



**State of New Jersey**  
DEPARTMENT OF COMMUNITY AFFAIRS  
101 SOUTH BROAD STREET  
PO BOX 819  
TRENTON, NJ 08625-0819

CHRIS CHRISTIE  
*Governor*

KIM GUADAGNO  
*Lt. Governor*

CHARLES A. RICHMAN  
*Commissioner*

**FINAL DECISION**

**January 26, 2016 Government Records Council Meeting**

Keith Kemery  
Complainant  
v.

Complaint No. 2014-290

Gloucester Township Fire District No. 4 (Camden)  
Custodian of Record

At the January 26, 2016 public meeting, the Government Records Council (“Council”) considered the January 19, 2016 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 did not fully comply with the Council’s second Interim Order, dated December 15, 2015, because he provided the requested incident report within the required time but did not timely provide the GRC with certified confirmation of compliance. The GRC received the certification on December 28, 2015, when it was due December 24, 2015.
2. Although the Custodian initially unlawfully denied access to one record, the unredacted incident report, he provided same to the Complainant within three days of receipt of the GRC’s second Interim Order, dated December 15, 2015. Additionally, the evidence of record does not indicate that the Custodian’s violations of OPRA had a positive element of conscious wrongdoing or were 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 26<sup>th</sup> Day of January, 2016

Robin Berg Tabakin, Esq., Chair  
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: January 29, 2016**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
January 26, 2016 Council Meeting**

**Keith Kemery<sup>1</sup>  
Complainant**

**GRC Complaint No. 2014-290**

v.

**Gloucester Township Fire District No. 4 (Camden)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:**

June 9, 2014 OPRA Request:

Incident investigation report for the March 3, 2014, incident “involving Tower Ladder 84 [a fire truck] contacting the newly installed door” at the Blackwood Clementon Road Fire Station (“Fire Station”)<sup>3</sup>

June 10, 2014 OPRA Request:

Incident investigation report regarding the February 24, 2014, report of “an offensive and demeaning word being written in the dust on a helmet” at the Blackwood Clementon Road fire station.

**Custodian of Record:** John C. McCann

**Request Received by Custodian:** June 9, 2014, and June 10, 2014

**Response Made by Custodian:** June 19, 2014, and July 28, 2014

**GRC Complaint Received:** August 12, 2014

**Background<sup>4</sup>**

December 15, 2015 Council Meeting:

At its public meeting on December 15, 2015, the Council considered the December 8, 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, found that:

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

<sup>2</sup> Represented by David F. Carlamere, Esq., Carlamere & Rowan (Blackwood, NJ).

<sup>3</sup> Other records were requested which are unrelated to this Complaint.

<sup>4</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.

Keith Kemery v. Gloucester Township Fire District No. 4 (Camden), 2014-290 – Supplemental Findings and Recommendations of the Executive Director

1. Although the Custodian failed to comply with the initial order of the GRC to provide the responsive documents with a detailed document index explaining the lawful basis for any redactions thereto within the five (5) business days as provided for in the Interim Order, thus requiring the GRC to make further demand for compliance, the Custodian did on October 23, 2015 provide the detailed document index explaining redactions made to the responsive documents.
2. The Custodian did not unlawfully deny access to the redacted personal e-mail address of the Fire Chief. N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-6. Specifically, the Custodian's redactions are consistent with the Council's decision in Gettler v. Twp. of Wantage (Sussex), GRC Complaint No. 2009-73 (Interim Order dated June 25, 2013), and there is sufficient information in the e-mails to determine the identity of the senders/recipients.
3. The Custodian unlawfully denied access when he redacted the name of a "former minor junior firefighter" from an incident report because he failed to provide any statutory justification for the exemption, and his claim that the name was not responsive to the requested report provides no legal basis for any redaction. Based on the Custodian's failure to provide a lawful basis for the redaction, the Custodian is ordered to provide the incident report without redacting the name. ACLU v. N.J. Div. of Criminal Justice, 435 N.J. Super. 533, 540-541 (App. Div. 2014).
4. **The Custodian shall comply with item # 3 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance in accordance with Court Rule 1:4-4 to the Executive Director.**
5. The Council defers analysis of whether the Custodian, the Chief, or any other employee of the public agency 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 16, 2015, the Council distributed its Interim Order to all parties. On December 28, 2015, the Custodian responded to the Council's Interim Order by certifying that he had provided via email a copy of the requested incident report without redacting the "former junior firefighter's" name. He provided a copy of the incident report, attached as Exhibit "A" to his certification to the GRC.

