



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

September 24, 2019 Government Records Council Meeting

Scott M. Halliwell and Anthony G. Pennant
Complainant

Complaint No. 2016-201

v.
Borough of Brooklawn (Camden)
Custodian of Record

At the September 24, 2019 public meeting, the Government Records Council (“Council”) considered the September 17, 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 Custodian complied with the Council’s August 27, 2019 Interim Order because he responded with the prescribed time frame providing the requested certification to the Executive Director.
2. The Custodian has borne his burden of proof that he lawfully denied access to the portion of the Complainants’ OPRA request seeking e-mail correspondence from the years 2013 and 2014. Specifically, the Custodian certified, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
3. The Custodian complied with the Council’s April 30, 2019 Interim Order because he responded within the prescribed time frame providing records and simultaneously provided certified confirmation of compliance to the Council Staff.
4. The Custodian violated N.J.S.A. 47:1A-6 by improperly withholding responsive records and failed to fully comply with the Council’s August 28, 2018 Interim Order. However, the Custodian complied with the Council’s April 30, 2019 and August 27, 2019 Interim Orders. 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 24th Day of September 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: September 27, 2019

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
September 24, 2019 Council Meeting**

**Scott M. Halliwell and Anthony G. Pennant¹
Complainant**

GRC Complaint No. 2016-201

v.

**Borough of Brooklawn (Camden)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies of:

1. All correspondence (e-mails, letters, faxes, and memos) that were to or from the Custodian, Custodian's Counsel, Mayor Branella, Councilman Mevoli, Former Chief Fran McKinney, Current Chief Shamus Ellis, Sgt. Hirst, Officer Stires or Officer Nicolas between April 20, 2013 to present regarding the subject matter Scott Halliwell or Anthony Pennant.
2. Internal Affairs Annual Summary Reports for 2013-2015 including all Tables and Executive Summaries
3. All closed/executive session minutes of the Borough Council from May 1, 2013 to December 31, 2015.
4. The eight most recently released reports to the public that give a brief synopsis of all complaints where a fine or suspension of 10 days or more was assessed to an agency member. (These reports are required by the AG's Internal Affairs Guidelines, Requirement 10).

Custodian of Record: Ryan Giles

Request Received by Custodian: June 15, 2016

Response Made by Custodian: June 15, 2016; July 6, 2016; July 14, 2016

GRC Complaint Received: July 18, 2016

Background

August 27, 2019 Council Meeting:

At its August 27, 2019 public meeting, the 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 the amended findings and recommendations. The Council, therefore, found that:

1. The Complainants have failed to establish in their request for reconsideration of the Council's April 30, 2019 Interim Order that either 1) the Council's decision is based upon

¹ No representation listed on record.

² Represented by Timothy Higgins of the Law Office of Timothy Higgins (Cherry Hill, NJ).

a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The Complainants failed to establish that the complaint should be reconsidered based on extraordinary circumstances, fraud, or illegality. The Complainants have also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Specifically, the Complainants did not elaborate on extraordinary circumstances relevant to the matter at hand. Further, the evidence of record does not indicate that the Custodian committed fraud or illegality based solely upon the Custodian's denial of access. Thus, the Complainant's request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

2. The Council should defer addressing whether the Custodian complied with the Council's April 30, 2019 Interim Order until the Custodian provides a certification explaining why responsive e-mails dated in 2013 and 2014 were not produced, if any.
3. **The Custodian shall comply with conclusion No. 2 above within five (5) business days from receipt of the Council's Interim Order, in accordance with N.J. Court Rules, R. 1:4-4,³ to the Executive Director.⁴**
4. The Council should defer addressing whether the Custodian knowingly and willfully denied access pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On August 28, 2019, the Council distributed its Interim Order to all parties. On September 4, 2019, the Custodian responded to the Council's Interim Order. The Custodian provided a certification stating that during the years 2013 and part of 2014, himself, the Borough of Brooklawn ("Borough") Mayor, Borough Council, and Borough Police Department exchanged e-mail communications using the extension, "@brooklawn.us." The Custodian certified that during May 2014, the Borough was converting to a Microsoft365 e-mail system.

The Custodian then certified that on or around May 2014, the domain and server for the "@brooklawn.us" extension ceased functioning, prior to the transfer of any data to the new system. The Custodian certified that he reached out to the Borough's IT vendor, who informed him that the older system had crashed, and that all e-mails and other contents were lost. The Custodian certified that as a result of the crash, any e-mails that may have been responsive to the Complainant's request were lost and irretrievable.

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."

⁴ 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.

Analysis

Compliance

August 27, 2019 Interim Order

At its August 27, 2019 meeting, the Council ordered the Custodian to provide a certification explaining why responsive e-mails for the years 2013 and 2014 were not produced in response to the Complainant's OPRA request. On August 28, 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 the close of business on September 5, 2019.

On September 4, 2019, the fourth (4th) business day after receipt of the Council's Order, the Custodian responded to the Council's Order, providing a certification as to why responsive e-mails from 2013 and 2014 were not provided to the Complainants.

Therefore, the Custodian complied with the Council's August 27, 2019 Interim Order because he responded with the prescribed time frame providing the requested certification to the Executive Director.

Having received the applicable certification in response to the Council's Order, the GRC can now address whether the Custodian unlawfully denied access to the disputed 2013 and 2014 e-mails.

The Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. See Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005). Here, the Complainants' OPRA request sought, among other records, e-mail correspondence by and between several parties during the years 2013-2016. At the time of the response, the Custodian stated that no responsive e-mails exist for the years 2013 and 2014 as a result of a server crash. However, in the Statement of Information ("SOI") the Custodian did not certify to these circumstances while discussing those records that were located but withheld entirely or produced with redactions.

Upon conducting an *in camera* review of the withheld and redacted records, the Council ordered the Custodian to produce said records in accordance thereof. Thereafter, the Complainants filed a motion for reconsideration, raising questions as to why responsive records for the years 2013 and 2014 were not included as part of the production. In order to clarify the Custodian's SOI response, the Council ordered him to submit a legal certification regarding the existence of said e-mails. On September 4, 2019, in response to the Council's Order, the Custodian certified that a server crash resulted in the Borough losing access to all e-mails from 2013 and 2014 that utilized the "@brooklawn.us" extension. As noted above, the Custodian previously addressed this in his response, but not his SOI.

Accordingly, the Custodian has borne his burden of proof that he lawfully denied access to the portion of the Complainants' OPRA request seeking e-mail correspondence from the years

2013 and 2014. Specifically, the Custodian certified, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer, GRC 2005-49.

April 30, 2019 Interim Order

In accordance with the Council's August 27, 2019 Interim Order, the GRC must now determine whether the Custodian complied with the Council's April 30, 2019 Interim Order. There, the Council ordered the Custodian to provide the Complainants with the responsive records in accordance with the Council's *In Camera* Examination findings. The Council further ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Council Staff. On May 2, 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 May 9, 2019.

On May 3, 2019, the first (1st) business day after receipt of the Council's Order, the Custodian responded to the Council's Order, certifying that he delivered the responsive records to the Complainants that same day via e-mail. The Custodian also certified that a hard-copy of the responsive records had been sent to the Complainants at their last known mailing address.

Therefore, the Custodian complied with the Council's April 30, 2019 Interim Order because he responded within the prescribed time frame providing records and 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)).

The Custodian violated N.J.S.A. 47:1A-6 by improperly withholding responsive records and failed to fully comply with the Council's August 28, 2018 Interim Order. However, the Custodian complied with the Council's April 30, 2019, and August 27, 2019 Interim Orders. 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 Custodian complied with the Council's August 27, 2019 Interim Order because he responded with the prescribed time frame providing the requested certification to the Executive Director.
2. The Custodian has borne his burden of proof that he lawfully denied access to the portion of the Complainants' OPRA request seeking e-mail correspondence from the years 2013 and 2014. Specifically, the Custodian certified, and the record reflects, that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
3. The Custodian complied with the Council's April 30, 2019 Interim Order because he responded within the prescribed time frame providing records and simultaneously provided certified confirmation of compliance to the Council Staff.
4. The Custodian violated N.J.S.A. 47:1A-6 by improperly withholding responsive records and failed to fully comply with the Council's August 28, 2018 Interim Order. However, the Custodian complied with the Council's April 30, 2019 and August 27, 2019 Interim Orders. 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: Samuel A. Rosado
Staff Attorney

September 17, 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

August 27, 2019 Government Records Council Meeting

Scott M. Halliwell and Anthony G. Pennant
Complainant

Complaint No. 2016-201

v.
Borough of Brooklawn (Camden)
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 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 Complainants have failed to establish in their request for reconsideration of the Council's April 30, 2019 Interim Order that either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The Complainants failed to establish that the complaint should be reconsidered based on extraordinary circumstances, fraud, or illegality. The Complainants have also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Specifically, the Complainants did not elaborate on extraordinary circumstances relevant to the matter at hand. Further, the evidence of record does not indicate that the Custodian committed fraud or illegality based solely upon the Custodian's denial of access. Thus, the Complainant's request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).
2. The Council should defer addressing whether the Custodian complied with the Council's April 30, 2019 Interim Order until the Custodian provides a certification explaining why responsive e-mails dated in 2013 and 2014 were not produced, if any.
3. **The Custodian shall comply with conclusion No. 2 above within five (5) business days from receipt of the Council's Interim Order, in accordance with N.J. Court Rules, R. 1:4-4,¹ to the Executive Director.²**

¹ "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."

² 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

4. The Council should defer addressing whether the Custodian knowingly and willfully denied access pending the Custodian's compliance with the Council's Interim Order.

Interim Order 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 28, 2019

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**

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

Scott M. Halliwell and Anthony G. Pennant¹
Complainant

GRC Complaint No. 2016-201

v.

Borough of Brooklawn (Camden)²
Custodial Agency

Records Relevant to Complaint: Electronic copies of:

1. All correspondence (e-mails, letters, faxes, and memos) that were to or from the Custodian, Custodian's Counsel, Mayor Branella, Councilman Mevoli, Former Chief Fran McKinney, Current Chief Shamus Ellis, Sgt. Hirst, Officer Stires or Officer Nicolas between April 20, 2013 to present regarding the subject matter Scott Halliwell or Anthony Pennant.
2. Internal Affairs Annual Summary Reports for 2013-2015 including all Tables and Executive Summaries
3. All closed/executive session minutes of the Borough Council from May 1, 2013 to December 31, 2015.
4. The eight most recently released reports to the public that give a brief synopsis of all complaints where a fine or suspension of 10 days or more was assessed to an agency member. (These reports are required by the AG's Internal Affairs Guidelines, Requirement 10).

