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Lt. Governor

CHARLES A. RICHMAN
Commissioner

INTERIM ORDER

July 25, 2017 Government Records Council Meeting

Jeff Carter
Complainant

Complaint No. 2015-166

v.

Franklin Fire District No. 1 (Somerset)
Custodian of Record

At the July 25, 2017 public meeting, the Government Records Council (“Council”) considered the July 18, 2017 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 bore his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, there was no “deemed” denial of the subject OPRA request. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Verry v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2014-325 (Final Decision dated October 27, 2015).
2. Accordingly, the GRC is unable to determine whether the Custodian unlawfully denied access to the requested records in their native format. Therefore, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the highly technical issue of whether a custodian can disclose records in their native, writable format on the basis that “format” is akin to “medium.” N.J.S.A. 47:1A-5(d); Owoh (O.B.O. O.R.) v. West Windsor Plainsboro Reg’l Sch. Dist. (Mercer), GRC Complaint No. 2012-167 (Interim Order dated February 26, 2013). Further, should the Office of Administrative Law determine that the Custodian unlawfully denied access to the records, it should make a determination on whether the Franklin Fire District No. 1 has the ability to protect the integrity of its records through all available technological methods. Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2014-137, *et seq.* (Interim Order dated April 28, 2015).
3. Because the evidence of record indicates that the denied e-mail attachments are draft documents, and because draft documents in their entirety comprise “inter-agency, intra-agency advisory, consultative or deliberative” material, the Custodian lawfully denied access to those attachments. N.J.S.A. 47:1A-1.1, N.J.S.A. 47:1A-6; Dalesky v. Borough of Raritan (Somerset), GRC Complaint No. 2008-61 (November 2009); Shea v. Village of Ridgewood (Bergen), GRC Complaint No. 2010-79 (February



2011). *See also* Ciesla v. NJ Dep't of Health and Senior Serv., GRC Complaint No. 2010-38 (May 2011) (*aff'd* Ciesla v. NJ Dept. of Health & Senior Serv., 429 N.J. Super. 127 (App. Div. 2012).

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 Office of Administrative Law's decision in this complaint.
5. The Council defers analysis of whether the Complainant is a prevailing party, pending the Office of Administrative Law's decision in this complaint.

Interim Order Rendered by the
Government Records Council
On The 25th Day of July, 2017

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: July 27, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 25, 2017 Council Meeting**

**Jeff Carter¹
Complainant**

GRC Complaint No. 2015-166

v.

**Franklin Fire District No. 1 (Somerset)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies of all e-mails and attachments (in their current existing format) between the Custodian, the Custodian’s Counsel, Deborah Nelson, Bernard Pongratz, and Fred Semrau relating to Financial Disclosure Statements (“FDS”) from January 21, 2011, through January 21, 2012.

Custodian of Record: Tim Szymborski
Request Received by Custodian: May 8, 2015
Response Made by Custodian: May 19, 2015
GRC Complaint Received: June 9, 2015

Background³

Request and Response:

On May 7, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On May 19, 2015, the alleged seventh (7th) business day after receipt of the OPRA request, the Custodian’s Counsel responded in writing on behalf of the Custodian by disclosing responsive records. The Custodian’s Counsel also denied access to attachments from three (3) e-mails, contending that they are exempt under the attorney-client privilege or “inter-agency, intra-agency advisory, consultative or deliberative” (“ACD”) material exemptions. N.J.S.A. 47:1A-1.1.

Denial of Access Complaint:

On June 9, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant first asserted that the Custodian failed to respond timely to his OPRA request, which resulted in a “deemed” denial of access. N.J.S.A.

¹ Represented by John A. Bermingham, Jr., Esq. (Mount Bethel, PA).

² Represented by Dominic DiYanni, Esq., of Eric M. Bernstein & Associates, LLC (Warren, NJ).

³ 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.

47:1A-5(g); N.J.S.A. 47:1A-5(i); Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

Next, the Complainant contended that the Custodian failed to disclose the responsive records in the exact medium requested. The Complainant argued that he explicitly noted in his OPRA request that:

[A]ny and all records that exist in electronic format (*e.g.* e-mails [*e.g.* .msg or similar extension], PDF files, spreadsheet files, word processing files, *etc.*) are specifically requested in electronic format.

[The Complainant] specifically request[s] electronic copies of the “Record Copy E-mail” of each individual’s “Inbox” and/or “Sent Items” folders.

[The Complainant] speci[fically] request[s] all attachments to all records in their original format (*e.g.*, PDF files, spreadsheet files, word processing files, *etc.*, including any reasonably construed variation thereof.

