



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

April 26, 2022 Government Records Council Meeting

Edwin Sheppard
Complainant

Complaint No. 2016-170

v.

NJ Department of Human Services,
Division of Medical Assistance & Health Services
Custodian of Record

At the April 26, 2022 public meeting, the Government Records Council (“Council”) considered the April 19, 2022 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian complied with the Council’s October 30, 2018 Interim Order because she responded in the prescribed time frame providing nine (9) redacted and unredacted copies of the requested e-mails and a document index. The Custodian also simultaneously provided certified confirmation of compliance to the Executive Director.
2. **The *In Camera* Examination set forth above reveals the Custodian has lawfully denied access to, or redacted portions of, the records listed in the document index pursuant to N.J.S.A. 47:1A-6.**
3. Because it is determined that the Custodian did not unlawfully deny access to any of the redacted portions of the responsive e-mails here and did not commit any violations of OPRA’s provisions, the GRC declines to address whether a knowing and willful violation occurred.

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 26th Day of April 2022

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: April 28, 2022

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
April 26, 2022 Council Meeting**

**Edwin Sheppard¹
Complainant**

GRC Complaint No. 2016-170

v.

**N.J. Dep't of Human Servs., Div. of Medical Assistance
& Health Servs.²
Custodial Agency**

Records Relevant to Complaint: "I request any and all communications between the Office of Quality Assurance and the Attorney General's Office in regards to Berge Acquisitions LLC, Berge Acquisitions LLC dba HomeCare Specialists, and/or HomeCare Specialists."

Custodian of Record: Dianna Rosenheim
Requests Received by Custodian: May 20, 2016
Response Made by Custodian: June 16, 2016
GRC Complaint Received: June 21, 2016

Records Submitted for *In Camera* Examination: Twenty-one (21) e-mail chains and attachments.

Background

October 30, 2018 Council Meeting:

At its October 30, 2018 public meeting, the Council considered the October 23, 2018 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The GRC must conduct an *in camera* review of the redacted e-mails chains, to determine the validity of the Custodian's assertion that the redactions were valid under OPRA as protecting ACD and attorney-client privileged material, and privacy interests. N.J.S.A. 47:1A-1.1. See Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).

¹ No representation listed on record.

² Represented by Deputy Attorney General James A. McGhee. Previously represented by Deputy Attorney General Angela Juneau Bezer and Francesco Ferrantelli, Jr. respectively.

2. **The Custodian must deliver³ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 1 above), nine (9) copies of the redacted records), a document or redaction index⁴, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,⁵ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On October 31, 2018, the Council distributed its Interim Order to all parties. On November 7, 2018, the Government Records Council ("GRC") received the Custodian's response to the Council's Interim Order. Therein, the Custodian certified that she was providing nine (9) redacted copies of the responsive e-mails, nine (9) unredacted copies of the same, and a document index, as required by the Council's Order.⁶

Analysis

Compliance

At its October 30, 2018 meeting, the Council ordered the Custodian to submit for *in camera* review nine (9) redacted and unredacted copies of the responsive e-mails and a document index. The Council also ordered the Custodian to simultaneously provide certified confirmation of compliance, in accordance with R. 1:4-4, to the Executive Director. On October 31, 2018, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on November 7, 2018.

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

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

⁵ "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."

⁶ The Complainant subsequently sent multiple communications contesting the GRC's denial of his attempt to amend his Denial of Access Complaint on August 21, 2017. However, the GRC's regulations are clear that an individual may amend their complaint "within 30 business days after the filing of the initial complaint." N.J.A.C. 5:105-2.3(h)(1). Further, any amendments filed beyond that time frame "shall only be accepted for consideration . . . when . . . authorized by the Executive Director." Id. at (h)(2). Here, the Complainant attempted to amend his complaint, without completing the GRC's Amended Denial of Access Complaint form, twelve (12) business days after expiration of the time frame set forth in N.J.A.C. 5:105-2.3(h)(1); thus, the Executive Director's approval was required to accept same. However, as noted in the October 30, 2018 Interim Order, the Executive Director rejected the filing as out of time. Id. at 4. For this reason, the GRC was within its regulatory rights to not consider the Complainant's amendment when adjudicating this complaint.