Custodian of Record: Ryan Giles

Request Received by Custodian: June 15, 2016

Response Made by Custodian: June 15, 2016; July 6, 2016; July 14, 2016

GRC Complaint Received: July 18, 2016

Background

April 30, 2019 Council Meeting:

At its April 30, 2019 public meeting, the Council considered the April 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 the amended findings and recommendations. The Council, therefore, found that:

1. The Custodian failed to comply fully with the Council's August 28, 2018 Interim Order

¹ No representation listed on record.

² Represented by Timothy Higgins of the Law Office of Timothy Higgins (Cherry Hill, NJ).

because although he provided nine (9) copies of the sixty-four (64) pages of e-mails and certification within the prescribed time frame, he failed to provide a document index identifying each record in accordance with Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346, 354 (App. Div. 2005).

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 deliver³ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁴ to the Council Staff.⁵**
3. As to the sender, recipients, date, time, subject, and salutations (where applicable) contained 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). Thus, the Custodian must disclose all of these portions of the responsive e-mails to the Complainant.
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, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁶ to the Council Staff.⁷**
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 2, 2019, the Council distributed its Interim Order to all parties. On May 3, 2019, the Custodian responded to the Council's Interim Order. The Custodian provided a certification, indicating that he delivered to the Complainants the requested records with the revised redactions made in accordance with the Interim Order.

³ 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.

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."

⁵ 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.

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."

⁷ 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.

On May 15, 2019, the Complainants filed a request for reconsideration of the Council's April 30, 2019 Interim Order based on extraordinary circumstances, fraud, and illegality. Later that same day, the Complainants provided an additional statement to accompany the request.

The Complainants argued in their request that the Custodian failed to provide e-mails for the years 2013 and 2014, despite their OPRA request seeking e-mails from 2013 through 2015. The Complainants asserted that e-mails for these years were not provided as part of the request or for the *in camera* review as ordered by the Council. The Complainants included screenshots of their e-mail account's inbox attempting to show responsive e-mails during these years that were not produced. The Complainants also claimed that these e-mails were provided as evidence during the Council's adjudication of a previous complaint.⁸ The Complainants argued that many complaints were filed against several agencies, including the Camden County Prosecutor's Office, New Jersey Division of Criminal Justice, Congressman Donald Norcross' Office, New Jersey Division of Civil Rights, and "Attorney Ethics," but communications from these agencies were not included in the request.

The Complainants asserted that the Custodian knowingly and willfully deceived all parties by claiming that all responsive records were provided as part of the request, and that the Borough of Brooklawn ("Borough") was aware of the Complainants' intention to file suit against the Borough.

Shortly after filing the initial request for reconsideration, the Complainants submitted a statement in support of their filing. Therein, the Complainants described the reasons why they submitted several OPRA requests to the Borough and believed they were mistreated by Borough officials as a result. The Complainants also stated that their rights were violated by both police and public officials stemming from events that occurred prior to filing OPRA requests and during the request process.

On May 30, 2019, the Custodian's Counsel submitted objections to the request for reconsideration. The Custodian's Counsel asserted that the April 30, 2019 Interim Order only addressed the validity of the Custodian's basis for exempting the records, and the Custodian's failure to provide a document index. Counsel argued that upon receiving the Interim Order, the Custodian provided the records in accordance with it. Counsel asserted that the Complainants' request for reconsideration objected to the August 28, 2018 Order and not the current pending Order. Counsel thus contended that the Complainants' failed to submit a timely reconsideration of the August 28, 2018 Order.

Analysis

Reconsideration

Pursuant to N.J.A.C. 5:105-2.10, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. Requests must be in writing, delivered to the Council and served on all parties. Parties

⁸ The complaint asserted was Scott M. Halliwell and Anthony G. Pennant v. Borough of Brooklawn (Camden), GRC Complaint No. 2016-130 (September 2017).

must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. N.J.A.C. 5:105-2.10(a) – (e).

In the matter before the Council, the Complainants filed the request for reconsideration of the Council's April 30, 2019 Interim Order on May 15, 2019, ten (10) days from the issuance of the Council's Order.

Applicable case law holds that:

A party should not seek reconsideration merely based upon dissatisfaction with a decision. D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. E.g., Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D'Atria, . . . 242 N.J. Super. at 401. "Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement." Ibid.

[In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).]

Additionally, pursuant to N.J.A.C. 5:105-2.10(a), the Council may reconsider any decision it renders, at its own discretion. Id.; Scheeler, Jr. v. N.J. State Police, GRC Complaint No. 2014-57, *et seq.* (December 2014).

Upon review, the GRC concludes that the Complainants did not meet the requirements for reconsideration based upon "extraordinary circumstances," "fraud" or "illegality." Specifically, the Complainants failed to elaborate on the extraordinary circumstances that justify reconsideration of the Interim Order. Further, while the Complainants provided evidence that they held copies of responsive records which the Custodian failed to provide, the Custodian noted in his original response that the Borough's website had crashed, and caused problems with access to e-mails from those missing years. Therefore, the Complainants' claims of "fraud" are not meritorious. Lastly, the Complainants do not elaborate on the claim of "illegality" beyond the assertion that the Custodian knowingly and willfully denied access, an issue which has yet to be addressed by the Council.