The Complainant contended that, notwithstanding the explicit instructions, the Custodian violated N.J.S.A. 47:1A-5(d) by not disclosing the responsive records in their “native” format/medium. Rather, the Complainant contended that the Custodian appeared to print and scan the responsive records. The Complainant also complained that the Custodian failed to disclose the original .pdf file containing FDS forms attached to one of the responsive e-mails. The Complainant also took issue with the fact that none of the e-mails indicates whether they were “blind-copied” to any recipient.

Additionally, the Complainant argued that the Custodian failed to disclose the following attachments:

1. January 25, April 3, and April 4, 2011 e-mails: “2007 FinancialDisclosure.pdf,” however, the Complainant noted that the Custodian presumably disclosed scanned copies of these attachments.
2. June 1, 2011 e-mail: “Cert of Melissa Kosensky 2011-74.doc; Cert of Melissa Kosensky 2011-75.doc; Cert of Melissa Kosensky 2011-76.doc.”
3. June 9, 2011 e-mail: “SOI.doc; Cert of Melissa Kosensky 2011-74.doc; SOI.doc; Cert of Melissa Kosensky 2011-75.doc; SOI.doc; Cert of Melissa Kosensky 2011-76.doc.”

The Complainant argued that the Custodian failed to disclose any of the attachments despite being repeatedly ordered to do so by the GRC. Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2012-284, *et seq.* (Interim Order dated March 25, 2014); Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2012-288, *et seq.* (Interim Order dated March 25, 2014); Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-281, *et seq.* (Interim Order dated January 30, 2015); Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-328, *et seq.* (Interim Order dated January 30, 2015) Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2014-137, *et seq.* (Interim Order dated April 28,

2015). The Complainant further contended that the Custodian failed to indicate in his document index whether any of the identified e-mails contained attachments.

Moreover, the Complainant contended that the Custodian violated OPRA by failing to provide three (3) e-mails identified in the document index as exempt under the attorney-client and ACD material exemptions.⁴ N.J.S.A. 47:1A-5(g). The Complainant alleged that this is especially problematic because the Custodian was previously ordered to do same by the GRC in several cases. Carter, GRC 2013-281, *et seq.*; Carter, GRC 2013-328, *et seq.* The Complainant asserted that the GRC should conduct an *in camera* review as required in Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005). Additionally, the Complainant contended that redactions would apply to any attachments, which the Custodian failed to disclose. The Complainant also asserted that the Custodian asserted no privilege for the attachments.

Regarding the attorney-client privilege exemption, the Complainant asserted that the Supreme Court has held that it is not absolute. In Re Kozlov, 79 N.J. 232, 243-244 (1979). The Custodian noted that the Kozlov Court determined that the privilege could be pierced if a balancing test weighs in favor of access. *See* Hammock v. Hoffman-LaRoche, Inc., 142 N.J. 356, 381 (1995); Payton v. NJ Turnpike Auth., 148 N.J. 524, 540 (1997). The Complainant asserted that several other exceptions exist, including “communications obtained in aid of a crime or fraud.” Kinsella v. Kinsella, 150 N.J. 276, 294 (1997). The Complainant also noted that even if communications are protected, factual information within the communication does not fall under the privilege. Keddie v. Rutgers, State Univ., 148 N.J. 36, 54 (1997). The Complainant contended that the responsive e-mails related to Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-76 (Final Decision dated June 30, 2015)⁵ and that the GRC should require disclosure of those e-mails.

The Complainant thus requested that the Council: 1) determine that the Custodian violated OPRA by failing to provide the responsive records within seven (7) business days; 2) determine that the Custodian violated OPRA by failing to provide the responsive records in the “medium” requested, or the “Record Copy E-mail” versions directly from each individuals’ inbox; 3) immediately order disclosure of all responsive records in the requested “medium”; 4) conduct an *in camera* review of any e-mail to which the Custodian asserted a privilege in accordance with Paff, 379 N.J. Super. 346; 5) determine that the Custodian knowingly and willfully violated OPRA and unreasonably denied access to the responsive record under the totality of the circumstances; and 6) determine that the Complainant is a prevailing party entitled to an award of reasonable attorney’s fees.

Statement of Information:

On June 30, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on March 7, 2015, after FFD’s

⁴ The GRC notes that the document index actually identified the attachments for the three (3) e-mails, not the e-mails themselves, as exempt under N.J.S.A. 47:1A-1.1.

⁵ The Complainant subsequently appealed from the Council’s Final Decision to the Appellate Division. That appeal is still pending.

business hours. The Custodian certified that his search included contacting FFD's Information Technology ("IT") vendor to perform a search of its servers for responsive records. The Custodian certified that the responsive records were extracted and sent to Custodian's Counsel for review. The Custodian certified that he also reached out to all identified individuals to check for responsive records on their own e-mail accounts; all replied back that no records existed. The Custodian certified that Custodian's Counsel responded in writing on his behalf on March 19, 2015, disclosing thirty-nine (39) pages of records. The Custodian certified that the Custodian's Counsel also provided a document index denying access to attachments from three (3) e-mails under the attorney-client privilege and ACD exemptions. N.J.S.A. 47:1A-1.1. The Custodian affirmed that the attachments constituted draft documents that were prepared for multiple Denial of Access Complaints filed by the Complainant. The Custodian noted that the Complainant subsequently received finalized versions of the documents upon the FFD's response to those complaints.

The Custodian asserted that no denial of access occurred here. The Custodian asserted that the FFD timely responded by disclosing all responsive e-mails and including a document index for the exempt attachments. Further, the Custodian contended that the FFD provided electronic access to one of the "medium" options contained within the OPRA request. The Custodian also noted that the attachments that were disclosed were already in .pdf form. The Custodian asserted that the only remaining issue is the exempt attachments, which were clearly exempt under the attorney-client privilege and ACD material exemptions.

The Custodian asserted that the FFD timely responded to the Complainant's OPRA request. The Custodian certified that he was at his full time job at the time that the Complainant submitted his OPRA request (at 12:35 p.m.). The Custodian thus certified that he did not receive the Complainant's OPRA request until after 8:00 p.m. on March 7, 2015, at which point he forwarded same to the Custodian's Counsel for review.

The Custodian refuted the Complainant's assertion that he did not provide three (3) e-mails, noting that the document index instead identified the attachments of each e-mail as exempt. The Custodian certified that he actually disclosed all three (3) e-mails in their entirety, even though he could have denied access to them under the attorney-client privilege. The Custodian asserted that this disclosure demonstrates the FFD's compliance with OPRA. However, the Custodian argued that the attachments were exempt in their entirety because he could not redact them reasonably.⁶

The Custodian further argued that he did not deny access to the responsive records because he provided them within seven (7) business days in electronic format (.pdf) as identified in the Complainant's OPRA request. The Custodian noted that all attachments were already in .pdf form and were provided in that format. The Custodian argued that the only outstanding issue here is whether he lawfully denied access to the three (3) attachments: he argued that he did.

⁶ The Custodian asserted that the Complainant should pay attorney's fees to the FFD for having to defend the complaint, which he believed should be administratively dismissed. The GRC notes that OPRA's fee shifting provision only applies to complainants. N.J.S.A. 47:1A-6.

Additional Submissions:

On July 9, 2015, the Complainant's Counsel submitted a letter brief to dispute the Custodian's SOI. Therein, Counsel first corrected the record by admitting that the Complainant did receive all three (3) e-mails, all three of which he previously claimed were not released and blamed the Custodian for not disclosing. However, Counsel refuted that one of the e-mails (dated May 31, 2011) was not disclosed in its entirety. Specifically, Counsel contended that the e-mail was part of a chain and did not include recipients of attachments.

Next, Counsel contended that the FFD's response was untimely and that the time of day the Custodian read his e-mails was of no moment. Counsel noted that the Complainant also copied Ms. Cuddy, who works in the FFD offices when those offices are open to the public, and James Wickman, who was the designated sub-custodian, on his OPRA request. Counsel thus argued that it is clear that the first (1st) business day began on May 8, 2015, and that the final business day to respond was May 18, 2015. Counsel contended that the Custodian's delay until May 19, 2015, to respond in writing resulted in a "deemed" denial. Counsel asserted that, should the Council accept this argument, it would set precedent that allowed custodians "to wait days, weeks, or even months" to open e-mailed OPRA requests. Counsel contended that he argued in Verry v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2014-325 (Final Decision dated October 27, 2015) that the Custodian should have utilized a sub-custodian while away on "personal" business. Counsel argued that, in the alternative, requestors were forced to wait until the Custodian "was good and ready" to respond to OPRA requests. Counsel alleged that the "deliberate and intentional conduct" shown by the Custodian here was "clearly a tactical ruse to *unreasonably* hamper access to records . . ." (emphasis in original).⁷ Counsel requested that the GRC take proactive steps to end the Custodian's repeated conduct of "invent[ing] unreasonable defenses to justify their blatant unlawful denial of access time-after-time" (*sic*).

Counsel additionally argued that the Custodian's veiled assertions that he was overburdened are unfounded. Counsel noted that the FFD did not fall within the specific criteria set forth in N.J.S.A. 47:1A-5(a), which allows for an agency to limit OPRA hours. Counsel further argued that the Custodian, who ran for and was elected to the FFD, knowingly accepted the role of "custodian of record." Counsel contended that the Custodian's legal obligations under OPRA take precedent over balancing his elected position with personal obligations. Counsel also contended that the Custodian is paid \$5,000.00 a year: "complaining that his personal . . . job interferes with his legal responsibilities as a *paid public official* is an insult to the tax payers . . ." (emphasis in original).

Moreover, Counsel contended that the Custodian did not fully disclose the May 31, 2011 e-mail. Specifically, Counsel argued that the Custodian did not disclose the e-mail in its original, electronic format. Rather, the e-mail does not include any indication to whom the e-mail was sent, who was copied, and if there were any recipients blind copied on the e-mail. Counsel also argued that the Complainant could not glean how many attachments were included in the e-mail. Counsel argued that all of the foregoing strongly supports a request for the GRC to require disclosure of all records in their original medium, as initially requested.

⁷ The GRC notes that the Complainant is challenging a one (1) business day discrepancy between his calculation of the seventh (7th) business day (May 18, 2015) and the Custodian's calculation (May 19, 2015).

Additionally, Counsel also contended that the Custodian did not provide any of the responsive e-mails in their original electronic format as requested; he instead chose to disclose them as a single .pdf file “created *after-the-fact*” (emphasis in original). Counsel argued that, contrary to the Council’s analysis on this issue in Carter, GRC 2014-137 & 2014-138 (consolidated),⁸ the Custodian had an obligation to provide the responsive e-mails in their original format per N.J.S.A. 47:1A-1 and N.J.S.A. 47:1A-5(d). See also Gannett Satellite Info Network, Inc., d/b/a Gannett New Jersey Newspapers/Courier News v. Borough of Raritan, SOM L-1798-09 (August 15, 2012)(slip op.)(rejecting defendants’ assertion that compiling and disclosing electronic data amounted to creating a new record). Counsel asserted that the decision in Gannett is directly on point here. Counsel argued that, as in Gannett: 1) the records requested are readily available in their original format; 2) the records constitute “information stored or maintained electronically” per N.J.S.A. 47:1A-1.1; and 3) the records existed in their original format before the request was submitted. Counsel further requested that, while Gannett is not binding, the Council take judicial notice and apply the same logic here to uphold OPRA’s unambiguous “command” that custodians provide responsive records in the medium requested when maintained in that medium. N.J.S.A. 47:1A-5(d).

Counsel further contended that the Council’s hypothetical argument in Carter, GRC 2014-137, *et seq.*, that a requestor could alter writable records had no basis in law. Counsel further argued that .pdf records could be manipulated as easily as writable records by anyone with knowledge to do so. Counsel postulated that in today’s highly computerized society; even “a middle school student” could easily manipulate electronic files. Counsel also likened the Carter holding to a situation where the Council would order an agency to reduce an audio recording to a transcript due to the *sua sponte* defense that that the recording would be altered. Counsel contended that such a holding would be grossly arbitrary and capricious because the conjectured conclusion would go against OPRA’s public policy favoring disclosure. Counsel contended that the Council’s sole authority is whether a record is disclosable and not to dictate what type of computer files a requestor may receive.

Counsel asserted that the audio recording/transcript example correlated to the instant complaint. Specifically, Counsel contended that a transcript would necessarily lose some characteristics of the original recording, such as voice inflections. Counsel argued that the requestor here would similarly lose all of those components of an e-mail in “original view” if it were provided in .pdf format. Counsel contended that placing a burden on a requestor to state a need for access is contrary to OPRA. Counsel contended that the Council should apply the audio recording/transcript example and “avoid repeating [the] unsustainable holding” of Carter, GRC 2014-137, *et seq.*

Counsel contended that the Council should consider creating a bright-line rule or test addressing disclosure of records in their original electronic format. Counsel argued that such an action would be no different from the Council’s establishment of criteria for a request for valid e-mails in Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-7 (April 2010). Counsel asserted that the test would serve the public interest by making it clear what criteria is required to “validate a request for electronic records in their original format.” Counsel suggested

⁸ To the GRC’s knowledge, the Complainant did not appeal from the Council’s decision in Carter, GRC 2014-137 & 2014-138. Additionally, Complainant’s Counsel received prevailing party attorney’s fees in that matter.

that the test could include whether the record constitutes a “government record;” did the record exist in an original format; and 3) did the requestor identify a specific medium in his/her OPRA request.⁹ Notwithstanding, Counsel asserted that his providing substantial statutory and precedential case law lent support for the Council to order disclosure of all responsive records in their original electronic formats.

Also, Counsel contended that the ACD exemption is not absolute; a record determined to be ACD must be pre-decisional and related to the formulation of policy changes. Corr. Medical Serv., Inc. v. Dep’t of Corr., 426 N.J. Super. 106, 122 (App. Div. 2012). Counsel contended that the Custodian unlawfully denied access to the attachments, which appear to be copies of SOIs because they could not be ACD in nature. Counsel argued that SOIs cannot be considered drafts because a public body does not have a vote on their accuracy. Counsel alleged that the Custodian argued in his SOI that any record containing ACD material is exempt in its entirety. Counsel contended that such an assertion is erroneous because OPRA requires custodians to redact records where applicable. Counsel further contended that the ACD exemption could no longer survive the fact that the withheld records appear to relate to Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-74 and 2011-75 (May 2012), which was closed more than three (3) years prior to the request date. Counsel also argued that the ACD exemption could not survive the fact that the Complainant was the complainant in Carter, GRC 2011-74, *et seq.* Further, Counsel argued that it is the GRC’s obligation to conduct an *in camera* review of the responsive attachments to determine whether any factual components should be disclosed. *See K.L. v. Evesham Twp. Bd. of Educ.*, 423 N.J. Super. 337, 362 n. 4 (App. Div. 2011)(noting that, although the Court did not address the applicability of the ACD exemption, the subject “notes” could be redacted to disclose only factual portions).

Further, Counsel argued that the Custodian failed to provide a sufficient account of his search for responsive records. Specifically, Counsel argued that the Custodian failed to certify to: 1) whom he contacted; 2) when he contacted them; 3) how the search was conducted; 4) who conducted the search; *etc.* Counsel alleged that the circumstances surrounding the Bridgegate controversy “demanded” reasonable steps to prove a sufficient search. Counsel also asked the Council to take judicial notice of Carter, GRC 2012-284, *et seq.*, and Carter, GRC 2012-288, *et seq.*, where the Office of Administrative Law (“OAL”) is conducting a hearing to resolve the facts related to, among other issues, the search for responsive records.

Finally, Counsel provided copies of e-mails between commissioners that contained “tirades” against the Complainant and his use of OPRA. Counsel argued that these e-mails prove the FFD had a self-serving interest to deny the Complainant lawful access for as long as possible. Although Counsel acknowledges that the GRC has no authority over what he and the Complainant find to be “non-civil, bullying, intimidating, harassing, humiliating, *etc.* treatment,” he argued that the e-mails prove the knowing and willful nature of the FFD’s actions.

⁹ Counsel illustrated his sample test with a detailed hypothetical example of a requestor seeking electronic access to Word™-writable sets of approved meeting minutes while she is on vacation in Siberia. Further, Counsel provided a second (2nd) hypothetical example, whereby a requestor sought records in .pdf format that required the custodian to convert same from a Word™ format.

On February 27, 2017, Complainant's Counsel submitted a letter brief to the GRC to seek a status update on the complaint. Counsel noted that the GRC is required to make an expedited determination per N.J.S.A. 47:1A-6 and 7(e) but that no determination had been issued during the past twenty (20) months. Counsel contended that such an unexpected delay adversely impacted the Complainant, who had yet to receive any records to date.¹⁰ Counsel further requested that the Council order disclosure as soon as possible because the Complainant's due process has been "*unfairly compromised*" (emphasis in original). Further, Counsel "petitioned" that the GRC determine whether this complaint contains contested facts requiring a fact-finding hearing. N.J.A.C. 1:1-4.1(a)(providing that an agency head must address a party petition to determine whether a case contains contested facts within thirty (30) days from receipt of the petition).

On July 5, 2017, Complainant's Counsel submitted another letter brief, asserting that the Council must be guided by the Supreme Court's decision in Paff v. Galloway Twp., 2017 N.J. LEXIS 680 (2017) and require disclosure of the responsive records in their native format. Complainant's Counsel also reiterated a number of arguments and relief already submitted as part of past briefs. Finally, Complainant's Counsel renewed his N.J.A.C. 1:1-4.1(a) "petition."

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).¹¹ 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).

Further, in Verry, GRC 2014-325, the complainant, having not received a response to his September 10, 2014 OPRA request, submitted a Denial of Access Complaint on September 23, 2014, asserting that a "deemed" denial of access occurred. In the SOI, the custodian certified that he did not receive the OPRA request until September 14, 2014, upon his return to the FFD from a convention; thus, the seven (7) business days expired on September 24, 2014. The custodian argued that the complaint was not ripe because he was not afforded a chance to respond. The Council agreed and determined that the complaint was unripe, reasoning that:

¹⁰ Contrary to Complainant Counsel's assertion, the Custodian provided records to the Complainant on May 19, 2015. The issue currently before the GRC – whether the Custodian properly disclosed records as a single .pdf – does not reflect that the Complainant "received no records to date."

¹¹ 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.

The GRC's case law consistently supports that *the statutorily mandated response time frame begins the day after the custodian's receipt* of an OPRA request. See Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2009-289 (May 2011). The GRC has memorialized this calculation in its training material, which is available on the GRC's website. See "A Citizen's Guide to [OPRA]" (2nd Edition – July 2011); "Handbook for Records Custodians" (5th Edition – January 2011).

Id. at 7 (emphasis added).¹²

The Complainant filed the instant complaint, arguing that the Custodian failed to respond timely to his OPRA request. In the SOI, the Custodian certified that he did not review the Complainant's OPRA request until after 8:00 p.m. on May 7, 2015, or after the FFD's normal business hours. The Custodian forwarded the request to Custodian's Counsel at 8:45 p.m. In response to the SOI, Complainant's Counsel disputed the date of receipt. To support his argument, Counsel noted that he submitted his OPRA request to the Custodian on May 7, 2015, copying Ms. Cuddy and Mr. Wickman. Counsel further argued that the FFD did not qualify for limited OPRA hours per N.J.S.A. 47:1A-5(a) because it did not meet the statutory criteria. Counsel argued that, as noted in Verry, GRC 2014-325, the Custodian should have utilized his sub-custodian if he was away from the FFD during its regularly scheduled business hours. Counsel also argued that the 24-hour discrepancy in the seven (7) business day response time represented a "tactical ruse" to deny access to records.

The GRC first notes that the FFD's designation of elected officials as custodian and sub-custodian (instead of designating Ms. Cuddy as the employee of the FFD) has created a special set of circumstances not envisioned within the current statutory language of OPRA. The evidence supports that the Custodian, although paid a stipend, is not a regular employee of the FFD. Thus, his designation puts him in the position of having to balance his full time job with his designation of custodian of record for the FFD. The case before the Council provides a good example of why such a designation could cause multiple issues for an agency when responding to an OPRA request. Nonetheless, the Custodian assumed the duties and all of its obligations and should have been prepared to adapt accordingly.

The GRC must now determine whether the instant facts support that the Custodian timely responded to the Complainant's OPRA request. After reviewing the facts and applying the Council's prior decision in Verry, GRC 2014-325, the record supports a timely response. Specifically, the Custodian certified that he received the Complainant's OPRA request at 8:00p.m. on May 7, 2015, after regular business hours, and forwarded it to Complainant's Counsel within the hour. Thus, the Custodian technically received the request on May 8, 2015, and the first (1st) business day thereafter was May 9, 2015. Further, that others in the FFD may have received the request during the day on May 7, 2015, is of no moment. The evidence of record also does not support that the GRC needs any additional information to make this determination.

The GRC approaches its finding here similarly to how the GRC treated the issue in Verry, GRC 2014-325. See also Kohn, GRC 2009-289. The only exception is that the

¹² The Council subsequently rejected the complainant's request for reconsideration. Id. (May 2017).

Complainant filed the complaint after the Custodian responded, thereby negating any question of ripeness, as was the case in Verry. Moreover, and contrary to Complainant Counsel's allegation that such a holding would allow custodians to abuse response times, such determinations are made on a case-by-case basis.

Therefore, the Custodian bore his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, there was no "deemed" denial of the subject OPRA request. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Verry, GRC 2014-325.

Medium Conversion

OPRA provides that:

A custodian shall permit access to a government record and provide a copy thereof in the medium requested if the public agency maintains the record in that medium. If the public agency does not maintain the record in the medium requested, the custodian shall either convert the record to the medium requested or provide a copy in some other meaningful medium.

N.J.S.A. 47:1A-5(d).

Further, the Council previously addressed a custodian's obligation to provide e-mails in their original, writable formats in Carter, GRC 2014-137, *et seq.* There, the Council declined to require disclosure of the e-mails in their original format, reasoning that:

Requiring a public agency to disclose e-mails in their original electronic state would expose the disclosed records to alterations, thus adversely affecting the integrity of those records. Simply put, Complainant's Counsel has not advanced a reasonable argument for disclosure of a record in its original, writable form. Nor did he establish that disclosing the records in .pdf format offers limited access to same. Further, there is no evidence to suggest that disclosing the responsive records in .pdf format, in fact, limited the Complainant's right of access.

Id. at 5.

Furthermore, OPRA states that "(i)f the GRC is unable to make a determination as to a record's accessibility based upon the complaint and the custodian's response thereto, the [GRC] shall conduct a hearing on the matter in conformity with the rules and regulations provided for hearings by a state agency in contested cases under the Administrative Procedures Act." N.J.S.A. 47:1A-7(e). Moreover, the Administrative Procedure Act provides that the Office of Administrative Law ("OAL") "shall acquire jurisdiction over a matter only after it has been determined to be a contested case by an agency head and has been filed with the [OAL] . . ." N.J.A.C. 1:1-3.2(a).

In Owoh (O.B.O. O.R.) v. West Windsor Plainsboro Reg'l Sch. Dist. (Mercer), GRC Complaint No. 2012-167 (Interim Order dated February 26, 2013), the Council was faced with a

matter of first impression on the disclosure of metadata. The Council held that the complaint should be sent to the Office of Administrative Law (“OAL”) due to the “highly technical nature of this issue . . .” Id. at 7.

Here, the Complainant sought access to the responsive records “in electronic format.” The Complainant noted that he requested all e-mails in their “Record Copy E-mail” and all attachments in their “original format (e.g., .PDF files, spreadsheet files, word processing files, etc.) . . .” The Custodian provided the responsive e-mails in electronic format by way of a single .pdf file, which included several chain e-mails with no redactions.¹³ The Complainant filed the instant complaint, arguing that the Custodian unlawfully denied access to the responsive records in their “native” or original format. In the SOI, the Custodian contended that no unlawful denial of access occurred because he disclosed the responsive records in one of the medium options the Complainant identified in the OPRA request.

In response to the SOI, Complainant’s Counsel argued that the Custodian provided an “after-the-fact” version of the records by printing them, scanning them, and converting them to a .pdf file. Counsel also argued that the Custodian failed to disclose one of the e-mails (included in a chain) in full because it did not contain recipients, those copied, and/or those blind-copied. Counsel also argued that the GRC should reach a conclusion here, based on the trial court’s holding in Gannett, SOM L-1798-09, instead of its “hypothetical argument” in Carter, GRC 2014-137, *et seq.* Counsel then proceeded to provide hypotheticals to illustrate his point. Among them, he posited that even middle school students could easily manipulate .pdf files in today’s highly computerized society. Further, Counsel argued that the Council’s reasoning in Carter, 2014-137, *et seq.*, was akin to an order requiring a custodian to transcribe an audio recording on a *sua sponte* basis.

Upon reviewing all facts and arguments here, the GRC finds that there exists a “highly technical” issue clouding whether the Complainant was entitled to the requested e-mails in their native format. Owoh, GRC 2012-167. Specifically, the Complainant advances a somewhat compelling argument that electronic format should be comparable to “medium” as contemplated in OPRA. Further, the facts of this complaint are distinguishable from those in Carter, GRC 2014-137, *et seq.* There, the complainant argued after the fact that the FFD was required to disclose the responsive records in their native format. However, the complainant generically sought the records in electronic format and not the “native format.” Here, the Complainant identified that he sought the records in their current native format.

Notwithstanding the foregoing, the Council’s decision in Carter, 2014-137, *et seq.* speaks to its responsibility to protect the integrity of records. Further, the GRC should note that Carter was not the first time it has taken into account the integrity of a “government record” when determining the “meaningful medium” issue. *See Taylor v. Cherry Hill Bd. of Educ. (Camden)*, GRC Complaint No. 2008-258 (August 2009) (holding that inspection was an acceptable alternative to providing paper copies of a record because the fragile records may not survive the copying process). For these reasons, the GRC cannot make a full determination on whether the

¹³ The Complainant already possessed several of these responsive e-mails in .pdf format and previously submitted them as part of his July 7, 2012 SOI rebuttal in Carter, GRC 2011-76. Further, he was the sender or recipient on two (2) of those e-mails.

Custodian should have disclosed the responsive e-mails in their native format to the Complainant and that a hearing before the OAL is the best means to determine this issue.

Accordingly, the GRC is unable to determine whether the Custodian unlawfully denied access to the requested records in their native format. Therefore, this complaint should be referred to the OAL for a hearing to resolve the highly technical issue of whether a custodian can disclose records in their native, writable format on the basis that “format” is akin to “medium.” N.J.S.A. 47:1A-5(d); Owoh, GRC 2012-167. Further, should the OAL determine that the Custodian unlawfully denied access to the records, it should make a determination on whether the FFD has the ability to protect the integrity of its records through all available technological methods. Carter, 2014-137, *et seq.*

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 provides that the definition of a government record “shall not include . . . [ACD] material.” When the 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 New Jersey Supreme Court has also ruled that a record that contains or involves factual components is entitled to deliberative-process protection under the exemption in OPRA when it was used in decision-making process *and* its disclosure would reveal deliberations that occurred during that process. Educ. Law Ctr., 198 N.J. 274.

The Council has repeatedly held that draft records of a public agency fall within the deliberative process privilege. In Dalesky v. Borough of Raritan (Somerset), GRC Complaint No. 2008-61 (November 2009), the Council, in upholding the custodian’s denial as lawful, determined that the requested record was a draft document and that draft documents in their entirety are ACD material pursuant to N.J.S.A. 47:1A-1.1. Subsequently, in Shea v. Village of Ridgewood (Bergen), GRC Complaint No. 2010-79 (February 2011), the custodian certified that a requested letter was a draft that had not yet been reviewed by the municipal engineer. The Council, looking to relevant case law, concluded that the requested letter was exempt from disclosure under OPRA as ACD material. *See also* Ciesla v. NJ Dep’t of Health and Senior Serv., GRC Complaint No. 2010-38 (May 2011)(*aff’d* Ciesla v. NJ Dept. of Health & Senior Serv., 429 N.J. Super. 127 (App. Div. 2012) (holding that a draft staff report was exempt from disclosure as ACD material).

Here, the Complainant, through Counsel’s July 9, 2015 letter brief, eventually disputed the Custodian’s denial of access to the subject e-mail attachments. The Complainant’s Counsel requested that the GRC conduct an *in camera* review to determine whether the Custodian should

have disclosed the attachments with redactions for all non-factual content. Conversely, the Custodian certified in the SOI that the attachments fell under the attorney-client privilege and ACD exemptions. N.J.S.A. 47:1A-1.1. The Custodian also affirmed that the attachments were draft documents that the FFD was working on to send to the GRC in response to the Complainant's prior Denial of Access Complaints. The Custodian certified that the Complainant ultimately received finalized copies of these attachments upon the FFD's response to those complaints.

In reviewing the e-mails that included the attachments, it is apparent that those attachments were, in fact, draft documents. Specifically, the Custodian's Counsel was drafting and submitting for review to the FFD those attachments in order to submit SOIs in Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-74, 2011-75, and 2011-76. In each e-mail, the Custodian's Counsel advised the recipients that he attached "draft [SOIs] . . . to review . . .," "certifications [he] drafted for . . . review," and "revised . . . SOI[s] and certifications . . ." It is thus abundantly clear that the attachments are draft documents exempt as ACD material per all precedential case law. Further, and contrary to Complainant Counsel's assertion, the possible presence of factual material in the attachments is of no moment here because the draft documents are exempt in their entirety. Further, the Supreme Court has addressed the issue of factual information in generally ACD records. Educ. Law Ctr., 198 N.J. 274. Further, and also contrary to Complainant Counsel's assertions, there is no need for an *in camera* here because the attachments are "per se exempt from access under OPRA." Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346, 355 (App. Div. 2005).

Accordingly, because the evidence of record indicates that the denied e-mail attachments are draft documents, and because draft documents in their entirety comprise ACD material, the Custodian lawfully denied access to those attachments. N.J.S.A. 47:1A-1.1, N.J.S.A. 47:1A-6; Dalesky, GRC 2008-61; Shea, 2010-79. *See also* Ciesla, GRC 2010-83.

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 OAL's decision in this complaint.

Prevailing Party Attorney's Fees

The Council defers analysis of whether the Complainant is a prevailing party, pending the OAL's decision in this complaint.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian bore his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, there was no "deemed" denial of the subject OPRA request. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Verry

v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2014-325 (Final Decision dated October 27, 2015).

2. Accordingly, the GRC is unable to determine whether the Custodian unlawfully denied access to the requested records in their native format. Therefore, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the highly technical issue of whether a custodian can disclose records in their native, writable format on the basis that “format” is akin to “medium.” N.J.S.A. 47:1A-5(d); Owoh (O.B.O. O.R.) v. West Windsor Plainsboro Reg’l Sch. Dist. (Mercer), GRC Complaint No. 2012-167 (Interim Order dated February 26, 2013). Further, should the Office of Administrative Law determine that the Custodian unlawfully denied access to the records, it should make a determination on whether the Franklin Fire District No. 1 has the ability to protect the integrity of its records through all available technological methods. Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2014-137, *et seq.* (Interim Order dated April 28, 2015).
3. Because the evidence of record indicates that the denied e-mail attachments are draft documents, and because draft documents in their entirety comprise “inter-agency, intra-agency advisory, consultative or deliberative” material, the Custodian lawfully denied access to those attachments. N.J.S.A. 47:1A-1.1, N.J.S.A. 47:1A-6; Dalesky v. Borough of Raritan (Somerset), GRC Complaint No. 2008-61 (November 2009); Shea v. Village of Ridgewood (Bergen), GRC Complaint No. 2010-79 (February 2011). *See also* Ciesla v. NJ Dep’t of Health and Senior Serv., GRC Complaint No. 2010-38 (May 2011) (*aff’d* Ciesla v. NJ Dept. of Health & Senior Serv., 429 N.J. Super. 127 (App. Div. 2012)).
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 Office of Administrative Law’s decision in this complaint.
5. The Council defers analysis of whether the Complainant is a prevailing party, pending the Office of Administrative Law’s decision in this complaint.

Prepared By: Frank F. Caruso
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July 18, 2017¹⁴

¹⁴ This complaint was prepared for adjudication at the Council’s June 27, 2017 meeting, but could not be adjudicated due to additional time for attorney review. Thereafter, the Complainant’s Council submitted a letter brief on July 5, 2017, which was added above.