



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

February 27, 2018 Government Records Council Meeting

Joshua Lazarus
Complainant

Complaint No. 2011-331

v.

NJ Department of Community Affairs
Custodian of Record

At the February 27, 2018 public meeting, the Government Records Council (“Council”) considered the February 20, 2018 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that this complaint be dismissed because the Complainant withdrew his complaint in an e-mail to the GRC on February 16, 2018. Therefore, no further adjudication is required.

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 27th Day of February, 2018

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 2, 2018



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Council Staff
February 27, 2018 Council Meeting**

**Joshua Lazarus¹
Complainant**

GRC Complaint No. 2011-331

v.

**New Jersey Department of Community Affairs²
Custodian of Records**

Records Relevant to Complaint: Copies of all correspondence, e-mails, notes or other documentation relating to the mold infestation or water leaks, from the roof or windows at 101 South Broad Street Trenton, NJ received or sent by the following: 1) Commissioner or Commissioner's staff; 2) Deputy Commissioner or Deputy Commissioner's staff; 3) Assistant Commissioner or Assistant Commissioner's staff; 4) Chief of Staff or Chief of Staff's staff; and 5) Building Maintenance Staff from January 1, 2009 through September 17, 2011.

Custodian of Record: Gabrielle Gallagher³

Request Received by Custodian: September 18, 2011

Response Made by Custodian: September 26, 2011

GRC Complaint Received: October 31, 2011

Background

January 29, 2013 Council Meeting:

At its January 29, 2013 public meeting, the Council considered the January 22, 2013 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:

[S]ince there are issues of contested facts, specifically whether or not the e-mails listed in the Custodian's Statement of Information contain advisory, consultative and deliberative material which is exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-1.1, this complaint should be referred to the Office of Administrative Law for an *in camera* review *de novo* and a determination of whether the Custodian unlawfully denied access to said e-mails. Additionally, if necessary, the Office of Administrative Law should make a determination of

¹ No legal representation listed on record.

² No legal representation listed on record.

³ The Custodian at the time of the Complainant's request and the Statement of Information was former Deputy Commissioner, BettyLou DeCroce. The current Custodian of Record is Tammori Petty.

whether the Custodian knowingly and willfully violated OPRA and unlawfully denied access to the requested e-mails under the totality of the circumstances.

Procedural History:

On February 1, 2013, the Council distributed its Interim Order to all parties. On May 7, 2013, this complaint was transmitted to the Office of Administrative Law (“OAL”). On February 16, 2018, the Complainant withdrew this complaint in writing (via e-mail) to the Government Records Council (“GRC”). On the same day, the GRC e-mailed the OAL alerting them to the withdraw. The GRC also asked that the OAL close and return this complaint for final adjudication.

Analysis

No analysis required.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that this complaint be dismissed because the Complainant withdrew his complaint in an e-mail to the GRC on February 16, 2018. Therefore, no further adjudication is required.

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

February 20, 2018



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

January 29, 2013 Government Records Council Meeting

Joshua Lazarus
Complainant

Complaint No. 2011-331

v.

New Jersey Department of Community Affairs
Custodian of Record

At the January 29, 2013 public meeting, the Government Records Council (“Council”) considered the January 22, 2013 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 since there are issues of contested facts, specifically whether or not the e-mails listed in the Custodian’s Statement of Information contain advisory, consultative and deliberative material which is exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-1.1, this complaint should be referred to the Office of Administrative Law for an *in camera* review *de novo* and a determination of whether the Custodian unlawfully denied access to said e-mails. Additionally, if necessary, the Office of Administrative Law should make a determination of whether the Custodian knowingly and willfully violated OPRA and unlawfully denied access to the requested e-mails under the totality of the circumstances.

Interim Order Rendered by the
Government Records Council
On The 29th Day of January, 2013

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: February 1, 2013



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 29, 2013 Council Meeting**

**Joshua Lazarus¹
Complainant**

GRC Complaint No. 2011-331

v.

**New Jersey Department of Community Affairs²
Custodian of Records**

Records Relevant to Complaint: Copies of all correspondence, e-mails, notes or other documentation relating to the mold infestation or water leaks, from the roof or windows at 101 South Broad Street Trenton, NJ received or sent by the following: 1) Commissioner or Commissioner's staff; 2) Deputy Commissioner or Deputy Commissioner's staff; 3) Assistant Commissioner or Assistant Commissioner's staff; 4) Chief of Staff or Chief of Staff's staff; and 5) Building Maintenance Staff from January 1, 2009 through September 17, 2011.

