



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

August 27, 2019 Government Records Council Meeting

Michael Ehrenreich
Complainant

Complaint No. 2016-192

v.

NJ Department of Transportation
Custodian of Record

At the August 27, 2019 public meeting, the Government Records Council (“Council”) considered the August 20, 2019 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The current Custodian complied with the Council’s July 30, 2019 Interim Order. Specifically, the current Custodian responded in the prescribed time frame providing all records requiring disclosure to the Complainant. Additionally, the current Custodian disclosed portions of the remaining e-mails deemed to be disclosable. Finally, the current Custodian simultaneously provided certified confirmation of compliance to the Council Staff.
2. The Custodian unlawfully denied access to certain e-mails in part or whole. However, the Custodian also lawfully denied access to most of the e-mail bodies, which was confirmed via *In Camera* Examination. Finally, both the Custodian and current Custodian properly complied with the Council’s Orders dated April 24, 2018 and July 30, 2019. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk’s Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.



Final Decision Rendered by the
Government Records Council
On The 27th Day of August 2019

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: August 29, 2019

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
August 27, 2019 Council Meeting**

**Michael Ehrenreich¹
Complainant**

GRC Complaint No. 2016-192

v.

**NJ Department of Transportation²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of “all documents, including e-mails, memoranda, and meeting minutes,” to or from Commissioner Jamie Fox, Commissioner Richard Hammer, Assistant Commissioner John Case, Jack Longworth, Warren Howard and Sophia Azam of the New Jersey Department of Transportation (“DOT”) between June 30, 2015 and May 13, 2016 regarding the Complainant’s request to have rumble strips removed from the vicinity of a property in Lambertville, NJ.

Custodian of Record: Amalia McShane³
Request Received by Custodian: May 13, 2016
Response Made by Custodian: May 24, 2016
GRC Complaint Received: July 11, 2016

Background

July 30, 2019 Council Meeting:

At its July 30, 2019 public meeting, the Council considered the July 23, 2019 *In Camera* 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 Custodian complied with the Council’s April 24, 2018 Interim Order because she responded in the prescribed time frame providing to the Council the appropriate records ordered for an *in camera* review. Additionally, the Custodian simultaneously provided certified confirmation of compliance to the GRC.

2. **On the basis of the Council’s determination in this matter, the Custodian shall comply with the Council’s Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order. Further, the**

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Jennifer Jaremback.

³ The current Custodian of Record is Dina Antinoro.

Custodian shall simultaneously deliver⁴ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁵ to the Council Staff.⁶

3. Thus, the Custodian must disclose all other portions of the responsive e-mails (except the four (4) redacted e-mail chains already provided) to the Complainant (*i.e.*, sender, recipients, date, time, subject, and salutations where applicable). As to those portions of the requested e-mails, the Custodian has unlawfully denied access. See Ray v. Freedom Acad. Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010).
4. **The Custodian shall comply with conclusion No. 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver⁷ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁸ to the Council Staff.⁹**
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 August 1, 2019, the Council distributed its Interim Order to all parties. On August 8, 2019, the current Custodian responded to the Council's Interim Order. Therein, the current Custodian certified that she provided the Complainant copies of all e-mails identified as disclosable in accordance with the Council's *In Camera* Examination Findings. The current Custodian further certified that she disclosed to the Complainant all remaining e-mails disclosing "sender, recipients, date, time, subject, and salutations where applicable." The current Custodian

⁴ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

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

⁷ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

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."

⁹ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

also affirmed that she provided to the Complainant a detailed document index explaining the lawful basis for each redaction.

Analysis

Compliance

At its July 30, 2019 meeting, the Council ordered the Custodian to conform with its *In Camera* Examination Findings. Further the Council ordered the Custodian to disclose all portions of the remaining e-mails otherwise not exempt. Finally, the Council ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rule R. 1:4-4, to the Council Staff. On August 1, 2019, 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 August 8, 2019.