On November 7, 2018, the fifth (5th) business day after receipt of the Council’s Order, the GRC received the Custodian’s response. Therein, the Custodian provided the requested nine (9) copies of the responsive records, both redacted and unredacted, as well as a document index. The Custodian also included certified confirmation of compliance to the Executive Director. Thus, compliance was successfully achieved here.

Therefore, the Custodian complied with the Council’s October 30, 2018 Interim Order because she responded in the prescribed time frame providing nine (9) redacted and unredacted copies of the requested e-mails and a document index. The Custodian also simultaneously provided certified confirmation of compliance to the Executive Director.

Unlawful Denial of Access

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

OPRA 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. As privacy interests are at issue here, the GRC asked both parties to respond to balancing test questions so the Council could employ the common law balancing test established by the New Jersey Supreme Court in Doe v. Poritz, 142 N.J. 1 (1995).

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. County of Bergen, 198 N.J. 408, 422-23, 427 (2009).

When “balanc[ing] OPRA’s interests in privacy and access” courts consider the following factors:

- (1) the type of record requested;
- (2) the information it does or might contain;
- (3) the potential for harm in any subsequent nonconsensual disclosure;
- (4) the injury from disclosure to the relationship in which the record was generated;
- (5) the adequacy of safeguards to prevent unauthorized disclosure;
- (6) the degree of need for access;
- and (7) whether there is an express statutory mandate, articulated public policy, or other recognized public interest militating toward access.

[Id. at 427 (quoting Doe, 142 N.J. at 88).]

However, in 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 this referral, the Council directed the OAL to determine whether personal e-mail addresses were disclosable both in the instance when a name is displayed or not displayed with 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 addresses. In reaching this 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 this 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.

OPRA also provides that the definition of a government record “shall not include . . . “inter-agency or intra-agency advisory, consultative, or deliberative [(“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 Ctr. v. 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.

A custodian claiming an exception to the disclosure requirements under OPRA on that basis must initially satisfy two conditions: 1) the document must be pre-decisional, meaning that the document was generated prior to the adoption of the governmental entity's policy or decision; and 2) the document must reflect the deliberative process, which means that it must contain opinions, recommendations, or advice about agency policies. See Educ. Law Ctr., 198 N.J. at 286. The key factor in this determination is whether the contents of the document reflect “formulation or exercise of . . . policy-oriented judgment or the process by which policy is formulated.” Id. at 295 (adopting the federal standard for determining whether material is “deliberative” and quoting Mapother v. Dep’t of Justice, 3 F.3d 1533, 1539 (D.C. Cir. 1993)). Once the governmental entity satisfies these two threshold requirements, a presumption of confidentiality is established, which the requester may rebut by showing that the need for the materials overrides the government's interest in confidentiality. Id. at 286-87.

OPRA also exempts access to “any record within the attorney-client privilege.” N.J.S.A. 47:1A-1.1 (emphasis added). To assert attorney-client privilege, a party must show that there was a confidential communication between lawyer and client in the course of that relationship and in professional confidence. N.J.R.E. 504(1). Such communications are only those “which the client either expressly made confidential or which [one] could reasonably assume under the circumstances would be understood by the attorney to be so intended.” State v. Schubert, 235 N.J.

Super. 212, 221 (App. Div. 1989). However, merely showing that “the communication was from client to attorney does not suffice, but the circumstances indicating the intention of secrecy must appear.” Id. at 220-21.

Further, “[t]he provisions of [OPRA] shall not abrogate or erode any . . . grant of confidentiality . . . recognized by . . . court rule.” N.J.S.A. 47:1A-9(b). As such, OPRA does not allow for the disclosure of attorney work product, consisting of “the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.” R. 4:10-2(c).

The GRC conducted an *in camera* examination on the submitted communications at issue in this complaint. Upon review, the GRC confirms that each of the applied redactions were lawful under the latter exemptions. N.J.S.A. 47:1A-1.1. The chain of e-mails shows that Vicki A. Mangiaracina of DMAHS sought and obtained legal advice on the impact of the Provisional Order and response thereto on applicable clients from her Deputy Attorney General (“DAG”). These discussions unmistakably exist within the course of the attorney-client relationship between Ms. Mangiaracina and the DAG.

The GRC notes that the Complainant’s Denial of Access Complaint assertion that the exemption did not apply because the “matter . . . had already passed” and the Office of Quality Assurance was not involved in the Provisional Order matter is in error for two (2) reasons. First, the attorney-client privilege does not require the existence of, or participation in, litigation; the exemption plainly provides clients flexibility to consult with their attorney on an array of legal issues and still invoke the protection. Second, and contrary to the Complainant’s assertion that the extent provisional order issue “had passed,” the evidence of record does not support this assertion. Specifically, the Provisional Order was dated April 1, 2016 and provided HomeCare thirty (30) days to respond, which it did on April 26, 2016 requesting dismissal of the matter. However, there is no indication that the matter concluded upon receipt of HomeCare’s response on April 29, 2016. Instead, the GRC is acutely aware that this matter concluded with a Consent Order on October 28, 2016. See Sheppard v. N.J. Dep’t of Law & Pub. Safety, Div. of Law, GRC Complaint No. 2017-180 (January 2022) at 4.

The GRC also finds that the redaction of the personal e-mail address in the April 29, 2016 (1:54p.m.) e-mail was proper under N.J.S.A. 47:1A-1. The GRC notes that while the Custodian did not specifically identify the redaction as Ms. Mangiaracina’s personal e-mail address at the time of her response, she did advise the Complainant of this fact via e-mail on June 20, 2016. The GRC confirms this to be factual based on the content of the redacted e-mail. The GRC does note that the facts here depart slightly from Gettler in that there it was impossible to determine ownership of the e-mails without a name displayed. Here, the evidence clearly supports that Ms. Mangiaracina included her personal e-mail address for efficacy of communication.

In closing, it appears from the Custodian’s document index that she abandoned the “inter-agency or intra-agency advisory, consultative, or deliberative [(“ACD”)] material” exemption in favor of the attorney-client and work product privileges. The e-mail chains to include pre-decisional discussion on the potential actions Division of Medical Assistance and Health Services would need to take depending on the outcome of a Provisional Order issued to HomeCare

Specialists. Notwithstanding, the GRC will not address this issue because the Custodian is no longer relying on the exemption. The GRC also does not reach the issue of whether the work product exemption applies to the redacted e-mails because same are already determined to be exempt under the attorney-client privilege. Finally, the GRC will also not address those redactions made to client names under Health Information & Patient Protection Act because the Complainant stated in the Denial of Access Complaint that he did not dispute them.

Thus, the In Camera Examination reveals that the redacted portions of the responsive e-mails were properly denied under the cited exemptions. N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9(b); R. 4:10-2(c). Thus, the Custodian lawfully denied access to those portions of the e-mails withheld from disclosure. N.J.S.A. 47:1A-6.

Knowing & Willful

Because it is determined that the Custodian did not unlawfully deny access to any of the redacted portions of the responsive e-mails here and did not commit any violations of OPRA's provisions, the GRC declines to address whether a knowing and willful violation occurred.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's October 30, 2018 Interim Order because she responded in the prescribed time frame providing nine (9) redacted and unredacted copies of the requested e-mails and a document index. The Custodian also simultaneously provided certified confirmation of compliance to the Executive Director.
2. **The *In Camera* Examination set forth above reveals the Custodian has lawfully denied access to, or redacted portions of, the records listed in the document index pursuant to N.J.S.A. 47:1A-6.**
3. Because it is determined that the Custodian did not unlawfully deny access to any of the redacted portions of the responsive e-mails here and did not commit any violations of OPRA's provisions, the GRC declines to address whether a knowing and willful violation occurred.

Prepared By: Frank F. Caruso
Executive Director

April 19, 2022



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

October 30, 2018 Government Records Council Meeting

Edwin Sheppard
Complainant

Complaint No. 2016-170

v.

NJ Department of Human Services,
Division of Medical Assistance & Health Services
Custodian of Record

At the October 30, 2018 public meeting, the Government Records Council ("Council") considered the October 23, 2018 Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The GRC must conduct an *in camera* review of the redacted e-mails chains, to determine the validity of the Custodian's assertion that the redactions were valid under OPRA as protecting ACD and attorney-client privileged material, and privacy interests. N.J.S.A. 47:1A-1.1. See Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).
2. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 1 above), nine (9) copies of the redacted records), a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,³ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

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

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

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



Interim Order Rendered by the
Government Records Council
On The 30th Day of October, 2018

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 31, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
October 30, 2018 Council Meeting**

**Edwin Sheppard¹
Complainant**

GRC Complaint No. 2016-170

v.

**N.J. Dep't of Human Servs., Div. of Medical Assistance
& Health Servs.²
Custodial Agency**

Records Relevant to Complaint: "I request any and all communications between the Office of Quality Assurance and the Attorney General's Office in regards to Berge Acquisitions LLC, Berge Acquisitions LLC dba HomeCare Specialists, and/or HomeCare Specialists."

Custodian of Record: Dianna Rosenheim
Requests Received by Custodian: May 20, 2016
Response Made by Custodian: June 16, 2016
GRC Complaint Received: June 21, 2016

Background³

Request and Response:

On May 20, 2016, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. June 16, 2016, Deputy Custodian Kellie Pushko ("Ms. Pushko") responded in writing, providing responsive records, with redactions made to some. Ms. Pushko asserted that the redactions were made to protect advisory, consultative, or deliberative ("ACD") material under N.J.S.A. 47:1A-1.1. Ms. Pushko also stated that the redactions contained attorney-client privileged information and/or attorney work product, also protected under N.J.S.A. 47:1A-1.1. Finally, Ms. Pushko asserted that other redactions were made to withhold information protected under the Health Information & Patient Protection Act ("HIPPA") and N.J.S.A. 47:1A-9(a).

Denial of Access Complaint:

On June 21, 2016, the Complainant filed a Denial of Access Complaint with the

¹ No representation listed on record.

² Represented by Deputy Attorney General Angela Juneau Bezer.

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 Council Staff the submissions necessary and relevant for the adjudication of this complaint.

Edwin Sheppard v. N.J. Department of Human Services, Division of Medical Assistance & Health Services, 2016-170 – Findings and Recommendations of the Council Staff

Government Records Council (“GRC”). The Complainant asserted that Ms. Pushko failed to prove that any of the redactions made to protect ACD material was “pre-decisional,” and asserted that none of the information was pre-decisional. The Complainant asserted that the Office of Quality Assurance (“OQA”) made a decision on the matter regarding HomeCare Specialists (“HomeCare”) on April 21, 2016 and a follow up on April 27, 2016. The Complainant contended that any alleged redaction made to protect ACD material would have to be dated prior to April 27, 2016. However, the Complainant asserted that the responsive e-mails received were sent on or after April 28, 2016. Thus, the Complainant concluded that any ACD redactions would be invalid.

Similarly, the Complainant argued that redactions made to protect attorney-client communications were invalid since the matter that would solicit attorney-client communications had already passed. The Complainant also asserted that OQA was not involved in the matter in question, and would therefore have no reason to seek advice from the Office of the Attorney General (“OAG”).

Next, the Complainant disputed Ms. Pushko’s redaction of an e-mail address. The Complainant contended that while he did not dispute the redaction of the e-mail’s attachment pursuant to HIPPA, no explanation was provided justify withholding the e-mail address. The Complainant contended that when he requested a rationale from Ms. Pushko, she told him that it was to protect the privacy interests of the e-mail address’s owner, as it was her personal e-mail address.

The Complainant contended that the response to his OPRA request was pushed back multiple times, and that despite providing Ms. Pushko the opportunity to cure the issues in the response, she neglected to address them.

Statement of Information:

On October 7, 2016, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that Ms. Pushko received the Complainant’s OPRA request on May 20, 2016. The Custodian certified that Ms. Pushko responded in writing on June 16, 2016, after several time extensions. The Custodian certified that all of the responsive records consist of e-mails between Vicki Mangiaracina (“Ms. Mangiaracina”) and Sharon Joyce, an Assistant Attorney General (“AAG Joyce”) with OAG.

The Custodian asserted that since the e-mail correspondence was between Ms. Mangiaracina and AAG Joyce, several redactions were made pursuant to the deliberative process and attorney-client privileges. The Custodian also contended that one e-mail contained a line redaction to conceal Ms. Mangiaracina’s personal e-mail address. The Custodian certified that Ms. Pushko received an e-mail from the Complainant on June 17, 2016, disputing the aforementioned redaction, and another e-mail on June 20, 2016, disputing the other redactions. The Custodian certified that Ms. Pushko responded on June 20, 2016, stating that the e-mail address was redacted because it is exempt from disclosure under OPRA’s privacy interests provision.

The Custodian argued that records which fall under the attorney-client privilege were protected under OPRA. N.J.S.A. 47:1A-1.1; Paff v. Div. of Law, 412 N.J. Super. 140, 150 (App.

Div. 2010). The Custodian asserted that the records at issue were communications between OAG and OQA, specifically between Ms. Mangiaracina and AAG Joyce. The Custodian asserted that the responsive e-mails contain inquiries from Ms. Mangiaracina and responses from AAG Joyce regarding the status, legal effects and consequences of the Provisional Order issued to HomeCare from the Department of Consumer Affairs (“DCA”). The Custodian contended that although OQA had no direct involvement in issuing the order, OQA is responsible with protecting consumers receiving medical assistance benefits, including those who received treatment at HomeCare. Therefore, the Custodian asserted that OQA, in order to fulfill its duties, would seek advice from OAG regarding the repercussions of the Provisional Order. Thus, the Custodian contended that the redactions contained within the communications between Ms. Mangiaracina and AAG Joyce were justified under N.J.S.A. 47:1A-1.1.

The Custodian also argued that the Complainant wrongly asserted that the attorney-client privilege could not be claimed because the HomeCare matter was public knowledge. The Custodian asserted that at the time the responsive e-mails were made, the decision on HomeCare had yet to be finalized. Therefore, the Custodian argued that it was reasonable for OQA to seek legal advice in order to plan for addressing issues that may face HomeCare customers if and when a final decision occurred.

In addition to attorney-client privilege, the Custodian argued that several of the redactions was also made under the deliberative process privilege, which is recognized within OPRA as the exemption protecting ACD material. N.J.S.A. 47:1A-1.1; Ciesla v. New Jersey Dep’t of Health & Sr. Servs., 429 N.J. Super. 127, 137 (App. Div. 2012). The Custodian asserted that the e-mails containing the redactions were exchanged within the 30-day period in which the Provisional Order remained provisional. Thus, the Custodian contended that the communications were pre-decisional material. The Custodian also stated that the e-mails were deliberative because AAG Joyce shared information regarding the contents of the proposed final order on HomeCare. Therefore, the Custodian contended that the redactions qualify under the deliberative process privilege, satisfying both prongs of the test.

Furthermore, the Custodian contended that the Complainant’s claim that the e-mails demonstrated that a decision had been made by OQA regarding HomeCare is incorrect. The Custodian argued that the final decision determining the applicability of the deliberative process was DCA, and not OQA. The Custodian asserted that the redacted communications reflected internal deliberations from DCA regarding the finalization of the Provisional Order.

As to the redaction made to protect privacy interests, the Custodian asserted that the GRC need not reach this matter, as the attorney-client privilege applies to all the e-mails at issue in the matter. The Custodian contended that, according to the plain language under N.J.S.A. 47:1A-1.1, should a record contain attorney-client privileged information, the whole of the record is exempt from access, in contrast to other exemptions where only the redacted information contained in a record would be withheld.

Notwithstanding the above, the Custodian argued that the redaction was justified to safeguard the privacy interests of Ms. Mangiaracina, citing N.J.S.A. 47:1A-1. The Custodian noted that the New Jersey Supreme Court in Burnett v. County of Bergen, 198 N.J. 408, 414 (2009),

found that “OPRA’s twin aims-of ready access to government records and protection of a citizen’s personal information-require a careful balancing of the interests at stake.” The Custodian noted that the balancing test outlined in Doe v. Poritz, 142 N.J. 1 (1995), dictates whether a record should be withheld from disclosure in the interests of an individual’s reasonable expectation of privacy.

The Custodian argued that Ms. Mangiaracina’s interest in the privacy of her e-mail address outweighs the Complainant’s interest in access. The Custodian contended that no evidence has been provided to show that revealing Ms. Mangiaracina’s personal address would aid in the public interest, nor has the Complainant demonstrated a need for access to the e-mail address. The Custodian asserted that Ms. Mangiaracina copied only one e-mail to her personal account, and said e-mail was among those provided to the Complainant. Therefore, the Custodian argued that evidence does not show that the e-mail is regularly used by Ms. Mangiaracina for work-related purposes. The Custodian contended that there is no reason to provide the e-mail address to the Complainant consistent with ORPA.

The Custodian requested that the GRC dismiss the complaint and deny the requested relief.

Additional Submissions:

On August 21, 2017, the Complainant submitted an Amended Complaint to the GRC, seeking in part to add Carol Grant as a party. The Custodian submitted an objection on September 18, 2017. Pursuant to N.J.A.C. 5:105-2.3(h), the amendment is well out of time to be accepted as a matter of right, and was rejected by the Executive Director.

Analysis

Unlawful Denial of Access

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

In Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the Council⁴ that accepted the custodian’s legal conclusion for the denial of access without further review. The Appellate Division noted that “OPRA contemplates the GRC’s meaningful review of the basis for an agency’s decision to withhold government records When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers.” Id. The Court stated that:

[OPRA] also contemplates the GRC’s *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of

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

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the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the ‘Open Public Meetings Act,’ N.J.S.A. 10:4-6 to -21, it also provides that the GRC ‘may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.’ N.J.S.A. 47:1A-7(f). This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.

[Id. at 355.]

Further, the Court found that:

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

[Id.]

In the instant matter, the Custodian asserted most of the redactions were made to protect attorney-client privileged information, and under the deliberative process privilege. N.J.S.A. 47:1A-1.1. The Custodian also asserted that an additional redaction was made in the interests of privacy, as it was the personal e-mail address of Ms. Mangiaracina. The Custodian provided descriptions of the responsive records and the information redacted as part of the SOI.

Notwithstanding the Custodian’s description of the responsive records, a “meaningful review” is necessary to determine whether all withheld and redacted records reasonably fall within the ACD, attorney-client, and privacy exemptions. The GRC must thus review same in order to determine the full applicability of exemptions. Such an action is not uncommon, as the GRC will routinely perform an *in camera* review in similar circumstances. See Pouliot v. N.J. Dep’t of Educ., GRC Complaint No. 2015-281 (Interim Order dated January 31, 2017).

Therefore, the GRC must conduct an *in camera* review of the redacted e-mails chains, to determine the validity of the Custodian’s assertion that the redactions were valid under OPRA as protecting ACD and attorney-client privileged material, and privacy interests. N.J.S.A. 47:1A-1.1. See Paff, 379 N.J. Super. at 346.

Knowing & Willful

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

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. The GRC must conduct an *in camera* review of the redacted e-mails chains, to determine the validity of the Custodian's assertion that the redactions were valid under OPRA as protecting ACD and attorney-client privileged material, and privacy interests. N.J.S.A. 47:1A-1.1. See Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).
2. **The Custodian must deliver⁵ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 1 above), nine (9) copies of the redacted records), a document or redaction index⁶, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,⁷ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Samuel A. Rosado
Staff Attorney

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

⁶ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

⁷ "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."

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