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Governor

TAHESHA L. WAY  
Lieutenant Governor

JACQUELYN A. SUÁREZ  
Acting Commissioner

## FINAL DECISION

### February 29, 2024 Government Records Council Meeting

Marc Liebeskind  
Complainant

Complaint No. 2022-339

v.

NJ Department of Transportation  
Custodian of Record

At the February 29, 2024 public meeting, the Government Records Council (“Council”) considered the February 20, 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 **the *In Camera* Examination set forth in the above reveals the Custodian has lawfully denied access to the redacted body of the May 17, 2022 e-mail in the document index pursuant to N.J.S.A. 47:1A-1.1. N.J.S.A. 47:1A-6.**

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 29<sup>th</sup> Day of February 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: March 4, 2024**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director  
February 27, 2024 Council Meeting**

**Marc Liebeskind<sup>1</sup>  
Complainant**

**GRC Complaint No. 2022-339**

v.

**N.J. Department of Transportation<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Copies of:

1. All correspondence between the Borough of Highland Park (“Borough”) and New Jersey Department of Transportation (“DOT”) regarding the temporary and permanent closures of North 4<sup>th</sup> Avenue and South 3<sup>rd</sup> Avenue within the Borough between April 1, 2022 and present.
2. All correspondence received by and sent from DOT regarding the temporary and permanent closures of North 4<sup>th</sup> Avenue and South 3<sup>rd</sup> Avenue within the Borough between April 1, 2022 and present.<sup>3</sup>

**Custodian of Record:** Joshua Joseph<sup>4</sup>

**Request Received by Custodian:** May 27, 2022

**Response Made by Custodian:** June 8, 2022

**GRC Complaint Received:** July 14, 2022

**Records Submitted for *In Camera* Examination:** Redacted May 17, 2022 (3:59:16 p.m.) e-mail body.

**Background**

**Request and Response:**

On May 27, 2022, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On June 8, 2022, the Custodian responded in writing advising the Complainant that an extension of time to respond through June 23, 2022 was necessary to continue the search process. On June 23, 2022, the Custodian responded in writing seeking another extension of time to respond through July 8, 2022 to continue to

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

<sup>2</sup> Represented by Deputy Attorney General (“DAG”) Morgan L. Rice. Previously represented by DAG John C. Lowenberg.

<sup>3</sup> The Complainant sought additional records that are not at issue in this complaint.

<sup>4</sup> Mr. Joseph recently left the Department.

facilitate DOT's search for responsive records. On the same day, the Complainant responded objecting to the second extension request and seeking a reason therefor. On June 27, 2022, the Custodian responded stating that OPRA requests seeking e-mails are "among the most time-consuming records requests" received by DOT. The Custodian set forth the process by which DOT had to search for and review e-mails prior to disclosure. The Custodian stated that "in sum, this process takes a significant amount of time which can vary based on the specifics of the OPRA request." The Custodian finally noted that DOT "aim[s] to provide responsive records as soon as they are available. . . ."

On July 7, 2022, the Custodian responded in writing disclosing responsive records and noting that same contain redactions for personal identifying information and "inter-agency or intra-agency advisory, consultative, or deliberative ("ACD") material." N.J.S.A. 47:1A-1, et seq.

#### Denial of Access Complaint:

On July 14, 2022, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant stated that S2364/A3708 proposed to extend the provisions of P.L. 2021, c. 15 regarding outdoor dining for two (2) additional years, which the Borough has relied on to pursue road closures within the municipality. The Complainant asserted the redacted e-mail body was allegedly later discussed verbally by three (3) mayors, inclusive of the Borough's Mayor. The Complainant contended that the privilege log accompanying the redacted e-mail at issue here contains no description of the content; thus, the Council should conduct an *in camera* review to determine whether the redaction was lawful. Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346, 355 (App. Div. 2005).

#### Statement of Information:

On August 9, 2022, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on May 27, 2022. The Custodian certified that following multiple extensions, he responded in writing on July 7, 2022 disclosing multiple records with redactions.

The Custodian averred that OPRA allows custodians to deny access to records that reflect ACD material. N.J.S.A. 47:1A-1.1; Educ. Law Ctr. v. N.J. Dep't of Educ., 198 N.J. 274, 284 (2009). The Custodian stated that for the ACD exemption to apply, the record or redacted material must: 1) be pre-decisional or generated prior to the adoption of an agency's policy or decision; and 2) be deliberative in nature. See Educ. Law Ctr., 198 N.J. at 286. The Custodian argued that the redacted e-mail body meets both prongs of the test because it "discusses aspects of the process" by which DOT would address municipal outdoor dining requests. The Custodian argued that the e-mail body, within the context of the total e-mail chain, proves that high level DOT officials were seeking and receiving advice on how to handle the outdoor dining issue. The Custodian thus contended that the e-mail body was clearly pre-decisional.

The Custodian further argued that high level government officials are permitted to engage in deliberations without them becoming public. The Custodian argued that such a policy would chill "open and frank discussion and recommendations." Educ. Law Ctr., 198 N.J. at 304. The

Custodian noted that the Complainant was provided with 72 pages of e-mails, including those containing the “final” decisions of DOT officials on this issue; however, he is not entitled to deliberative discussions under the ACD exemption.

The Custodian contended that based on the above, he lawfully redacted the e-mail in question. The Custodian further argued that the privilege log, which DOT provided voluntarily, along with the disclosed e-mails were sufficient to support the denial. The Custodian thus argued that an *in camera* review is not necessary here.

