



**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*

**FINAL DECISION**

**January 28, 2014 Government Records Council Meeting**

Sheldon L Pepper  
Complainant

Complaint No. 2012-316

v.

Township of Downe (Cumberland)  
Custodian of Record

At the January 28, 2014 public meeting, the Government Records Council (“Council”) considered the January 21, 2014 Supplemental 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 December 20, 2013 Interim Order because she responded in the prescribed time frame certifying the records had already been provided, stating that the records would be sent again to the Complainant, and simultaneously provided certified confirmation of compliance to the Executive Director.
2. The GRC’s *in camera* review and the certifications of the Custodian demonstrate that the Custodian provided the Complainant with all records responsive to the request. 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 28<sup>th</sup> Day of January, 2014

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: January 30, 2014**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
January 28, 2014 Council Meeting**

**Sheldon L. Pepper<sup>1</sup>  
Complainant**

**GRC Complaint No. 2012-316**

v.

**Township of Downe (Cumberland)  
Custodial Agency**

**Records Relevant to Complaint:** The Complainant seeks copies of “any letters, e-mails and or faxes regarding changes, additions, deletions to zoning ordinance related to M-1 zone and permitted uses within M-1 zone to and from Planning Board Solicitor Duffy, Planning Board Secretary Mimi Marlour, Mayor & Planning Board Member Bob Campbell and Twp. Solicitor John Carr.”

**Custodian of Record:** Nadine E. Lockley<sup>2</sup>

**Request Received by Custodian:** September 6, 2012

**Response Made by Custodian:** September 14, 2012

**GRC Complaint Received:** December 13, 2012

**Background**

**December 20, 2013 Council Meeting:**

At its December 20, 2013 public meeting, the Council considered the December 10, 2013 *In Camera* 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 Council’s October 29, 2013 Order required the Custodian to provide the GRC with unredacted and redacted records, certifications of the Custodian, and a document or redaction index within five (5) days of receipt of the Order. The GRC received the above referenced documents from the Custodian in two installments. The Township Solicitor’s certification and accompanying documents arrived timely within five (5) business days on November 7, 2013. The PB Solicitor’s certification and accompanying documents arrived on the sixth (6<sup>th</sup>) business day. Therefore, the Custodian partially failed to comply with the deadline in the Council’s Interim Order.

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

<sup>2</sup> The Custodian of Record is currently Constance S. Garton.

2. The Custodian unlawfully denied access to the requested record because the emails are responsive to the Complainant's request and are not exempt from disclosure under OPRA. N.J.S.A. 47:1A-1.1. The Custodian shall disclose a copy of the above-referenced emails exchanged by the Planning Board Solicitor and Planning Board Secretary, unless such emails have already been produced for the Complainant.
3. **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 above in item number two (2) within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.**<sup>3</sup>
4. 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 December 23, 2013, the Council distributed its Interim Order to all parties.

On January 10, 2014, the Custodian responded to the Council's Interim Order. The Custodian noted in a letter dated January 9, 2014 that she received the Council's Order on January 6, 2014. The Custodian stated that copies of the documents ordered to be disclosed were being provided to the Complainant. The Custodian certified, in relevant part, that:

I am the Custodian charged by the Township of Downe with the responsibility for responding to the request for records on which this complaint is based.

The documents attached hereto are true copies of the specific documents mentioned in the Interim Order of the Council dated December 23, 2013 and requested to be disclosed to the Complainant. No redactions were made despite the confusion caused by the claim of the potential right to such redactions made in the Planning Board Solicitor's correspondence. At no time were any documents withheld on the basis of any claim of privilege.

The email documents which are attached were produced on September 14, 2012 to the complainant and produced for the Government Records Council's in camera inspection on November 7, 2013.

Certification of Nadine Lockley (January 9, 2014).

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<sup>3</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

## Analysis

### Compliance

At its December 20, 2013 meeting, the Council ordered the Custodian to disclose a copy of August 11, 2012 emails exchanged by the Planning Board Solicitor and Planning Board Secretary, unless such emails had already been produced for the Complainant, within five business days from receipt of same and to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On December 23, 2013, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. The Custodian received the Council's Interim Order on January 6, 2014. Thus, the Custodian's response was due by close of business on January 13, 2014.

On January 10, 2014, the fourth (4<sup>th</sup>) business day after receipt of the Council's Order, the Custodian provided certified confirmation of compliance to the GRC, stating that: (1) the documents the Council ordered disclosed had previously been provided to the Complainant; and (2) an additional copy of the documents would be forwarded to the Complainant.

