



**State of New Jersey**  
**GOVERNMENT RECORDS COUNCIL**

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

**CHRIS CHRISTIE**  
*Governor*

**KIM GUADAGNO**  
*Lt. Governor*

**RICHARD E. CONSTABLE, III**  
*Commissioner*

**FINAL DECISION**

**March 31, 2015 Government Records Council Meeting**

Matthew Cheng  
Complainant

Complaint No. 2014-213

v.

Town of West New York (Hudson)  
Custodian of Record

At the March 31, 2015 public meeting, the Government Records Council (“Council”) considered the March 24, 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 complied with the Council’s February 24, 2015 Interim Order because she responded in the prescribed time frame providing the Complainant the responsive e-mail (with appropriate redactions) via his preferred method of delivery and simultaneously provided certified confirmation of compliance to the Executive Director.
2. Although the Custodian unlawfully denied access to portions of the responsive E-mail, she lawfully denied access to other portions of same. Further, the Custodian subsequently complied with the Council’s December 16, 2014 and February 24, 2015 Interim Orders. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s unlawful denial of access 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 31<sup>st</sup> Day of March, 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: April 2, 2015**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
March 31, 2015 Council Meeting**

**Matthew Cheng<sup>1</sup>  
Complainant**

**GRC Complaint No. 2014-213**

v.

**Town of West New York (Hudson)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Copies of e-mails between Allan Roth and the following individuals regarding changing the West New York Board of Education (“BOE”) election from April to November for the time period January 28, 2014 through March 31, 2014:

- Mayor Felix Roque
- Commissioner FiorD’Aliza Frias
- Commissioner Caridad Rodriguez
- Commissioner Ruben Vargas
- Commissioner Dr. Count J. Wiley
- Gilberto Garcia
- Joe Demarco
- Silvio Acosta

**Custodian of Record:** Carmela Ricci  
**Request Received by Custodian:** April 25, 2014  
**Response Made by Custodian:** May 14, 2014  
**GRC Complaint Received:** May 29, 2014

**Background**

**February 24, 2015 Council Meeting:**

At its February 24, 2015 public meeting, the Council considered the February 17, 2015 *In Camera* Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian complied with the Council’s December 16, 2014 Interim Order because she submitted nine (9) copies of the E-mail to the GRC and certified

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

<sup>2</sup> Represented by Sheri Siegelbaum, Esq., of Scarinci, Hollenbeck (Lyndhurst, NJ).

confirmation of compliance to the Executive Director within the extended time frame to comply.

2. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.<sup>3</sup>**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

#### Procedural History:

On February 25, 2015, the Council distributed its Interim Order to all parties. On February 27, 2015, the Custodian responded to the Council's Interim Order. The Custodian certified that, on this day, she provided to the Complainant the E-mail with redactions as required by the Council's Order. The Custodian also certified that she sent the record to the Complainant via his preferred method of delivery (e-mail).

#### Analysis

##### Compliance

At its February 24, 2015 meeting, the Council ordered the Custodian to disclose the E-mail to the Complainant with appropriate redactions as required by the Order. Further, the Council ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On February 25, 2015, 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 March 4, 2015.

On February 27, 2015, the second (2<sup>nd</sup>) business day after receipt of the Council's Order, the Custodian disclosed the record (with appropriate redactions) to the Complainant via e-mail. Additionally, the Custodian provided certified confirmation of compliance to the Executive Director.

Therefore, the Custodian complied with the Council's February 24, 2015 Interim Order because she responded in the prescribed time frame providing the Complainant the responsive E-mail (with appropriate redactions) via his preferred method of delivery and simultaneously provided certified confirmation of compliance to the Executive Director.

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

## **Knowing & Willful**

OPRA states that “[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty . . .” N.J.S.A. 47:1A-11(a). OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states “. . . [i]f the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA] . . .” N.J.S.A. 47:1A-7(e).

