



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

October 30, 2018 Government Records Council Meeting

Adam M. Szura
Complainant

Complaint No. 2016-175

v.

Bergen County Department of 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 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. Both the Complainant and Custodian timely complied with the Council’s May 22, 2018 Interim Order. Specifically, the Complainant timely submitted his balancing test questionnaire. Further, the Custodian, through Counsel, timely submitted both the appropriate number of documents for *in camera* review, certified confirmation of compliance, and the Bergen County Department of Health Services’ balancing test questionnaire.
2. The Custodian has borne her burden of proving that releasing the complaining party’s personal information to the Complainant would violate their reasonable expectation of privacy. N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-6; Burnett v. Cnty. of Bergen, 198 N.J. 408, 422-23, 427 (2009). As such, the Custodian lawfully redacted the complaining party’s personal information contained in the responsive e-mail chain. See also Perino, GRC 2004-128.
3. **The *In Camera* Examination set forth in the above table reveals the Custodian has lawfully denied access the redacted portions of the responsive e-mail chain pursuant to N.J.S.A. 47:1A-6.**
4. Because there has been no unlawful denial of access here, the Council should decline 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 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: November 1, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Adam M. Szura¹
Complainant**

GRC Complaint No. 2016-175

v.

**Bergen County Department of Health Services²
Custodial Agency**

Records Relevant to Complaint: Hardcopies of a citizen complaint filed against the Complainant on or about April 24, 2013 and e-mail communications between Mary Raftery and Mary Ann Ligos discussing the complaint.

Custodian of Record: Nancy Mangieri
Request Received by Custodian: January 27, 2015
Response Made by Custodian: February 5, 2015
GRC Complaint Received: June 28, 2016

Records Submitted for *In Camera* Examination: E-mails between Mary Ann Ligos and Mary Raftery dated April 24, 2013 (2 pages).

Background

May 22, 2018 Council Meeting:

At its May 22, 2018 public meeting, the Council considered the May 15, 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, found that:

1. The GRC must conduct an *in camera* review of two (2) page e-mail chain to determine the validity of the Custodian's assertion that the record was exempt under OPRA pursuant to the privacy interest exemption. N.J.S.A. 47:1A-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 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**

¹ No legal representation listed on record.

² Represented by Christine D'Aloia, Esq. (Hackensack, NJ).

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.

the redacted records, a document or redaction index⁴, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 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 GRC will need to conduct a balancing test to determine whether the Custodian unlawfully denied access to certain personal information. Thus, the Complainant and Custodian shall submit responses to their above-respective balancing test questionnaires.
4. **Both the Complainant and Custodian shall comply with conclusion No. 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 N.J. Court Rule, R. 1:4-4,⁶ to Council Staff.**
5. 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 May 24, 2018, the Council distributed its Interim Order to all parties on. On May 31, 2018, the Complainant submitted his balancing test questionnaire providing the following responses:

1. Why do you need the requested record(s) or information?

Response: The Complainant affirmed that he sought the redacted information in order to file a restraining order against them for "enduring personal stress, invasion of privacy, los[s] of public credibility, community standing, and quality of life" caused by multiple false complaints and frivolous legal action.

2. How important is the requested record(s) or information to you?

Response: The Complainant affirmed that access was essential and consistent with Paff v. Bergen Cnty., 2014 N.J. Super. Unpub. LEXIS 2455 (October 16, 2014), where the court held that OPRA did not create an exemption for guidelines issued by the Attorney General. The Complainant argued that by extension, Custodian Counsel's position was invalidated on the same premise.

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 "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."

3. Do you plan to redistribute the requested record(s) or information?

Response: The Complainant certified that the redacted information, if obtained by him, would be used for court filings.

4. Will you use the requested record(s) or information for unsolicited contact of the individuals named in the government record(s)?

Response: The Complainant affirmed that he would not use the records for unsolicited contact.

On June 4, 2018, on behalf of the Custodian, Counsel responded to the Council's Interim Order. Therein, Counsel certified that she was providing nine (9) copies of both the redacted and unredacted e-mail chain in accordance with the Council's Order. Counsel noted that she was personally familiar with the facts of this complaint, as well as the records at issue, through her position.

On June 6, 2018, the Government Records Council ("GRC") e-mailed the Custodian providing a copy of the Complainant's balancing test questionnaire, noting that it was unclear whether the Complainant provided same to her. The GRC further indicated that it was still waiting for the Bergen County Department of Health Services' ("DHS") balancing test questionnaire and that the compliance deadline expired on June 7, 2018.