#### Additional Submissions:

On August 18, 2022, the Complainant responded to the SOI. Therein, the Complainant argued that the GRC is required to conduct a “meaningful review” where it is not clear whether the record or redaction is valid. Rodriguez v. Kean Univ., GRC Complaint No. 2016-40 (Interim Order dated March 28, 2017) (citing Paff, 379 N.J. Super. at 354); see also Katon v. v. N.J. Dep’t of Law & Pub. Safety, Office of the Attorney Gen., 2015 N.J. Super. Unpub. LEXIS 256 (App. Div. 2015) (reversing the Council’s prior decision for failure to perform an *in camera* review); Pouliot v. N.J. Dep’t of Educ., GRC Complaint No. 2015-281 (Interim Order dated January 31, 2017); Liebeskind v. Borough of Highland Park (Middlesex), GRC Complaint No. 2021-79 (Interim Order dated April 26, 2022). The Complainant contended that the disclosed e-mails in the relevant e-mail chain spoke to “operational difficulties” with the expansion of the existing law, but neither those e-mails nor the subject line clearly shows how the redacted e-mail body comprised of ACD material. The Complainant further argued that rather than provide a concise argument on the content of the redaction, the Custodian resorted to generalized speculation and conjecture. The Complainant thus argued that the GRC should accordingly conduct an *in camera* review.

#### December 12, 2023 Council Meeting:

At its December 12, 2023 public meeting, the Council considered the December 5, 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 redacted May 17, 2022 (3:59:16 p.m.) e-mail to determine the validity of the Custodian’s assertion that e-mail body was exempt under the cited exemption. N.J.S.A. 47:1A-1.1 See [Paff, 379 N.J. Super. at 355]. **Thus, The Custodian shall deliver<sup>5</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted record, nine (9) copies of the redacted record, and a document or redaction index.<sup>6</sup>**

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<sup>5</sup> 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.

<sup>6</sup> The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

**This is an Administrative Order requiring compliance within ten (10) business days after receipt thereof. The Custodian shall also simultaneously deliver<sup>7</sup> certified confirmation of compliance with this Order, in accordance with N.J. Court Rules, R. 1:4-4,<sup>8</sup> to the Executive Director.**

Procedural History:

On December 14, 2023, the Council distributed its Interim Order to all parties. On December 29, 2023, Custodian's Counsel submitted a formal letter of representation and sought a five (5) business day extension of the compliance time frame due to the Custodian's recent departure. On the same day, the GRC granted Custodian Counsel's request for extension through January 8, 2024 and reminded her that the record requested for *in camera* review must be physically received by the deadline date.

On January 8, 2024, Administrative Analyst Priya Alur responded to the Council's Interim Order. Ms. Alur certified that she has been a member of DOT's OPRA/Records/Torts Litigation Unit since May 2019 and is familiar with this complaint. Ms. Alur certified that she was providing nine (9) redacted and unredacted copies of the May 17, 2022 e-mail for *in camera* review and a document index.

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. 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.

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<sup>7</sup> 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.

<sup>8</sup> "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."

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. The results of this examination are set forth below.

The e-mail under review was sent by Deputy Chief of Staff Vanessa Holman to Commissioner Diane Gutierrez-Scaccetti (and cc’ing Lisa Adams, also of DOT) on May 17, 2022. The redacted content of the e-mail includes discussion of whether the DOT’s suggested process for making outdoor dining requests is appropriate. Ms. Holman suggested a short-term plan for addressing the issue and asked for opinions thereon.

Upon review, the redacted e-mail body clearly meets the two-prong test necessary to be exempt as ACD material. Regarding the first prong, the discussion occurred prior to DOT setting a clear policy on outdoor dining requests and especially considering the potential passage of S2364, which did not become law until August 3, 2022. P.L. 2022, c. 85. Regarding the second prong, the e-mail body clearly reflects DOT’s deliberative process as it relates to outdoor dining requests, contains recommendations on how to proceed, and seeks further deliberation on those recommendations. When taken in the context of the entire e-mail chain, the redacted discussion clearly occurred before DOT’s final decision on an appropriate outdoor dining request process.

Accordingly, the Custodian lawfully denied access to the redacted e-mail body because it constituted ACD material exempt from disclosure under OPRA. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that **the *In Camera* Examination set forth in the above reveals the Custodian has lawfully denied access to the redacted body of the May 17, 2022 e-mail in the document index pursuant to N.J.S.A. 47:1A-1.1. N.J.S.A. 47:1A-6.**

Prepared By: Frank F. Caruso  
Executive Director

February 20, 2024



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

**Marc Liebeskind**  
**Complainant**

**GRC Complaint No. 2022-339**

v.

**N.J. Department of Transportation**  
**Custodial Agency**

**Custodian of Record:** Joshua Joseph  
**Request Received by Custodian:** May 27, 2022  
**GRC Complaint Received:** July 14, 2022

**Order:** The GRC must conduct an *in camera* review of the redacted May 17, 2022 (3:59:16 p.m.) e-mail to determine the validity of the Custodian's assertion that e-mail body was exempt under the cited 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, 355 (App. Div. 2005). **Thus, The Custodian shall deliver<sup>1</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted record, nine (9) copies of the redacted record, and a document or redaction index.<sup>2</sup>**

**This is an Administrative Order requiring compliance within ten (10) business days after receipt thereof. The Custodian shall also simultaneously deliver<sup>3</sup> certified confirmation of compliance with this Order, in accordance with N.J. Court Rules, R. 1:4-4,<sup>4</sup> to the Executive Director.**

**Effective Date of Disposition:** December 12, 2023

Prepared By: Frank F. Caruso  
Executive Director

Date: December 5, 2023

**Distribution Date: December 14, 2023**

<sup>1</sup> 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.

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

<sup>3</sup> 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.

<sup>4</sup> "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."