



State of New Jersey

DEPARTMENT OF COMMUNITY AFFAIRS
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PHILIP D. MURPHY
Governor

TAHESHA L. WAY
Lieutenant Governor

JACQUELYN A. SUÁREZ
Commissioner

FINAL DECISION

July 30, 2024 Government Records Council Meeting

Charles Arentowicz
Complainant

v.

Township of Long Hill (Morris)
Custodian of Record

Complaint No. 2022-169

At the July 30, 2024 public meeting, the Government Records Council (“Council”) considered the July 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 complied with the Council’s January 31, 2023 Administrative Order because she responded in the prescribed time frame providing nine (9) redacted and unredacted copies of the two (2) e-mail chains for *in camera* review and simultaneously provided certified confirmation of compliance to the Executive Director.
2. **On the basis of the Council’s determination in this matter, the Custodian shall comply with the Council’s Findings of the *In Camera* Examination set forth in the above table within twenty (20) business days from receipt of this Order. In the circumstance where the records ordered for disclosure are not provided to the Complainant, the Council's Final Decision may be enforced in the Superior Court of New Jersey. N.J. Court Rules, R. 4:67-6; N.J.A.C. 5:105-2.9(c).**

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 July 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: August 1, 2024

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Charles Arentowicz¹
Complainant**

GRC Complaint No. 2022-169

v.

**Township of Long Hill (Morris)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies of all correspondence (e-mails, letters, and attachments thereto) between the Township of Long Hill (“Township”) Committee, Township professionals, Township Administrator, and County, State, and federal officials regarding the “floodwall” between July 1, 2021 and March 17, 2022.

Custodian of Record: Megan Phillips

Request Received by Custodian: March 18, 2022

Response Made by Custodian: March 28, 2022

GRC Complaint Received: April 29, 2022

Records Submitted for *In Camera* Examination: September 15, 2021 e-mail chains (2:30 p.m. and 3:52 p.m.).

Background

Request and Response:

On March 18, 2022, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On March 28, 2022, the Custodian responded in writing disclosing nine (9) e-mail chains, at least two (2) of which contained redactions under the “inter agency, or intra agency advisory, consultative, or deliberative [(“ACD”)] material” exemption. N.J.S.A. 47:1A-1.1.

Denial of Access Complaint:

On April 29, 2022, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant disputed the redactions applied to two (2) of the e-mail chains he received in response to the subject OPRA request. However, the Complainant did not provide any additional arguments supporting his dispute.

¹ No legal representation listed on record.

² Represented by John R. Pidgeon, Esq. of Pidgeon & Pidgeon, P.C. (Princeton, NJ).

Statement of Information:³

On October 31, 2022, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on March 18, 2022. The Custodian certified that her search included sending the OPRA request to all officials identified therein to locate responsive records. The Custodian certified that she responded in writing on March 28, 2022 disclosing nine (9) e-mail chains with at least two (2) containing redactions under the ACD exemption. N.J.S.A. 47:1A-1.1.

The Custodian argued that the redacted information within the two (2) e-mail chains related to a floodwall. The Custodian asserted that the communications occurred in anticipation that Township Committee would be discussing the issue at a future date. The Custodian argued that as such, all disclosed communications were considered “pre-decisional and deliberative in nature . . .” See Shea v. Village of Ridgewood (Bergen), GRC Complaint No. 2010-79 (February 2011). The Custodian thus asserted that the redacted e-mails that are the focus of this complaint were subject to the ACD exemption. The Custodian noted that should the Township Committee decide to consider construction of a floodwall, same will be done at a public meeting and all background materials will be made available to the public.

January 31, 2023 Council Meeting:

At its January 31, 2023 public meeting, the Council considered the January 24, 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 redacted September 15, 2021 e-mails (2:30 p.m. and 3:52 p.m.) 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 deliver⁴ 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.⁵**

Procedural History:

On February 2, 2023, the Council distributed its Administrative Order to all parties. On February 9, 2023, the GRC received the Custodian’s response to the Council’s Interim Order. Therein, the Custodian certified that she was providing nine (9) redacted and unredacted copies of the relevant e-mail chains containing redactions under the ACD exemption. The Custodian noted that both her and Custodian’s Counsel have since offered the Complainant the e-mail chains in

³ On May 16, 2022, this complaint was referred to mediation. On October 18, 2022, this complaint was referred back to the GRC for adjudication.

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.

unredacted form because the Township Committee never discussed the issue and due to the factual nature of the information.

Analysis

Compliance

At its January 31, 2023 meeting, the Council ordered the Custodian to provide to the Council for *in camera* review nine (9) copies of the redacted and unredacted e-mail chains and a document index. The Custodian was also required to simultaneously provide certified confirmation of compliance to the Executive Director. R. 1:4-4. On February 2, 2023, the Council distributed its Administrative 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 16, 2023.

On February 9, 2023, the fifth (5th) business day after receipt of the Council's Order, the Custodian submitted for *in camera* review nine (9) redacted and unredacted copies of the two (2) e-mail chains. The Custodian also included a document index and certified confirmation of compliance as part of her response.