As the moving party, the Complainants were required to establish either of the necessary criteria set forth above: either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. See Cummings, 295 N.J. Super. at 384. The Complainants failed to establish

that the complaint should be reconsidered based on extraordinary circumstances, fraud, or illegality. The Complainants have also failed to show that the Council acted arbitrarily, capriciously or unreasonably. See D'Atria, 242 N.J. Super. at 401. Specifically, the Complainants did not elaborate on extraordinary circumstances relevant to the matter at hand. Further, the evidence of record does not indicate that the Custodian committed fraud or illegality based solely upon the Custodian's denial of access. Thus, the Complainant's request for reconsideration should be denied. Cummings, 295 N.J. Super. at 384; D'Atria, 242 N.J. Super. at 401; Comcast, 2003 N.J. PUC at 5-6.

However, in accordance with N.J.A.C. 5:105-2.4(a), the Council should nonetheless reconsider its Interim Order on its own volition to seek an additional certification from the Custodian. See also Gordon v. City of Orange (Essex), GRC Complaint No. 2011-336, *et seq.* (May 2013) (complainant's request for reconsideration based on fraud and "new evidence" was denied; however, the Council reconsidered its decision).

A review of the evidence indicates that in his response to the Complainants' OPRA request, the Custodian stated that as a result of a website crash, the Borough lost e-mails from all of 2013 and some dated in 2014. However, the Custodian did not certify to this explanation in his Statement of Information nor in his response to the Council's Interim Order. Therefore, the Custodian should provide a certification as to these records to ensure that all aspects of the Complainants' OPRA request has been addressed.

Accordingly, the Council should defer addressing whether the Custodian complied with the Council's April 30, 2019 Interim Order until the Custodian provides a certification explaining why responsive e-mails dated in 2013 and 2014 were not produced, if any.

Additionally, the Council should defer addressing whether the Custodian knowingly and willfully denied access pending the Custodian's compliance with the Council's Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Complainants have failed to establish in their request for reconsideration of the Council's April 30, 2019 Interim Order that either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The Complainants failed to establish that the complaint should be reconsidered based on extraordinary circumstances, fraud, or illegality. The Complainants have also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Specifically, the Complainants did not elaborate on extraordinary circumstances relevant to the matter at hand. Further, the evidence of record does not indicate that the Custodian committed fraud or illegality based solely upon the Custodian's denial of access. Thus, the Complainant's request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To

Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

2. The Council should defer addressing whether the Custodian complied with the Council's April 30, 2019 Interim Order until the Custodian provides a certification explaining why responsive e-mails dated in 2013 and 2014 were not produced, if any.
3. **The Custodian shall comply with conclusion No. 2 above within five (5) business days from receipt of the Council's Interim Order, in accordance with N.J. Court Rules, R. 1:4-4,⁹ to the Executive Director.**¹⁰
4. The Council should defer addressing whether the Custodian knowingly and willfully denied access pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Samuel A. Rosado
Staff Attorney

August 20, 2019

⁹ "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."

¹⁰ 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
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

April 30, 2019 Government Records Council Meeting

Scott M. Halliwell and Anthony G. Pennant
Complainant

Complaint No. 2016-201

v.

Borough of Brooklawn (Camden)
Custodian of Record

At the April 30, 2019 public meeting, the Government Records Council ("Council") considered the April 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 failed to comply fully with the Council's August 28, 2018 Interim Order because although he provided nine (9) copies of the sixty-four (64) pages of e-mails and certification within the prescribed time frame, he failed to provide a document index identifying each record in accordance with Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346, 354 (App. Div. 2005).
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. As to the sender, recipients, date, time, subject, and salutations (where applicable) contained the requested e-mails, the Custodian has unlawfully denied access. See See Ray v. Freedom Acad. Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010). Thus, the Custodian must disclose all of these portions of the responsive e-mails to the Complainant.

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, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁴ to the Council Staff.⁵**
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 April 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: May 2, 2019

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."

⁵ 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
April 30, 2019 Council Meeting**

**Scott M. Halliwell and Anthony G. Pennant¹
Complainant**

GRC Complaint No. 2016-201

v.

**Borough of Brooklawn (Camden)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies of:

1. All correspondence (e-mails, letters, faxes, and memos) that were to or from the Custodian, Custodian's Counsel, Mayor Branella, Councilman Mevoli, Former Chief Fran McKinney, Current Chief Shamus Ellis, Sgt. Hirst, Officer Stires or Officer Nicolas between April 20, 2013 to present regarding the subject matter Scott Halliwell or Anthony Pennant.
2. Internal Affairs Annual Summary Reports for 2013-2015 including all Tables and Executive Summaries
3. All closed/executive session minutes of the Borough Council from May 1, 2013 to December 31, 2015.
4. The eight most recently released reports to the public that give a brief synopsis of all complaints where a fine or suspension of 10 days or more was assessed to an agency member. (These reports are required by the AG's Internal Affairs Guidelines, Requirement 10).

Custodian of Record: Ryan Giles

Request Received by Custodian: June 15, 2016

Response Made by Custodian: June 15, 2016; July 6, 2016; July 14, 2016

GRC Complaint Received: July 18, 2016

Records Submitted for *In Camera* Examination: Nine copies of sixty-four (64) pages of e-mail correspondence by and from various parties pertaining to the Complainant from April 20, 2013 to present.

Background

August 28, 2018 Council Meeting:

At its August 28, 2018 public meeting, the Council considered the August 21, 2018 Findings and Recommendations of the Council Staff and all related documentation submitted by

¹ No representation listed on record.

² Represented by Timothy Higgins of the Law Office of Timothy Higgins (Cherry Hill, NJ).

