] material.” N.J.S.A. 47:1A-1.1.

¹ No legal representation listed on record.

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

³ The Custodian 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 April 19, 2021, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant disputed the redacted portion of the October 15, 2020 e-mail.

Statement of Information:⁵

On September 8, 2021, the Custodian filed a Statement of Information (“SOI”) attaching a legal certification from Ms. Santiago. The Custodian certified that she received the Complainant’s OPRA request on March 24, 2021. The Custodian certified that Ms. Santiago responded in writing on her behalf on April 13, 2021 disclosing 59 pages of records. The Custodian certified that one e-mail dated October 15, 2020 was partially redacted to exempt ACD discussions of the Borough’s next steps on the street closure issue.

The Custodian contended that the redaction was lawful based on OPRA, as well as precedential court and GRC caselaw addressing deliberative communications. N.J.S.A. 47:1A-1.1; Educ. Law Ctr. v. N.J. Dep’t of Educ., 198 N.J. 274-286 (2009); Eastwood v. Borough of Englewood Cliffs (Bergen), GRC Complaint No. 2012-121 (June 2013). The Custodian contended that the redacted content within the e-mail contained Councilmember Hale’s recommendation on how the Borough should proceed prior to any decision by the Council. See Santiago Cert. ¶ 6.

Analysis

Unlawful Denial of Access

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

In Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the 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

⁵ On May 4, 2021, this complaint was referred to mediation. On August 27, 2021, this complaint was referred back to the GRC for adjudication.

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

provisions of the ‘Open Public Meetings Act,’ N.J.S.A. 10:4-6 to -21, it also provides that the GRC ‘may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.’ N.J.S.A. 47:1A-7(f). This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.

[Id. at 355.]

Further, the court found that:

We hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal . . . There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC’s obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7(f), which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.

[Id.]

Here, the Custodian disclosed to the Complainant multiple e-mails and attachments. Of those e-mails, the Custodian redacted the body of the October 15, 2020 e-mail citing the ACD exemption. N.J.S.A. 47:1A-1.1. The Complainant filed this complaint disputing the exempting, but not elaborating the reasons he believed said denial was unlawful. In the SOI, the Custodian contended that the redaction was lawful because it contained recommendations regarding a potential Borough policy. Citing Educ. Law Ctr.; 198 N.J. 274 (2009) and Eastwood, GRC 2012-121.

Upon review of the evidence of record here, the GRC cannot determine whether the exemptions applied to the redacted portion of the October 15, 2020 e-mail. The GRC bases this position on the fact that e-mails disclosed to the Complainant that both predate and postdate the redacted e-mail discuss street closures in the Borough for dining expansion during the pandemic. Based on these e-mails, it is not clear whether the Borough kept reimagining its already decided policy of closing those streets to the extent that the redacted e-mail body could be considered ACD in nature. Thus, the GRC must review the redacted e-mail body to determine the full applicability of the ACD exemption. Such an action is common, as the GRC will routinely perform an *in camera* review in similar circumstances. See e.g. Pouliot v. N.J. Dep’t of Educ., GRC Complaint No. 2015-281 (Interim Order dated January 31, 2017).

Therefore, the GRC must conduct an *in camera* review of the October 15, 2020 e-mail to determine the validity of the Custodian’s purported assertion that the body of same was exempt under the ACD material exemption. N.J.S.A. 47:1A-1.1. See Paff, 379 N.J. Super. at 346.

Knowing & Willful

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The GRC must conduct an *in camera* review of the October 15, 2020 e-mail to determine the validity of the Custodian's purported assertion that the body of same was exempt under the "inter-agency, or intra-agency advisory, consultative, or deliberative material" exemption. 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 (App. Div. 2005).
2. **The Custodian shall deliver⁷ to the Council in a sealed envelope nine (9) copies of the requested unredacted October 15, 2020 e-mail (see conclusion No. 1 above), nine (9) copies of the redacted e-mail, 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 e-mail provided is the e-mail requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Executive Director

April 19, 2022

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 the GRC physically receives them 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."