Request Made: September 18, 2011

Response Made: September 26, 2011

Custodian: Gabrielle Gallagher³

GRC Complaint Filed: October 31, 2011⁴

Background

September 18, 2011

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form. The Complainant indicates that the preferred method of delivery is e-mail.

September 26, 2011

Marlene Wyncarzuk's ("Ms. Wyncarzuk"), Executive Assistant to the former Deputy Commissioner, response to the OPRA request. Ms. Wyncarzuk responds in writing via e-mail to the Complainant's OPRA request on the sixth (6th) business day following receipt of such request. Ms. Wyncarzuk states that an additional five (5) business days is needed to fulfill the request due its scope.

¹ No legal representation listed on record.

² No legal representation listed on record.

³ The Custodian at the time of the Complainant's request and the Statement of Information was former Deputy Commissioner, BettyLou DeCroce.

⁴ The GRC received the Denial of Access Complaint on said date.

September 26, 2011

E-mail from the Complainant to Ms. Wynarczuk. The Complainant states that N.J.S.A. 47:1A-5(i) requires the Custodian to make the records responsive available within seven (7) business days of the request. The Complainant also states that he does not agree to the Ms. Wynarczuk's request for an additional five (5) business days to complete the request.

September 27, 2011

E-mail from Ms. Wynarczuk to the Complainant. Ms. Wynarczuk states that additional time is needed to ensure that a sufficient search for e-mails is performed. Ms. Wynarczuk also states that according to prior Government Records Council ("GRC") decisions, the requestor does not need to agree to the extension, provided that there is a legitimate reason for the extension. Ms. Wynarczuk further states that the records responsive to the request will be provided by October 7, 2011.

October 6, 2011

Letter from the Custodian to the Complainant. The Custodian states that the Complainant's request for records of unnamed "staff" does not specifically identify a government record and is therefore invalid pursuant to MAG Entertainment, LLC v. Division of Alcohol Beverage Control, 375 N.J. Super. 534 (App. Div. 2005). The Custodian also states that records which are not otherwise exempt under OPRA are being provided for named staff, (i.e. the Commissioner, Commissioner's staff, etc.). The Custodian further states that she created a list of all the records responsive to the request. The Custodian additionally states that this list includes a notes section, identifying said records as either "no exemption" or "exempt-ACD." The Custodian states that the records listed as "exempt-ACD" contain advisory, consultative or deliberative ("ACD") material and will not be released.

The Custodian states that the deliberative process privilege permits government agencies to withhold records that reflect advisory opinions, recommendations and deliberations as submitted as part of a process by which governmental decisions and policies are formulated. *See* NLRB V. Sears, Roebuck & Co., 421 U.S. 150 (1975). The Custodian also states that the New Jersey Supreme Court has ruled that if a record contains factual components said record is entitled to the deliberative process protection exemption under OPRA when it was used in the decision-making process and its disclosure would reveal deliberations that occurred during that process. *See* Education Law Center v. NJ Department of Education, 198 N.J. 274 (2009).

October 31, 2011

Denial of Access Complaint filed with the GRC with the following attachments:

- Complainant's OPRA request dated September 18, 2011
- Letter from the Custodian to the Complainant dated October 6, 2011 with attachments.⁵

⁵ The Complainant includes a copy of the Custodian's list of the records responsive to his OPRA request. Joshua Lazarus v. New Jersey Department of Community Affairs, 2011-331 – Findings and Recommendations of the Executive Director

The Complainant states that he filed his OPRA request on September 18, 2011. The Complainant states that he received a response from the Custodian on October 7, 2011 with several records responsive to the request and a list of all records that were denied for release pursuant to N.J.S.A. 47:1A-1.1 as such records contain ACD material.

The Complainant states that the requested records contain information relating to matters of health and safety of the employees and the public. The Complainant also states that there are obvious ongoing environmental problems at 101 South Broad Street Trenton, NJ; thus, the Custodian's denial of access is placing the welfare of the employees and the public in danger. The Complainant also states that these records may contain information that may have significant value to the employees, as well as their health care providers, who are suffering from continuing problems such as asthma, congestion, constant coughing and nasal problems. The Complainant further states that the GRC should overrule the Custodian's denial of his request because the actions that have been taken to remedy this problem have not been successful. The Complainant states that the employees have a right to know why the mold problem has not been resolved in a timely manner.