On August 8, 2019, the fifth (5th) business day after receipt of the Council's Order, the current Custodian submitted certified confirmation of compliance to the Council Staff. Therein, the current Custodian certified that she disclosed to the Complainant all e-mails in accordance with the Council's *In Camera* Examination Findings. The current Custodian also affirmed that she disclosed portions of the remaining e-mails as required and included a document index. Based on the forgoing, the GRC is satisfied that the current Custodian properly complied with the Council's Order.

Therefore, the current Custodian complied with the Council's July 30, 2019 Interim Order. Specifically, the current Custodian responded in the prescribed time frame providing all records requiring disclosure to the Complainant. Additionally, the current Custodian disclosed portions of the remaining e-mails deemed to be disclosable. Finally, the current Custodian simultaneously provided certified confirmation of compliance to the Council Staff.

Knowing & Willful

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

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must

have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (*id.*; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

In the matter before the Council, the Custodian unlawfully denied access to certain e-mails in part or whole. However, the Custodian also lawfully denied access to most of the e-mail bodies, which was confirmed via *In Camera* Examination. Finally, both the Custodian and current Custodian properly complied with the Council's Orders dated April 24, 2018 and July 30, 2019. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The current Custodian complied with the Council's July 30, 2019 Interim Order. Specifically, the current Custodian responded in the prescribed time frame providing all records requiring disclosure to the Complainant. Additionally, the current Custodian disclosed portions of the remaining e-mails deemed to be disclosable. Finally, the current Custodian simultaneously provided certified confirmation of compliance to the Council Staff.
2. The Custodian unlawfully denied access to certain e-mails in part or whole. However, the Custodian also lawfully denied access to most of the e-mail bodies, which was confirmed via *In Camera* Examination. Finally, both the Custodian and current Custodian properly complied with the Council's Orders dated April 24, 2018 and July 30, 2019. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: Frank F. Caruso
Executive Director

August 20, 2019



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

July 30, 2019 Government Records Council Meeting

Michael Ehrenreich
Complainant

Complaint No. 2016-192

v.

NJ Department of Transportation
Custodian of Record

At the July 30, 2019 public meeting, the Government Records Council (“Council”) considered the July 23, 2019 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 Custodian complied with the Council’s April 24, 2018 Interim Order because she responded in the prescribed time frame providing to the Council the appropriate records ordered for an *in camera* review. Additionally, the Custodian simultaneously provided certified confirmation of compliance to the GRC.
2. **On the basis of the Council’s determination in this matter, the Custodian shall comply with the Council’s Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order. Further, the Custodian shall simultaneously deliver¹ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,² to the Council Staff.³**
3. Thus, the Custodian must disclose all other portions of the responsive e-mails (except the four (4) redacted e-mail chains already provided) to the Complainant (*i.e.*, sender, recipients, date, time, subject, and salutations where applicable). As to those portions of the requested e-mails, the Custodian has unlawfully denied access. See Ray v. Freedom Acad. Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010).

¹ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

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

4. **The Custodian shall comply with conclusion No. 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver⁴ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁵ to the Council Staff.⁶**
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 30th Day of July 2019

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: August 1, 2019

⁴ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

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

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Council Staff
July 30, 2019 Council Meeting**

**Michael Ehrenreich¹
Complainant**

GRC Complaint No. 2016-192

v.

**NJ Department of Transportation²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of “all documents, including e-mails, memoranda, and meeting minutes,” to or from Commissioner Jamie Fox, Commissioner Richard Hammer, Assistant Commissioner John Case, Jack Longworth, Warren Howard and Sophia Azam of the New Jersey Department of Transportation (“DOT”) between June 30, 2015 and May 13, 2016 regarding the Complainant’s request to have rumble strips removed from the vicinity of a property in Lambertville, NJ.

Custodian of Record: Amalia McShane
Request Received by Custodian: May 13, 2016
Response Made by Custodian: May 24, 2016
GRC Complaint Received: July 11, 2016

Records Submitted for *In Camera* Examination: Fifty-seven (57) e-mail chains, some with attachments.