On the same day, Custodian's Counsel provided DHS's balancing test questionnaire providing the following responses:

1. The type of record(s) requested.

Response: Counsel certified that the records comprised of an e-mail complaint sent to DHS regarding the Complainant.

2. The information the requested records do or might contain.

Response: Counsel certified that the redactions contained name, address, telephone number, and other individually identifying information about the complaining party.

3. The potential harm in any subsequent non-consensual disclosure of the requested records.

Response: Counsel affirmed DHS's opinion that disclosure of the requested information would lead to a physical confrontation between the parties and/or retribution against the complaining party.

4. The injury from disclosure to the relationship in which the requested record was generated.

Response: Counsel affirmed that disclosure would cause future complaining parties to hesitate submitting complaints regarding health code violations if they know their personal contact information would be released.

5. The adequacy of safeguards to prevent unauthorized disclosure.

Response: Counsel stated that the redactions provide the only safeguard from unauthorized access.

6. Whether there is an express statutory mandate, articulated public policy or other recognized public interest militating toward access.

Response: Counsel certified that the complaining party's right to privacy and request to remain anonymous due to threat of physical confrontation/retribution from the Complainant outweigh disclosure of the redacted information. N.J.S.A. 47:1A-1.1.

Analysis

Compliance

At its May 22, 2018 meeting, the Council ordered the Custodian to provide nine (9) redacted and unredacted copies of the e-mail chain deemed to be responsive to the Complainant's OPRA request. Further, the Council ordered the Custodian to simultaneously provide certified confirmation of compliance to the GRC. Finally, the Council ordered both parties to submit balancing test questionnaires so that it may conduct a privacy balancing test of the redacted personal information present in the e-mail chain. On May 24, 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 June 1, 2018. Thereafter, the deadline was extended to June 7, 2018 to allow the parties time to submit their questionnaires.

On May 31, 2018, the Complainants sent his balancing test questionnaire via U.S. mail, which was received by the GRC on June 5, 2018. On June 4, 2018, the sixth (6th) business day after receipt of the Council's Order, Custodian's Counsel responded on behalf of the Custodian providing nine (9) copies of the applicable e-mail chain in both redacted and unredacted form. On June 6, 2018, Custodian's Counsel submitted the DHS's balancing test questionnaire. Based on the foregoing, and in light of the time extension, the evidence of record supports that both parties complied with the Council's Order.

Therefore, both the Complainant and Custodian timely complied with the Council's May 22, 2018 Interim Order. Specifically, the Complainant timely submitted his balancing test questionnaire. Further, the Custodian, through Counsel, timely submitted both the appropriate

number of documents for *in camera* review, certified confirmation of compliance, and the DHS's balancing test questionnaire.

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.

In order to determine whether the Custodian lawfully denied access to the redacted personal information contained in the responsive e-mail chain, the GRC will first need to perform a balancing test. Performing this test will ultimately result in a finding of whether the information was properly redacted. Once the GRC has reached a determination on the privacy issue, it will address the record *in camera* to determine whether all redactions were lawful.

Privacy Balancing Test

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 the Complainant and the Custodian 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 New Jersey 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).

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 v. Poritz, 142 N.J. 1, 88 (1995).]

This test will enable the Council to weigh DHS's asserted need to protect the privacy of individuals against the Complainant's asserted need to access the requested records.

A. *Courts Have Required that Certain Personal Information Be Redacted From Records Released in Response to an OPRA Request Where OPRA’s Interest in Privacy Outweighs the Interest in Access*

In Burnett, a commercial business requested approximately eight million pages of land title records extending over a twenty-two year period; the records contained names, addresses, social security numbers, and signatures of numerous individuals. Burnett, supra, 198 N.J. at 418. After balancing the seven factors, the Court “[fou]nd that the twin aims of public access and protection of personal information weigh in favor of redacting [social security numbers] from the requested records before releasing them” because “[i]n that way, disclosure would not violate the reasonable expectation of privacy citizens have in their personal information.” Id. at 437. The Court emphasized that the “balance [wa]s heavily influenced by concerns about the bulk sale and disclosure of a large amount of social security numbers—which [the commercial business] admittedly does not need, and which are not an essential part of the records sought.” Id. at 414. Moreover, “the requested records [we]re not related to OPRA’s core concern of transparency in government.” Ibid.