The Complainant states that the Custodian's denial based on "unnamed staff" should be overruled. The Complainant also states that he specifically identified which staff he wanted to include in his request. The Complainant further states that he included the specific titles of those staff members in his request. Lastly, the Complainant states that the specific identify of those individuals would be impractical.

The Complainant does not agree to mediate this complaint.

November 7, 2011

Request for the Statement of Information ("SOI") sent to the Custodian.

November 16, 2011

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated September 18, 2011
- E-mail from Ms. Wynarczuk to the Complainant dated September 26, 2011
- E-mail from the Complainant to Ms. Wynarczuk dated September 26, 2011
- E-mail from Ms. Wynarczuk to the Complainant dated September 27, 2011
- Letter from the Custodian to the Complainant dated October 6, 2011 with attachments.⁶

The Custodian certifies that she sent a request to the Information Technology Department and requested that they searched for records responsive to the OPRA request. The Custodian also certifies that no records responsive were destroyed in accordance with the Records Destruction Schedule established and approved by Records Management Services.

⁶ The Custodian attaches an e-mail from Stacy Spera, ("Ms. Spera"), Chief of Operations, to Charlie Pierson ("Mr. Pierson"), Building Manager, dated September 15, 2011, with redactions.
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The Custodian certifies that she received the Complainant's OPRA request on September 18, 2011. The Custodian also certifies that she responded to the Complainant's request on October 6, 2011, within the requested five (5) business day extension. The Custodian further certifies that she provided some records responsive to the Complainant's request. The Custodian certifies that she did not provide the other e-mails responsive to the Complainant's request because such e-mails contain ACD material.⁷

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

"...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*" (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

"... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ... The terms shall not include *inter-agency or intra-agency advisory, consultative, or deliberative material.*" (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

"...[t]he public agency shall have the burden of proving that the denial of access is authorized by law..." N.J.S.A. 47:1A-6.

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 the instant complaint, the Custodian responded in writing, via letter, to the Complainant's OPRA request on October 6, 2011, within the requested extension of time. The Custodian denied access to the e-mails responsive to the Complainant's request

⁷ The Custodian included a table listing the e-mails responsive to the Complainant's request which are exempt from disclosure as ACD material.

because they were exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 as such e-mails contain ACD material. The Custodian included as part of the SOI a table listing the e-mails responsive to the Complainant's request which are exempt from disclosure as ACD.

Conversely, the Complainant asserts that the Custodian's denial should be overruled because the actions taken to remedy the mold problem at 101 South Broad Street Trenton, NJ, have not been successful. The Complainant also asserts that the employees have a right to know why this matter has not been resolved in a timely manner.

In Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the Complainant appealed a final decision of the GRC⁸ in which the GRC dismissed the complaint by accepting the Custodian's legal conclusion for the denial of access without further review. The Court stated 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."

The Court also stated that:

"[t]he statute 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 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-7f. This provision would be unnecessary if the Legislature did not intend to permit *in camera* review."

Further, the Court stated that:

"[w]e 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-7f, which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption."

⁸ Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005).
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In addition, the Administrative Procedures Act provides that the Office of Administrative Law (“OAL”) “shall acquire jurisdiction over a matter only after it has been to be a contested case by an agency head and has been filed with the [OAL]...” *N.J.A.C. 1:1-3.2(a)*.

Therefore, since there are issues of contested facts, specifically whether or not the e-mails listed in the Custodian’s SOI contain ACD material which is exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-1.1, this complaint should be referred to OAL for an *in camera* review *de novo* and a determination of whether the Custodian unlawfully denied access to said e-mails. Additionally, if necessary, OAL should make a determination of whether the Custodian knowingly and willfully violated OPRA and unlawfully denied access to the requested e-mails under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that since there are issues of contested facts, specifically whether or not the e-mails listed in the Custodian’s Statement of Information contain advisory, consultative and deliberative material which is exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-1.1, this complaint should be referred to the Office of Administrative Law for an *in camera* review *de novo* and a determination of whether the Custodian unlawfully denied access to said e-mails. Additionally, if necessary, the Office of Administrative Law should make a determination of whether the Custodian knowingly and willfully violated OPRA and unlawfully denied access to the requested e-mails under the totality of the circumstances.

Prepared and

Approved By: Karyn Gordon, Esq.
Acting Executive Director

January 22, 2013