Certain legal standards must be considered when making the determination of whether the Custodian’s actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian’s actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian’s actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian’s actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (*id.*; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); the Custodian’s actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

Although the Custodian unlawfully denied access to portions of the responsive E-mail, she lawfully denied access to other portions of same. Further, the Custodian subsequently complied with the Council’s December 16, 2014 and February 24, 2015 Interim Orders. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s unlawful denial of access 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 complied with the Council’s February 24, 2015 Interim Order because she responded in the prescribed time frame providing the Complainant the responsive e-mail (with appropriate redactions) via his preferred method of delivery and simultaneously provided certified confirmation of compliance to the Executive Director.
2. Although the Custodian unlawfully denied access to portions of the responsive E-mail, she lawfully denied access to other portions of same. Further, the Custodian

subsequently complied with the Council's December 16, 2014 and February 24, 2015 Interim Orders. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's unlawful denial of access 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: Frank F. Caruso  
Communications Specialist/Resource Manager

Approved By: Dawn R. SanFilippo  
Deputy Executive Director

March 24, 2015



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Commissioner

INTERIM ORDER

February 24, 2015 Government Records Council Meeting

Matthew Cheng  
Complainant

Complaint No. 2014-213

v.

Town of West New York (Hudson)  
Custodian of Record

At the February 24, 2015 public meeting, the Government Records Council (“Council”) considered the February 17, 2015 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian complied with the Council’s December 16, 2014 Interim Order because she submitted nine (9) copies of the E-mail to the GRC and certified confirmation of compliance to the Executive Director within the extended time frame to comply.
2. **On the basis of the Council’s determination in this matter, the Custodian shall comply with the Council’s Findings of the *In Camera* Examination within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.<sup>1</sup>**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

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

Interim Order Rendered by the  
Government Records Council  
On The 24<sup>th</sup> Day of February, 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 25, 2015**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director  
February 24, 2015 Council Meeting**

**Matthew Cheng<sup>1</sup>  
Complainant**

**GRC Complaint No. 2014-213**

v.

**Town of West New York (Hudson)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Copies of e-mails between Allan Roth and the following individuals regarding changing the West New York Board of Education (“BOE”) election from April to November for the time period January 28, 2014 through March 31, 2014:

- Mayor Felix Roque
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- Commissioner Caridad Rodriguez
- Commissioner Ruben Vargas
- Commissioner Dr. Count J. Wiley
- Gilberto Garcia
- Joe Demarco
- Silvio Acosta

**Custodian of Record:** Carmela Ricci  
**Request Received by Custodian:** April 25, 2014  
**Response Made by Custodian:** May 14, 2014  
**GRC Complaint Received:** May 29, 2014

**Records Submitted for *In Camera* Examination:** E-mail from Mr. Roth to Mr. Garcia dated February 13, 2014 (“E-Mail”)(2 pages)

**Background**

**December 16, 2014 Council Meeting:**

At its December 16, 2014 public meeting, the Council considered the December 9, 2014 Findings and Recommendations of the Executive Director and all related documentation

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

<sup>2</sup> Represented by Sheri Siegelbaum, Esq., of Scarinci, Hollenbeck (Lyndhurst, NJ).

submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The GRC must conduct an *in camera* review of the responsive E-mail between Mr. Roth and Mr. Garcia to determine the validity of the Custodian's assertion that the same is attorney-client privileged and exempt from disclosure under OPRA. *See Paff v. NJ Dep't of Labor, Bd. of Review*, 379 N.J. Super. 346 (App. Div. 2005); N.J.S.A. 47:1A-1.1. Further, the Custodian must provide additional information as to the positions of both Mr. Roth and Mr. Garcia, as well as to their status as legal counsel for each respective agency.
2. **The Custodian must deliver<sup>3</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see No. 1 above), a document or redaction index<sup>4</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,<sup>5</sup> that the record provided is the record requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

#### Procedural History:

On December 17, 2014, the Council distributed its Interim Order to all parties. On the same day, the Custodian sought an extension of time until January 8, 2015 due to multiple vacations and other pressing issues, which the GRC granted.

On January 8, 2015, the Custodian responded to the Council's Interim Order. The Custodian certified that she is providing nine (9) copies of the E-mail. The Custodian certified that the E-mail was between Mr. Roth, an attorney, and Mr. Gilberto, who was the attorney for the Town of West New York ("Town") at that time. The Custodian noted that she denied access to the E-mail based on advice of Corporation Counsel that same concerned legal matters to be discussed with the Town's Commissioners.

#### Analysis

##### Compliance

On December 16, 2014, the Council ordered the Custodian to submit nine (9) copies of the E-mail for an *in camera* review with a document index and further to provide certified

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<sup>3</sup> The *in camera* records may be sent by overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

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

<sup>5</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On December 17, 2014, the Council distributed its 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 December 24, 2014.

On December 17, 2014, the Custodian sought an extension until January 8, 2015 to respond, which the GRC granted. On January 8, 2015, the Custodian responded to the Interim Order providing nine (9) copies of the E-mail and certified confirmation of compliance to the Executive Director.

Therefore, the Custodian complied with the Council's December 16, 2014 Interim Order because she submitted nine (9) copies of the E-mail to the GRC and certified confirmation of compliance to the Executive Director within the extended time frame to comply.

### **Unlawful Denial of Access**

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request "with certain exceptions." N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful. N.J.S.A. 47:1A-6.

OPRA exempts access to ". . . any record within the attorney-client privilege." N.J.S.A. 47:1A-1.1. In the context of public entities, these privileges extend to communications between the public body, the attorney retained to represent it, necessary intermediaries and agents through whom communications are conveyed, and co-litigants who have employed a lawyer to act for them in a common interest. See Tractenberg v. Twp. Of W. Orange, 416 N.J. Super. 354, 376 (App. Div. 2010); In re Env'tl. Ins. Declaratory Judgment Actions, 259 N.J. Super. 308, 313 (App. Div. 1992). At the same time, the attorney-client and work product privileges do not apply to automatically and completely insulate attorney correspondence from disclosure. See Hunterdon Cnty. P.B.A. Local 188 v. Twp. of Franklin, 286 N.J. Super. 389, 394; In the Matter of Grand Jury Subpoenas, 241 N.J. Super. 18, 30 (App. Div. 1989).

The Custodian, in support of her denial of access to the records, cited N.J.S.A. 47:1A-1.1 (a government record shall not include any records within the attorney-client privilege). The Custodian raised no other defenses to nondisclosure.

The GRC conducted an *in camera* examination on the E-mail. Specifically, the E-mail is between Mr. Roth and Mr. Garcia relating to an alteration in BOE's election. Further, the E-mail is broken up into two (2) main sections: the first is a paragraph plus a standalone sentence and the second is the text of a draft resolution.

To first address the Complainant's allegation that Mr. Roth was not an attorney, the GRC notes that the Custodian certified in her compliance submission that Mr. Roth was an attorney at the time of the E-mail. Further, based on the signature block included in the E-mail, Mr. Roth was with Roth, D'Aquanni, LLC, ("Firm") at the time he sent the E-mail. Mr. Roth's profile on

the Firm's website supports that he has previously served as in-house Counsel and now serves as personnel and special education Counsel for the BOE.<sup>6</sup> Thus, the Complainant's argument that the attorney-client privilege could not apply because Mr. Roth was not attorney is erroneous.

However, the attorney-client privilege exemption is exclusive to a public agency and the attorney retained to represent it. *See Tractenberg*. It is clear that Mr. Roth represented the BOE and that Mr. Garcia represented the Town at the time of the E-mail. However, there is no indication that 1) the Town retained Mr. Roth as counsel in any way, or 2) that the E-mail was between parties with common interest due to possible or pending litigation. *See O'Boyle v. Borough of Longport*, 218 N.J. 168 (2014)(regarding common interest).

Notwithstanding the Custodian's initial denial of access, the Council is permitted to raise additional defenses regarding the disclosure of records pursuant to *Paff v. Twp. of Plainsboro*, 2007 N.J. Super. Unpub. LEXIS 2135 (App. Div. 2007), *certif. denied* by *Paff v. Twp. of Plainsboro*, 193 N.J. 292 (2007).<sup>7</sup> In *Paff*, the complainant challenged the GRC's authority to uphold a denial of access for reasons never raised by the custodian. Specifically, the Council did not uphold the basis for the redactions cited by the custodian. The Council, on its own initiative, determined that the Open Public Meetings Act prohibited the disclosure of the redacted portions to the requested executive session minutes. The Council affirmed the custodian's denial to portions of the executive session minutes but for reasons other than those cited by the custodian. The complainant argued that the GRC did not have the authority to do anything other than determine whether the custodian's cited basis for denial was lawful. The Court held that:

The GRC has an independent obligation to 'render a decision as to whether the record which is the subject of the complaint is a government record which must be made available for public access pursuant to' OPRA . . . The GRC is not limited to assessing the correctness of the reasons given for the custodian's initial determination; it is charged with determining if the initial decision was correct.

Id.

The Court further stated that:

Aside from the clear statutory mandate to decide if OPRA requires disclosure, the authority of a reviewing agency to affirm on reasons not advanced by the reviewed agency is well established. *Cf. Bryant v. City of Atl. City*, 309 N.J. Super. 596, 629-30 (App. Div. 1998) (citing *Isko v. Planning Bd. Of Livingston*, 51 N.J. 162, 175 (1968) (lower court decision may be affirmed for reasons other than those given below)); *Dwyer v. Erie Inv. Co.*, 138 N.J. Super. 93, 98 (App. Div. 1975) (judgments must be affirmed even if lower court gives wrong reason), *certif. denied*, 70 N.J. 142 (1976); *Bauer v. 141-149 Cedar Lane Holding Co.*, 42 N.J. Super. 110, 121 (App. Div. 1956) (question for reviewing court is propriety of action reviewed, not the reason for the action), *aff'd*, 24 N.J. 139 (1957).

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<sup>6</sup> <http://www.rdlegal.net/team-single.html> (Accessed January 15, 2015).

<sup>7</sup> On appeal from *Paff v. Twp. of Plainsboro*, GRC Complaint No. 2005-29 (March 2006).

Id.

OPRA provides that the definition of a government record “. . . shall not include . . . inter-agency or intra-agency advisory, consultative, or deliberative [“ACD”] material.” When this exception is invoked, a governmental entity may “withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated.” Educ. Law Center v. N.J. Dep’t of Educ., 198 N.J. 274, 285 (2009)(citing NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975)). The custodian claiming an exception to the disclosure requirements under OPRA on this basis must initially satisfy two conditions: (1) the document must be pre-decisional, meaning that the document was generated prior to the adoption of the governmental entity’s policy or decision; and (2) the document must reflect the deliberative process, which means that it must contain opinions, recommendations, or advice about agency policies. Id. at 286 (internal citations and quotations omitted).

The key factor in this determination is whether the contents of the document reflect “formulation or exercise of . . . policy-oriented judgment or the process by which policy is formulated.” Id. at 295 (adopting the federal standard for determining whether material is “deliberative” and quoting Mapother v. Dep’t of Justice, 3 F.3d 1533, 1539 (D.C. Cir. 1993)). Once the governmental entity satisfies these two threshold requirements, a presumption of confidentiality is established, which the requester may rebut by showing that the need for the materials overrides the government’s interest in confidentiality. Id. at 286-87.

Regarding the paragraph, it is composed of five (5) sentences with a sixth (6<sup>th</sup>) standalone sentence. A review of the paragraph reveals that the first two (2) sentences contain no ACD material. Specifically, those sentences provide general facts about the content of the E-mail and the State’s actions as they relate to the upcoming election. The middle three (3) sentences, however, contain advisory and consultative statements meeting the definition of ACD material. The sixth (6) sentence is a basic closing line. Based on its review, the GRC is satisfied that only the three (3) middle sentences are ACD material and may be redacted. The Custodian has unlawfully denied access to the remaining sentences and must be disclose same without redactions.

Regarding the draft resolution, the GRC has routinely determined that draft documents are exempt as ACD material. See Parave-Fogg v. Lower Alloways Creek Twp., GRC Complaint No. 2006-51 (August 2006)(holding that draft minutes are exempt from disclosure as ACD material); Cielsa v. NJ Dep’t of Health & Senior Serv., Div. of Health Care Quality & Oversight, GRC Complaint No. 2010-38 (Final Decision dated May 24, 2011)(holding that a draft report is exempt as ACD material); Wolosky v. Sparta Bd. of Educ. (Sussex), GRC Complaint No. 2010-193 (November 2011); Hyland v. Twp. of Lebanon, et al, GRC Complaint Nos. 2012-227 and 2012-228 (Interim Order dated June 24, 2014). As the E-mail makes it clear that the resolution contained in the body of the E-mail is in draft form, the GRC is satisfied that same should not be disclosed.

Additionally, consistent with N.J.S.A. 47:1A-5(g), if the custodian of a government record asserts that part of a particular record is exempt from public access pursuant to OPRA, the custodian must delete or excise from a copy of the record that portion which the custodian asserts

is exempt from access and must promptly permit access to the remainder of the record.

Thus, the Custodian must disclose all other portions of the E-mail to the Complainant (i.e. sender, recipients, date, time, subject, salutations and closings where applicable). As to these portions of the E-mail, the Custodian has unlawfully denied access. *See Ray v. Freedom Acad. Charter Sch. (Camden)*, GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010).

Based on the foregoing, the Custodian must disclose the E-mail in accordance with the Council's *in camera* analysis.

### **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 December 16, 2014 Interim Order because she submitted nine (9) copies of the E-mail to the GRC and certified confirmation of compliance to the Executive Director within the extended time frame to comply.
2. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.<sup>8</sup>**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

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

Approved By: Dawn R. SanFilippo  
Deputy Executive Director

February 17, 2015

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<sup>8</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.



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INTERIM ORDER

December 16, 2014 Government Records Council Meeting

Matthew Cheng  
Complainant

Complaint No. 2014-213

v.

Town of West New York (Hudson)  
Custodian of Record

At the December 16, 2014 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 GRC must conduct an *in camera* review of the responsive e-mail between Mr. Roth and Mr. Garcia to determine the validity of the Custodian's assertion that the same is attorney-client privileged and exempt from disclosure under OPRA. *See Paff v. NJ Dep't of Labor, Bd. of Review*, 379 N.J. Super. 346 (App. Div. 2005); *N.J.S.A. 47:1A-1.1*. Further, the Custodian must provide additional information as to the positions of both Mr. Roth and Mr. Garcia, as well as to their status as legal counsel for each respective agency.
2. **The Custodian must deliver<sup>1</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see No. 1 above), a document or redaction index<sup>2</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,<sup>3</sup> that the record provided is the record requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

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

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

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

Interim Order Rendered by the  
Government Records Council  
On The 16<sup>th</sup> Day of December, 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: December 17, 2014**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
December 16, 2014 Council Meeting**

**Matthew Cheng<sup>1</sup>  
Complainant**

**GRC Complaint No. 2014-213**

v.

**Town of West New York (Hudson)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Copies of e-mails between Allan Roth and the following individuals regarding changing the West New York Board of Education (“BOE”) election from April to November for the time period January 28, 2014 through March 31, 2014:

- Mayor Felix Roque
- Commissioner FiorD’Aliza Frias
- Commissioner Caridad Rodriguez
- Commissioner Ruben Vargas
- Commissioner Dr. Count J. Wiley
- Gilberto Garcia
- Joe Demarco
- Silvio Acosta

**Custodian of Record:** Carmela Ricci  
**Request Received by Custodian:** April 25, 2014  
**Response Made by Custodian:** May 14, 2014  
**GRC Complaint Received:** May 29, 2014

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

**Request and Response:**

On April 25, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On May 14, 2014, the Custodian responded in writing advising that the Town of West New York (“Town”) located one (1) responsive e-mail that is exempt as attorney-work product. On the same day, the Complainant

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

<sup>2</sup> Represented by Sheri Siegelbaum, Esq., of Scarinci, Hollenbeck (Lyndhurst, NJ).

<sup>3</sup> The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

noted that Mr. Roth was not the BOE attorney. Further, the Complainant requested that the Custodian seek advice from Corporation Counsel as to the application of the attorney-work product exemption to the responsive record. On May 16, 2014, the Custodian responded stating that, per Corporation Counsel, the e-mail is exempt as attorney-work product.

#### Denial of Access Complaint:

On May 29, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant disputed that the responsive e-mail was exempt as attorney-work product. The Complainant asserted that Mr. Roth is the Administrative Assistant to Special Services and not the BOE’s attorney. Thus, the Complainant argued that the attorney-work product exemption did not apply and the responsive e-mail should be disclosed.

#### Statement of Information:

On June 13, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on April 25, 2014 and responded in writing on both May 14 and May 16, 2014.

The Custodian contended that the responsive e-mail is between Mr. Roth, an attorney, and Mr. Garcia, attorney of the Town, regarding legal action. The Custodian argued that this email is attorney-client privileged and is thus exempt.

#### Additional Submissions:

On June 14, 2014, the Complainant e-mailed the GRC reiterating that Mr. Roth is not an attorney for the BOE and thus the e-mail is not subject to the attorney-client privilege exemption.

### **Analysis**

#### **Unlawful Denial of Access**

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

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 Council<sup>4</sup> that accepted the custodian’s legal conclusion for the denial of access without further review. The Appellate Division noted 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

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<sup>4</sup> Paff v. NJ Dep’t of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

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 stated that:

[OPRA] 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 found that:

We hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal . . . . There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC’s obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7(f), which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.

Id.

Here, the Complainant filed his complaint with the GRC on disputing that the responsive e-mail was exempt under the attorney-client privilege exemption. Specifically, the Complainant argued that Mr. Roth is not an attorney for the BOE and thus no privilege applied to the e-mail. However, in the SOI, the Custodian argued that both Mr. Roth and Mr. Gilberto are attorneys and that she lawfully denied access to the communication regarding legal action. Based on the foregoing, it is necessary for the GRC to conduct an *in camera* examination of the e-mail.

Therefore, the GRC must conduct an *in camera* review of the responsive e-mail between Mr. Roth and Mr. Garcia to determine the validity of the Custodian’s assertion that the same is attorney-client privileged and exempt from disclosure under OPRA. *See Paff*, 379 N.J. Super. at 346; N.J.S.A. 47:1A-1.1. Further, the Custodian must provide additional information as to the positions of both Mr. Roth and Mr. Garcia, as well as to their status as legal counsel for each respective agency.

### **Knowing & Willful**

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

## Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The GRC must conduct an *in camera* review of the responsive e-mail between Mr. Roth and Mr. Garcia to determine the validity of the Custodian's assertion that the same is attorney-client privileged and exempt from disclosure under OPRA. *See Paff v. NJ Dep't of Labor, Bd. of Review*, 379 N.J. Super. 346 (App. Div. 2005); N.J.S.A. 47:1A-1.1. Further, the Custodian must provide additional information as to the positions of both Mr. Roth and Mr. Garcia, as well as to their status as legal counsel for each respective agency.
2. **The Custodian must deliver<sup>5</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see No. 1 above), a document or redaction index<sup>6</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,<sup>7</sup> that the record provided is the record requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

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

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

December 9, 2014

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<sup>5</sup> The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

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