Background

April 24, 2018 Council Meeting:

At its April 24, 2018 public meeting, the Council considered the April 17, 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 the responsive records withheld from disclosure, as well as the four (4) redacted e-mail chains, to determine the validity of the Custodian’s assertion that the record was exempt under OPRA as “inter-agency or intra-agency advisory, consultative, or deliberative [(“ACD”)] material.” 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 legal representation listed on record.

² Represented by Deputy Attorney General Jennifer Jaremback.

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 (applicable to the four (4) redacted e-mail chains), 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 [Government Records Council (“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 April 25, 2018, the Council distributed its Interim Order to all parties on. On April 30, 2018, the Custodian responded to the Council’s Interim Order. The Custodian certified that she was providing true and accurate copies of responsive e-mail chains. The Custodian averred that she withheld said records as “inter-agency or intra-agency advisory, consultative, or deliberative [(“ACD”)] material.” N.J.S.A. 47:1A-1.1. The Custodian also certified that five (5) of those e-mail chains contained draft memoranda, which are exempt from disclosure under Id.; See Libertarians for Transparent Gov’t v. Gov’t Records Council, 453 N.J. Super. 83 (App. Div. 2018). Finally, the Custodian affirmed that she was providing redacted and unredacted copies of four (4) e-mail chains that were provided to the Complainant. Id.

Analysis

Compliance

At its April 24, 2018 meeting, the Council ordered the Custodian to provide the Council for *in camera* review nine (9) copies of all withheld responsive records, as well as nine (9) copies of four (4) e-mail chains disclosed to the Complainant both redacted and unredacted. Further, the Council ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the GRC. On April 25, 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 May 2, 2018.

On April 30, 2018, the third (3rd) business day after receipt of the Council’s Order, the Custodian sent to the GRC copies of those records required for an *in camera* review, inclusive of the four (4) e-mail chains in redacted and unredacted form. Additionally, the Custodian

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."

simultaneously provided certified confirmation of compliance to the GRC. Thus, the Custodian complied with the Council's Order

Therefore, the Custodian complied with the Council's April 24, 2018 Interim Order because she responded in the prescribed time frame providing to the Council the appropriate records ordered for an *in camera* review. Additionally, the Custodian simultaneously provided certified confirmation of compliance to the GRC.

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 the definition of a government record "shall not include . . . [ACD] material." When the exception is invoked, a governmental entity may "withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated." Educ. Law Center v. N.J. Dep't of Educ., 198 N.J. 274, 285 (2009)(citing NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975)). The New Jersey Supreme Court has also ruled that a record that contains or involves factual components is entitled to deliberative-process protection under the exemption in OPRA when it was used in decision-making process *and* its disclosure would reveal deliberations that occurred during that process. Educ. Law Ctr., 198 N.J. 274.

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

The Council has also repeatedly held that draft records of a public agency fall within the deliberative process privilege. In Dalesky v. Borough of Raritan (Somerset), GRC Complaint No. 2008-61 (November 2009), the Council, in upholding the custodian's denial as lawful, determined that the requested record was a draft document and that draft documents in their entirety are ACD material pursuant to N.J.S.A. 47:1A-1.1. Subsequently, in Shea v. Village of Ridgewood (Bergen), GRC Complaint No. 2010-79 (February 2011), the custodian certified that a requested letter was a draft that had not yet been reviewed by the municipal engineer. The Council, looking to relevant

case law, concluded that the requested letter was exempt from disclosure under OPRA as ACD material. See also Libertarians, 453 N.J. Super. 83; Ciesla v. N.J. Dep't of Health and Senior Serv., GRC Complaint No. 2010-38 (May 2011) (aff'd Ciesla v. N.J. Dep't of Health & Senior Serv., 429 N.J. Super. 127 (App. Div. 2012) (holding that a draft staff report was exempt from disclosure as ACD material).