Scott M. Halliwell and Anthony G. Pennant v. Borough of Brooklawn (Camden) – *In Camera* Findings and Recommendations of the Council Staff

the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian's response to Item No. 1 of the Complainant's OPRA request was sufficient in that it provided a specific lawful basis for denying access to e-mails and other correspondence. Therefore, the Custodian did not violate OPRA under N.J.S.A. 47:1A-5(g). See D'Appolonia v. Borough of Deal (Monmouth), GRC Complaint No. 2008-62 (September 2009), and Bellan-Boyer v. N.J. Dep't of Cmty. Affairs, Comm'rs Office, GRC Complaint No. 2007-114 (October 2007).
2. The GRC must conduct an *in camera* review of the sixty-four (64) responsive e-mails to determine the validity of the Custodian's assertion that the records are exempt in their entirety under OPRA pursuant to attorney-client privilege. 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).
3. **The Custodian must deliver³ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 2 above), a document or redaction index⁴, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 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.**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On August 29, 2018, the Council distributed its Interim Order to all parties. On August 30, 2018, the Custodian responded to the Council's Interim Order. The Custodian certified that he provided nine (9) copies of the requested e-mail correspondence that was withheld from disclosure. The Custodian also certified that the records totaled sixty-four (64) pages.

Analysis

Compliance

At its August 28, 2018 meeting, the Council ordered the Custodian to provide nine (9) unredacted copies of the sixty-four pages of e-mails withheld from disclosure, a document index, and certified confirmation of compliance within five (5) business days from receipt of the

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."

Council's Interim Order. On August 29, 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 September 6, 2018.

On August 30, 2018, the first (1st) business day after receipt of the Council's Order, the Custodian delivered nine (9) copies of the unredacted records and a certification of compliance. However, the Custodian did not include a document index to identify each record and the lawful basis for denial. See Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346, 354 (App. Div. 2005).

Therefore, the Custodian failed to comply fully with the Council's August 28, 2018 Interim Order because although he provided nine (9) copies of the sixty-four (64) pages of e-mails and certification within the prescribed time frame, he failed to provide a document index identifying each record in accordance with Paff, 379 N.J. Super. at 354.

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.

Attorney-Client Privilege

OPRA provides that a "government record" shall not include "any record within the attorney-client privilege." N.J.S.A. 47:1A-1.1 (emphasis added). To assert attorney-client privilege, a party must show that there was a confidential communication between lawyer and client in the course of that relationship and in professional confidence. N.J.R.E. 504(1). Such communications are only those "which the client either expressly made confidential or which [one] could reasonably assume under the circumstances would be understood by the attorney to be so intended." State v. Schubert, 235 N.J. Super. 212, 221 (App. Div. 1989). However, merely showing that "the communication was from client to attorney does not suffice, but the circumstances indicating the intention of secrecy must appear." Id. at 220-21.

In the context of public entities, the attorney-client privilege extends to communications between the public body, the attorney retained to represent it, necessary intermediaries and agents through whom communications are conveyed, and co-litigants who have employed a lawyer to act for them in a common interest. See Tractenberg v. Twp. Of W. Orange, 416 N.J. Super. 354, 376 (App. Div. 2010); In re Env'tl. Ins. Declaratory Judgment Actions, 259 N.J. Super. 308, 313 (App. Div. 1992).

Mediation Communications

The Council is permitted to raise additional defenses regarding the disclosure of records pursuant to Paff v. Twp. of Plainsboro, 2007 N.J. Super. Unpub. LEXIS 2135 (App. Div.) (certif.

denied, 193 N.J. 292 (2007)).⁶ In Paff, the complainant challenged the GRC’s authority to uphold a denial of access for reasons never raised by the custodian. Specifically, the Council did not uphold the basis for the redactions cited by the custodian. The Council, on its own initiative, determined that the Open Public Meetings Act prohibited the disclosure of the redacted portions to the requested executive session minutes. The Council affirmed the custodian’s denial to portions of the executive session minutes but for reasons other than those cited by the custodian. The complainant argued that the GRC did not have the authority to do anything other than determine whether the custodian’s cited basis for denial was lawful. The court held that:

The GRC has an independent obligation to “render a decision as to whether the record which is the subject of the complaint is a government record which must be made available for public access pursuant to’ OPRA . . . The GRC is not limited to assessing the correctness of the reasons given for the custodian’s initial determination; it is charged with determining if the initial decision was correct.”

The court further stated that:

Aside from the clear statutory mandate to decide if OPRA requires disclosure, the authority of a reviewing agency to affirm on reasons not advanced by the reviewed agency is well established. Cf. Bryant v. City of Atl. City, 309 N.J. Super. 596, 629-30 (App. Div. 1998) (citing Isko v. Planning Bd. of Livingston, 51 N.J. 162, 175 (1968) (lower court decision may be affirmed for reasons other than those given below)); Dwyer v. Erie Inv. Co., 138 N.J. Super. 93, 98 (App. Div. 1975) (judgments must be affirmed even if lower court gives wrong reason), certif. denied, 70 N.J. 142 (1976); Bauer v. 141-149 Cedar Lane Holding Co., 42 N.J. Super. 110, 121 (App. Div. 1956) (question for reviewing court is propriety of action reviewed, not the reason for the action) (aff’d, 24 N.J. 139 (1957)).

OPRA regulations provide that “[m]ediation practices shall be governed by the Uniform Mediation Act, N.J.S.A. 2A:23C-1 et seq.”

N.J.S.A. 2A:23C-2 defines a “mediation communication” as:

[A] statement, whether verbal or nonverbal or in a record, that occurs during a mediation or is made for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator. A mediation communication shall not be deemed to be a public record under [OPRA].