#### Compliance

At its meeting on December 15, 2015, the Council ordered the Custodian to disclose the unredacted incident report. On December 16, 2015, the Council distributed its Interim Order to all parties, providing the Custodian with five (5) business days to reply. Thus, the Custodian's response was due by close of business on December 24, 2015.

On December 21, 2015, the third (3<sup>rd</sup>) business day following receipt of the order, the Custodian sent the unredacted incident report via e-mail, the requested method of receipt, and also sent it by certified mail, return receipt requested, to the Complainant. However, the Custodian's certification of compliance was not received by the GRC until December 28, 2015, the sixth (6<sup>th</sup>) business day following receipt of the Order.

Therefore, the Custodian did not fully comply with the Council's second Interim Order, dated December 15, 2015, because he provided the requested incident report within the required time but did not timely provide the GRC with certified confirmation of compliance. The GRC received the certification on December 28, 2015, when it was due December 24, 2015.

### **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)).

In the present case, the Custodian did not fully comply with the GRC's initial Interim Order because he failed to provide timely copies of two documents along with the required document index to explain any redactions for a review by the GRC. When he finally did provide same, the requested incident report contained a redacted name, for which there was no lawful explanation offered. Subsequent to that Order, the Custodian was ordered to provide a copy of the unredacted report to the Complainant within five (5) business days with a certification of compliance to the GRC. While the Custodian did provide the unredacted report to the Complainant within three (3) days of receipt of the order, he failed to timely provide the GRC with a timely certification of compliance.

Although the Custodian initially unlawfully denied access to one record, the unredacted incident report, he provided same to the Complainant within three days of receipt of the GRC's second Interim Order, dated December 15, 2015. Additionally, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or were 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 did not fully comply with the Council's second Interim Order, dated December 15, 2015, because he provided the requested incident report within the required time but did not timely provide the GRC with certified confirmation of compliance. The GRC received the certification on December 28, 2015, when it was due December 24, 2015.
  
2. Although the Custodian initially unlawfully denied access to one record, the unredacted incident report, he provided same to the Complainant within three days of receipt of the GRC's second Interim Order, dated December 15, 2015. Additionally, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or were 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: Ernest Bongiovanni  
Staff Attorney

Reviewed By: Joseph Glover  
Executive Director

January 19, 2016



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
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CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

CHARLES A. RICHMAN  
Commissioner

**INTERIM ORDER**

**December 15, 2015 Government Records Council Meeting**

Keith Kemery  
Complainant

Complaint No. 2014-290

v.

Gloucester Township Fire District No. 4 (Camden)  
Custodian of Record

At the December 15, 2015 public meeting, the Government Records Council (“Council”) considered the December 8, 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. Although the Custodian failed to comply timely with the Council’s September 29, 2015, Interim Order to provide the responsive documents along with a detailed document index explaining the lawful basis for any redactions thereto, thus requiring the GRC to make a further demand for compliance, the Custodian did on October 23, 2015, eventually provide the detailed document index explaining redactions made to the responsive documents.
2. The Custodian did not unlawfully deny access to the redacted personal e-mail address of the Fire Chief. N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-6. Specifically, the Custodian’s redactions are consistent with the Council’s decision in Gettler v. Twp. of Wantage (Sussex), GRC Complaint No. 2009-73 (Interim Order dated June 25, 2013), and there is sufficient information in the e-mails to determine the identity of the senders/recipients.
3. The Custodian unlawfully denied access when he redacted the name of a “former minor junior firefighter” from an incident report because he failed to provide any statutory justification for the exemption, and his claim that the name was not responsive to the requested report provides no legal basis for any redaction. Based on the Custodian’s failure to provide a lawful basis for the redaction, the Custodian is ordered to provide the incident report without redacting the name. ACLU v. N.J. Div. of Criminal Justice, 435 N.J. Super. 533, 540-541 (App. Div. 2014).
4. **The Custodian shall comply with item # 3 above within five (5) business days from receipt of the Council’s Interim Order and simultaneously provide certified**



**confirmation of compliance in accordance with Court Rule 1:4-4 to the Executive Director.**

5. The Council defers analysis of whether the Custodian, the Chief, or any other employee of the public agency 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 15<sup>th</sup> Day of December, 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: December 16, 2015**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
December 15, 2015 Council Meeting**

**Keith Kemery<sup>1</sup>  
Complainant**

**GRC Complaint No. 2014-290**

v.

**Gloucester Township Fire District No. 4 (Camden)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:**

June 9, 2014 OPRA Request:

Incident investigation report for the March 3, 2014, incident “involving Tower Ladder 84 [a fire truck] contacting the newly installed door” at the Blackwood Clementon Road Fire Station (“Fire Station”)<sup>3</sup>

June 10, 2014 OPRA Request:

Incident investigation report regarding the February 24, 2014, report of “an offensive and demeaning word being written in the dust on a helmet” at the Blackwood Clementon Road fire station.

**Custodian of Record:** John C. McCann

**Request Received by Custodian:** June 9, 2014, and June 10, 2014

**Response Made by Custodian:** June 19, 2014, and July 28, 2014

**GRC Complaint Received:** August 12, 2014

**Background<sup>4</sup>**

September 29, 2015 Council Meeting:

At its public meeting on September 29, 2015, the Council considered the September 22, 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, found that:

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

<sup>2</sup> Represented by David F. Carlamere, Esq., Carlamere & Rowan (Blackwood, NJ).

<sup>3</sup> Other records were requested which are unrelated to this Complaint.

<sup>4</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.

Keith Kemery v. Gloucester Township Fire District No. 4 (Camden), 2014-290 – Supplemental Findings and Recommendations of the Executive Director

1. The Custodian did not bear his burden of proof that he 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 access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, and his failure to respond within the requested extension of time frame 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), Kelley, GRC 2007-11. Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-253 (September 2009).
2. The Custodian and/or the Chief may have unlawfully denied access to the requested records. Pursuant to Paff, the GRC must conduct an *in camera* review to validate the assertion that the records are exempt from disclosure under a claim of privilege. The Custodian must provide the two investigative reports to the GRC along with a certification explaining the reason for denial and arguments justifying the asserted privilege. Lombardino v. Borough of Ho-Ho-Kus (Bergen), GRC Complaint No. 2013-92 (October 2013); Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005). N.J.S.A. 47:1A-5 (h).
3. **The Custodian shall comply with item 2 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,<sup>5</sup> to the Executive Director.<sup>6</sup>**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

#### Procedural History:

On October 1, 2015, the Council distributed its Interim Order to all parties. On October 9, 2015, the Custodian responded to the Council's Interim Order. In his response, the Custodian's Counsel took exception to the GRC's decision and argued that the records sought were not government records. He argued that the GRC should instead determine that the Fire District did not unlawfully deny access to public records. The Custodian also certified to a lengthy history of his understanding of the case and attached a two page redacted report, which was "related" to the OPRA request from June 10, 2014, and a nine page report that was "related" to the OPRA

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<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."

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

Keith Kemery v. Gloucester Township Fire District No. 4 (Camden), 2014-290 – Supplemental Findings and Recommendations of the Executive Director

request from June 9, 2014.<sup>7</sup> He further certified that Fire Chief John Vinnoni had previously refused to provide the reports to him and that he believed the OPRA request and response by the Chief was part of a “continuous and ongoing dispute” between the Chief and Mr. Kemery. Finally he stated that no policy was in place at the time the OPRA requests were filed that would have required the Fire Chief to provide to the Fire District investigative reports concerning personnel. However, such a policy is indeed now in place.

On October 19, 2015, Counsel for the Custodian provided a detailed document index, certified by the Custodian. In that certification, Counsel clarified that the reports attached to the documents that were submitted to the GRC on October 9, 2014, did not merely “relate” to the subject incidents but instead were the actual reports requested by the Complainant. He also submitted a supplemental certification to correct the Custodian’s prior certification. In it, the Custodian contended that the redaction of the Fire Chief’s personal e-mail address was proper, arguing that N.J.S.A. 47:1A-1 exempts private phone numbers and personal e-mail addresses. He also argued that the redactions in the June 10, 2014 report all concerned one former junior firefighter, who was not connected to the incident under investigation. The Custodian claimed this redaction to be permitted by N.J.S.A. 47:1A-9a, which allows exemptions permitted in other statutes to apply to OPRA.

### Analysis

#### Compliance

At its meeting on September 29, 2015, the Council ordered the Custodian to disclose the two requested records for an *in camera* review to determine if the records were exempt from disclosure, owing to a claim of privilege. Preliminarily it is noted that the GRC could have ordered that copies of the documents without redactions be submitted for a confidential review. However, based on the specifics of the instant case, the Council instead ordered that the responsive documents be produced and that if any redactions were made, the Custodian must include a detailed document index explaining the lawful basis for each redaction. On October 1, 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.

On October 9, 2014, the Custodian responded to the Order and provided the two requested reports. Upon receipt, the GRC requested a detailed document index to include the legal justification for any redactions made. On October 23, 2015, the Custodian provided the detailed document index and stated that there were two redactions one from each report that require further analysis. Based on the evidence of record, the GRC finds ample information to make a ruling.

Although the Custodian failed to comply timely with the Council’s September 29, 2015, Interim Order to provide the responsive documents along with a detailed document index explaining the lawful basis for any redactions thereto, thus requiring the GRC to make a further

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<sup>7</sup> The Custodian stated that the redactions related to the June 10, 2014 OPRA request were the names of “three junior firefighters” and that the redacted item in the report related to the June 9, 2014 OPRA request was the Fire chief’s personal e-mail address.

Keith Kemery v. Gloucester Township Fire District No. 4 (Camden), 2014-290 – Supplemental Findings and Recommendations of the Executive Director

demand for compliance, the Custodian did on October 23, 2015, eventually provide the detailed document index explaining redactions made to the responsive documents.

Redaction of the Fire Chief's personal e-mail address from the report requested on June 9, 2014.

OPRA provides that “a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy . . .” N.J.S.A. 47:1A-1.

The Supreme Court has explained that N.J.S.A. 47:1A-1's safeguard against disclosure of personal information is substantive and requires “a balancing test that weighs both the public's strong interest in disclosure with the need to safeguard from public access personal information that would violate a reasonable expectation of privacy.” Burnett v. Cnty. of Bergen, 198 N.J. 408, 422-23, 427 (2009).

The GRC looks to Gettler v. Twp. of Wantage (Sussex), GRC Complaint No. 2009-73 *et seq.* (Interim Order dated June 25, 2013), in which the Council was tasked with determining whether the custodian lawfully denied access to redacted personal e-mail addresses. After determining that additional development of the record was necessary, the Council referred the complaint to the Office of Administrative Law (“OAL”). As part of that referral, the Council asked the OAL to determine whether personal e-mail addresses were disclosable, both in the instance when a name is displayed or not displayed within the address.

The OAL obtained balancing test responses from the parties and conducted the test based on the Burnett factors. Based on its application of the test, the OAL determined that the factors weighed in favor of redaction of personal e-mail addresses. In reaching its conclusion, the OAL reasoned that the potential for harm in subsequent nonconsensual disclosure and the lack of any adequate safeguards preventing unauthorized disclosure of the email addresses outweighed the complainant's degree of need for access to the email addresses. The OAL applied that reasoning to all e-mails where names accompanied the personal e-mail addresses but did require the disclosure of those e-mail addresses not accompanied by a name. The Council accepted the OAL's Initial Decision without modification.

In Gettler, the development of the record required the Council to refer the complaint to OAL, which employed a balancing test to determine whether a private e-mail address was disclosable. The facts and reasoning of Gettler are clearly applicable here. Specifically, the Custodian certified that the redacted e-mail addresses were personal addresses. Additionally, these addresses were accompanied by identifiers, thus clarifying to whom the e-mail addresses belonged. The Custodian's redactions are consistent with those the OAL determined to be lawful in Gettler.

Therefore, the Custodian did not unlawfully deny access to the redacted personal e-mail addresses of the Fire Chief. N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-6. Specifically, the Custodian's redactions are consistent with the Council's decision in Gettler, GRC 2009-73 *et seq.*, and there is sufficient information in the e-mails to determine the identity of the senders and recipients.

Redaction of a name from the report requested on June 10, 2014.

OPRA explicitly states that a “public agency shall have the burden of proving that [a] denial of access is *authorized by law*” (emphasis added). N.J.S.A. 47:1A-6. In the instant matter, the Custodian redacted the name of a “former minor junior firefighter,” alleging that OPRA permits exemptions as provided in other statutes. However, the Custodian failed to identify the statute that authorizes the redaction. The Custodian also stated that the name, redacted in three different places in the report, was “not related to the incident report” requested. However, no exemption contained in OPRA permits a custodian to deny access merely on the basis that the Custodian does not consider the requested record responsive to the subject OPRA request. ACLU v. N.J. Div. of Criminal Justice, 435 N.J. Super. 533, 540-541 (App. Div. 2014). Additionally, the Custodian failed to provide any lawful basis for such a redaction.

Based on the foregoing, the Custodian unlawfully denied access when he redacted the name of a “former minor junior firefighter” from an incident report because he failed to provide any statutory justification for the exemption, and his claim that the name was not responsive to the requested report provides no legal basis for any redaction. Based on the Custodian’s failure to provide a lawful basis for the redaction, the Custodian is ordered to provide the incident report without redacting the name. ACLU, *supra* at 540-541.

**Knowing & Willful**

The Council defers analysis of whether the Custodian, the Chief, or any other employee of the public agency 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. Although the Custodian failed to comply timely with the Council’s September 29, 2015, Interim Order to provide the responsive documents along with a detailed document index explaining the lawful basis for any redactions thereto, thus requiring the GRC to make a further demand for compliance, the Custodian did on October 23, 2015, eventually provide the detailed document index explaining redactions made to the responsive documents.
2. The Custodian did not unlawfully deny access to the redacted personal e-mail address of the Fire Chief. N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-6. Specifically, the Custodian’s redactions are consistent with the Council’s decision in Gettler v. Twp. of Wantage (Sussex), GRC Complaint No. 2009-73 (Interim Order dated June 25, 2013), and there is sufficient information in the e-mails to determine the identity of the senders/recipients.

3. The Custodian unlawfully denied access when he redacted the name of a “former minor junior firefighter” from an incident report because he failed to provide any statutory justification for the exemption, and his claim that the name was not responsive to the requested report provides no legal basis for any redaction. Based on the Custodian’s failure to provide a lawful basis for the redaction, the Custodian is ordered to provide the incident report without redacting the name. ACLU v. N.J. Div. of Criminal Justice, 435 N.J. Super. 533, 540-541 (App. Div. 2014).
4. **The Custodian shall comply with item # 3 above within five (5) business days from receipt of the Council’s Interim Order and simultaneously provide certified confirmation of compliance in accordance with Court Rule 1:4-4 to the Executive Director.**
5. The Council defers analysis of whether the Custodian, the Chief, or any other employee of the public agency 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: Ernest Bongiovanni  
Staff Attorney

Reviewed By: Joseph Glover  
Executive Director

December 8, 2015



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
101 SOUTH BROAD STREET  
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CHRIS CHRISTIE  
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INTERIM ORDER

September 29, 2015 Government Records Council Meeting

Keith Kemery  
Complainant

Complaint No. 2014-290

v.

Gloucester Township Fire District No. 4 (Camden)  
Custodian of Record

At the September 29, 2015 public meeting, the Government Records Council (“Council”) considered the September 22, 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 did not bear his burden of proof that he 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 access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, and his failure to respond within the requested extension of time frame, 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), Kelley, GRC 2007-11. Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008). *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-253 (September 2009).
2. The Custodian and/or the Chief may have unlawfully denied access to the requested records. Pursuant to Paff, the GRC must conduct an *in camera* review to validate the assertion that the records are exempt from disclosure under a claim of privilege. The Custodian must provide the two investigative reports to the GRC along with a certification explaining the reason for denial and arguments justifying the asserted privilege. Lombardino v. Borough of Ho-Ho-Kus (Bergen), GRC Complaint No. 2013-92 (October 2013); Paff v. NJ Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005). N.J.S.A. 47:1A-5 (h).
3. **The Custodian shall comply with item 2 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,<sup>1</sup> to the Executive Director.<sup>2</sup>**

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

Interim Order Rendered by the  
Government Records Council  
On The 29<sup>th</sup> Day of September, 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: October 1, 2015**

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<sup>1</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."

<sup>2</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
September 29, 2015 Council Meeting**

**Keith Kemery<sup>1</sup>  
Complainant**

**GRC Complaint No. 2014-290**

v.

**Gloucester Township Fire District No. 4 (Camden)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:**

June 9, 2014 OPRA Request:

Incident investigation report for the March 3, 2014, incident “involving Tower Ladder 84 [a fire truck] contacting the newly installed door” at the Blackwood Clementon Road Fire Station (“Fire Station”)<sup>3</sup>

June 10, 2014 OPRA Request:

Incident investigation report regarding the February 24, 2014, report of “an offensive and demeaning word being written in the dust on a helmet” at the Blackwood Clementon Road fire station.

**Custodian of Record:** John C. McCann

**Request Received by Custodian:** June 9, 2014, and June 10, 2014

**Response Made by Custodian:** June 19, 2014, and July 28, 2014

**GRC Complaint Received:** August 12, 2014

**Background<sup>4</sup>**

Request and Response:

On June 9, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On June 10, 2014, the Complainant submitted an additional OPRA request to the Custodian seeking the above-mentioned records. On June 19, 2014, the Custodian responded in writing to both requests and

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

<sup>2</sup> Represented by David F. Carlamere, Esq. (Blackwood, NJ)

<sup>3</sup> Other records were requested which are not unrelated to this Complaint.

<sup>4</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.

sought an additional two weeks to obtain the information from the Fire Station. On July 28, 2014, the Custodian sent another letter to the Complainant, this time stating that the Fire Station “did not submit a copy of the report to the Board of Fire Commissioners. Therefore, there is no Fire District 4 record to forward.”

#### Denial of Access Complaint:

On August 12, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian unlawfully denied the incident investigation reports of two events that occurred at the Fire Station: the March 3, 2014, incident involving Tower Ladder 84, and the February 24, 2014, incident involving an offensive word that was allegedly written in the dust of a helmet. The Complainant argued that the Gloucester Township Fire District 4 (“Fire District”) owns both the Tower Ladder 84 truck and the fire station. Therefore, he argued, an investigation report conducted by and for the Blackwood Fire Company is a public document which the Fire District must provide. Regarding the offensive word allegedly written on a helmet, he argued that the Fire District owns the helmet, and the event was reported by an employee of the Fire District. Therefore, he argues that the investigation report is also a public document.

#### Statement of Information:

On September 12, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on June 8, 2014, and that he responded on July 19, 2014, by hand delivering two letters, one dated July 17 and the other dated July 19, 2014. In his response, the Custodian requested a two week extension of time so that he could obtain the records from the Fire Station. The Custodian attached to his SOI an e-mail memo, dated July 26, 2014, from the Chief of the Fire Station. In the memo, the Chief responded to the Custodian’s request for the records and stated in pertinent part: “[Our] long standing procedure ... permits the personnel files of the Blackwood Fire Company to be maintained by the Board of Fire Commissioners under the sole authority of the Chief [and] I currently have no intention, absent a court order/subpoena, of authorizing the release of any ... investigation reports for public review.” The Custodian stated that the Chief’s refusal to release the reports to the Fire Commissioners caused the Commissioners to pass a Resolution on August 20, 2014, to require the Chief to release the requested reports to the Fire Commissioners. As of September 9, 2014, the Fire Commissioners had received no reports.

### 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).<sup>5</sup> 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. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

Moreover, OPRA provides that:

If the . . . 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).

In Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008), the custodian responded in writing on the fifth (5th) business day after receipt of the complainant's OPRA request by seeking an extension of time until April 20, 2007. However, the custodian responded again on April 20, 2007, stating that the requested records would be provided later in the week. Id. The evidence of record showed that no records were provided until May 31, 2007. Id. The GRC held that:

The Custodian properly requested an extension of time to provide the requested records to the Complainant by requesting such extension in writing within the statutorily mandated seven (7) business days pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) . . . however . . . [b]ecause the Custodian failed to provide the Complainant access to the requested records by the extension date anticipated . . . the Custodian violated N.J.S.A. 47:1A-5(i) resulting in a "deemed" denial of access to the records.

Id.

In the present case, the Custodian certified that his office received the OPRA request on June 9, 2014, and that he responded to the request on June 19, 2014, eight (8) business days later. Also, on June 19, 2014, the Custodian requested a two week extension of time. However, the Custodian failed to respond within the extended time frame. Instead of responding to the Complainant by June 23, 2014, two weeks from the requested extension of time, he instead responded on July 28, 2014, several weeks following the extended deadline.

Therefore, the Custodian did not bear his burden of proof that he 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 access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7)

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<sup>5</sup> 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.

business days, and his failure to respond within the requested extension of time frame, 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), Kelley, GRC 2007-11. Kohn, 2007-124. *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-253 (September 2009).

### **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.

OPRA further provides that “[a]ny officer or *employee* of a *public agency* who receives a request for access to a government record *shall forward* the request to the *custodian of the record* or *direct the requestor* to the *custodian of the record*.” N.J.S.A. 47:1A-5(h) (emphasis added). In Lombardino v. Borough of Ho-Ho-Kus (Bergen), GRC Complaint No. 2013-92 (October 2013), the complainant submitted an OPRA request using the Borough of Ho-Ho-Kus’s official request form. The recipient of the request believed the request to be for discovery and forwarded the request to the municipal prosecutor instead of the OPRA custodian. The Council found that the recipient violated N.J.S.A. 47:1A-5(h) for failing to forward the OPRA request to the custodian or direct the complainant to the custodian.

The Custodian states the records are not in his possession because an employee of the Fire Station refuses to give him the reports. However, the employee withholding the records stated in his memo to the District that the requested records are part of “*the personnel files of the Blackwood Fire Company to be maintained by the Board of Fire Commissioners*” (emphasis added) but under the Fire Chief’s “sole authority.” Thus, the records are government records, maintained by the Fire District. Employees in possession of records that the Custodian is supposed to maintain are subject to OPRA’s mandates and possible penalties. N.J.S.A. 47:1A-5(h). The Custodian stated that the Chief claims an exemption from OPRA because the records are from an internal investigation and/or are part of personnel records.

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>6</sup> that dismissed the complaint after 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 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

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<sup>6</sup> Paff v. N.J. Dep’t of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

provides that the GRC “may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.” N.J.S.A. 47:1A-7(f). This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.

Id. at 355.

Further, the Court stated that:

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

Id.

In the instant matter, the Custodian and/or the Chief may have unlawfully denied access to the two requested investigative reports. Pursuant to Paff, the GRC must conduct an *in camera* review of the requested records to validate the assertion that the records are exempt from disclosure under a claim of privilege. The Custodian must provide the two investigative reports to the GRC along with a certification explaining the reason for denial and arguments justifying the asserted privilege. Paff, 379 N.J. Super, 346. N.J.S.A. 47:1A-5(h) Lombardino, GRC 2013-92.

### **Knowing & Willful**

The Council defers analysis of whether the Custodian, the Chief, or any other employee of the public agency 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 his burden of proof that he 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 access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, and his failure to respond within the requested extension of time frame, 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), Kelley, GRC 2007-11. Kohn v. Twp. of Livingston Library (Essex), GRC Complaint No. 2007-124

(March 2008). *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-253 (September 2009).

2. The Custodian and/or the Chief may have unlawfully denied access to the requested records. Pursuant to Paff, the GRC must conduct an *in camera* review to validate the assertion that the records are exempt from disclosure under a claim of privilege. The Custodian must provide the two investigative reports to the GRC along with a certification explaining the reason for denial and arguments justifying the asserted privilege. Lombardino v. Borough of Ho-Ho-Kus (Bergen), GRC Complaint No. 2013-92 (October 2013); Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005). N.J.S.A. 47:1A-5 (h).
3. **The Custodian shall comply with item 2 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,<sup>7</sup> to the Executive Director.<sup>8</sup>**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Ernest Bongiovanni  
Staff Attorney

Reviewed By: Joseph Glover  
Executive Director

September 22, 2015

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<sup>7</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."

<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.