Therefore, the Custodian complied with the Council's January 31, 2023 Administrative Order because she responded in the prescribed time frame providing nine (9) redacted and unredacted copies of the two (2) e-mail chains for *in camera* review and 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 on the submitted record. Initially, the GRC notes that the Custodian has asserted that following the disclosure here, the Township Committee did not ultimately engage in discussions on the floodwall. The Custodian averred that based on this, she has offered to disclose the e-mails without redactions under the premise that they are longer subject to the ACD exemption. Notwithstanding this change in position, the GRC’s review here must remain focused on whether the denial was lawful at the time of disclosure and without employing hindsight. The results of this examination are set forth in the following table:

Record No.	Record Name/Date	Description of Redaction	Custodian’s Explanation/ Citation for Redactions	Findings of the <i>In Camera</i> Examination⁶
1.	E-mail from Joe Hubert to the Township Engineer dated September 15, 2021 (2:30p.m.)	Mr. Hubert produced a chart showing river forecasts for a four (4) day period.	ACD material exemption. <u>N.J.S.A.</u> 47:1A-1.1.	The e-mail body contains factual information related to Passaic River’s cresting forecast. While factual information may be considered part of an ACD record per <u>Educ. Law Ctr.</u> , the GRC cannot square how the disclosure of this basic forecasting information could reveal substantive deliberations. Thus, the e-mail body cannot meet the

⁶ **Unless expressly identified for redaction, everything in the record shall be disclosed.** For purposes of identifying redactions, unless otherwise noted a paragraph/new paragraph begins whenever there is an indentation and/or a skipped space(s). The paragraphs are to be counted starting with the first whole paragraph in each record and continuing sequentially through the end of the record. If a record is subdivided with topic headings, renumbering of paragraphs will commence under each new topic heading. Sentences are to be counted in sequential order throughout each paragraph in each record. Each new paragraph will begin with a new sentence number. If only a portion of a sentence is to be redacted, the word in the sentence which the redaction follows or precedes, as the case may be, will be identified and set off in quotation marks. If there is any question as to the location and/or extent of the redaction, the GRC should be contacted for clarification before the record is redacted. The GRC recommends the redactor make a paper copy of the original record and manually "black out" the information on the copy with a dark colored marker, then provide a copy of the blacked-out record to the requester.

				two (2) prong test to be considered ACD material. Thus, Custodian unlawfully denied access to the body of this e-mail and must disclose same. <u>N.J.S.A. 47:1A-6.</u>
2.	E-mail from the Township Engineer to Mr. Hubert dated September 15, 2021 (2:30p.m.)	The Engineer requests to information on river forecasts associated with floodwall discussions and provides the reason for the request.	ACD material exemption. <u>N.J.S.A. 47:1A-1.1.</u>	The redacted e-mail body contains two (2) redacted sentences. The first (1 st) sentence states the request for data from a recent storm and does not in and of itself invoke deliberations. However, the second (2 nd) sentence does provide connection to a pending deliberation on the floodwall that is within the ACD exemption. Thus, Custodian unlawfully denied access to the first (1st) sentence of the e-mail body and must again disclose same with only the second (2nd) sentence redacted. <u>N.J.S.A. 47:1A-6.</u>
3.	E-mail from the Township Engineer to Nancy Malool dated September 15, 2021 (3:53p.m.)	The Engineer provided guidance on documents in anticipation of a meeting about the floodwall project.	ACD material exemption. <u>N.J.S.A. 47:1A-1.1.</u>	The content of this e-mail body contains discussion and brief analysis of attachments in anticipation of an upcoming internal meeting about the floodwall. Thus, the discussions contained herein clearly relate to internal deliberations on the floodwall issue and fall within the ACD exemption. Thus, Custodian lawfully denied access to the body of this e-mail. <u>N.J.S.A. 47:1A-6.</u>

Thus, while the Custodian lawfully denied access to the second (2) sentence of the second (2nd) e-mail and entirety of the body of the third (3rd) e-mail, she unlawfully denied access to the body of the first (1st) e-mail and first (1st) sentence of the second (2nd) e-mail. N.J.S.A. 47:1A-1.1. The GRC notes that the *In Camera* Examination findings do not prohibit the Custodian from simply disclosing the e-mails in their entirety per her compliance statement.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's January 31, 2023 Administrative Order because she responded in the prescribed time frame providing nine (9) redacted and unredacted copies of the two (2) e-mail chains for *in camera* review and simultaneously provided certified confirmation of compliance to the Executive Director.
2. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the above table within twenty (20) business days from receipt of this Order. In the circumstance where the records ordered for disclosure are not provided to the Complainant, the Council's Final Decision may be enforced in the Superior Court of New Jersey. N.J. Court Rules, R. 4:67-6; N.J.A.C. 5:105-2.9(c).**

Prepared By: Frank F. Caruso
Executive Director

July 23, 2024



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

Charles Arentowicz
Complainant

GRC Complaint No. 2022-169

v.

Township of Long Hill (Morris)
Custodial Agency

Custodian of Record: Megan Phillips
Request Received by Custodian: March 18, 2021
GRC Complaint Received: April 29, 2022

Order: The GRC must conduct an *in camera* review of the responsive redacted September 15, 2021 e-mails (2:30 p.m. and 3:52 p.m.) 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: January 31, 2023

Prepared By: Frank F. Caruso
Executive Director

Date: January 24, 2023

Distribution Date: February 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."