With respect to a future GRC adjudication, N.J.S.A. 2A:23C-4(a) provides: “Except as otherwise provided in section 6 . . . a mediation communication is privileged as provided in subsection b. of this section and shall not be subject to discovery or admissible in evidence in a proceeding unless waived or precluded as provided by section 5”

⁶ On appeal from Paff v. Township of Plainsboro, GRC Complaint No. 2005-29 (March 2006).
Scott M. Halliwell and Anthony G. Pennant v. Borough of Brooklawn (Camden) – *In Camera* Findings and Recommendations of the Council Staff

Additionally, N.J.S.A. 2A:23C-8 provides: “Unless made during a session of a mediation which is open, or is required by law to be open, to the public, mediation communications are confidential to the extent agreed by the parties or provided by other law or rule of this State.”

The GRC conducted an *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 Record	Custodian’s Explanation/ Citation for Non-disclosure	Findings of the <i>In Camera</i> Examination⁷
1.	July 14, 2015	E-mail from Counsel to Custodian w/ copy to Theresa Branella and Mike Mevoli. 2pgs.	Record contains attorney-client privileged information. <u>N.J.S.A. 47:1A-1.1.</u>	The body of the e-mail on the first page contains Counsel’s advice on responding to an OPRA request. Therefore, that portion of the e-mail is exempt from disclosure. <u>N.J.S.A. 47:1A-1.1.</u> However, the Custodian unlawfully denied access to the remainder of the e-mail and must disclose it. N.J.S.A. 47:1A-6.
2.	July 15, 2015	E-mail from Custodian’s Counsel to Custodian w/ copy to Mike Mevoli 1pg.	Record contains attorney-client privileged information. <u>N.J.S.A. 47:1A-1.1.</u>	Counsel requests the Custodian to review the attached document (not included) The e-mail does not contain attorney-client privileged information. Thus, the Custodian unlawfully denied access to the e-

⁷ **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.

				mail and must disclose it. <u>N.J.S.A. 47:1A-6.</u>
3.	May 26, 2016	1pg.		The e-mail is withheld from disclosure as it is a mediation communication. <u>N.J.S.A. 2A:23C-4(a).</u>
4.	May 18, 2016	E-mail from Custodian to Custodian's Counsel. 1pg.	Record contains attorney-client privileged information. <u>N.J.S.A. 47:1A-1.1.</u>	The second sentence in the main body of the e-mail has the Custodian asking Counsel which possible response to give regarding an OPRA request. Therefore, that portion of the e-mail is exempt from disclosure. <u>N.J.S.A. 47:1A-1.1.</u> However, the Custodian unlawfully denied access to the remainder of the e-mail and must disclose it. <u>N.J.S.A. 47:1A-6.</u>
5.	May 12, 2016	E-mail from Custodian to Custodian's Counsel. 1pg.	Record contains attorney-client privileged information. <u>N.J.S.A. 47:1A-1.1.</u>	Counsel is requesting the Custodian to sign the attached documents (not included). The e-mail does not contain attorney-client privileged information. Thus, the Custodian unlawfully denied access to the e-mail and must disclose it. <u>N.J.S.A. 47:1A-6.</u>
6.	May 12, 2016	E-mail from Custodian to Custodian's Counsel. 1pg.	Record contains attorney-client privileged information. <u>N.J.S.A. 47:1A-1.1.</u>	Custodian is asking Counsel about an e-mail received from the GRC. The e-mail does not contain attorney-client privileged information. Thus, the Custodian unlawfully denied access to the e-mail and must disclose it. <u>N.J.S.A. 47:1A-6.</u>

7.	April 14, 2016	3pgs.		The e-mail is withheld from disclosure as it is a mediation communication. <u>N.J.S.A. 2A:23C-4(a).</u>
8.	April 4, 2016	E-mail from Custodian to Custodian's Counsel. 1pg.	Record contains attorney-client privileged information. <u>N.J.S.A. 47:1A-1.1.</u>	The Custodian is forwarding potential responses to the Complainant to Counsel, presumably for review. Therefore, the Custodian lawfully denied access to the body of the e-mail and shall redact it accordingly. <u>N.J.S.A. 47:1A-1.1.</u>
9.	October 12, 2015	2pgs.		The e-mail is withheld from disclosure as it is a mediation communication. <u>N.J.S.A. 2A:23C-4(a).</u>
10.	September 18, 2015	E-mail from Custodian to Custodian's Counsel. 1pg.	Record contains attorney-client privileged information. <u>N.J.S.A. 47:1A-1.1.</u>	Custodian's response upon receiving correspondence from the GRC. The e-mail does not contain attorney-client privileged information. Thus, the Custodian unlawfully denied access to the e-mail and must disclose it. <u>N.J.S.A. 47:1A-6.</u>
11.	August 20, 2015	E-mail from Custodian to Custodian's Counsel. 1pg.	Record contains attorney-client privileged information. <u>N.J.S.A. 47:1A-1.1.</u>	Custodian forwarded correspondence from the Complainant without further input. The e-mail does not contain attorney-client privileged information. Thus, the Custodian unlawfully denied access to the e-mail and must disclose it. <u>N.J.S.A. 47:1A-6.</u>
12.	August 18, 2015	E-mail from Custodian to Custodian's	Record contains attorney-client	The e-mail contains no message beyond the attached document (not

		Counsel w/ copy to Theresa Branella. 1pg.	privileged information. <u>N.J.S.A.</u> 47:1A-1.1.	provided) and does not contain attorney-client privileged information. Thus, the Custodian unlawfully denied access to the e-mail and must disclose it. <u>N.J.S.A. 47:1A-6.</u>
13.	August 12, 2015	E-mail from Custodian to Custodian's Counsel. 2pgs.	Record contains attorney-client privileged information. <u>N.J.S.A.</u> 47:1A-1.1.	The Custodian relayed information he received to Counsel, suggesting a strategy for an upcoming meeting. Therefore, the Custodian lawfully denied access to the body of the e-mail and shall redact it accordingly <u>N.J.S.A.</u> 47:1A-1.1.
14.	July 27, 2015	E-mail from Custodian to Mike Mevoli and Custodian's Counsel. 2pgs.	Record contains attorney-client privileged information. <u>N.J.S.A.</u> 47:1A-1.1.	The e-mail contains no message beyond the attached document (not provided) and does not contain attorney-client privileged information. Thus, the Custodian unlawfully denied access to the e-mail and must disclose it. <u>N.J.S.A. 47:1A-6.</u>
15.	July 23, 2015	E-mail from Custodian to Mike Mevoli and Custodian's Counsel. 2pgs.	Record contains attorney-client privileged information. <u>N.J.S.A.</u> 47:1A-1.1.	The e-mail contains no message beyond the attached document (not provided) and does not contain attorney-client privileged information. Thus, the Custodian unlawfully denied access to the e-mail and must disclose it. <u>N.J.S.A. 47:1A-6.</u>
16.	July 23, 2015	E-mail from Custodian to Custodian's Counsel. 3pgs.	Record contains attorney-client privileged information.	The Custodian is requesting advice from Counsel on responding to the Complainant. Therefore, the Custodian

			<u>N.J.S.A.</u> 47:1A-1.1.	lawfully denied access to the body of the e-mail and shall redact it accordingly <u>N.J.S.A.</u> 47:1A-1.1.
17.	July 23, 2015	E-mail from Custodian to Custodian's Counsel. 3pgs.	Record contains attorney-client privileged information. <u>N.J.S.A.</u> 47:1A-1.1.	The Custodian is requesting advice from Counsel on responding to the Complainant. Therefore, the Custodian lawfully denied access to the body of the e-mail and shall redact it accordingly <u>N.J.S.A.</u> 47:1A-1.1.
18.	July 13, 2015	E-mail from Custodian to Custodian's Counsel. 1pg.	Record contains attorney-client privileged information. <u>N.J.S.A.</u> 47:1A-1.1.	The Custodian is requesting advice from Counsel on responding to the Complainant. Therefore, the Custodian lawfully denied access to the body of the e-mail and shall redact it accordingly <u>N.J.S.A.</u> 47:1A-1.1.
19.	April 13, 2016	2pgs.		The e-mail is withheld from disclosure as it is a mediation communication. <u>N.J.S.A.</u> 2A:23C-4(a).
20.	April 6, 2016	E-mail from Custodian's Counsel to Custodian. 2pgs.	Record contains attorney-client privileged information. <u>N.J.S.A.</u> 47:1A-1.1.	Counsel requests the Custodian to review the attached document (not included). The e-mail does not contain attorney-client privileged information. Thus, the Custodian unlawfully denied access to the e-mail and must disclose it. <u>N.J.S.A.</u> 47:1A-6.
21.	February 12, 2016	E-mail from Custodian's Counsel to Custodian. 1pg.	Record contains attorney-client privileged information.	Counsel requests the Custodian to review the attached document (not included) for Mike Mevoli to sign.

			<u>N.J.S.A.</u> 47:1A-1.1.	Counsel's statement suggests revisions made to document and for approval. Therefore, the Custodian lawfully denied access to the body of the e-mail and shall redact it accordingly <u>N.J.S.A.</u> 47:1A-1.1.
22.	January 22, 2016	2pgs.		The e-mail is withheld from disclosure as it is a mediation communication. <u>N.J.S.A.</u> 2A:23C-4(a).
23.	January 22, 2016	1pg.		The e-mail is withheld from disclosure as it is a mediation communication. <u>N.J.S.A.</u> 2A:23C-4(a).
24.	July 18, 2015	E-mail from Custodian's Counsel to Custodian, w/ copy to Michael Joyce. 2pgs.	Record contains attorney-client privileged information. <u>N.J.S.A.</u> 47:1A-1.1.	Counsel requests the Custodian to review the attached document (not included). The e-mail does not contain attorney-client privileged information. Thus, the Custodian unlawfully denied access to the e-mail and must disclose it. <u>N.J.S.A.</u> 47:1A-6.
25.	July 15, 2015	E-mail from Custodian's Counsel to Custodian, w/ copy to Mike Mevoli. 1pg.	Record contains attorney-client privileged information. <u>N.J.S.A.</u> 47:1A-1.1.	Counsel requests the Custodian to review the attached document (not included). The e-mail does not contain attorney-client privileged information. Thus, the Custodian unlawfully denied access to the e-mail and must disclose it. <u>N.J.S.A.</u> 47:1A-6.
26.	May 12, 2016	E-mail from Custodian's Counsel to Custodian. 2pgs.	Record contains attorney-client privileged	Counsel requests the Custodian to review the attached document (not included). The e-mail

			information. <u>N.J.S.A.</u> 47:1A-1.1.	does not contain attorney-client privileged information. Thus, the Custodian unlawfully denied access to the e-mail and must disclose it. <u>N.J.S.A. 47:1A-6.</u>
27.	April 14, 2016	2pgs.		The e-mail is withheld from disclosure as it is a mediation communication. <u>N.J.S.A. 2A:23C-4(a).</u>
28.	April 14, 2016	2pgs.		The e-mail is withheld from disclosure as it is a mediation communication. <u>N.J.S.A. 2A:23C-4(a).</u>
29.	March 18, 2016	E-mail from Custodian's Counsel to Anna Minx, w/ copy to the Custodian. 1pg.	Record contains attorney-client privileged information. <u>N.J.S.A.</u> 47:1A-1.1.	Counsel provided a copy of an invoice (not included). The e-mail does not contain attorney-client privileged information. Thus, the Custodian unlawfully denied access to the e-mail and must disclose it. <u>N.J.S.A. 47:1A-6.</u>
30.	February 21, 2016	E-mail from Custodian's Counsel to Anna Minx, w/ copy to the Custodian. 1pg.	Record contains attorney-client privileged information. <u>N.J.S.A.</u> 47:1A-1.1.	Counsel provided a copy of an invoice (not included). The e-mail does not contain attorney-client privileged information. Thus, the Custodian unlawfully denied access to the e-mail and must disclose it. <u>N.J.S.A. 47:1A-6.</u>
31.	January 24, 2016	E-mail from Custodian's Counsel to Anna Minx, w/ copy to the Custodian. 1pg.	Record contains attorney-client privileged information. <u>N.J.S.A.</u> 47:1A-1.1.	Counsel provided a copy of an invoice (not included). The e-mail does not contain attorney-client privileged information. Thus, the Custodian unlawfully denied access to the e-

				mail and must disclose it. <u>N.J.S.A. 47:1A-6.</u>
32.	August 17, 2015	First 3pgs: E-mail from Custodian's Counsel to Custodian. Last 2pgs: Appears to be zoomed in sections of the correspondence attached to the e-mail.	Record contains attorney-client privileged information. <u>N.J.S.A. 47:1A-1.1.</u>	The last 2pgs contain Custodian's Counsel's revision of a disposition letter at the behest of the Custodian. Therefore, those pages are withheld from disclosure. <u>N.J.S.A. 47:1A-1.1.</u> However, the Custodian unlawfully denied access to the e-mail itself and must disclose it. <u>N.J.S.A. 47:1A-6.</u>
33.	July 23, 2015	E-mail from Custodian's Counsel to Custodian. 2pgs.	Record contains attorney-client privileged information. <u>N.J.S.A. 47:1A-1.1.</u>	Counsel notifying the Custodian that he will review forwarded correspondence. The e-mail does not contain attorney-client privileged information. Thus, the Custodian unlawfully denied access to the e-mail and must disclose it. <u>N.J.S.A. 47:1A-6.</u>
34.	July 13, 2015	E-mail from Custodian's Counsel to Custodian. 1pg.	Record contains attorney-client privileged information. <u>N.J.S.A. 47:1A-1.1.</u>	Counsel notifying the Custodian that he will review forwarded correspondence. The e-mail does not contain attorney-client privileged information. Thus, the Custodian unlawfully denied access to the e-mail and must disclose it. <u>N.J.S.A. 47:1A-6.</u>
35.	April 19, 2015	E-mail from Custodian's Counsel to Michael Joyce, w/ copy to the Custodian. 3pgs.	Record contains attorney-client privileged information. <u>N.J.S.A. 47:1A-1.1.</u>	Counsel requesting that Michael Joyce take notice of the forwarded correspondence. The e-mail does not contain attorney-client privileged information. Thus, the Custodian unlawfully denied access to the e-

				mail and must disclose it. <u>N.J.S.A. 47:1A-6.</u>
36.	April 19, 2015	E-mail from Custodian's Counsel to Michael Joyce w/ copy to the Custodian. 3pgs.	Record contains attorney-client privileged information. <u>N.J.S.A. 47:1A-1.1.</u>	Counsel requesting that Michael Joyce take notice of the forwarded correspondence. The e-mail does not contain attorney-client privileged information. Thus, the Custodian unlawfully denied access to the e-mail and must disclose it. <u>N.J.S.A. 47:1A-6.</u>
37.	N/A	Appears to be zoomed in sections of the correspondence attached to the e-mail. 2pgs.	Record contains attorney-client privileged information. <u>N.J.S.A. 47:1A-1.1.</u>	The correspondence appears to be the same as the attachment to Record No. 32. Therefore, the pages are withheld from disclosure. <u>N.J.S.A. 47:1A-1.1.</u>

Additionally, 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. In prior decisions, the Council has routinely required disclosure of certain information contained within e-mails, to include sender, recipients, date, time, subject, and salutations (where applicable). See Ray v. Freedom Acad. Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010); Verry v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-287 (Interim Order dated June 30, 2015).

Accordingly, as to the sender, recipients, date, time, subject, and salutations (where applicable) contained the requested e-mails, the Custodian has unlawfully denied access. See Ray, GRC 2009-185. Thus, the Custodian must disclose all of these portions of the responsive e-mails to the Complainant.

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 failed to comply fully with the Council's August 28, 2018 Interim Order because although he provided nine (9) copies of the sixty-four (64) pages of e-mails and certification within the prescribed time frame, he failed to provide a document index identifying each record in accordance with Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346, 354 (App. