



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

November 17, 2015 Government Records Council Meeting

Thomas E. Ciccarone
Complainant

Complaint No. 2013-280

v.

NJ Department of Treasury
Custodian of Record

At the November 17, 2015 public meeting, the Government Records Council (“Council”) considered the November 10, 2015 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’s Counsel has successfully established in his request for partial reconsideration of the Council’s January 30, 2015 Interim Order that that the complaint should be reconsidered because: (a) the Council mistakenly ordered disclosure of the second and third sentences in the e-mail from Virginia Martucci, dated September 17, 2010, Bates stamped Ciccarone0012; and (b) the Council incorrectly failed to allow the Custodian to redact the client’s question to Counsel in addition to Counsel’s reply to the client in the Board’s November 9, 2010 executive session meeting minutes, Bates stamped Ciccarone035-037. Thus, Counsel’s request for reconsideration shall be granted, and no further disclosures shall be made because all redactions at issue in the reconsideration are lawful. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D’Atria v. D’Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).
2. Although the Custodian failed to bear her burden of proving that she timely responded to the Complainant’s request and that all of the redactions were authorized by law, she did fully comply in a timely manner with the Council’s July 29, 2014 Interim Order. Additionally, the evidence of record does not indicate that the Custodian’s actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian’s actions did 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 17th Day of November, 2015

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: November 19, 2015

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***Reconsideration*
Supplemental Findings and Recommendations of the Executive Director
November 17, 2015 Council Meeting**

**Thomas E. Ciccarone¹
Complainant**

GRC Complaint No. 2013-280

v.

**State of New Jersey Department of Treasury²
Custodial Agency**

Records Relevant to Complaint: Any and all reports and communications between the Division of Pensions and Benefits and members of PERS, PFRS, and TPAF concerning post retirement employment since January 1, 2009, to the present.

- Include all non-privileged correspondence from attorneys on behalf of members or employers seeking determinations of eligibility for post-retirement employment in a part-time or full time capacity.
- Include e-mails from/to/between or among Susan Culliton, Florence Shephard, Hank Cyzyk, Ned Thompson, Ken Hartman, Virginia Martucci, Marc Pfeffer, and Kathleen Coates concerning post-retirement or pension enrollment.
- Include any and all emails, letters, phone records, PERS Board minutes, including executive session minutes with references to the Complainant, PERS member number 734737. Lastly, include emails, phone records, directives, and orders from the Governor or Governor's staff relative to the retirement application of the Complainant in August/September 2010.

Custodian of Record: Florence Sheppard³
Request Received by Custodian: June 18, 2013
Response Made by Custodian: July 24, 2013
GRC Complaint Received: September 23, 2013

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Jeff Ignatowitz.

³ Cynthia Jablonski was the original Custodian.

Background

January 30, 2015 Council Meeting

At its January 30, 2015 public meeting, the Government Records Council (“Council”) considered the December 9, 2014 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 Custodian complied with the Council’s July 29, 2014 Interim Order because she responded in the prescribed extended time frame by providing the requested records and supporting material for the Council to conduct an *in camera* inspection, as well as certified confirmation of compliance with respect to paragraph 8 of the Interim Order.
2. The records responsive to request item number 5 of the Interim Order are the same records that the Custodian disclosed to the Complainant in redacted form as Bates 2 in response to request item number 3. Accordingly, because paragraphs 7 and 8 of the Council’s July 29, 2014 Interim Order reflect a redundancy, said paragraphs of the Order are vacated.
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 in the above table within five (5) business days from receipt of this Order and provide certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4 to the Executive Director.**
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 February 3, 2015, the Council distributed its January 30, 2015 Interim Order to all parties. On February 10, 2015, the fifth (5th) business day following receipt of the Council’s Interim Order, the Custodian responded to the Council’s Order by providing a certification, stating that she disclosed to the Complainant all records in compliance with the Council’s Order except for: (a) the second and third sentences in the Martucci e-mail, dated September 17, 2010, at 9:19 a.m., Bates stamped Ciccarone0012; and (b) the executive session minutes from the PERS Board’s November 9, 2010 meeting, Bates stamped Ciccarone 035-Ciccarone 037. The Custodian certified that those records were withheld because the agency is moving for reconsideration with respect to these items.

On February 18, 2015, the tenth (10th) business day following receipt of the Council’s Order, the Custodian’s Counsel filed a request for partial reconsideration of the Council’s January 30, 2015 Interim Order, based on mistake. According to the Custodian’s Counsel, the Council mistakenly ordered disclosure of the second and third sentences in the e-mail from

Virginia Martucci, dated September 17, 2010, at 9:19 a.m. Counsel also asserted that the Council mistakenly ordered disclosure of the Board's November 9, 2010 executive session meeting minutes with the exception of Column No. 6, captioned "DAG Legal Advice," and by doing so construed the attorney-client privilege too narrowly.

On March 2, 2015, the eighth (8th) business day following receipt of the Custodian's request for reconsideration, the Complainant submitted an objection to the request for reconsideration.

Analysis

Reconsideration

Pursuant to N.J.A.C. 5:105-2.10, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. Requests must be in writing, delivered to the Council, and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. N.J.A.C. 5:105-2.10(a) – (e).

In the matter before the Council, the Custodian's Counsel filed the request for reconsideration of the Council's Order on February 18, 2015, ten (10) business days from the issuance of the Council's Order.

Applicable case law holds that:

"A party should not seek reconsideration merely based upon dissatisfaction with a decision." D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D'Atria, . . . 242 N.J. Super. at 401. "Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement." Ibid.

In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

Here, the Custodian's Counsel argued that the Council mistakenly ordered disclosure of the second and third sentences in the e-mail from Virginia Martucci, dated September 17, 2010, at 9:19 a.m. Counsel argues that those sentences are exempt as advisory, consultative, or

deliberative (“ACD”) material under N.J.S.A. 47:1A-1.1 and as records that are part of an ongoing investigation pursuant to N.J.S.A. 47:1A-3(a). Counsel also asserted that the Council mistakenly ordered disclosure of the Board’s November 9, 2010 executive session meeting minutes with the exception of Column No. 6 captioned “DAG Legal Advice.”

The Complainant states that it is difficult for him to respond to the Custodian’s assertion that the second and third sentences in the Martucci e-mail should not be disclosed because he has not been able to view the unredacted record. The Complainant asks the Council to reaffirm its Order. With respect to the executive session minutes, the Complainant states that the GRC should make a finding that the need for confidentiality no longer exists and that unredacted minutes be disclosed, even if there was at one time a legitimate claim by the Custodian to the attorney-client privilege. The Complainant cites to N.J.S.A. 10:4-13 and N.J.S.A. 10:4-14 in support of his position that if sufficient facts and information to permit the public to understand and appraise the reasonableness of the public body’s determination are to be provided, then the matter discussed and the legal advice that contributed to the public body’s determination must be disclosed.

As the moving party, the Custodian’s Counsel was required to establish either of the necessary criteria set forth above: either 1) the Council’s decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. *See Cummings*, 295 N.J. Super. at 384.

With respect to the second paragraph in the e-mail Bates stamped 0012, after the Council conducted an *in camera* examination of the record it determined that:

The first three sentences of the second paragraph do not contain opinions, recommendations or advice; therefore the sentences are not exempt as ACD material per N.J.S.A. 47:1A-1.1. The sentences also are not exempt as attorney-client privileged and attorney work product per N.J.S.A. 47:1A-1.1. Further, the Custodian failed to provide a nexus between the sentences and an on-going investigation per N.J.S.A. 47:1A-3(a); therefore the sentences shall be disclosed. The balance of the second paragraph contains opinions and is exempt as ACD material per N.J.S.A. 47:1A-1.1; therefore this content was lawfully redacted.

The Custodian’s Counsel argues that in the second and third sentences of the e-mail, which the Council ordered disclosed, Ms. Martucci’s statements are not factual assertions. Rather, Counsel contends that Ms. Martucci was noting her present sense mental impressions and opinions. Counsel further contends that such statements reflect opinions, recommendations, and investigation conducted by employees of the agency to form internal policy and recommend agency action related to retirees who pre-plan a return to public employment prior to their retirement.

Counsel states that the need for denial becomes more apparent when the subject e-mail is understood in its context. Counsel, after briefly describing its functions and responsibilities, stated that the PERS Board provides oversight and direction to the benefits programs. Counsel asserted that Division employees investigate matters, respond to inquiries, and provide

recommendations to the Board for final agency action, which are pre-decisional. Counsel states that the Supreme Court noted that “individual documents may not be capable of being determined to be, necessarily, deliberative material, or not, standing alone. A court must assess such fact-based documents against the backdrop of an agency’s deliberative efforts in order to determine a documents nexus to that process, and its capacity to expose the agency’s deliberative thought-processes.” Educ. Law Ctr. v. NJ Dep’t of Educ., 198 N.J. 274, 280-81 (2009).

Counsel argues that, in the instant complaint, the nexus between the communications in the second and third sentences is evidenced by the agency’s deliberative efforts, as expressed in the subject e-mail, and must be assessed against the backdrop of what it was attempting to accomplish. Counsel states that the backdrop is contained in the documents discussing the Complainant’s individual matter and the development of the overall policy regarding return to employment after retirement. Counsel states that when viewed in this context, the scope of the Division’s duties to support the PERS Board’s responsibilities as fiduciaries of the retirement system and the communications and opinions expressed by the Division to make recommendations before the Board are exempt from release under OPRA. Counsel further stresses the importance that pre-decisional communications among Division employees reflecting their individual thoughts, opinions, and recommendations, be exempt from public disclosure in order to ensure unencumbered communication in the development of recommendations to the Board of Trustees.

The Custodian’s Counsel, citing N.J.S.A. 47:1A-3(a), also argues that the requested e-mail is part of an ongoing investigation and that disclosing the two redacted sentences would undermine the Division’s ability to administer the pension system, and therefore access would be inimical to the public interest.

The GRC agrees with Counsel’s argument that pre-decisional communications among employees reflecting their individual thoughts, opinions, and recommendations, should be exempt from public disclosure in order to ensure unencumbered communication in the development of policy. In fact, the Council took that into consideration when reaching their January 30, 2015, decision. Indeed, the Council ordered a great many of the existing redactions to remain in place to deny access for that very reason. In arriving at their January 30, 2015, decision, the Council believed that the two sentences the Council ordered disclosed in the Martucci e-mail, Bates stamped Ciccarone0012, did not reflect the individual’s thoughts, opinions and recommendations. However, against the backdrop expounded upon by the Custodian’s Counsel, the Council finds that the Custodian’s request for reconsideration should be granted. And, upon reconsideration, the Council finds that the two sentences in the Martucci e-mail, Bates stamped Ciccarone0012, do express the writer’s opinions and therefore were lawfully redacted. Cummings, 295 N.J. Super. 384; D’Atria, 242 N.J. Super. 401; Comcast, 2003 N.J. PUC at 5-6.

With respect to the PERS Board’s November 9, 2010 executive session meeting minutes, Bates stamped 035-037, the Custodian’s Counsel has established that the complaint should be reconsidered because the Council incorrectly failed to allow the Custodian to redact the client’s question to Counsel in addition to Counsel’s reply to the client. Specifically, the Council in its Order only allowed redaction of Counsel’s reply to the client. Thus, Counsel’s request for

reconsideration should be granted. Cummings, 295 N.J. Super. 384; D'Atria, 242 N.J. Super. 401; Comcast, 2003 N.J. PUC at 5-6.

Accordingly, the Custodian's Counsel has successfully established in his request for partial reconsideration of the Council's January 30, 2015 Interim Order that that the complaint should be reconsidered because (a) the Council mistakenly ordered disclosure of the second and third sentences in the e-mail from Virginia Martucci, dated September 17, 2010, Bates stamped Ciccarone0012; and (b) the Council incorrectly failed to allow the Custodian to redact the client's question to Counsel in addition to Counsel's reply to the client in the Board's November 9, 2010 executive session meeting minutes, Bates stamped Ciccarone035-037. Thus, Counsel's request for reconsideration shall be granted, and no further disclosures shall be made because all redactions at issue in the reconsideration are lawful. Cummings, 295 N.J. Super. 384; D'Atria, 242 N.J. Super. 401; Comcast, 2003 N.J. PUC at 5-6.

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 (Berg); 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, although the Custodian failed to bear her burden of proving that she timely responded to the Complainant's request and that all of the redactions were authorized by law, she did fully comply in a timely manner with the Council's July 29, 2014 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian's actions did 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's Counsel has successfully established in his request for partial reconsideration of the Council's January 30, 2015 Interim Order that that the complaint should be reconsidered because: (a) the Council mistakenly ordered disclosure of the second and third sentences in the e-mail from Virginia Martucci, dated September 17, 2010, Bates stamped Ciccarone0012; and (b) the Council incorrectly failed to allow the Custodian to redact the client's question to Counsel in addition to Counsel's reply to the client in the Board's November 9, 2010 executive session meeting minutes, Bates stamped Ciccarone035-037. Thus, Counsel's request for reconsideration shall be granted, and no further disclosures shall be made because all redactions at issue in the reconsideration are lawful. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

2. Although the Custodian failed to bear her burden of proving that she timely responded to the Complainant's request and that all of the redactions were authorized by law, she did fully comply in a timely manner with the Council's July 29, 2014 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian's actions did 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: John E. Stewart

Reviewed By: Joseph D. Glover
Executive Director

November 10, 2015



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 30, 2015 Government Records Council Meeting

Thomas E. Ciccarone
Complainant

Complaint No. 2013-280

v.

NJ Department of Treasury
Custodian of Record

At the January 30, 2015 public meeting, the Government Records Council (“Council”) considered the December 9, 2014 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 July 29, 2014 Interim Order because she responded in the prescribed extended time frame providing the requested records and supporting material for the Council to conduct an *in camera* inspection, as well as certified confirmation of compliance with respect to paragraph 8 of the Interim Order.
2. The records responsive to request item number 5 of the Interim Order are the same records that the Custodian disclosed to the Complainant in redacted form as Bates 2 in response to request item number 3. Accordingly, because paragraphs 7 and 8 of the Council’s July 29, 2014 Interim Order reflect a redundancy, said paragraphs of the Order are vacated.
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 in the above table within five (5) business days from receipt of this Order and provide certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4 to the Executive Director.**
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 30th Day of January, 2015

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 3, 2015

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
January 30, 2015 Council Meeting**

**Thomas E. Ciccarone¹
Complainant**

GRC Complaint No. 2013-280

v.

**State of New Jersey Department of Treasury²
Custodial Agency**

Records Relevant to Complaint: Any and all reports and communications between the Division of Pensions and Benefits and members of PERS, PFRS, and TPAF concerning post retirement employment since January 1, 2009 to the present.

- Include all non-privileged correspondence from attorneys on behalf of members or employers seeking determinations of eligibility for post-retirement employment in a part-time or full time capacity.
- Include emails from/to/between or among Susan Culliton, Florence Shepherd, Hank Cyzyk, Ned Thompson, Ken Hartman, Virginia Martucci, Marc Pfeffer and Kathleen Coates concerning post-retirement or pension enrollment.
- Include any and all emails, letters, phone records, PERS Board minutes, including executive session minutes with references to the Complainant, PERS member number 734737. Lastly, include emails, phone records, directives and orders from the Governor or Governor's staff relative to the retirement application of the Complainant in August/September 2010.

Custodian of Record: Florence Sheppard³
Request Received by Custodian: June 18, 2013
Response Made by Custodian: July 24, 2013
GRC Complaint Received: September 23, 2013

Records Submitted for *In Camera* Examination:

1. Redacted and unredacted copies of e-mails disclosed to the Complainant in response to request item number 3.
2. Unredacted copies of executive session minutes for the November 9, 2010 Board meeting that are responsive, in part, to the Complainant's request item number 4.

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Jeff Ignatowitz.

³ Cynthia Jablonski was the original Custodian.

Background

July 29, 2014 Council Meeting:

At its July 29, 2014 public meeting, the Government Records Council (“Council”) considered the July 22, 2014 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 Custodian did not bear her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting or denying access within the statutorily mandated seven (7) business days, or a reasonably necessary extension thereof, results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i).
2. The Custodian did not unlawfully deny access to request item number 1 because the Custodian certified that the records disclosed in response to the request are the only records responsive to the request and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification.
3. Because the Complainant’s request item number 2 sought “all... correspondence from attorneys on behalf of members or employers seeking determinations of eligibility for post-retirement employment...” and failed to seek identifiable government records, the request is invalid under OPRA. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005), NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). Thus, the Custodian has not unlawfully denied access to this request item.
4. Pursuant to Paff v. NJ Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the e-mails responsive to request item number 3, which are listed in Table 2, to determine the validity of the Custodian’s assertion that the e-mails contain advisory, consultative, or deliberative and attorney-client privileged material exempt from access pursuant to N.J.S.A. 47:1A-1.1, are subject to exemption as an on-going investigation per N.J.S.A. 47:1A-3(a), and/or are subject to the pension records exemption pursuant to N.J.S.A. 47:1A-10. The GRC must also conduct an *in camera* review of the executive session minutes for the November 9, 2010 Board meeting which are responsive, in part, to the Complainant’s request item number 4, to determine the validity of the Custodian’s assertion that the e-mails contain attorney-client privileged material exempt from access pursuant to N.J.S.A. 47:1A-1.1.
5. **The Custodian must deliver to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see paragraph 4 above), nine (9) copies of the**

redacted records, a document or redaction index, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, 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.

6. The Custodian did not unlawfully deny access to the Board minutes concerning the Complainant for November 2010, January 2011, and May 2012, which are in part responsive to request item number 4, because the Custodian directed the Complainant to the specific location on the Internet where the responsive records are located and there is a presumption that the complainant had access to the Internet because the records were requested to be disclosed electronically.
7. Because the Custodian did not bear her burden of proving that she lawfully denied access to request item number 5, the Custodian shall disclose to the Complainant all records responsive to this request item.
8. **The Custodian shall comply with paragraph 7 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
9. 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 July 30, 2014, the Council distributed its July 29, 2014 Interim Order to all parties. On August 6, 2014, the Custodian's Counsel requested and was granted an extension of time until August 11, 2014 to comply with the Council's Interim Order. On August 11, 2014, the Custodian responded to the Interim Order by delivering to the GRC in a sealed envelope nine (9) copies of the requested redacted and unredacted e-mails responsive to request item number 3, as well as nine (9) copies of the unredacted executive session minutes of the November 9, 2010 Board meeting for an *in camera* inspection. The Custodian also included a document or redaction index, as well as a legal certification that the record provided is the record requested by the Council for the *in camera* inspection. The legal certification also addressed the Custodian's compliance with respect to paragraph 8 of the Interim Order. In addition, the Custodian's Counsel forwarded a five (5) page letter to the GRC dated August 8, 2014.

The Custodian certified that the item identified as request item number 5 in the Interim Order, which is "emails, phone records, directives and orders from the Governor or Governor's staff relative to the retirement application of the Complainant in August/September 2010" is the same record that was disclosed to the Complainant in redacted form as Bates 2 in response to request item number 3. The Custodian certified that Bates 2 is the only record responsive to

request item number 5 in the Interim Order. The Custodian's Counsel further elaborated on this point in his August 8, 2014 letter to the GRC. Counsel in his letter initially states that he is requesting reconsideration of paragraphs 8 and 9 of the Interim Order because the documents responsive to paragraph 8 were identified and produced in redacted form in response to OPRA request item number 3. Counsel states that Bates 2 is responsive to both item number 3 and item number 4 as labeled by the Custodian (item number 5 as labeled by the GRC). Counsel states that this issue arose from confusion with how the items were numbered. He states that the OPRA request is styled as four paragraphs, and the Custodian styled her response to the request in a similar fashion. Counsel goes on to state that the Complainant in the Denial of Access complaint also lists four request items. Counsel states that in lieu of requesting reconsideration of the Interim Order which requires the Custodian to produce the records listed in item number 5, the Custodian requests that the GRC clarify the Order to note that the only record responsive to item number 5 is Bates 2, which is in the scope of request item number 3 and was provided to the GRC for an *in camera* examination.

Analysis

Compliance

At its July 29, 2014 meeting, the Council ordered the Custodian to deliver to the GRC nine (9) copies of the requested redacted and unredacted e-mails responsive to request item number 3 and nine (9) copies of the unredacted executive session minutes of the November 9, 2010 Board meeting for an *in camera* inspection. The Council also ordered the Custodian to deliver to the GRC a legal certification that the records provided are the records requested by the Council for the *in camera* inspection, a redaction index, and a certification of compliance with respect to paragraph 8 of the Interim Order. On July 30, 2014, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on August 6, 2014.

On August 6, 2014, the Custodian's Counsel requested and was granted a three (3) business day extension of time to comply with the Council's Order; therefore, as extended the Custodian's response was due by close of business on August 11, 2014. On August 11, 2014, the Custodian delivered to the GRC nine (9) copies of the requested redacted and unredacted e-mails, nine (9) copies of the unredacted executive session minutes, a legal certification that the records provided are the records requested by the Council for the *in camera* inspection, a redaction index, and a certification of compliance with respect to paragraph 8 of the Interim Order.

Accordingly, the Custodian complied with the Council's July 29, 2014 Interim Order because she responded in the prescribed extended time frame providing the requested records and supporting material for the Council to conduct an *in camera* inspection, as well as certified confirmation of compliance with respect to paragraph 8 of the Interim Order.

Modification of Council's July 29, 2014 Interim Order

In his August 8, 2014 letter, Counsel implies that the GRC erred by renumbering the Complainant's request items to provide for an additional item number 5 that the Custodian failed to address, which is contrary to the manner in which both the Complainant and the Custodian styled the request items. Counsel's implication is that a GRC mistake would serve as the basis for reconsideration.

The GRC did not err by renumbering the last sentence in the Complainant's request as an additional request item number 5. The Complainant actually made a single request which was set forth in the first paragraph of his OPRA request. The Complainant then went on to expound upon his request by adding three additional paragraphs which listed items that he wanted included as records responsive to the request. The Complainant's request therefore consisted of four (4) paragraphs. The GRC recognized the manner in which the Complainant framed his request and mirrored it when describing the "Records Relevant to Complaint" in the Findings and Recommendations of the Executive Director. However, contrary to Counsel's assertion, in the Custodian's July 24, 2013 response, she treated the first three paragraphs of the request as request items numbered 1 through 3, and then she broke the fourth paragraph down into two request items of one sentence each. The Custodian therefore treated the Complainant's request as five (5) separate request items and the GRC analyzed the complaint from that perspective.⁴ Accordingly, the GRC did not err; it merely drafted the Order to comport with the Custodian's perception of the form of request. As such, "mistake by the GRC" would not constitute sufficient grounds to warrant reconsideration.

Nonetheless, the GRC now understands that the records responsive to request item number 5 of the Interim Order are the same records that the Custodian disclosed to the Complainant in redacted form as Bates 2 in response to request item number 3. Accordingly, because paragraphs 7 and 8 of the Council's July 29, 2014 Interim Order reflect a redundancy, said paragraphs of the Order are vacated.

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.

The Custodian certified that the e-mails responsive to request item number 3, which were order by the Council for an *in camera* examination, had to be redacted because they contained advisory, consultative, or deliberative ("ACD") material exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

⁴ The Custodian's response set forth the Complainant's request items as five (5) separate and distinct italicized paragraphs. The potential confusion resulting from the form of request was addressed by the GRC in footnote 5 of the July 22, 2014 Findings and Recommendations of the Executive Director which were incorporated in the Council's July 29, 2014 Interim Order.

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OPRA excludes from the definition of a government record "... inter-agency or intra-agency advisory, consultative or deliberative material." N.J.S.A. 47:1A-1.1. It is evident that this phrase is intended to exclude from the definition of a government record the types of documents that are the subject of the "deliberative process privilege."

In O'Shea v. West Milford BOE, GRC Complaint No. 2004-93 (April 2006), the Council stated that:

[N]either the statute nor the courts have defined the terms ... "advisory, consultative, or deliberative" in the context of the public records law. The Council looks to an analogous concept, the deliberative process privilege, for guidance in the implementation of OPRA's ACD exemption. Both the ACD exemption and the deliberative process privilege enable a governmental entity to shield from disclosure material that is pre-decisional and deliberative in nature. Deliberative material contains opinions, recommendations, or advice about agency policies. In Re the Liquidation of Integrity Ins. Co., 165 N.J. 75, 88 (2000); In re Readoption With Amendments of Death Penalty Regulations, 182 N.J.149 (App. Div. 2004).

The deliberative process privilege is a doctrine that permits government agencies to withhold documents that reflect advisory opinions, recommendations and deliberations submitted as part of a process by which governmental decisions and policies are formulated. NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975). Specifically, the New Jersey Supreme Court has 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 the decision-making process *and* its disclosure would reveal deliberations that occurred during that process. Educ. Law Ctr. v. NJ Dep't of Educ., 198 N.J. 274 (2009). This long-recognized privilege is rooted in the concept that the sovereign has an interest in protecting the integrity of its deliberations. The earliest federal case adopting the privilege is Kaiser Alum. & Chem. Corp. v. United States, 157 F. Supp. 939 (1958). The privilege and its rationale were subsequently adopted by the federal district courts and circuit courts of appeal. United States v. Farley, 11 F.3d 1385, 1389 (7th Cir.1993).

The deliberative process privilege was discussed at length in Integrity at 84-88. There, the Court addressed the question of whether the Commissioner of Insurance, acting in the capacity of liquidator of a regulated entity, could protect certain records from disclosure which she claimed contained opinions, recommendations or advice regarding agency policy. Id. at 81. The Court adopted a qualified deliberative process privilege based upon the holding of McClain v. Coll. Hosp., 99 N.J. 346 (1985). Id. at 88. In doing so, the Court noted that:

A document must meet two requirements for the deliberative process privilege to apply. First, it must have been generated before the adoption of an agency's policy or decision. In other words, it must be pre-decisional. ... Second, the document must be deliberative in nature, containing opinions, recommendations, or advice about agency policies. ... Purely factual material that does not reflect deliberative processes is not protected. ... Once the government demonstrates that the subject materials meet those threshold requirements, the privilege comes into play. In such circumstances, the government's interest in candor is the "preponderating

policy” and, prior to considering specific questions of application, the balance is said to have been struck in favor of non-disclosure.

Id. at 84-85 (citations omitted).

The Court further set out procedural guidelines based upon those discussed in McClain:

The initial burden falls on the state agency to show that the documents it seeks to shield are pre-decisional and deliberative in nature (containing opinions, recommendations, or advice about agency policies). Once the deliberative nature of the documents is established, there is a presumption against disclosure. The burden then falls on the party seeking discovery to show that his or her compelling or substantial need for the materials overrides the government's interest in non-disclosure. Among the considerations are the importance of the evidence to the movant, its availability from other sources, and the effect of disclosure on frank and independent discussion of contemplated government policies.

Integrity, 165 N.J. at 88 (citing McClain, 99 N.J. at 361-62).

The Custodian also certified that some of the e-mails had to be redacted because they were subject to exemption as an ongoing investigation per N.J.S.A. 47:1A-3(a), and/or were subject to the pension records exemption pursuant to N.J.S.A. 47:1A-10, and/or were attorney-client privileged, exempt from access pursuant to N.J.S.A. 47:1A-1.1. The Custodian further certified that the executive session minutes for the November 9, 2010 Board meeting were exempt from access as attorney-client privileged material pursuant to N.J.S.A. 47:1A-1.1.

With respect to records subject to an investigation in progress, OPRA provides:

[W]here it shall appear that the record or records that are sought to be inspected, copied, or examined shall pertain to an investigation in progress by any public agency, the right of access provided for in [OPRA]...may be denied if the inspection, copying, or examination of such record or records shall be inimical to the public interest; provided, however, that this provision shall not be construed to allow any public agency to prohibit access to a record of that agency that was open for public inspection, examination, or copying before the investigation commenced.

N.J.S.A. 47:1A-3(a).

Concerning pension records, OPRA provides:

[T]he personnel or pension records of any individual in the possession of a public agency, including but not limited to records relating to any grievance filed by or against an individual, shall not be considered a government record and shall not be made available

for public access, except that an individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefore, and the amount and type of pension received shall be a government record...

N.J.S.A. 47:1A-10.

OPRA also excludes from the definition of a government record any record within the attorney client privilege. N.J.S.A. 47:1A-1.1. In New Jersey, protecting confidentiality within the attorney-client relationship has long been recognized by the courts. *See, e.g. Matter of Grand Jury Subpoenas*, 241 N.J. Super. 18 (App. Div. 1989). In general, the attorney-client privilege renders as confidential communications between a lawyer and a client made in the course of that professional relationship. *See N.J.S.A. 2A: 84A-20 and Fellerman v. Bradley*, 99 N.J. 493, 498-99 (1985). Rule 504 (1) of the New Jersey Rules of Evidence provides that communications between a lawyer and client, "in the course of that relationship and in professional confidence, are privileged...." Such communications as discussion of litigation strategy, evaluation of liability, potential monetary exposure and settlement recommendations are considered privileged. The Press of Atlantic City v. Ocean Cnty. Joint Ins. Fund, 337 N.J. Super. 480, 487 (Law Div. 2000). Also confidential are mental impressions, legal conclusions, and opinions or theories of attorneys. In Re Environmental Ins. Actions, 259 N.J. Super. 308, 317 (App. Div. 1992).

The attorney-client privilege "recognizes that sound legal advice or advocacy serves public ends and that the confidentiality of communications between client and attorney constitutes an indispensable ingredient of our legal system." Matter of Grand Jury Subpoenas, 241 N.J. Super. 18, 27-8 (App. Div.1989). The attorney-client privilege protects communications between a lawyer and the client made in the course of that professional relationship, and particularly protects information which, if disclosed, would jeopardize the legal position of the client. N.J.S.A. 2A:84A-20; RPC 1.6. The New Jersey Supreme Court has observed that RPC 1.6 "expands the scope of protected information to include all information relating to the representation, regardless of the source or whether the client has requested it be kept confidential or whether disclosure of the information would be embarrassing or detrimental to the client." In re Advisory Opinion No. 544 of N.J. Sup. Court, 103 N.J. 399, 406 (1986).

Redaction of otherwise public documents is appropriate where protection of privileged or confidential subject matter is a concern. South Jersey Publishing Co., Inc. v. N. J. Expressway Auth., 124 N.J. 478, 488-9 (1991). Moreover, whether the matter contained in the requested documents pertains to pending or closed cases is important, because the need for confidentiality is greater in pending matters. Keddie v. Rutgers, 148 N.J. 36, 54 (1997). Nevertheless, "[e]ven in closed cases. . .attorney work-product and documents containing legal strategies may be entitled to protection from disclosure." Id.

The GRC conducted an *in camera* examination on the submitted records. The results of this examination are set forth in the following table:

Record or Redaction Number	Record Name/Date ⁵	Description of Record or Redaction	Custodian's Explanation/ Citation for Non-disclosure	Findings of the <i>In Camera</i> Examination ⁶
1.	<p>BATES 1:</p> <p>E-mail from Marie O'Connell dated August 9, 2010 at 4:20 pm.</p> <p>E-mail from Hank Schwedes dated August 10, 2010 at 8:21 am.</p>	<p>Entire e-mail content from Marie O'Connell's e-mail and entire e-mail content from Hank Schwedes' e-mail except for "Hank"</p>	<p>ACD per <u>N.J.S.A. 47:1A-1.1</u> and on-going investigation per <u>N.J.S.A. 47:1A-3(a)</u>.</p>	<p>The e-mail from Marie O'Connell does not contain opinions, recommendations or advice; therefore the e-mail is not exempt as ACD material per <u>N.J.S.A. 47:1A-1.1</u>.⁷ Further, the Custodian failed to provide a nexus between this e-mail and an on-going investigation per <u>N.J.S.A. 47:1A-3(a)</u>; therefore this e-mail shall be disclosed in its entirety.</p> <p>The e-mail from Hank Schwedes contains ACD material in the first paragraph because it offers an opinion; therefore the first paragraph was lawfully redacted. The balance of the e-mail shall be disclosed because it does not contain ACD material and the Custodian failed to provide a nexus</p>

⁵ Throughout this table, if a Bates numbered page contains duplicates of e-mails(s) already addressed, only the newly added e-mail(s) will be examined.

⁶ Unless expressly identified for redaction, everything in the record shall be disclosed.

⁷ All references to opinions, recommendations or advice refer to opinions, recommendations or advice about agency policy.

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				between this e-mail and an on-going investigation per <u>N.J.S.A. 47:1A-3(a)</u> .
2.	<p>BATES 2:</p> <p>E-mail from Regina Egea dated September 15, 2010 at 7:58 am.</p> <p>E-mail from Florence Sheppard dated September 15, 2010 at 8:30 am.</p>	Entire e-mail content of E-mail from Regina Egea except for salutation.	ACD per <u>N.J.S.A. 47:1A-1.1</u> and on-going investigation per <u>N.J.S.A. 47:1A-3(a)</u> .	The first paragraph in the e-mail from Regina Egea does not contain opinions, recommendations or advice; therefore the first paragraph of the e-mail is not exempt as ACD material per <u>N.J.S.A. 47:1A-1.1</u> . Further, the Custodian failed to provide a nexus between the first paragraph of the e-mail and an on-going investigation per <u>N.J.S.A. 47:1A-3(a)</u> ; therefore the first paragraph shall be disclosed in its entirety. The second paragraph contains ACD material because it seeks an opinion; therefore the second paragraph was lawfully redacted.
3.	<p>BATES 3:</p> <p>E-mail from Florence Sheppard dated September 15, 2010 at 9:05 am.</p>	Entire e-mail content.	ACD per <u>N.J.S.A. 47:1A-1.1</u> and on-going investigation per <u>N.J.S.A. 47:1A-3(a)</u> .	The first paragraph contains ACD material because it seeks an opinion; therefore the first paragraph was lawfully redacted. The second paragraph does not contain opinions, recommendations or advice; therefore the second paragraph of

				the e-mail is not exempt as ACD material per <u>N.J.S.A. 47:1A-1.1</u> . Further, the Custodian failed to provide a nexus between the second paragraph of the e-mail and an on-going investigation per <u>N.J.S.A. 47:1A-3(a)</u> ; therefore the second paragraph shall be disclosed in its entirety.
4.	<p>BATES 4</p> <p>All e-mails in Bates 4 are dated September 15, 2010.</p> <p>9:32 am e-mail from Janice Nelson.</p> <p>10:06 am e-mail from Virginia Martucci.</p> <p>10:09 am e-mail from Janice Nelson.</p>	Entire e-mail content of each e-mail was redacted.	ACD per <u>N.J.S.A. 47:1A-1.1</u> and on-going investigation per <u>N.J.S.A. 47:1A-3(a)</u> .	All three e-mails contain ACD material because they offer an opinion or advice; therefore the three e-mails were lawfully redacted.
5.	<p>BATES 5</p> <p>All e-mails in Bates 5 are dated September 15, 2010.</p>	Entire e-mail content of each e-mail was redacted.	ACD per <u>N.J.S.A. 47:1A-1.1</u> and on-going investigation per <u>N.J.S.A. 47:1A-3(a)</u> .	The 10:08 e-mail from Janice Nelson does not contain opinions, recommendations or advice; therefore the e-mail is not exempt as ACD material per

	<p>10:08 am e-mail from Janice Nelson.</p> <p>10:12 am e-mail from Virginia Martucci.</p> <p>10:16 am e-mail from Janice Nelson.</p>		<p><u>N.J.S.A. 47:1A-1.1.</u> Further, the Custodian failed to provide a nexus between this e-mail and an on-going investigation per <u>N.J.S.A. 47:1A-3(a)</u>; therefore this e-mail shall be disclosed in its entirety.</p> <p>The salutation and the last two sentences of the 10:12 e-mail from Virginia Martucci do not contain opinions, recommendations or advice; therefore the e-mail is not exempt as ACD material per <u>N.J.S.A. 47:1A-1.1.</u> Further, the Custodian failed to provide a nexus between this e-mail and an on-going investigation per <u>N.J.S.A. 47:1A-3(a)</u>; therefore the salutation and the last two sentences shall be disclosed. The balance of the e-mail content contains advice and is exempt as ACD material per <u>N.J.S.A. 47:1A-1.1.</u></p> <p>The 10:16 am e-mail from Janice Nelson contains advice and is exempt as ACD material per <u>N.J.S.A. 47:1A-1.1.</u></p>
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6.	BATES 7 ⁸ E-mail from Janice Nelson dated September 15, 2010 at 10:22 am.	Entire e-mail content was redacted.	ACD per <u>N.J.S.A. 47:1A-1.1</u> and on-going investigation per <u>N.J.S.A. 47:1A-3(a)</u>	<p>The second sentence does not contain opinions, recommendations or advice; therefore the sentence is not exempt as ACD material per <u>N.J.S.A. 47:1A-1.1</u>. Further, the Custodian failed to provide a nexus between this sentence and an on-going investigation per <u>N.J.S.A. 47:1A-3(a)</u>; therefore this sentence shall be disclosed.</p> <p>The balance of the e-mail contains ACD material because it offers advice and contains opinions and recommendations; therefore the balance of the e-mail was lawfully redacted.</p>
7.	BATES 8 E-mail from Janice Nelson dated September 15, 2010 at 12:21 pm.	Entire e-mail content was redacted.	ACD per <u>N.J.S.A. 47:1A-1.1</u> and on-going investigation per <u>N.J.S.A. 47:1A-3(a)</u> and attorney-client privileged and attorney work product per <u>N.J.S.A. 47:1A-1.1</u>	The first two sentences and the fifth sentence do not contain opinions, recommendations or advice; therefore the sentences are not exempt as ACD material per <u>N.J.S.A. 47:1A-1.1</u> . The sentences also are not exempt as attorney-client privileged and

⁸ Bates 6 was already addressed.

				<p>attorney work product per <u>N.J.S.A. 47:1A-1.1</u>. Further, the Custodian failed to provide a nexus between these sentences and an on-going investigation per <u>N.J.S.A. 47:1A-3(a)</u>; therefore these sentences shall be disclosed.</p> <p>The third and fourth sentences as well as the last paragraph contain opinions and advice and are exempt as ACD material per <u>N.J.S.A. 47:1A-1.1</u>; therefore this content was lawfully redacted.</p> <p>The second to the last paragraph is attorney-client privileged and therefore was lawfully redacted.</p>
8.	<p>BATES 9</p> <p>E-mail from Regina Egea dated September 15, 2010 at 1:40 pm.</p>	<p>Entire e-mail content except for salutation was redacted.</p>	<p>ACD per <u>N.J.S.A. 47:1A-1.1</u> and on-going investigation per <u>N.J.S.A. 47:1A-3(a)</u> and attorney-client privileged and attorney work product per <u>N.J.S.A. 47:1A-1.1</u></p>	<p>The redacted portion of the e-mail seeks advice and is exempt as ACD material per <u>N.J.S.A. 47:1A-1.1</u>; therefore this content was lawfully redacted.</p>
9.	<p>BATES 11⁹</p> <p>E-mail from Virginia</p>	<p>Entire content of both e-mails was redacted.</p>	<p>ACD per <u>N.J.S.A. 47:1A-1.1</u> and on-going investigation per <u>N.J.S.A. 47:1A-</u></p>	<p>The e-mail from Janice Nelson seeks advice and is exempt as ACD material per</p>

⁹ Bates 10 did not contain redacted material.

	<p>Martucci dated September 15, 2010 at 3:21 pm.</p> <p>E-mail from Janice Nelson dated September 15, 2010 at 5:09 pm.</p>		<p>3(a) and attorney-client privileged and attorney work product per <u>N.J.S.A. 47:1A-1.1</u></p>	<p><u>N.J.S.A. 47:1A-1.1</u>; therefore this content was lawfully redacted.</p> <p>The e-mail from Virginia Martucci offers advice and recommendations and is exempt as ACD material per <u>N.J.S.A. 47:1A-1.1</u>; therefore this content was lawfully redacted.</p>
10.	<p>BATES 12</p> <p>E-mail from Virginia Martucci dated September 17, 2010 at 9:19 am.¹⁰</p> <p>E-mail from Virginia Martucci dated September 17, 2010 at 2:06 pm.</p> <p>E-mail from Janice Nelson dated September 17, 2010 at 2:10 pm.</p>	<p>Entire content of all e-mails was redacted.</p>	<p>ACD per <u>N.J.S.A. 47:1A-1.1</u> and on-going investigation per <u>N.J.S.A. 47:1A-3(a)</u> and attorney-client privileged and attorney work product per <u>N.J.S.A. 47:1A-1.1</u></p>	<p>The first sentence of the first paragraph in the 9:19 am e-mail from Virginia Martucci does not contain opinions, recommendations or advice; therefore the sentence is not exempt as ACD material per <u>N.J.S.A. 47:1A-1.1</u>. The sentence also is not exempt as attorney-client privileged and attorney work product per <u>N.J.S.A. 47:1A-1.1</u>. Further, the Custodian failed to provide a nexus between the sentence and an on-going investigation per <u>N.J.S.A. 47:1A-3(a)</u>; therefore the sentence</p>

¹⁰ Part of the first paragraph of this e-mail was obliterated in the unredacted records (Bates stamped 12) delivered to the GRC in compliance with the Interim Order. The Custodian certified that the unreadable e-mail segment was highlighted in red which served to obliterate the text when copied. However, the Custodian sent another unredacted copy of the e-mail Bates stamped 38 which displayed the full text and allowed for an unobstructed *in camera* inspection of the e-mail.

	<p>E-mail from Janice Nelson dated September 17, 2010 at 2:22 pm.</p>			<p>shall be disclosed. The balance of the first paragraph seeks advice and is exempt as ACD material per <u>N.J.S.A. 47:1A-1.1</u>; therefore this content was lawfully redacted.</p> <p>The first three sentences of the second paragraph in the 9:19 am e-mail from Virginia Martucci do not contain opinions, recommendations or advice; therefore the sentences are not exempt as ACD material per <u>N.J.S.A. 47:1A-1.1</u>. The sentences also are not exempt as attorney-client privileged and attorney work product per <u>N.J.S.A. 47:1A-1.1</u>. Further, the Custodian failed to provide a nexus between the sentences and an ongoing investigation per <u>N.J.S.A. 47:1A-3(a)</u>; therefore the sentences shall be disclosed. The balance of the second paragraph contains opinions and is exempt as ACD material per <u>N.J.S.A. 47:1A-1.1</u>; therefore this content was lawfully redacted.</p>
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			<p>The e-mail from Virginia Martucci dated September 17, 2010 at 2:06 pm references a portion of an earlier e-mail that was approved for redaction. As such, it does not contain ACD material; therefore the sentence is not exempt under <u>N.J.S.A. 47:1A-1.1</u>. The e-mail also is not exempt as attorney-client privileged and attorney work product per <u>N.J.S.A. 47:1A-1.1</u>. Further, the Custodian failed to provide a nexus between the content of the e-mail and an on-going investigation per <u>N.J.S.A. 47:1A-3(a)</u>; therefore the e-mail shall be disclosed.</p> <p>The last two sentences in the e-mail from Janice Nelson dated September 17, 2010 at 2:10 pm. do not contain opinions, recommendations or advice; therefore the sentences are not exempt as ACD material per <u>N.J.S.A. 47:1A-1.1</u>. The sentences also are not exempt as attorney-client privileged and</p>
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				<p>attorney work product per <u>N.J.S.A. 47:1A-1.1</u>. Further, the Custodian failed to provide a nexus between the sentences and an on-going investigation per <u>N.J.S.A. 47:1A-3(a)</u>; therefore the sentences shall be disclosed. The balance of the e-mail contains advice and is exempt as ACD material per <u>N.J.S.A. 47:1A-1.1</u>; therefore this content was lawfully redacted. The e-mail from Janice Nelson dated September 17, 2010 at 2:22 pm references a portion of an earlier e-mail that was approved for redaction. As such, it does not contain ACD material; therefore the e-mail is not exempt under <u>N.J.S.A. 47:1A-1.1</u>. The e-mail also is not exempt as attorney-client privileged and attorney work product per <u>N.J.S.A. 47:1A-1.1</u>. Further, the Custodian failed to provide a nexus between the content of the e-mail and an on-going investigation per <u>N.J.S.A. 47:1A-3(a)</u>; therefore the e-mail</p>
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				shall be disclosed.
11.	BATES 15 ¹¹ E-mail from Virginia Martucci dated September 27, 2010 at 9:19 am. E-mail from Michael Czyzyk dated September 27, 2010 at 10:02 am.	Entire content of both e-mails was redacted.	ACD per <u>N.J.S.A. 47:1A-1.1</u>	E-mail from Virginia Martucci seeks advice and is exempt as ACD material per <u>N.J.S.A. 47:1A-1.1</u> ; therefore this content was lawfully redacted. E-mail from Michael Czyzyk provides advice and is exempt as ACD material per <u>N.J.S.A. 47:1A-1.1</u> ; therefore this content was lawfully redacted.
9.	BATES 16 E-mail from Michael Czyzyk dated October 5, 2010 at 3:57 pm. E-mail from Kathleen Coates dated October 5, 2010 at 5:36 pm.	Entire content of both e-mails was redacted.	ACD per <u>N.J.S.A. 47:1A-1.1</u>	E-mail from Michael Czyzyk provides advice and is exempt as ACD material per <u>N.J.S.A. 47:1A-1.1</u> ; therefore this content was lawfully redacted. E-mail from Kathleen Coates seeks advice and is exempt as ACD material per <u>N.J.S.A. 47:1A-1.1</u> ; therefore this content was lawfully redacted.
10.	BATES 19 ¹² E-mail from Kathleen Coates dated	Entire content except for salutation of e-mail from Kathleen	ACD per <u>N.J.S.A. 47:1A-1.1</u>	The e-mail from Kathleen Coates references a draft document that would likely be ACD;

¹¹ Bates 13 and 14 were already addressed.

¹² Bates 17 and 18 do not contain redacted material.

	<p>November 10, 2010 at 8:41 am.</p> <p>E-mail from Virginia Martucci dated November 10, 2010 at 10:47 am.</p>	<p>Coates.</p> <p>Entire content of e-mail from Virginia Martucci.</p>		<p>however, the e-mail does not have the draft attached. The draft was not part of the e-mail because the heading does not reference an attachment.</p> <p>The third and sixth sentences in the e-mail from Kathleen Coates contain recommendations and are exempt as ACD material per <u>N.J.S.A. 47:1A-1.1</u>; therefore these sentences were lawfully redacted. The balance of the e-mail shall be disclosed.</p> <p>The e-mail from Virginia Martucci does not contain ACD material and shall be disclosed in its entirety.</p>
8.	<p>BATES 20</p> <p>E-mail from Janice Nelson dated November 10, 2010 at 2:20 pm.</p> <p>E-mail from Kathleen Coates dated November 10, 2010 at 2:34 pm.</p>	<p>Entire content of e-mail from Janice Nelson.</p> <p>First paragraph of e-mail from Kathleen Coates.</p> <p>Entire content of e-mail from Virginia Martucci.</p>	ACD per <u>N.J.S.A. 47:1A-1.1</u>	<p>The first sentence in the e-mail from Janice Nelson does not contain ACD material and shall be disclosed. The balance of the e-mail offers advice and seeks advice and is exempt as ACD material per <u>N.J.S.A. 47:1A-1.1</u>; therefore these sentences were lawfully redacted.</p> <p>The first sentence in</p>

	E-mail from Virginia Martucci dated November 10, 2010 at 10:47 am.			<p>the first paragraph of the e-mail from Kathleen Coates does not contain ACD material and shall be disclosed. The balance of the first paragraph offers advice and is exempt as ACD material per <u>N.J.S.A. 47:1A-1.1</u>; therefore same was lawfully redacted.</p> <p>The redacted material in the e-mail from Virginia Martucci offers advice and is exempt as ACD material per <u>N.J.S.A. 47:1A-1.1</u>; therefore same was lawfully redacted.</p>
9.	BATES 21 E-mail from Virginia Martucci dated November 12, 2010 at 10:35 am.	Entire content except for salutation.	ACD per <u>N.J.S.A. 47:1A-1.1</u> and on-going investigation per <u>N.J.S.A. 47:1A-3(a)</u> and pension records exemption per <u>N.J.S.A. 47:1A-10</u>	The redacted material in the e-mail seeks advice and is exempt as ACD material per <u>N.J.S.A. 47:1A-1.1</u> ; therefore same was lawfully redacted.
10.	BATES 22 E-mail from Janice Nelson dated November 12, 2010 at 12:15 pm. E-mail from Virginia Martucci	Entire content of both e-mails.	ACD per <u>N.J.S.A. 47:1A-1.1</u> and on-going investigation per <u>N.J.S.A. 47:1A-3(a)</u> and pension records exemption per <u>N.J.S.A. 47:1A-10</u>	The first and second sentences in the e-mail from Janice Nelson do not contain ACD material. Also, the Custodian failed to provide a nexus between the sentences and an on-going investigation per <u>N.J.S.A. 47:1A-</u>

	dated November 12, 2010 at 1:55 am.			<p>3(a). Further, nothing in the first or second sentence is exempt from disclosure as a pension record per <u>N.J.S.A. 47:1A-10</u>. Therefore, the first and second sentences and shall be disclosed. The balance of the e-mail offers advice and seeks advice and is exempt as ACD material per <u>N.J.S.A. 47:1A-1.1</u>; therefore the content was lawfully redacted.</p> <p>The e-mail from Virginia Martucci offers advice and seeks advice and is exempt as ACD material per <u>N.J.S.A. 47:1A-1.1</u>; therefore the content was lawfully redacted.</p>
11.	<p>BATES 26¹³</p> <p>E-mail from Virginia Martucci dated November 18, 2010 at 2:35 pm.</p> <p>E-mail from Janice Nelson dated November 18, 2010 at 3:30</p>	<p>Entire content of Virginia Martucci's 2:35 pm e-mail except for the salutation and last sentence.</p> <p>Entire content of the other two e-mails.</p>	<p>ACD per <u>N.J.S.A. 47:1A-1.1</u> and on-going investigation per <u>N.J.S.A. 47:1A-3(a)</u> and pension records exemption per <u>N.J.S.A. 47:1A-10</u></p>	<p>The 2:35 pm e-mail from Virginia Martucci seeks advice and is exempt as ACD material per <u>N.J.S.A. 47:1A-1.1</u>; therefore the content was lawfully redacted.</p> <p>The e-mail from Janice Nelson offers advice and recommendations and is exempt as</p>

¹³ Bates 23 and 25 were already addressed. Bates 24 does not contain redacted material not already addressed. Thomas E. Ciccarone v. State of New Jersey Department of Treasury, 2013-280 – *In Camera* Findings and Recommendations of the Executive Director

	pm. E-mail from Virginia Martucci dated November 18, 2010 at 3:39 pm.			ACD material per <u>N.J.S.A. 47:1A-1.1</u> ; therefore the content was lawfully redacted. The 3:39 pm e-mail from Virginia Martucci seeks advice and is exempt as ACD material per <u>N.J.S.A. 47:1A-1.1</u> ; therefore the content was lawfully redacted.
12.	BATES 28 ¹⁴ E-mail from Virginia Martucci dated November 19, 2010 at 8:50 am.	Entire content except for salutation.	ACD per <u>N.J.S.A. 47:1A-1.1</u>	The first sentence in the e-mail does not contain ACD material and shall be disclosed. The balance of the e-mail offers opinion and advice and is exempt as ACD material per <u>N.J.S.A. 47:1A-1.1</u> ; therefore the material was lawfully redacted.
13.	BATES 29 E-mail from Virginia Martucci dated November 23, 2010 at 10:11 am.	1 st two paragraphs.	ACD per <u>N.J.S.A. 47:1A-1.1</u>	The first paragraph in the e-mail does not contain ACD material and shall be disclosed. The second paragraph offers a recommendation and is exempt as ACD material per <u>N.J.S.A. 47:1A-1.1</u> ; therefore the second paragraph was lawfully redacted.

¹⁴ Bates 27 does not contain redacted material.

14.	BATES 30 E-mail from Susanne Culliton dated November 23, 2010 at 11:01 am.	Entire content of e-mail.	ACD per <u>N.J.S.A. 47:1A-1.1</u>	The e-mail offers advice and is exempt as ACD material per <u>N.J.S.A. 47:1A-1.1</u> ; therefore the content was lawfully redacted.
15.	BATES 31 E-mail from Virginia Martucci dated November 24, 2010 at 10:28 am.	Entire content except for salutation.	ACD per <u>N.J.S.A. 47:1A-1.1</u>	The first, second and fourth sentences in the e-mail do not contain ACD material and shall be disclosed. The third sentence offers opinion and is exempt as ACD material per <u>N.J.S.A. 47:1A-1.1</u> ; therefore this sentence was lawfully redacted.
16.	BATES 33 ¹⁵ E-mail from Kenneth Hartman dated December 6, 2010 at 10:24 am.	Entire content of e-mail.	ACD per <u>N.J.S.A. 47:1A-1.1</u>	The e-mail does not contain ACD material and shall be disclosed in its entirety.
17.	BATES 34 E-mail from Susanne Culliton dated December 6, 2010 at 10:46 am. E-mail from Kenneth Hartman dated	Entire content of both e-mails.	ACD per <u>N.J.S.A. 47:1A-1.1</u>	The e-mail from Susanne Culliton offers opinion and is exempt as ACD material per <u>N.J.S.A. 47:1A-1.1</u> ; therefore the content was lawfully redacted. The first sentence in the e-mail from Kenneth Hartman does not contain

¹⁵ Bates 32 does not contain redacted material.

	December 6, 2010 at 10:55 am.			ACD material and shall be disclosed. The balance of the e-mail offers opinion and is exempt as ACD material per <u>N.J.S.A. 47:1A-1.1</u> ; therefore the material was lawfully redacted.
18.	BATES 35 – 37 Executive session minutes for the November 9, 2010 Board meeting.	Entire record.	Attorney-client privileged material exempt from access pursuant to <u>N.J.S.A. 47:1A-1.1</u> .	The sixth column from the left captioned “DAG Legal Advice” contains a summary of advice provided from an attorney to the attorney’s client and is therefore exempt in its entirety as attorney-client privileged pursuant to <u>N.J.S.A. 47:1A-1.1</u> , and may be lawfully redacted. The balance of the record shall be disclosed. ¹⁶

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 Custodian complied with the Council’s July 29, 2014 Interim Order because she responded in the prescribed extended time frame providing the requested records and supporting material for the Council to conduct an *in camera* inspection, as well as certified confirmation of compliance with respect to paragraph 8 of the Interim Order.

¹⁶ On page three of the minutes (Bates 37) there is a horizontal line across the table. Below the line are five redactions. The Custodian certified that these redactions relate to another matter. As such, the redactions below the horizontal line are not relevant to the instant complaint.

Thomas E. Ciccarone v. State of New Jersey Department of Treasury, 2013-280 – *In Camera* Findings and Recommendations of the Executive Director

2. The records responsive to request item number 5 of the Interim Order are the same records that the Custodian disclosed to the Complainant in redacted form as Bates 2 in response to request item number 3. Accordingly, because paragraphs 7 and 8 of the Council's July 29, 2014 Interim Order reflect a redundancy, said paragraphs of the Order are vacated.
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 in the above table within five (5) business days from receipt of this Order and provide certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4 to the Executive Director.**
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: John E. Stewart, Esq.

Approved By: Dawn R. SanFilippo, Esq.
Deputy Executive Director

December 9, 2014¹⁷

¹⁷ This complaint was prepared for adjudication at the Council's December 16, 2014 meeting but could not be adjudicated due to lack of outside counsel's advice.

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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

July 29, 2014 Government Records Council Meeting

Thomas E. Ciccarone
Complainant

Complaint No. 2013-280

v.

NJ Department of Treasury
Custodian of Record

At the July 29, 2014 public meeting, the Government Records Council (“Council”) considered the July 22, 2014 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 did not bear her burden of proof that she timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting or denying access within the statutorily mandated seven (7) business days, or a reasonably necessary extension thereof, results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i).
2. The Custodian did not unlawfully deny access to request item number 1 because the Custodian certified that the records disclosed in response to the request are the only records responsive to the request and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification.
3. Because the Complainant’s request item number 2 sought “all... correspondence from attorneys on behalf of members or employers seeking determinations of eligibility for post-retirement employment...” and failed to seek identifiable government records, the request is invalid under OPRA. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005), NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). Thus, the Custodian has not unlawfully denied access to this request item.
4. Pursuant to Paff v. NJ Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the e-mails responsive to request item number 3, which are listed in Table 2, to determine the validity of the Custodian’s assertion that the e-mails contain advisory, consultative, or deliberative and attorney-client privileged material exempt from access pursuant to N.J.S.A.



47:1A-1.1, are subject to exemption as an on-going investigation per N.J.S.A. 47:1A-3(a), and/or are subject to the pension records exemption pursuant to N.J.S.A. 47:1A-10. The GRC must also conduct an *in camera* review of the executive session minutes for the November 9, 2010 Board meeting which are responsive, in part, to the Complainant's request item number 4, to determine the validity of the Custodian's assertion that the e-mails contain attorney-client privileged material exempt from access pursuant to N.J.S.A. 47:1A-1.1.

5. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see paragraph 4 above), nine (9) copies of the redacted records, a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,³ 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.**
6. The Custodian did not unlawfully deny access to the Board minutes concerning the Complainant for November 2010, January 2011, and May 2012, which are in part responsive to request item number 4, because the Custodian directed the Complainant to the specific location on the Internet where the responsive records are located and there is a presumption that the complainant had access to the Internet because the records were requested to be disclosed electronically.
7. Because the Custodian did not bear her burden of proving that she lawfully denied access to request item number 5, the Custodian shall disclose to the Complainant all records responsive to this request item.
8. **The Custodian shall comply with paragraph 7 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.⁴**
9. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

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

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

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

⁴ 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.

Interim Order Rendered by the
Government Records Council
On The 29th Day of July, 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: July 30, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 29, 2014 Council Meeting**

**Thomas E. Ciccarone¹
Complainant**

GRC Complaint No. 2013-280

v.

**State of New Jersey Department of Treasury²
Custodial Agency**

Records Relevant to Complaint: Any and all reports and communications between the Division of Pensions and Benefits and members of PERS, PFRS, and TPAF concerning post retirement employment since January 1, 2009 to the present.

- Include all non-privileged correspondence from attorneys on behalf of members or employers seeking determinations of eligibility for post-retirement employment in a part-time or full time capacity.
- Include emails from/to/between or among Susan Culliton, Florence Shepherd, Hank Cyzyk, Ned Thompson, Ken Hartman, Virginia Martucci, Marc Pfeffer and Kathleen Coates concerning post-retirement or pension enrollment.
- Include any and all emails, letters, phone records, PERS Board minutes, including executive session minutes with references to the Complainant, PERS member number 734737. Lastly, include emails, phone records, directives and orders from the Governor or Governor's staff relative to the retirement application of the Complainant in August/September 2010.

Custodian of Record: Florence Sheppard³
Request Received by Custodian: June 18, 2013
Response Made by Custodian: July 24, 2013
GRC Complaint Received: September 23, 2013

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Jeff Ignatowitz.

³ Cynthia Jablonski was the original Custodian.

Background⁴

Request and Response:

On June 18, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records.⁵ After four agreed-upon extensions of time, on July 24, 2013, the twenty-fifth (25th) business day following receipt of the request, the Custodian responded in writing informing the Complainant that Fact Sheets numbered 21, 28, 29 and 58 were determined to be responsive to request item number 1 of the request and were therefore being disclosed. The Custodian informed the Complainant that request item number 2 of the request is overly broad. With respect to request item number 3, the Custodian disclosed one (1) e-mail string between the Complainant and Kenneth Hartman and informed the Complainant that she was still searching for additional records. With respect to request item number 4, the Custodian referred the Complainant to the agency’s website for the requested PERS Board minutes. The Custodian said other records responsive to the request item were in the process of being redacted and would be made available in two business days. Although the Custodian said that some records which required redactions would be ready in two business days, she requested an extension of time until August 2, 2013 to disclose the remaining requested e-mails in request item number 3, the balance of records responsive to request item number 4, and all of the records responsive to request item number 5. The Complainant agreed to an extension of time until August 2, 2013, but said he would not agree to further extensions.

On August 2, 2013, the Custodian sent a letter to the Complainant requesting an extension of time until August 13, 2013. On August 13, 2013, the Custodian sent a letter to the Complainant requesting an extension of time until August 27, 2013. The Complainant notified the Custodian on that same date that he did not agree to the extension of time. The Complainant further reiterated that he informed the Custodian that the extension of time until August 2, 2013 was the last extension he agreed to accept. The Custodian notified the Complainant on August 27, 2013, that she was still trying to determine if some or all of the requested records were government records, and that she would provide the Complainant with a status update on September 11, 2013.

By letter dated September 11, 2013, the Custodian notified the Complainant that she attached Adobe files to the letter which contain the communications he had requested and that the Custodian’s response satisfies the Complainant’s request.

⁴ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

⁵ The Complainant made one (1) request for: “[a]ny and all reports and communications between the Division of Pensions and Benefits and members of PERS, PFRS, and TPAF concerning post retirement employment since January 1, 2009 to the present.” The Complainant then went on to clarify his request by adding three additional paragraphs which listed items that he wanted included as records responsive to the request. The Complainant’s request therefore consisted of four paragraphs. In the Custodian’s July 24, 2013 response, she treated the first three paragraphs of the request as three separate request items, and she broke the fourth paragraph down into two additional request items of one sentence each. The Custodian therefore treated the Complainant’s request as five separate request items, and the GRC will therefore analyze the complaint from that perspective.

Thomas E. Ciccarone v. State of New Jersey Department of Treasury, 2013-280 – Findings and Recommendations of the Executive Director

Denial of Access Complaint:

On September 23, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant states that he filed an OPRA request with the Custodian on June 18, 2013. The Complainant asserts that on June 27, 2013, the Custodian requested and was granted an extension of time until July 9, 2013 in order to respond to the request. The Complainant asserts that on July 9, 2013, the Custodian sought and was granted an extension of time until July 12, 2013. The Complainant states that this extension of time was followed with another request for an extension of time on July 12, 2013, and the Complainant states that he agreed to an extension of time until July 17, 2013. On July 17, 2013, the Complainant states that the Custodian requested and was granted an extension of time until July 24, 2013.

On July 24, 2013, the Complainant states that the Custodian disclosed to him Division of Pension Fact Sheets numbered 21, 28, 29 and 58 and a copy of an e-mail from Ken Hartman to the Complainant. The Complainant states that the Custodian said she was redacting the balance of the requested e-mails and that she would disclose them in two days. The Complainant further states that the Custodian included a link to the Division’s website where the Complainant could obtain access to the requested minutes. The Complainant indicated that he is not satisfied the Fact Sheets were responsive to his request. The Complainant states that the Custodian also denied the second paragraph of his request as overly broad, which the Complainant disputes. The Complainant states that the Custodian also requested another extension of time until August 2, 2013, in order to address the remainder of his request. The Complainant states that he agreed to the extension of time but informed the Custodian that this was the last time he would do so.

The Complainant states that on August 2, 2013, the Custodian requested an extension of time until August 13, 2013, and on August 13, 2013, the Custodian requested an extension of time until August 27, 2013. The Complainant states that by e-mail dated August 13, 2013, he objected to the extension of time; however, the Custodian notified him on August 27, 2013 that she was sorry he felt the need to object but she was still trying to determine if some or all of the requested records were government records and that she would provide the Complainant with a status update on September 11, 2013.

The Complainant states that on September 11, 2013, he received thirty-four (34) pages of heavily redacted e-mails from the Custodian, along with an exemption log which cited attorney-client privilege and inter-agency or intra-agency advisory, consultative, or deliberative (“ACD”) material as the reason for the redactions. The Complainant contends that the e-mails do not contain ACD material and should not be redacted. The Complainant also contends that the attorney-client privilege should not apply because there is no attorney-client relationship between the parties exchanging e-mails. The Complainant states that some redacted e-mails were between Regina Egea, Florence Sheppard and Susan Culliton. The Complainant asserts that Regina Egea is not an attorney and that Florence Sheppard is the Acting Director of the Division of Pensions and Benefits. The Complainant states that Susan Culliton is an attorney but has not been serving as legal counsel to the Division since 2010. The Complainant states that other non-attorney parties addressed in the e-mails are Virginia Martucci, Michael Czyzyk and Kathleen Coates.

The Complainant states that the Custodian failed to respond to the request item contained in the last sentence of the fourth paragraph of his request.

Statement of Information:

On October 9, 2013, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that she received the Complainant’s request on June 18, 2013 and responded to the request on July 24, 2013 and September 11, 2013.

The Custodian certifies that upon receipt of the request she arranged for the Information Technology Department to conduct an electronic search of the requested e-mails, which included both current and the archived e-mails within Treasury and the Governor’s Office.

The Custodian certifies that the following requests were made for an extension of time in order to respond to the Complainant’s request:

TABLE 1

DATE OF REQUEST FOR AN EXTENSION OF TIME	EXTENSION OF TIME REQUESTED UNTIL:	REASON FOR EXTENSION
June 27, 2013	July 9, 2013	gather and review records
July 9, 2013	July 12, 2013	gather and review records
July 12, 2013	July 17, 2013	gather and review records
July 17, 2013	July 24, 2013 (some records disclosed)	gather and review records
July 24, 2013	August 2, 2013	search for add’l records
August 2, 2013	August 13, 2013	gather and review records
August 13, 2013	August 27, 2013	legal review of records
August 27, 2013	September 11, 2013	determine whether records are government records

The Custodian certifies that on July 24, 2013, the Division disclosed Fact Sheets numbered 21, 28, 29 and 58, which are the only records responsive to request item number 1 of the Complainant’s request. The Custodian certifies that request item number 2 was overly broad because the request failed to identify any specific document or record. The Custodian certified she would have to manually search hundreds of thousands of pension records in order to locate records responsive to the request. The Custodian cites MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 549 (App. Div. 2005) as authority for her denial. The Custodian further certifies that in response to request item number 3, one (1) item was disclosed in its entirety. The item was an e-mail between the Complainant and Kenneth Hartman dated September 17, 2010. With respect to request item number 4, the Custodian referred the Complainant to the agency’s website for the requested PERS Board minutes; however, the Custodian stated that the executive session minutes for the November 9, 2010 PERS Board are exempt from disclosure as attorney-client privileged material.

The Custodian certifies that on September 11, 2013, an unredacted copy of an e-mail responsive to the Complainant’s request, was disclosed to the Complainant. The disclosed e-mail

was from the Complainant to Virginia Martucci, dated October 7, 2010, and Bates (stamped) 17-18. The Custodian further certifies she also disclosed the following redacted records to the Complainant on September 11, 2013:

TABLE 2

DISCLOSED RECORD	REASON FOR REDACTION
E-mail from Marie O’Connell dated August 9, 2010 ⁶ [Bates 1]	ACD per <u>N.J.S.A. 47:1A-1.1</u> and on-going investigation per <u>N.J.S.A. 47:1A-3(a)</u>
E-mail from Florence Sheppard dated September 15, 2010 [Bates 2-6]	ACD per <u>N.J.S.A. 47:1A-1.1</u> and on-going investigation per <u>N.J.S.A. 47:1A-3(a)</u>
E-mail from Florence Sheppard dated September 15, 2010 [Bates 7]	ACD per <u>N.J.S.A. 47:1A-1.1</u> and on-going investigation per <u>N.J.S.A. 47:1A-3(a)</u>
E-mail from Janice Nelson dated September 15, 2010 [Bates 8-14]	ACD per <u>N.J.S.A. 47:1A-1.1</u> and on-going investigation per <u>N.J.S.A. 47:1A-3(a)</u> and attorney-client privileged and attorney work product per <u>N.J.S.A. 47:1A-1.1</u>
E-mail from Virginia Martucci dated September 27, 2010 [Bates 15]	ACD per <u>N.J.S.A. 47:1A-1.1</u>
E-mail from Michael Czyzyk dated October 5, 2010 [Bates 16]	ACD per <u>N.J.S.A. 47:1A-1.1</u>
E-mail from Kathleen Coates dated November 10, 2010 [Bates 19]	ACD per <u>N.J.S.A. 47:1A-1.1</u>
E-mail from Janice Nelson dated November 10, 2010 [Bates 20]	ACD per <u>N.J.S.A. 47:1A-1.1</u>
E-mail from Virginia Martucci dated November 12, 2010 [Bates 21]	ACD per <u>N.J.S.A. 47:1A-1.1</u> and on-going investigation per <u>N.J.S.A. 47:1A-3(a)</u> and pension records exemption per <u>N.J.S.A. 47:1A-10</u>
E-mail from Virginia Martucci dated November 12, 2010 [Bates 21-25]	ACD per <u>N.J.S.A. 47:1A-1.1</u> and on-going investigation per <u>N.J.S.A. 47:1A-3(a)</u> and pension records exemption per <u>N.J.S.A. 47:1A-10</u>
E-mail from Virginia Martucci dated November 18, 2010	ACD per <u>N.J.S.A. 47:1A-1.1</u> and on-going investigation

⁶ Date of e-mail or date of first e-mail in a string.

[Bates 26-27]	per <u>N.J.S.A. 47:1A-3(a)</u> and pension records exemption per <u>N.J.S.A. 47:1A-10</u>
E-mail from Complainant dated November 18, 2010 [Bates 28]	ACD per <u>N.J.S.A. 47:1A-1.1</u>
E-mail from Virginia Martucci dated November 23, 2010 [Bates 29]	ACD per <u>N.J.S.A. 47:1A-1.1</u>
E-mail from Virginia Martucci dated November 23, 2010 [Bates 30]	ACD per <u>N.J.S.A. 47:1A-1.1</u>
E-mail from Complainant dated November 18, 2010 [Bates 31-32]	ACD per <u>N.J.S.A. 47:1A-1.1</u>
E-mail from Complainant dated December 6, 2010 [Bates 33-34]	ACD per <u>N.J.S.A. 47:1A-1.1</u>

The Custodian certifies that the all of the records were redacted in part because they contain ACD material exempt from access pursuant to N.J.S.A. 47:1A-1.1. The Custodian certifies that the records reflect the opinions, recommendations and investigations conducted by employees of the Division to form internal agency policy and recommend agency action related to retirees who return to public employment. The Custodian also certifies the employees' communications reflect advice and recommendations in preparation for the Board of Trustees of PERS to take action in the Complainant's case as was requested by him, as well as to consider the underlying policies governing employees who pre-plan a return to employment prior to their retirement. The Custodian further certifies that the PERS Board has no employees and is dependent upon Division employees for its administrative needs. The Custodian certifies that the Division employees investigate matters, respond to inquiries, and provide recommendations to the Board for final agency action. The Custodian certifies that it is critical that the pre-decisional communications among Division employees reflecting their individual thoughts, opinions and recommendations be exempt from public disclosure in order to ensure unencumbered communication in the development of recommendations to the Board of Trustees, and as such, the disclosed e-mails were properly redacted.

The Custodian certifies that, in addition to being exempt as ACD material, the e-mails identified as Bates 2-14 and Bates 21-27 are exempt from disclosure because they relate to an ongoing investigation conducted into pension abuses that occur when members request retirement having pre-arranged plans to return to work at the same employer. The Custodian certifies that disclosing records that are part of an ongoing investigation undermines the Division's ability to administer the pension system, and therefore access would be inimical to the public interest. The Custodian cites N.J.S.A. 47:1A-3(a) as legal authority for denying access to the e-mails identified as Bates 2-14 and Bates 21-27.

The Custodian states that notwithstanding the Complainant's assertion that the attorney-client privilege is not applicable to the e-mails identified as Bates 8, 11 and 14, the privilege does apply because the employees named in the e-mails are not dispositive of whether the e-mails contain protected attorney-client communications. The Custodian certifies that the discussion of legal advice by employees of the client agency does not defeat the privilege. The Custodian cites UpJohn Co. v. United States, 449 U.S. 383 (1981) as authority for her argument.

Finally, the Custodian certifies that the e-mails identified as Bates 21-26 contain references to facts arising from other named members of PERS which are exempt from access pursuant to N.J.S.A. 47:1A-10.

Analysis

Timeliness

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian's failure to respond within the required seven (7) business days results in a "deemed" denial. Id. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).⁷ Thus, a custodian's failure to respond in writing to a complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

Although OPRA allows up to (7) business days for a custodian to grant or deny access, the Council will not find that a custodian has violated OPRA if the statutory time period is enlarged by agreement of the parties. Moreover, even where a complainant has refused to agree to the custodian's request for an extension of time, the Council has found that the custodian may still properly secure such an extension.

In Criscione v. Town of Guttenberg (Hudson), GRC Complaint No. 2010-68 (November 2010), the Council determined that, notwithstanding the fact that the complainant did not agree to the extension of time requested by the custodian, the extension was proper "...because the Custodian provided a written response requesting an extension on the sixth (6th) business day following receipt of the Complainant's OPRA request and provid[ed] a date certain on which to expect production of the records requested..."

Subsequently, in Rivera v. City of Plainfield Police Department (Union), GRC Complaint No. 2009-317 (May 2011), the custodian responded to the complainant's request in writing on the fourth (4th) business day following receipt of such request, requesting an extension of time to respond to the request and providing an anticipated deadline date when the requested records would be made available. The complainant did not agree to the custodian's request for an

⁷ A custodian's written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

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extension of time; however, the Council determined that because the custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated deadline date when the requested records would be made available, the custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i).

However, even though it is well settled that a custodian may properly obtain an extension of time to grant or deny access despite objection from the complainant, the custodian cannot exploit same to continuously deny access by repeatedly rolling over an extension once it is obtained. Therefore, the GRC must decide when a series of extensions of time to respond to the request crosses the threshold of reasonableness and constitutes a denial of access.

Here the Custodian requested, and the Complainant approved, four (4) extensions of time totaling twenty-five (25) business days beyond the date of request. On the last day of the fourth extension, the Custodian granted and denied access to some of the requested records and then requested yet another seven (7) business day extension of time in order to address the balance of the Complainant's request. Even though the Complainant again agreed to the extension of time, he made it clear that he would agree to no further extensions. Despite the Complainant's objection, the Custodian availed herself to three more extensions of time totaling an additional twenty-seven (27) business days. These twenty-seven (27) business days were on top of the agreed upon thirty-two (32) business days the Custodian already had available to her to respond to the request. The Custodian in this complaint required a total of fifty-nine (59) business days to complete her response to the request.

OPRA provides that unless a shorter time period is applicable, the custodian must grant or deny access to a government record not later than seven (7) business days after receiving the request; however, "[i]f the government record is in storage or archived, the requestor shall be so advised within seven business days after the custodian receives the request. The requestor shall be advised by the custodian when the record can be made available. If the record is not made available by that time, access shall be deemed denied." N.J.S.A. 47:1A-5(i). Accordingly, there is no provision in OPRA allowing for multiple extensions of time. However, the Council has not found a violation of OPRA where more than one extension of time was provided for by agreement of the parties or where it was found to be reasonably necessary.

In this complaint, by agreement of the parties the Custodian had five (5) extensions of time, which provided in the aggregate twenty-five (25) business days of time beyond the initial seven (7) business days. After the fifth extension, the Complainant did not agree to further extensions of time. The GRC must therefore determine whether the additional twenty-seven (27) business days taken by the Custodian at this juncture were reasonably necessary in order to respond to the request.

To determine if the extended time for a response is reasonable, the GRC must first consider the complexity of the request as measured by the number of items requested, the ease in identifying and retrieving requested records, and the nature and extent of any necessary redactions. The GRC must next consider the amount of time the custodian already had to

respond to the request. Finally, the GRC must consider any extenuating circumstances which could hinder the custodian's ability to effectively respond to the request.⁸

Here, the Custodian determined that five (5) items were requested by the Complainant. Of the five items, the Custodian disclosed four Pension Fact Sheets responsive to request item number 1; seventeen e-mail or e-mail threads, all but two of which were redacted, responsive to request item number 3; and a referral to the agency's website for three records responsive to request item number 4. The Custodian denied all records responsive to request item number 2 because the request was alleged to be invalid. The Custodian also denied one record from request item number 4 because it was alleged to be exempt as attorney-client privileged material. The Custodian also denied all records responsive to request item number 5, but failed to give a reason for the denial. Given the low number of request items, which required disclosure of only 21 records, this request was rather low in complexity, notwithstanding the fact that the majority of the disclosed e-mails were redacted. Moreover, the search for responsive records was not burdensome because the Information Technology Department was tasked to conduct an electronic search which included both current and archived e-mails within Treasury as well as the Governor's Office.

From the Custodian's receipt of the request on June 18, 2013, until expiration of the last agreed-upon extension of time on August 2, 2013, the Custodian had thirty-two (32) business days to respond to the request. The Custodian only responded to a portion of the request within that time frame and sought an additional twenty-seven (27) business days—a period of time just one week short of four months from the date the request was received—in order to complete the response. Thirty-two (32) business days was ample time for the Custodian to respond to a request of this nature, and barring any extenuating circumstances, the response should have taken much less time. With respect to extenuating circumstances, none were asserted in either the requests for extensions of time or the SOI. The primary reasons articulated for extending the time to respond were to “gather and review records” and “to search for additional records” which are routine ministerial duties required of records custodians. The Custodian also certified that a legal review of the records required additional time, but certainly the necessity for such a review should have been apparent immediately following record retrieval. The reason the Custodian gave to justify the last (8th) extension of time was to determine “whether or not some or all of the records at issue are public government records.” This should have been the first question addressed upon receipt of the request. As such, it is not a persuasive reason for justifying an extension of time.

Extending the response time by an additional twenty-seven (27) business days following expiration of the last agreed-upon extension of time in order to address the balance of the Complainant's request is clearly an excessive amount of time and flies in the face of OPRA's mandate to “...promptly comply...” with a records request and to grant or deny access “...as soon as possible...” N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i).

⁸ Such “extenuating circumstances” would include, but not be limited to, retrieval of records that are in storage or archived (especially if at a remote storage facility), conversion of records to another medium to accommodate the requestor, emergency closure of the custodial agency, or the custodial agency's need to reallocate resources to a higher priority due to *force majeure*.

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Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting or denying access within the statutorily mandated seven (7) business days, or a reasonably necessary extension thereof, results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i).

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.

Request item number 1 - any and all reports and communications between the Division of Pensions and Benefits and members of PERS, PFRS, and TPAF concerning post retirement employment since January 1, 2009 to the present

In response to this request item the Custodian disclosed to the Complainant on July 24, 2013 copies of Fact Sheets numbered 21, 28, 29 and 58. The Complainant stated that the Fact Sheets were not responsive to his request; however, the Custodian certified that the Fact Sheets are authored by the agency to assist its members with frequently recurring retirement issues and there are no other records responsive to the request.

As such, the Custodian did not unlawfully deny access to request item number 1 because the Custodian certified that the records disclosed in response to the request are the only records responsive to the request and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification.

Request item number 2 - all non-privileged correspondence from attorneys on behalf of members or employers seeking determinations of eligibility for post-retirement employment in a part-time or full time capacity

The New Jersey Appellate Division has held that "[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records 'readily accessible for inspection, copying, or examination.'* N.J.S.A. 47:1A-1." MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005)(emphasis added). The Court reasoned that:

Most significantly, the request failed to identify with any specificity or particularity the governmental records sought. *MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past.* Such an open-ended demand required the

Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted.

Id. at 549 (emphasis added).

The Court further held that “[u]nder OPRA, agencies are required to disclose only ‘identifiable’ government records not otherwise exempt . . . In short, OPRA does not countenance open-ended searches of an agency's files.” Id. (emphasis added). See also Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005),⁹ NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

Here, the Complainant’s OPRA request item number 2 sought “all... correspondence from attorneys on behalf of members or employers seeking determinations of eligibility for post-retirement employment...” Here, “correspondence” identifies a class of records which could take many forms, such as letters, e-mails, memoranda, etc. Moreover, the specific parties sending or receiving the correspondence are not identified. The Custodian certified that she would have to research hundreds of thousands of pension member files and employee files in order to locate records which might be responsive to the request. This is not a request for a specifically identifiable government record, and OPRA “...is not intended as a research tool litigants may use to force government officials to identify and siphon useful information...” MAG, 375 N.J. Super. at 546. As such, this request item is not valid, and the Custodian did not unlawfully deny access.

Therefore, because the Complainant’s request item number 2 sought “all... correspondence from attorneys on behalf of members or employers seeking determinations of eligibility for post-retirement employment...” and failed to seek identifiable government records, the request is invalid under OPRA. MAG, 375 N.J. Super. at 546; Bent, 381 N.J. Super. at 37; New Jersey Builders, 390 N.J. Super. at 180; Schuler, GRC 2007-151. Thus, the Custodian has not unlawfully denied access to this request item.

Request item number 3 - emails from/to/between or among Susan Culliton, Florence Shepherd, Hank Cyzyk, Ned Thompson, Ken Hartman, Virginia Martucci, Marc Pfeffer and Kathleen Coates concerning post-retirement or pension enrollment

Request item number 4 - any and all emails, letters, phone records, PERS Board minutes, including executive session minutes with references to the Complainant, PERS member number 734737

⁹ Affirming Bent v. Stafford Police Dep’t, GRC Case No. 2004-78 (October 2004).

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The Custodian determined that several e-mails were responsive to request item number 3. On July 24, 2013, the Custodian disclosed one (1) unredacted e-mail string from the Complainant to Kenneth Hartman dated September 17, 2010. The remaining e-mails determined to be responsive to the request (listed in Table 2 above) were disclosed to the Complainant in redacted form on September 11, 2013. The Custodian certified that the e-mails had to be redacted because they contained ACD and attorney-client privileged material exempt from access pursuant to N.J.S.A. 47:1A-1.1, were subject to exemption as an on-going investigation per N.J.S.A. 47:1A-3(a), and/or were subject to the pension records exemption pursuant to N.J.S.A. 47:1A-10. Conversely, the Complainant argued that the e-mails were unnecessarily redacted.

The Custodian also determined that executive session minutes for the November 9, 2010 Board meeting are responsive, in part, to the Complainant's request item number 4. The Custodian did not disclose the record, however, she certified that it was attorney-client privileged material exempt from access pursuant to N.J.S.A. 47:1A-1.1. The Complainant did not dispute the Custodian's denial because the identity of the record and allegation that it was exempt from access were raised by the Custodian for the first time in the SOI.

In Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the Council¹⁰ dismissing 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." Id. The Court also stated that:

The 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-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

¹⁰ Paff v. NJ Dep't of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

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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.

Therefore, pursuant to Paff, 379 N.J. Super. at 346, the GRC must conduct an *in camera* review of the e-mails responsive to request item number 3, which are listed in Table 2, to determine the validity of the Custodian's assertion that the e-mails contain ACD and attorney-client privileged material exempt from access pursuant to N.J.S.A. 47:1A-1.1, are subject to exemption as an on-going investigation per N.J.S.A. 47:1A-3(a), and/or are subject to the pension records exemption pursuant to N.J.S.A. 47:1A-10. The GRC must also conduct an *in camera* review of the executive session minutes for the November 9, 2010 Board meeting which are responsive, in part, to the Complainant's request item number 4, to determine the validity of the Custodian's assertion that the e-mails contain attorney-client privileged material exempt from access pursuant to N.J.S.A. 47:1A-1.1.

Also in request item number 4, the Custodian determined that Board minutes concerning the Complainant for November 2010, January 2011, and May 2012 are available online and she provided a link to the records on the Division's website. Directing a requestor to a location on the custodial agency's website is a valid means of granting access. In Rodriguez v. Kean University, GRC Complaint No. 2013-69 (March 2014), the Council found that "...a custodian shall direct a requestor, with reasonable clarity, to the specific location on the Internet where the responsive records reside. This shall include...providing a link to the exact location of the requested document...[and] is contingent upon the requestor's ability to electronically access the records..." The Council went on to note that "[i]f the request was submitted electronically or the records were requested to be disclosed electronically, there will be a presumption that the complainant has access to the Internet."

Accordingly, the Custodian did not unlawfully deny access to the Board minutes concerning the Complainant for November 2010, January 2011, and May 2012, which are in part responsive to request item number 4, because the Custodian directed the Complainant to the specific location on the Internet where the responsive records are located and there is a presumption that the complainant had access to the Internet because the records were requested to be disclosed electronically.

Request item number 5 - emails, phone records, directives and orders from the Governor or Governor's staff relative to the retirement application of the Complainant in August/September 2010

In the Custodian's July 24, 2014 response to the request, the Custodian requested an extension of time to grant or deny access to request item number 5; however, the Custodian failed to subsequently address this item. Moreover, despite the fact that the Complainant stated in the complaint that the Custodian denied access to the item, the Custodian did not provide a legal reason for denying access in the SOI.

Accordingly, because the Custodian did not bear her burden of proving that she lawfully denied access to request item number 5, the Custodian shall disclose to the Complainant all records responsive to this request item.

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 Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting or denying access within the statutorily mandated seven (7) business days, or a reasonably necessary extension thereof, results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i).
2. The Custodian did not unlawfully deny access to request item number 1 because the Custodian certified that the records disclosed in response to the request are the only records responsive to the request and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification.
3. Because the Complainant's request item number 2 sought "all... correspondence from attorneys on behalf of members or employers seeking determinations of eligibility for post-retirement employment..." and failed to seek identifiable government records, the request is invalid under OPRA. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005), NJ Builders Assoc. v. NJ Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). Thus, the Custodian has not unlawfully denied access to this request item.
4. Pursuant to Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the e-mails responsive to request item number 3, which are listed in Table 2, to determine the validity of the Custodian's assertion that the e-mails contain ACD and attorney-client privileged material exempt from access pursuant to N.J.S.A. 47:1A-1.1, are subject to exemption as an on-going investigation per N.J.S.A. 47:1A-3(a), and/or are subject to the pension records exemption pursuant to N.J.S.A. 47:1A-10. The GRC must also conduct an *in camera* review of the executive session minutes for the November 9, 2010 Board meeting which are responsive, in part, to the Complainant's request item number 4, to determine the validity of the Custodian's assertion that the e-mails

contain attorney-client privileged material exempt from access pursuant to N.J.S.A. 47:1A-1.1.

5. **The Custodian must deliver¹¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see paragraph 4 above), nine (9) copies of the redacted records, a document or redaction index¹², as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,¹³ 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.**
6. The Custodian did not unlawfully deny access to the Board minutes concerning the Complainant for November 2010, January 2011, and May 2012, which are in part responsive to request item number 4, because the Custodian directed the Complainant to the specific location on the Internet where the responsive records are located and there is a presumption that the complainant had access to the Internet because the records were requested to be disclosed electronically.
7. Because the Custodian did not bear her burden of proving that she lawfully denied access to request item number 5, the Custodian shall disclose to the Complainant all records responsive to this request item.
8. **The Custodian shall comply with paragraph 7 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.¹⁴**
9. 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: John E. Stewart, Esq.

Approved By: Dawn R. SanFilippo, Esq.
Acting Executive Director
July 22, 2014

¹¹ 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.

¹² The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

¹³ "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."

¹⁴ 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.

Thomas E. Ciccarone v. State of New Jersey Department of Treasury, 2013-280 – Findings and Recommendations of the Executive Director