The GRC conducted an *in camera* examination on the submitted record. The results of this examination are set forth in the following table. The GRC notes that only those e-mail bodies/attachments where it has determined the asserted privilege does not apply (in part or whole) are listed below. The GRC will not list any e-mails to which it deems that exemptions properly applied to the body of same:

Record No.	Record Name/Date	Description of Record or Redaction	Custodian's Explanation/ Citation for Non-disclosure	Findings of the In Camera Examination⁶
1.	E-mail from Michelle Saupe to Mr. Howard and Richard Jaffe dated July 8, 2015 (11:22 a.m.) Note: Seven (7) additional e-mails are included in the e-mail chain.	Ms. Saupe confirms receipt of e-mail and thanks Mr. Howard and Mr. Jaffe.	ACD material. <u>N.J.S.A. 47:1A-1.1.</u>	The body of the e-mail does not contain any ACD discussions warranting nondisclosure. Thus, the Custodian must disclose this portion of the e-mail chain. The remaining seven (7) e-mail bodies were properly withheld as ACD material. <u>N.J.S.A. 47:1A-1.1.</u>
2.	E-mail from Mukesh Shah to Mr. Howard and Dave Bizuga (cc'ing Mr. Longworth) dated	Mr. Mukesh states "FYI."	ACD material. <u>N.J.S.A. 47:1A-1.1.</u>	The body of the e-mail does not contain any ACD discussions warranting nondisclosure. Thus, the Custodian must disclose this portion of the e-mail chain.

⁶ **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.

	<p>August 4, 2015 (1:37 p.m.)</p> <p>Note: Seven (7) additional e-mails are included in the e-mail chain.</p>			<p>The remaining seven (7) e-mail bodies were properly withheld as ACD material. <u>N.J.S.A. 47:1A-1.1.</u></p>
3.	<p>E-mail from Jane Ditmars to Mr. Jaffe and Mr. Howard dated March 9, 2016 (10:49 a.m.)</p> <p>Note: The e-mail contains an attachment containing three (3) pages.</p>	<p>Ms. Ditmars notes that the attached was being sent as an FYI.</p>	<p>ACD material. <u>N.J.S.A. 47:1A-1.1.</u></p>	<p>The body of the e-mail does not contain any ACD discussions warranting nondisclosure. Thus, the Custodian must disclose this e-mail.</p> <p>As to the attachments, the referral slip (one (1) page) was properly denied as ACD material and the remaining pages were provided to the Complainant (two (2) pages).</p>
4.	<p>E-mail from Amanda Thorn to Krishna Tripathi, Mr. Shah, and Mr. Longworth dated July 20, 2015 (11:19 a.m.)</p> <p>Note: Three (3) additional e-mails are included in the e-mail chain.</p>	<p>Ms. Thorn states “FYI.”</p>	<p>ACD material. <u>N.J.S.A. 47:1A-1.1.</u></p>	<p>The body of the e-mail does not contain any ACD discussions warranting nondisclosure. Thus, the Custodian must disclose this portion of the e-mail chain.</p> <p>The remaining three (3) e-mail bodies were properly withheld as ACD material. <u>N.J.S.A. 47:1A-1.1.</u></p>
5.	<p>E-mail from Mr. Longworth to Andrew Tunnard and Ray Kauffman dated July 24, 2015 (8:09 a.m.)</p> <p>Note: Six (6) additional e-mails, including No. 6 below, are</p>	<p>Mr. Longworth states “FYI.”</p>	<p>ACD material. <u>N.J.S.A. 47:1A-1.1.</u></p>	<p>The body of the e-mail does not contain any ACD discussions warranting nondisclosure. Thus, the Custodian must disclose this portion of the e-mail chain.</p> <p>Except as stated for item No. 6 below, the remaining e-mail bodies were properly withheld as ACD</p>