Similarly, the Appellate Division has concluded that the identity of an individual who attempted suicide by jumping off a bridge should not be disclosed in an OPRA request seeking police and fire department reports about the incident under Burnett. Alfano v. Margate City, 2012 N.J. Super. Unpub. LEXIS 2179, 1-2, 8-10 (App. Div. 2012).

B. *Courts Have Not Required Redaction of Certain Personal Information From Records Released in Response to an OPRA Request Where OPRA’s Interest in Access Outweighs the Interest in Privacy*

In contrast, the Appellate Division has affirmed a trial court’s determination that the identity of a person who called 911 complaining about illegal parking blocking his driveway should not be redacted when the owner of the car filed an OPRA request seeking a copy of the 911 call under Burnett. Ponce v. Town of W. New York, 2013 N.J. Super. Unpub. LEXIS 436, 3-4 (App. Div. 2013). The trial judge explained that

[t]he type of information requested by [the car owner] is not particularly sensitive or confidential. When the caller made a complaint [to] the police department that someone was blocking his or her driveway he or she could reasonably expect that his name may be revealed in connection with the complaint. There has not been evidence presented to suggest that revealing the caller's identity or the call itself would result in any serious harm or confrontation between the caller and the - - [sic] and the [car owner]. It may in fact be helpful for the [car owner] to know the information in order to challenge his parking violation.

[Id. at 7-8.]

The Appellate Division emphasized that the city’s arguments against disclosure of the caller’s identity were “predicated on the notion that if [the car owner] learns the identity of his accuser he will retaliate in some fashion, thus discouraging the average person from reporting incidents to the police via the 911 emergency system.” Id. at 9. However, the city “ha[d] not presented any evidence of past hostility between these two individuals” and the court emphasized that “[a]bsent compelling reasons, which are conspicuously absent in this record, few can argue that in a free society an accused is not entitled to know the identity of his accuser.” Id. at 9-10. Therefore, the court concluded that “[n]one of the concerns in favor of confidentiality articulated by the Court in Burnett, supra, 198 N.J. at 427, [we]re applicable” and affirmed the trial court’s decision ordering disclosure of the caller’s identity. Ponce, supra, at 10.

Similarly, the Appellate Division has concluded that addresses should not be redacted from a mailing list of self-identified “senior citizens” compiled by a county to contact those individuals through a newsletter. Renna v. Cnty. of Union, 2012 N.J. Super. Unpub. LEXIS 342, 1, 11-12 (App. Div. 2012). A website operator filed an OPRA request seeking access to that mailing list so that she could disseminate information in furtherance of non-profit activities related to monitoring county government. Id. at 2. The court applied the Burnett factors. Id. at 11. The first two factors weighed in favor of disclosure, because “the intent and spirit of OPRA are to maximize public awareness of governmental matters” and “the interest in the dissemination of information, even that unrelated to senior matters, outweighs a perceived notion of expectation of privacy.” Id. at 12.

C. *Application of the Burnett Factors to Balance OPRA’s Interests in Privacy and Access in the Present Matter Dictates that the Redacted Personal Information Contained in the E-mail Chain Not Be Disclosed*

The present matter requires application of the Burnett factors to balance OPRA’s dual interests in privacy and access as applied to the release of the complaining party’s personal information contained in a government record.

i. *Burnett Factors One and Two*

The first and second Burnett factors require consideration of the records requested, and the type of information contained therein, respectively. Custodian’s Counsel indicates that e-mail chain represented a citizen filing a complaint against the Complainant. Custodian’s Counsel further stated that the redactions made to that chain included, among other information, the complaining party’s name, address, telephone number, and other personal identifying information.

There is no dispute that the e-mail chain is, in its base form, a “government record” for purposes of OPRA. N.J.S.A. 47:1A-1.1. The Custodian disclosed said record with redactions, which the Complainant disputes. However, the redactions do not principally alter the substance of the document. Furthermore, the e-mail chain clearly describes the allegations against the Complainant. These two (2) factors Disclosure of the redacted personal information is not warranted under these two factors.

ii. *Burnett Factors Three and Four*

The third and fourth Burnett factors address the potential for harm in subsequent nonconsensual disclosure of the redacted personal information, and the injury from disclosure to the relationship in which the record was generated, respectively.

Regarding the potential harm in nonconsensual disclosure, Custodian's Counsel argued that disclosure of the information would lead to a physical confrontation or retribution against the complaining party. Regarding whether disclosure of the requested records has potential harm to the agency and to the individuals named. Harm to the complaining party is indicated above. As for harm to DHS, the Custodian's Counsel argued that disclosure here would likely force others to hesitate prior to reporting a potential health code violation.

The agency has a responsibility to safeguard against such potential actions in all possible manners. Doe v. Poritz, 142 N.J. 1, 82 (1995). Significant concerns about the potential harm from disclosure of the redacted personal information exist here. Thus, these factors weigh against the release of the redacted personal information.

iii. *Burnett Factor Five*

The fifth Burnett factor requires consideration of the adequacy of safeguards to prevent unauthorized disclosure of the complaining party's personal information. Custodian's Counsel identified the redactions as the only safeguard to prevent unauthorized disclosure of the complaining party's personal information.

Absent redaction, there appear to be no other safeguards against unauthorized disclosure. While the Complainant has stated that he did not intend to redistribute the complaining party's information (except to the applicable judicial body), DHS would have no ability to prevent any disclosure once the unredacted record was disclosed to the Complainant.

There appears to be no intent on the Complainant's behalf to provide for unauthorized disclosure of the information. This is especially true given that the Complainant's intended use of the information will relate to directly a potential court proceeding only. Such a disclosure does not outwardly constitute "unauthorized disclosure." Thus, while there is always a legitimate concern for an agency's inability to protect privacy information after disclosure, the responses here elicit a conclusion weighing in favor of disclosure of the complaining party's information.

iv. *Burnett Factor Six*

The sixth Burnett factor addresses the degree of need for access to the redacted personal information. In his balancing test questionnaire, the Complainant stated that he needed the information to file a restraining order against the complaining party. The Complainant alleged that the party caused him significant harm by filing complaints. Further, the Complainant alleged that access to the unredacted record was essential to defending himself.

In weighing this factor, the GRC looks to Ponce, 2013 N.J. Super. Unpub LEXIS 436 for comparison. There, the court had a similar issue of determining whether to disclose personal information of a 911 caller who reported plaintiff for illegally parking in their driveway. The trial court, after conducting the balancing test, required disclosure of the 911 tape without redactions. The trial court reasoned that there was no evidence suggesting disclosure would result in confrontation or harm. The trial court noted that disclosure could instead aid the plaintiff in defending a parking summons issued because of the call. On appeal, the court affirmed in part because it was “in complete agreement with the trial [court’s] observation that defendants’ fear concerning plaintiff’s likelihood of retaliation are based on mere speculation.” Id. at 9.

Here, the issue is relatively the same; the Complainant seeks access to personal information regarding the complaining party so that he could effectively defend himself against perceived harassment. However, this complaint departs from Ponce in that there is sufficient evidence to provide that the “likelihood of retaliation” is more than “mere speculation.” As will be indicated below, portions of the redacted e-mail chain provide this evidence.⁷

Thus, while the GRC understands the Complainant’s need for the complaining party’s information, this factor ultimately weighs against disclosure for the reasons stated above.

v. Burnett Factor Seven

The seventh Burnett factor requires consideration as to whether an express statutory mandate, articulated public policy, or other recognized public interest militating toward access to the personal information exists. Here, Custodian’s Counsel asserted that OPRA protected the complaining party’s right to privacy and “request to remain” anonymous to avoid physical confrontation or retribution. N.J.S.A. 47:1A-1. However, there is no evidence in the record to suggest that any express statutory mandate, articulated public policy, or other recognized public interest militating toward access to the personal information exists.

vi. Balancing of the Burnett Factors

On balancing the Burnett factors, OPRA’s dual object to provide both public access and protection of personal information weigh against disclosure and in favor of maintaining all redactions for the complaining party’s personal information. Most notably, the potential for harm to the complaining party outweighs the degree of need for access to their personal information. There is no dispute that the e-mail chain itself constitutes public records, and that document has already been disclosed with redactions.

The GRC notes that this complaint is reasonably comparable to Perino v. Borough of Haddon Heights, GRC Complaint No. 2014-128 (November 2004), where the GRC upheld the custodian’s denial of access to personal information of a complaining party. Here, as in Perino, the complaining party contacted DHS to report potential code violations. Further, the evidence of record supports a stronger potential for unsolicited contact and confrontation greatly outweighing the Complainant’s need to obtain the complaining party’s personal information.

⁷ The GRC cannot provide a more detailed accounting of that information, which has been redacted, because doing so could compromise the *in camera* review and Council’s findings.

Therefore, the Custodian has borne her burden of proving that releasing the complaining party's personal information to the Complainant would violate their reasonable expectation of privacy. N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-6; Burnett v. Cnty. of Bergen, 198 N.J. 408, 422-23, 427 (2009). As such, the Custodian lawfully redacted the complaining party's personal information contained in the responsive e-mail chain. See also Perino, GRC 2004-128.

In Camera Review

Having made a determination as to the potential disclosure of the complaining party's personal information, the GRC now addresses the *in camera* examination on the submitted record. The results of this examination are set forth in the following table:

Record No.	Record Name/Date	Description of Redaction	Custodian's Explanation/ Citation for Redactions	Findings of the <i>In Camera</i> Examination⁸
No. 1	E-mail from Ms. Raftery to Ms. Ligos dated April 24, 2013 (1:45 p.m.)	Complaining party name in subject line.	Privacy Interest per <u>N.J.S.A. 47:1A-1</u> .	As noted in its balancing test analysis, the Custodian lawfully redacted the complaining party's name. Thus, the Custodian lawfully redacted this e-mail. <u>N.J.S.A. 47:1A-1</u> .
No. 2	E-mail from Ms. Ligos to "healthdept" dated April 24, 2013 (9:27 a.m.)	Complaining party name in subject line.	Privacy Interest per <u>N.J.S.A. 47:1A-1</u> .	As noted in its balancing test analysis, the Custodian lawfully redacted the complaining party's name. Thus, the Custodian lawfully redacted this e-mail. <u>N.J.S.A. 47:1A-1</u> .
No. 3	E-mail from Ms. Raftery to Ms. Ligos dated April	Complaining party name in subject line.	Privacy Interest per <u>N.J.S.A. 47:1A-1</u> .	As noted in its balancing test analysis, the Custodian lawfully

⁸ **Unless expressly identified for redaction, everything in the record shall be disclosed.** For purposes of identifying redactions, unless otherwise noted a paragraph/new paragraph begins whenever there is an indentation and/or a skipped space(s). The paragraphs are to be counted starting with the first whole paragraph in each record and continuing sequentially through the end of the record. If a record is subdivided with topic headings, renumbering of paragraphs will commence under each new topic heading. Sentences are to be counted in sequential order throughout each paragraph in each record. Each new paragraph will begin with a new sentence number. If only a portion of a sentence is to be redacted, the word in the sentence which the redaction follows or precedes, as the case may be, will be identified and set off in quotation marks. If there is any question as to the location and/or extent of the redaction, the GRC should be contacted for clarification before the record is redacted. The GRC recommends the redactor make a paper copy of the original record and manually "black out" the information on the copy with a dark colored marker, then provide a copy of the blacked-out record to the requester.

	24, 2013 (9:19 a.m.)			redacted the complaining party's name. Thus, the Custodian lawfully redacted this e-mail. <u>N.J.S.A. 47:1A-1.</u>
No. 4	E-mail from complaining party to "healthdept" dated April 23, 2013 (3:39 p.m.)	Complaining party's name, street address, home and cellphone number, e-mail address, as well as potentially identifying dialogue contained in parts of two (2) paragraphs.	Privacy Interest per <u>N.J.S.A. 47:1A-1.</u>	As noted in its balancing test, the Custodian lawfully denied access to the complaining party's personal information. Regarding the redacted paragraphs, the information therein contains descriptions of events that, if disclosed, would clearly identify the complaining party. The GRC is satisfied that to disclose the substance of these paragraphs would negate the already valid privacy exemption afforded to the complaining party's personal information. For these reasons, the GRC is satisfied that the Custodian lawfully redacted this e-mail in accordance with <u>N.J.S.A. 47:1A-1.</u>

Thus, the Custodian lawfully denied access to the redacted portions of the e-mail chain based on the privacy interest exemption. N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-6.

Finally, because there has been no unlawful denial of access here, the Council should decline to address whether a knowing and willful violation occurred.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. Both the Complainant and Custodian timely complied with the Council's May 22, 2018 Interim Order. Specifically, the Complainant timely submitted his balancing test questionnaire. Further, the Custodian, through Counsel, timely submitted both the

appropriate number of documents for *in camera* review, certified confirmation of compliance, and the Bergen County Department of Health Services' balancing test questionnaire.

2. The Custodian has borne her burden of proving that releasing the complaining party's personal information to the Complainant would violate their reasonable expectation of privacy. N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-6; Burnett v. Cnty. of Bergen, 198 N.J. 408, 422-23, 427 (2009). As such, the Custodian lawfully redacted the complaining party's personal information contained in the responsive e-mail chain. See also Perino, GRC 2004-128.
3. **The *In Camera* Examination set forth in the above table reveals the Custodian has lawfully denied access the redacted portions of the responsive e-mail chain pursuant to N.J.S.A. 47:1A-6.**
4. Because there has been no unlawful denial of access here, the Council should decline to address whether a knowing and willful violation occurred.

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

October 23, 2018



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DEPARTMENT OF COMMUNITY AFFAIRS
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INTERIM ORDER

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Adam M. Szura
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v.

Bergen County Department of Health Service
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At the May 22, 2018 public meeting, the Government Records Council ("Council") considered the May 15, 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 two (2) page e-mail chain to determine the validity of the Custodian's assertion that the record was exempt under OPRA pursuant to the privacy interest exemption. N.J.S.A. 47:1A-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 Rule 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 GRC will need to conduct a balancing test to determine whether the Custodian unlawfully denied access to certain personal information. Thus, the Complainant and Custodian shall submit responses to their above-respective balancing test questionnaires.
4. **Both the Complainant and Custodian shall comply with conclusion No. 3 above within five (5) business days from receipt of the Council's Interim Order and**

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."



simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule, R. 1:4-4,⁴ to Council Staff.

5. 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 22nd Day of May, 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: May 24, 2018

⁴ "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."

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
May 22, 2018 Council Meeting**

**Adam M. Szura¹
Complainant**

GRC Complaint No. 2016-175

v.

**Bergen County Department of Health Services²
Custodial Agency**

Records Relevant to Complaint: Hardcopies of a citizen complaint filed against the Complainant on or about April 24, 2013 and e-mail communications between Mary Raftery and Mary Ann Ligos discussing the complaint.

Custodian of Record: Nancy Mangieri
Request Received by Custodian: January 27, 2015
Response Made by Custodian: February 5, 2015
GRC Complaint Received: June 28, 2016

Background³

Request and Response:

On January 22, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On February 5, 2015, on behalf of the Custodian, Counsel responded in writing obtaining an extension of time until February 17, 2015 to search the County of Bergen’s (“County”) electronic database for responsive records. On February 11, 2015, the Custodian responded to the Complainant providing access to a one (1) page letter regarding a past OPRA request filed by the Complainant on the same topic. The Custodian stated that the attached represented the “entire contents of the County’s file.”

On February 18, 2015, the Complainant sent a letter to Custodian’s Counsel arguing that the County’s response was incomplete. The Complainant contended that he knew the County received one or more e-mail complaints against him on or about April 24, 2013. Further, the Complainant contended that Ms. Raftery and Ms. Ligos exchanged internal communications about him and that Ms. Ligos e-mailed James Locarro “yet to be discovered documents.” The

¹ No legal representation listed on record.

² Represented by Christine D’Aloia, Esq. (Hackensack, 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 Council Staff the submissions necessary and relevant for the adjudication of this complaint.

Complainant thus renewed his OPRA request for the complaint, internal communications, and amended it to include a “complete [County] file e-mailed to [Mr.] Locarro on April 24, 2013.”

On February 27, 2015, Custodian’s Counsel again responded on Custodian’s behalf disclosing a two (2) page e-mail chain with redactions. Counsel stated that the redacted information comprised of personal identifiers for the individual who filed the complaint. Counsel averred that the County believed disclosure of that information would violate a citizen’s reasonable expectation of privacy. N.J.S.A. 47:1A-1.1; Serrano v. South Brunswick Twp., 358 N.J. Super. 352 (App. Div. 2003). Counsel finally noted that the County did not maintain any other records associated with the disclosed e-mails. On March 19, 2015, the Complainant responded arguing that neither N.J.S.A. 47:1A-1.1 nor Serrano supported the County’s position on the redactions. The Complainant reiterated his request for the records, but without redactions. On March 26, 2015, Custodian’s Counsel advised the Complainant that the redactions were appropriate under both OPRA and all prevailing case law. N.J.S.A. 47:1A-1; Wilcox v. Twp. of West Caldwell, GRC Complaint No. 2004-28 (October 2004); Giannakis v. N.J. Dep’t of Educ. GRC Complaint No. 2012-152 (May 2013); Doe v. Poritz, 142 N.J. 1, 82 (1995).

On April 23, 2015, the Complainant chastised the County for relying on personal privacy to protect a “predator” who “previously filed numerous anonymous[,] false complaints against” the Complainant. The Complainant alleged that the e-mail complaint at issue here “triggered an unbelievable invasion of [his] privacy” via a Borough of Rutherford (“Borough”) investigation. The Complainant contended that he wanted the personal information of the individual to file a restraining order against him/her. On April 28, 2015, Custodian’s Counsel sent a letter to the Complainant reiterating her denial, including relevant case law, from her March 16, 2015 letter.

Denial of Access Complaint:

On June 28, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant contended that he was attempting to identify an individual filing complaints against him with the County Department of Health Services. The Complainant contended that prevailing case law supports that the Custodian unlawfully denied access to the individual’s identity. Shuttleworth v. City of Camden, 258 N.J. Super. 573-85, (App. Div. 1992) (certif. den. 133 N.J. 429 (1993)); Serrano v. South Brunswick Twp., 358 N.J. Super. 352 (App. Div. 2003); Courier News v. Hunterdon Cnty. Prosecutor’s Office, 358 N.J. Super. 373 (App. Div. 2003). The Complainant also argued that although N.J.S.A. 47:1A-1 allowed for redactions to certain personal information, the exemption did not include name, address, e-mail address, or text of a complaint.

Statement of Information:

On July 15, 2016, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on January 27, 2015. The Custodian certified that her search for records included directing County Information Technology (“IT”) staff to conduct a search of e-mails between Ms. Raftery and Ms. Ligos regarding the Complainant on the dates provided in the OPRA request. The Custodian affirmed that on February 5, 2015, she extended the time frame to respond to allow for IT to conduct the search. The Custodian affirmed

that IT initially found only one (1) letter from her to the Complainant in November 2014. The Custodian certified that the Complainant sent additional correspondence on February 18, 2015 that included a letter from the Borough. The Custodian noted that the letter referenced redacted records, but the Complainant did not include them. The Custodian certified that based on this correspondence, IT was directed to conduct another search, but extended the search time frame to a week before and after the date identified in the OPRA request. The Custodian affirmed that once again, the search yielded no responsive records.

The Custodian certified that following the second search, Custodian's Counsel directed the Health Department to contact the Borough for any responsive records. The Custodian certified that the Borough forwarded Custodian's Counsel the e-mails referenced by the Complainant on February 20, 2015. The Custodian affirmed that those letters never reference the Complainant by name or address; thus, it was impossible to find them on the County's server. Notwithstanding, the Custodian certified Custodian's Counsel responded on her behalf in writing on February 11, 2015 disclosing the two (2) pages of e-mails, with redactions, to the Complainant.

The Custodian contended that she lawfully denied access to the complaining individual's personal information. The Custodian asserted that, contrary to the Complainant's claim, the redactions satisfied her obligation to protect the individual's reasonable expectation of privacy. N.J.S.A. 47:1A-1; Serrano, 358 N.J. Super. 352. The Custodian argued that the Council has consistently upheld redactions of names and addresses of complaining parties due to the potential for unsolicited contact and confrontation. Newark Morning Ledger, Co. v. N.J. Dep't of Env'tl. Prot., GRC Complaint No. 2003-136 (April 2004); Wilcox v. Twp. of West Caldwell, GRC Complaint No. 2004-28 (October 2004); Giannakis v. N.J. Dep't of Educ., GRC Complaint No. 2012-152 (May 2013). The Custodian also asserted that the New Jersey Supreme Court has also supported personal identifier redactions where disclosure could "invite unsolicited contact or intrusion based on the additional revealed information." Doe v. Poritz, 142 N.J. 1, 82 (1995) (citing Aronson v. Internal Revenue Serv., 767 F. Supp. 378, 389 (D. Mass 1991)).

Additional Submissions:

On July 20, 2016, the Complainant sent a letter to the GRC refuting that he did not attach the Borough letter referenced in the SOI as part of his February 18, 2015 letter to the Custodian. The Complainant resubmitted a copy of that letter and attachment to support his statement.

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

[Id. at 355.]

Further, the Court found that:

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

[Id.]

Here, the Complainant sought correspondence from the County: the Custodian disclosed a two (2) page e-mail chain containing a number of redactions. Those redactions included the identity of an individual contacting the County to make a complaint against the Complainant, the individual's contact information, information in the "Subject" line, and two (2) paragraphs of the initial e-mail's body. In the Denial of Access Complaint, the Complainant alleged that he sought the records to identify the individual filing complaints against him. The Complainant contended that OPRA did not support the redaction of names, addresses, e-mail addresses, or the body of the e-mail. In the SOI, the Custodian argued that she properly denied access to the redacted information under N.J.S.A. 47:1A-1 and all precedential case law. Further, the Custodian expressed her concern that disclosure would result in unsolicited contact.

Notwithstanding the Custodian's description of the responsive records, a "meaningful review" is necessary to determine whether all redacted information reasonably feel within the personal privacy exemption. Specifically, while portions of the redacted e-mails could be easily

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

identified as personal information, the Custodian also redacted portions of the chain that are less clearly identifiable. The GRC's concern arises from redacted information in the "Subject" line, as well as two (2) paragraphs in the initial e-mail's body. Because it is unclear whether these redactions are comprised entirely of personal information, the GRC must thus review same in order to determine the full applicability of privacy exemption.

Therefore, the GRC must conduct an *in camera* review of two (2) page e-mail chain to determine the validity of the Custodian's assertion that the record was exempt under OPRA pursuant to the privacy interest exemption. N.J.S.A. 47:1A-1. See Paff, 379 N.J. Super. at 346.

Moreover, when privacy issues are raised, the GRC has often employed the seven-factor balancing test conducted in Burnett v. Cnty. of Bergen, 198 N.J. 408 (2009) to determine whether an unlawful denial of access occurred. See Giannakis, GRC 2012-152. In order to effectively conduct this test, the GRC has typically required a complainant to submit a privacy balancing test questionnaire responding to the following:

- 1. Why do you need the requested record(s) or information?**
- 2. How important is the requested record(s) or information to you?**
- 3. Do you plan to redistribute the requested record(s) or information?**
- 4. Will you use the requested record(s) or information for unsolicited contact of the individuals named in the government record(s)?**

The GRC has also typically required a custodian to submit a privacy balancing test questionnaire simultaneously responding to the following:

- 1. The type of record(s) requested.**
- 2. The information the requested records do or might contain.**
- 3. The potential harm in any subsequent non-consensual disclosure of the requested records.**
- 4. The injury from disclosure to the relationship in which the requested record was generated.**
- 5. The adequacy of safeguards to prevent unauthorized disclosure.**
- 6. Whether there is an express statutory mandate, articulated public policy or other recognized public interest militating toward access.**

The GRC has then utilized the parties' responses to conduct the balancing test. See Schechter v. Thomas Edison State Coll., GRC Complaint No. 2013-74 (January 2014); but see Smith v. N.J.

Dep't of Banking & Ins., GRC Complaint No. 2014-301 (March 2015) (where the Council conducted a balancing test notwithstanding the complainant's failure to submit responses).

Here, the parties have raised a privacy issue regarding all, or some, of the redacted material in the two (2) page e-mail chain. However, neither party has submitted adequate information allowing the GRC to conduct a balancing test. For this reason, the GRC cannot determine whether an unlawful denial of access occurred without acquiring responses to the above-mentioned balancing test questionnaires.

Accordingly, the GRC will need to conduct a balancing test to determine whether the Custodian unlawfully denied access to certain personal information. Thus, the Complainant and Custodian shall submit responses to their above-respective balancing test questionnaires.

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 two (2) page e-mail chain to determine the validity of the Custodian's assertion that the record was exempt under OPRA pursuant to the privacy interest exemption. N.J.S.A. 47:1A-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 Rule 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 GRC will need to conduct a balancing test to determine whether the Custodian unlawfully denied access to certain personal information. Thus, the Complainant and Custodian shall submit responses to their above-respective balancing test questionnaires.

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."

4. **Both the Complainant and Custodian shall comply with conclusion No. 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 N.J. Court Rule, R. 1:4-4,⁸ to Council Staff.**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

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

May 15, 2018

⁸ "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."