Therefore, the Custodian complied with the Council's December 20, 2013 Interim Order because she responded in the prescribed time frame certifying the records had already been provided, stating that the records would be sent again to the Complainant, and simultaneously provided certified confirmation of compliance to the Executive Director.

### 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, 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 GRC's *in camera* review and the certifications of the Custodian demonstrate that the Custodian provided the Complainant with all records responsive to the request. 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. The Custodian complied with the Council's December 20, 2013 Interim Order because she responded in the prescribed time frame certifying the records had already been provided, stating that the records would be sent again to the Complainant, and simultaneously provided certified confirmation of compliance to the Executive Director.
2. The GRC's *in camera* review and the certifications of the Custodian demonstrate that the Custodian provided the Complainant with all records responsive to the request. 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: Robert T. Sharkey, Esq.  
Staff Attorney

Approved By: Dawn R. SanFilippo, Esq.  
Senior Counsel

January 21, 2014



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

December 20, 2013 Government Records Council Meeting

Sheldon L. Pepper  
Complainant

Complaint No. 2012-316

v.

Township of Downe (Cumberland)  
Custodian of Record

At the December 20, 2013 public meeting, the Government Records Council (“Council”) considered the December 10, 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:

1. The Council’s October 29, 2013 Order required the Custodian to provide the GRC with unredacted and redacted records, certifications of the Custodian, and a document or redaction index within five (5) days of receipt of the Order. The GRC received the above referenced documents from the Custodian in two installments. The Township Solicitor’s certification and accompanying documents arrived timely within five (5) business days on November 7, 2013. The PB Solicitor’s certification and accompanying documents arrived on the sixth (6<sup>th</sup>) business day. Therefore, the Custodian partially failed to comply with the deadline in the Council’s Interim Order.
2. The Custodian unlawfully denied access to the requested record because the emails are responsive to the Complainant’s request and are not exempt from disclosure under OPRA. N.J.S.A. 47:1A-1.1. The Custodian shall disclose a copy of the above-referenced emails exchanged by the Planning Board Solicitor and Planning Board Secretary, unless such emails have already been produced for the Complainant.
3. **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 above in item number two (2) within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.<sup>1</sup>**

<sup>1</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

4. 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.

Interim Order Rendered by the  
Government Records Council  
On The 20<sup>th</sup> Day of December, 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: December 23, 2013**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director  
December 20, 2013 Council Meeting**

**Sheldon L. Pepper<sup>1</sup>  
Complainant**

**GRC Complaint No. 2012-316**

v.

**Township of Downe (Cumberland)  
Custodial Agency**

**Records Relevant to Complaint:** The Complainant seeks copies of “any letters, e-mails and or faxes regarding changes, additions, deletions to zoning ordinance related to M-1 zone and permitted uses within M-1 zone to and from Planning Board Solicitor Duffy, Planning Board Secretary Mimi Marlour, Mayor & Planning Board Member Bob Campbell and Twp. Solicitor John Carr.”

**Custodian of Record:** Nadine E. Lockley<sup>2</sup>

**Request Received by Custodian:** September 6, 2012

**Response Made by Custodian:** September 14, 2012

**GRC Complaint Received:** December 13, 2012

**Background**

**December 17, 2013 Council Meeting:**

At its October 29, 2013 public meeting, the Council considered the October 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:

1. The GRC must conduct an *in camera* review of the undisclosed communications between the Planning Board Solicitor and Planning Board or Township Solicitor that are responsive to the Complainant’s request in order to determine the validity of the Custodian’s assertion that attorney-client privilege exempts those records from disclosure pursuant to N.J.S.A. 47:1A-1.1. See Paff v. N.J. Dept. of Labor, Bd. of Review, 379 N.J. Super. 354-55 (App. Div. 2005).
2. **The Custodian must deliver<sup>3</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see item number one (1) above), a**

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

<sup>2</sup> The Custodian of Record is currently Constance S. Garton.

**document or redaction index<sup>4</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,<sup>5</sup> that the records provided are the records 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 October 30, 2013 the Council distributed its Interim Order to all parties. On November 7 2013, five (5) business days later, the Custodian responded in part to the Council's Interim Order. The Custodian provided the Government Records Council ("GRC") with a certification from Township Solicitor John G. Carr, Esq. ("Township Solicitor") dated November 4, 2013, correspondence to the Complainant from the Township Solicitor dated May 24, 2013, and Correspondence to Downe Township ("Township") from the Township Solicitor dated August 13, 2012.

On November 8, 2012, six (6) business days after the distribution of the Interim Order, the Custodian provided the remainder of her response to the GRC, which included a certification from Planning Board Solicitor Edward F. Duffy, Esq. ("PB Solicitor") dated November 5, 2013, correspondence to the Township Clerk from the PB Solicitor with an attached list of the documents provided dated June 3, 2013, correspondence to Joseph G. Carr, Esq. from the PB Solicitor with an email attachment dated February 22, 2013, correspondence to the PB Solicitor from the Township Solicitor dated June 29, 2012, and correspondence to the PB Solicitor from the Township Solicitor dated June 15, 2012.

#### Analysis

#### Compliance

The Council's October 29, 2013 Order required the Custodian to provide the GRC with unredacted and redacted records, certifications of the Custodian, and a document or redaction index within five (5) days of receipt of the Order. The GRC received the above referenced documents from the Custodian in two installments. The Township Solicitor's certification and accompanying documents arrived timely within five (5) business days on November 7, 2013. However, the PB Solicitor's certification and accompanying documents arrived on the sixth (6<sup>th</sup>)

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<sup>3</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 they arrive at the GRC office by the deadline.

<sup>4</sup> The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

<sup>5</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."

business day. Therefore, the Custodian partially failed to comply with the Council's Interim Order by delivering some of the documents after the deadline.

### **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. For example, OPRA exempts from disclosure any attorney-client privileged documents. N.J.S.A. 47:1A-1.1. 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.

The Custodian initially relied upon OPRA's exemption of attorney-client privileged materials. After reviewing the Custodian's SOI, the GRC sought clarification from her regarding whether any responsive documents had not been disclosed to the Complainant. The Custodian certified that additional documents "do exist in the form of communications between [the PB Solicitor] and either the Planning Board or Township Solicitor but these records were not disclosed due to attorney-client privileged (*sic*). These records are not in the possession of the Custodian." The Council's Interim Order sought those records.

The GRC conducted an in-camera examination of the submitted records. The Custodian neither submitted any materials that had been redacted nor asserted that any records were exempt from disclosure under OPRA. Rather, the PB Solicitor certified that he had initially claimed attorney-client privilege regarding communications between himself and the Township Solicitor, but that he later learned that all of the communications in question had been disclosed to the Complainant. Those documents were part of the record before the GRC prior to the Council's issuance of the Council's Interim Order. Further, both the PB Solicitor and the Township Solicitor certified that they have produced all documents responsive to the Complainant's request and that no additional responsive documents exist to which the Complainant has not been granted access to, save for one.

The PB Solicitor and Township Solicitor again each certified that the sole remaining undisclosed document that may be responsive to the Complainant's request is an email exchange dated August 11, 2012 from the PB Solicitor transmitting a proposed zoning-related resolution and the Planning Board Secretary's ("PB Secretary") acknowledgement of receipt. The Custodian submitted these emails to the GRC in response to the Council's Interim Order, which were subsequently reviewed *in camera*.

The Custodian unlawfully denied access to the requested record because the emails are responsive to the Complainant's request and are not exempt from disclosure under OPRA. N.J.S.A. 47:1A-1.1. The Custodian shall disclose a copy of the above-referenced emails exchanged by the PB Solicitor and PB Secretary, unless such emails have already been provided to the Complainant.

## **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 Council's October 29, 2013 Order required the Custodian to provide the GRC with unredacted and redacted records, certifications of the Custodian, and a document or redaction index within five (5) days of receipt of the Order. The GRC received the above referenced documents from the Custodian in two installments. The Township Solicitor's certification and accompanying documents arrived timely within five (5) business days on November 7, 2013. The PB Solicitor's certification and accompanying documents arrived on the sixth (6<sup>th</sup>) business day. Therefore, the Custodian partially failed to comply with the deadline in the Council's Interim Order.
2. The Custodian unlawfully denied access to the requested record because the emails are responsive to the Complainant's request and are not exempt from disclosure under OPRA. N.J.S.A. 47:1A-1.1. The Custodian shall disclose a copy of the above-referenced emails exchanged by the Planning Board Solicitor and Planning Board Secretary, unless such emails have already been produced for the Complainant.
3. **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 above in item number two (2) within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.<sup>6</sup>**
4. 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: Robert T. Sharkey, Esq.  
Staff Attorney

Approved By: Brandon D. Minde, Esq.  
Executive Director

December 10, 2013

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<sup>6</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.



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

October 29, 2013 Government Records Council Meeting

Sheldon L. Pepper  
Complainant

Complaint No. 2013-316

v.

Township of Downe (Cumberland)  
Custodian of Record

At the October 29, 2013 public meeting, the Government Records Council ("Council") considered the October 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:

1. The GRC must conduct an *in camera* review of the undisclosed communications between the Planning Board Solicitor and Planning Board or Township Solicitor that are responsive to the Complainant's request in order to determine the validity of the Custodian's assertion that attorney-client privilege exempts those records from disclosure pursuant to N.J.S.A. 47:1A-1.1. See Paff v. N.J. Dept. of Labor, Bd. of Review, 379 N.J. Super. 354-55 (App. Div. 2005).
2. **The Custodian must deliver<sup>1</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see item number one (1) above), a document or redaction index<sup>2</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,<sup>3</sup> that the records provided are the records 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.

<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 they arrive at the GRC office 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> "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 29th Day of October, 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: October 30, 2013**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Sheldon L. Pepper<sup>1</sup>  
Complainant**

**GRC Complaint No. 2012-316**

v.

**Township of Downe (Cumberland)  
Custodial Agency**

**Records Relevant to Complaint:** The Complainant seeks copies of “any letters, e-mails and or faxes regarding changes, additions, deletions to zoning ordinance related to M-1 zone and permitted uses within M-1 zone to and from Planning Board Solicitor Duffy, Planning Board Secretary Mimi Marlour, Mayor & Planning Board Member Bob Campbell and Twp. Solicitor John Carr.”

**Custodian of Record:** Nadine E. Lockley<sup>2</sup>

**Request Received by Custodian:** September 6, 2012

**Response Made by Custodian:** September 14, 2012

**GRC Complaint Received:** December 13, 2012

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

**Request and Response:**

On September 6, 2012, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On September 14, 2012, six (6) business days later, the Custodian responded in writing granting the request in part and denying the request in part. Emails provided to the Complainant from the Custodian state that while a proposed Downe Township (the “Township”) Planning Board (“PB”) resolution containing suggested language must be disclosed, “any correspondence from [the PB Solicitor] to the Board” or “between [the PB Solicitor] and the township solicitor” are exempt under attorney-client privilege.

The Complainant twice received documents from the Custodian prior to making the OPRA request that lead to this complaint. On August 16, 2012, the Complainant sought “e-mails between (to & from) PB Secretary – Mrs. Marlour and Township Solicitor Mr. Carr regarding or related to the zoning ordinance, proposed amendments to same and any regarding or relating to

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

<sup>2</sup> The Custodian of Record is currently Constance S. Garton.

<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.

Sheldon L. Pepper v. Township of Downe, 2012-316 – Findings and Recommendations of the Executive Director

M-1 Zone.” The Custodian provided responsive emails on August 23, 2012. On August 27, 2012, based on information contained in those emails, the Complainant requested a “copy [of] 6/15/12 and 6/29/12 letters from Twp. Solicitor Carr to Planning Board Solicitor Duffy re proposed changes to M-1 Zone.” The Custodian disclosed copies of those two letters.

The emails and letters the Custodian provided in response to the August 23, 2012 and August 27, 2012 requests were again provided to the Complainant following his September 6, 2012 request. The Custodian also gave the Complainant a copy of a proposed resolution relating to the Township’s M-1 Zone.

#### Denial of Access Complaint:

On December 13, 2012, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that, if they exist, additional emails, letters, or faxes from the Township Solicitor or Planning Board Secretary regarding changes or amendments to the zoning ordinance have not been produced. The Complainant contends that the requested documents involve only the exercise of regular and normal PB business and, therefore, “are clearly within the public interest.” The Complainant further asserts his own interest in obtaining the requested documents “by way of litigation directly related to the M-1 Zone . . . .”<sup>4</sup>

The Complainant contends that a claim of attorney-client privilege cannot “be used as a cover to conduct the regular business of the board in secret.” The Complainant asserts that the communications between the PB Solicitor and Township Solicitor are not covered by the privilege because there is no attorney-client relationship. The Complainant further asserts that the privilege is waived for communications between the Township Solicitor and the PB because the Township Solicitor is “a third party.” The Complainant also contends that while the PB Solicitor can raise the attorney-client privilege on his own, the PB, as the client, “would not have approved of shielding communications” by claiming this privilege.

#### Statement of Information:

On July 23, 2013, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that she received the Complainant’s OPRa request on September 6, 2012 and responded to that request on September 14, 2012. The Custodian certifies that she contacted the PB Secretary and PB Solicitor regarding the Complainant’s most recent request. The Custodian further certifies that she gave the Complainant copies of the documents she received in response, including emails provided by the PB Secretary, letters from the Township Solicitor, and emails between the Custodian and the PB Solicitor. It is apparent from a review of the SOI that the Custodian also gave the Complainant a copy of a proposed PB resolution concerning an amendment to the Township zoning ordinances relating to the M-1 Zones.

The Custodian asserts, by reference to the PB Solicitor’s email as provided to the Complainant, that “any correspondence from [the PB Solicitor] to the Board is exempt as

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<sup>4</sup> It is unclear whether the Complainant is referring to previous litigation over the Township’s zoning ordinances or a potential future suit.



attorney-client privilege[,] as [is] any correspondence between [the PB Solicitor] and the township solicitor.”

Additionally, though the Custodian does not certify to these statements directly, the correspondence contained in the SOI and sent to her by the PB Secretary and Township Solicitor both contend that: (1) each party has no other documents responsive to the Complainant’s request; and (2) said documents were provided to the Complainant in response to his August 23, 2012 and August 27, 2012 OPRA requests.

### Additional Submissions

On October 1, 2013, the GRC sought clarification from the Custodian regarding whether (1) all responsive documents had been disclosed to the Complainant, or (2) some responsive documents had not been disclosed based on an assertion of attorney-client privilege. On October 15, 2013, the GRC received a certification stating in relevant part that:

I was the Custodian charged by the public agency with the responsibility for responding to the request for records dated September 6, 2012 on which this complaint is based.

The documents presented in the Statement of Information are true copies of all documents sent or received by the Custodian. Some additional documents do exist in the form of communications between Planning Board Solicitor Duffy and either the Planning Board or Township Solicitor but these records were not disclosed due to attorney-client privileged (*sic*). These records are not in the possession of the Custodian.

Certification of Nadine Lockley dated October 11, 2013.

### Analysis<sup>5</sup>

#### 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. Dept. of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the GRC 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:

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<sup>5</sup> There may be other OPRA issues in this matter; however, the Council’s analysis is based solely on the claims made in the Complainant’s Denial of Access Complaint.

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.

Paff, 379 N.J. Super. at 354.

The court also stated that:

The statute . . . 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-7(f). This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.

Id. at 355.

Further, the court stated 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 timely responded in writing to the Complainant six (6) business days after receiving his request. The Custodian provided emails and letters which had been previously disclosed to the Complainant. As evident from the record, the authors of these documents, the PB Secretary and Township Solicitor, each informed the Custodian that no additional responsive documents existed.

The Custodian, however, also certified that "[s]ome additional documents do exist in the form of communications between Planning Board Solicitor Duffy and either the Planning Board or Township Solicitor . . . ." The Custodian asserts that these documents are exempt from disclosure under OPRA based on attorney-client privilege, but also states that she is not in possession of these documents. The record does not indicate the nature or content of these communications, aside from the Custodian's and PB Solicitor's claims of privilege.

Therefore, the GRC must conduct an *in camera* review of the undisclosed communications between the PB Solicitor and PB or Township Solicitor that are responsive to the Complainant's request in order to determine the validity of the Custodian's assertion that attorney-client privilege exempts those records from disclosure pursuant to N.J.S.A. 47:1A-1.1. See Paff, 379 N.J. Super. 354-55.

### **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 undisclosed communications between the Planning Board Solicitor and Planning Board or Township Solicitor that are responsive to the Complainant's request in order to determine the validity of the Custodian's assertion that attorney-client privilege exempts those records from disclosure pursuant to N.J.S.A. 47:1A-1.1. See Paff v. N.J. Dept. of Labor, Bd. of Review, 379 N.J. Super. 354-55 (App. Div. 2005).
2. **The Custodian must deliver<sup>6</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see item number one (1) above), a document or redaction index<sup>7</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,<sup>8</sup> that the records provided are the records 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: Robert T. Sharkey  
Staff Attorney

Approved By: Brandon D. Minde, Esq.  
Executive Director

October 22, 2013

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<sup>6</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 they arrive at the GRC office by the deadline.

<sup>7</sup> The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

<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."

Sheldon L. Pepper v. Township of Downe, 2012-316 – Findings and Recommendations of the Executive Director