	included in the e-mail chain.			material. <u>N.J.S.A. 47:1A-1.1.</u>
6.	E-mail from Ms. Tripathi to Ms. Thorn and Mr. Shah (cc'ing Mr. Longworth) dated July 20, 2015 (1:03 p.m.) Note: Six (6) additional e-mails, including No. 5 above, are included in the e-mail chain.	Ms. Tripathi states "FYI."	ACD material. <u>N.J.S.A. 47:1A-1.1.</u>	The body of the e-mail does not contain any ACD discussions warranting nondisclosure. Thus, the Custodian must disclose this portion of the e-mail chain. Except as stated for item No. 5 above, the remaining e-mail bodies were properly withheld as ACD material. <u>N.J.S.A. 47:1A-1.1.</u>
7.	E-mail from Jennifer Godoski to Robert Parker, Mr. Longworth, and Mr. Tunnard dated July 24, 2015 (8:45 a.m.) Note: Three (3) additional e-mails are included in the e-mail chain.	Ms. Godoski states "Thank you."	ACD material. <u>N.J.S.A. 47:1A-1.1.</u>	The body of the e-mail does not contain any ACD discussions warranting nondisclosure. Thus, the Custodian must disclose this portion of the e-mail chain. The remaining three (3) e-mail bodies were properly withheld as ACD material. <u>N.J.S.A. 47:1A-1.1.</u>
8.	E-mail from Mr. Longworth to Mr. Shah, Ms. Thorn, and Ms. Tripathi dated July 24, 2015 (9:35 a.m.) Note: The three (3) e-mails identified in No. 7 above are also included in this e-mail chain.	Mr. Longworth states "FYI."	ACD material. <u>N.J.S.A. 47:1A-1.1.</u>	The body of the e-mail does not contain any ACD discussions warranting nondisclosure. Thus, the Custodian must disclose this portion of the e-mail chain. As noted above, the remaining three (3) e-mail bodies were properly withheld as ACD material. <u>N.J.S.A. 47:1A-1.1.</u>
9.	E-mail from Mr. Longworth to Mr. Shah, Ms. Thorn, and Ms. Tripathi	Mr. Longworth states "FYI."	ACD material. <u>N.J.S.A. 47:1A-1.1.</u>	The body of the e-mail does not contain any ACD discussions warranting nondisclosure. Thus, the Custodian must disclose

	<p>dated July 24, 2015 (9:35 a.m.)</p> <p>Note: The three (3) e-mails identified in Nos. 7 and 8 above are also included in this e-mail chain, as well as one (1) additional e-mail.</p>			<p>this portion of the e-mail chain.</p> <p>The remaining four (4) e-mail bodies, including the three (3) e-mail bodies addressed above, were properly withheld as ACD material. <u>N.J.S.A. 47:1A-1.1.</u></p>
10.	<p>E-mail from Mr. Shah to Mr. Longworth dated July 28, 2015 (9:34 a.m.)</p> <p>Note: Eight (8) additional e-mails, including No. 11 below, are included in this e-mail chain.</p>	Mr. Shah states “FYI.”	ACD material. <u>N.J.S.A. 47:1A-1.1.</u>	<p>The body of the e-mail does not contain any ACD discussions warranting nondisclosure. Thus, the Custodian must disclose this portion of the e-mail chain.</p> <p>Except as stated for item No. 11 below, the remaining e-mail bodies were properly withheld as ACD material. <u>N.J.S.A. 47:1A-1.1.</u></p>
11.	<p>E-mail from Mr. Shah to Robert Blight (cc’ing Ms. Thorn and Ms. Tripathi) dated July 28, 2015 (8:59 a.m.)</p> <p>Note: Eight (8) additional e-mails, including No. 10 above, are included in this e-mail chain.</p>	Mr. Shah states “FYI.”	ACD material. <u>N.J.S.A. 47:1A-1.1.</u>	<p>The body of the e-mail does not contain any ACD discussions warranting nondisclosure. Thus, the Custodian must disclose this portion of the e-mail chain.</p> <p>Except as stated for item No. 10 above, the remaining e-mail bodies were properly withheld as ACD material. <u>N.J.S.A. 47:1A-1.1.</u></p>
12.	<p>E-mail from Mr. Longworth to Mr. Kauffman and Mr. Tunnard dated July 28, 2015 (9:53 a.m.)</p>	Mr. Longworth states “FYI.”	ACD material. <u>N.J.S.A. 47:1A-1.1.</u>	<p>The body of the e-mail does not contain any ACD discussions warranting nondisclosure. Thus, the Custodian must disclose this portion of the e-mail chain.</p>

	Note: All e-mails described in No. 10 and 11 above are included in this e-mail chain			Except as stated for item No. 10 and 11 above, the remaining e-mail bodies were properly withheld as ACD material. <u>N.J.S.A. 47:1A-1.1.</u>
13.	E-mail from Mr. Shah to Mr. Longworth dated July 31, 2015 (9:14 a.m.) Note: Two (2) additional e-mails are included in this e-mail chain.	Mr. Shah states: “FYI.”	ACD material. <u>N.J.S.A. 47:1A-1.1.</u>	The body of the e-mail does not contain any ACD discussions warranting nondisclosure. Thus, the Custodian must disclose this portion of the e-mail chain. The remaining two (2) e-mail bodies were properly withheld as ACD material. <u>N.J.S.A. 47:1A-1.1.</u>
14.	E-mail from Mr. Longworth to Mr. Kauffman dated August 3, 2015 (11:13 a.m.) Note: Seven (7) additional e-mails are included in this e-mail chain.	Mr. Longworth states “FYI.”	ACD material. <u>N.J.S.A. 47:1A-1.1.</u>	The body of the e-mail does not contain any ACD discussions warranting nondisclosure. Thus, the Custodian must disclose this portion of the e-mail chain. The remaining seven (7) e-mail bodies were properly withheld as ACD material. <u>N.J.S.A. 47:1A-1.1.</u>
15.	E-mail from Mr. Shah to Mr. Howard and Mr. Bizuga (cc’ing Mr. Longworth) dated August 3, 2015 (12:53 p.m.) Note: Five (5) additional e-mails are included in this e-mail chain.	Mr. Shah states “FYI.”	ACD material. <u>N.J.S.A. 47:1A-1.1.</u>	The body of the e-mail does not contain any ACD discussions warranting nondisclosure. Thus, the Custodian must disclose this portion of the e-mail chain. The remaining five (5) e-mail bodies were properly withheld as ACD material. <u>N.J.S.A. 47:1A-1.1.</u>
16.	E-mail from Dave Lambert to Dana Hecht dated	Mr. Lambert states “FYI.”	ACD material. <u>N.J.S.A. 47:1A-1.1.</u>	Although this portion of the e-mail chain does not appear to be responsive to

	<p>November 27, 2015 (8:29 p.m.)</p> <p>Note: Ten (10) additional e-mails are included in this e-mail chain.</p>			<p>the Complainant’s OPRA request, a custodian cannot withhold disclosure on the basis that the information within a record may not be responsive to a request. <u>ACLU v. NJ Div. of Criminal Justice</u>, 435 N.J. Super. 533, 540-541 (App. Div. 2014). Further, the body of the e-mail does not contain any ACD discussions warranting nondisclosure. Thus, the Custodian must disclose this portion of the e-mail chain.</p> <p>The remaining nine (9) e-mail bodies were properly withheld as ACD material. <u>N.J.S.A. 47:1A-1.1.</u></p>
17.	<p>E-mail from Mr. Longworth to Mr. Shah, Ms. Thorn, Ms. Tripathi (cc’ing Roy Neuman) dated December 1, 2015 (1:22 p.m.)</p> <p>Note: Fifteen (15) additional e-mails are included in this e-mail chain.</p>	Mr. Longworth states “FYI.”	ACD material. <u>N.J.S.A. 47:1A-1.1.</u>	<p>The body of the e-mail does not contain any ACD discussions warranting nondisclosure. Thus, the Custodian must disclose this portion of the e-mail chain.</p> <p>The remaining fifteen (15) e-mail bodies were properly withheld as ACD material. <u>N.J.S.A. 47:1A-1.1.</u></p>

As noted above, all e-mail bodies not addressed above were lawfully withheld under the ACD exemption. Further, the Custodian lawfully denied access to the draft attachments contained with the universe of records reviewed *in camera* in accordance with Libertarians, 453 N.J. Super. 83.

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

Thus, the Custodian must disclose all other portions of the responsive e-mails (except the four (4) redacted e-mail chains already provided) to the Complainant (*i.e.*, sender, recipients, date, time, subject, and salutations where applicable). As to those portions of the requested e-mails, the Custodian has unlawfully denied access. See Ray v. Freedom Acad. Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010).

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 Custodian complied with the Council's April 24, 2018 Interim Order because she responded in the prescribed time frame providing to the Council the appropriate records ordered for an *in camera* review. Additionally, the Custodian simultaneously provided certified confirmation of compliance to the GRC.
2. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order. Further, the Custodian shall simultaneously deliver⁷ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁸ to the Council Staff.⁹**
3. Thus, the Custodian must disclose all other portions of the responsive e-mails (except the four (4) redacted e-mail chains already provided) to the Complainant (*i.e.*, sender, recipients, date, time, subject, and salutations where applicable). As to those portions of the requested e-mails, the Custodian has unlawfully denied access. See Ray v. Freedom Acad. Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010).
4. **The Custodian shall comply with conclusion No. 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each**

⁷ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

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."

⁹ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

redaction, if applicable. Further, the Custodian shall simultaneously deliver¹⁰ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,¹¹ to the Council Staff.¹²

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
Acting Executive Director

July 23, 2019

¹⁰ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

¹¹ "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."

¹² Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.



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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

April 24, 2018 Government Records Council Meeting

Michael Ehrenreich
Complainant

Complaint No. 2016-192

v.

NJ Department of Transportation
Custodian of Record

At the April 24, 2018 public meeting, the Government Records Council (“Council”) considered the April 17, 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 responsive records withheld from disclosure, as well as the four (4) redacted e-mail chains, to determine the validity of the Custodian’s assertion that the record was exempt under OPRA as “inter-agency or intra-agency advisory, consultative, or deliberative [(“ACD”)] material.” 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 (applicable to the four (4) redacted e-mail chains), 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 24th Day of April, 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: April 25, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
April 24, 2018 Council Meeting**

**Michael Ehrenreich¹
Complainant**

GRC Complaint No. 2016-192

v.

**NJ Department of Transportation²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of “all documents, including e-mails, memoranda, and meeting minutes,” to or from Commissioner Jamie Fox, Commissioner Richard Hammer, Assistant Commissioner John Case, Jack Longworth, Warren Howard and Sophia Azam of the New Jersey Department of Transportation (“DOT”) between June 30, 2015 and May 13, 2016 regarding the Complainant’s request to have rumble strips removed from the vicinity of a property in Lambertville, NJ.

Custodian of Record: Amalia McShane

Request Received by Custodian: May 13, 2016

Response Made by Custodian: May 24, 2016

GRC Complaint Received: July 11, 2016

Background³

Request and Response:

On May 13, 2016, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On May 24, 2016, the Custodian responded in writing stating that an extension of time until June 10, 2016 would be necessary to gather, identify, and review for responsive records. On June 10, 2016, the Custodian obtained a second (2nd) extension of time until June 24, 2016 to review possibly responsive records. On June 24, 2016, the Custodian obtained a third (3rd) extension until July 8, 2016. On July 8, 2016, the Custodian disclosed 216 pages of records (with redactions). The Custodian also denied access to another 187 pages of records and included a document index. The Custodian stated that the records were redacted or withheld under the “inter-agency or intra-agency advisory, consultative, or deliberative [(“ACD”)] material” exemption. N.J.S.A. 47:1A-1.1.

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Jennifer Jaremback.

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

Denial of Access Complaint:

On July 11, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that he sought the responsive records to determine how DOT decided to deny his request to remove rumble strips from the road outside of a property he owned. The Complainant also wanted to know what other factors were involved in making this decision. The Complainant stated that DOT claimed that many of the responsive records were exempt under the ACD exemption.

Statement of Information:

On July 26, 2016, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on May 13, 2016. The Custodian certified that her search included collecting all correspondence, memoranda, and e-mails from the named individuals relating to the rumble strip removal request for the relevant time period. The Custodian certified that in all, she located 403 pages of responsive records. The Custodian certified that, after a few extensions, she responded in writing on July 8, 2016 disclosing 216 pages of e-mails and attachments, including four (4) e-mail chains with redactions, and providing the Complainant a document index. The Custodian further affirmed that she denied access to the remaining records, consisting of e-mails, draft documents, and a few other types of records, under the ACD exemption.

The Custodian contended that she lawfully denied access to the requested records, in part of whole, under the ACD privilege. The Custodian noted that in order to be considered ACD in nature, a record must meet a two-prong test: 1) the record is pre-decisional (created prior to adoption of a policy); and 2) the record is deliberative (containing opinions, recommendations or advice about that policy). See Ciesla v. N.J. Dep’t of Health & Senior Serv., 429 N.J. Super. 127, 138 (App. Div. 2012)(citing In re: Liquidation of Integrity Ins., Co., 165 N.J. 75, 83 (2000)).

The Custodian contended that the responsive correspondence contained DOT representatives’ opinions and recommendations regarding the decision decision-making process about the rumble strip issue. The Custodian asserted that these correspondence reflect the necessary back-and-forth in formulating agency policy. By way of example, the Custodian stated that some of the e-mails regard DOT’s balancing of safety protections of the strips against the noise nuisance they may cause. The Custodian further asserted that the records reflect the exact type of material the exemption was meant to protect. See Educ. Law Ctr. v. N.J. Dep’t of Educ., 198 N.J. 274 (2009).

Additionally, the Custodian contended that she lawfully denied access to several draft documents included in the universe of responsive records. See Ciesla, 429 N.J. Super. at 140-141. The Custodian asserted that she denied access to draft correspondence from DOT to the Complainant regarding his numerous complaints about the rumble strips. The Custodian argued that these drafts were not finalized and subject to edits. The Custodian contended that nondisclosure of the drafts “avoids the confusion that could result from release of information concerning matters that do not bear on an agency’s chosen course.” Id. at 138. The Custodian thus argued that she lawfully denied access to any responsive draft documents.

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 DOT: the Custodian disclosed 216 pages of records, inclusive of redactions to four (4) of the disclosed e-mail chains. The Custodian also denied access to the remainder of the records as ACD, arguing that they were deliberative or were draft documents. In the Denial of Access Complaint, the Complainant alleged that he sought

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

the records to determine how DOT arrived at the decision to not remove rumble strips from the road in front a property he owned. In the SOI, the Custodian argued that she properly denied access to the records, in part and whole, because they met the two-prong test required to be exempt as ACD material under OPRA (citing Ciesla, 429 N.J. Super. at 138).

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 exemption. The GRC must thus review same in order to determine the full applicability of ACD exemption. 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 responsive records withheld from disclosure, as well as the four (4) redacted e-mail chains, to determine the validity of the Custodian's assertion that the record was exempt under OPRA as ACD material. 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 responsive records withheld from disclosure, as well as the four (4) redacted e-mail chains, to determine the validity of the Custodian's assertion that the record was exempt under OPRA as "inter-agency or intra-agency advisory, consultative, or deliberative [(“ACD”)] material." 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 (applicable to the four (4) redacted e-mail chains), 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**

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."

be received by the GRC within five (5) business days from receipt of the Council's Interim Order.

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

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

April 17, 2018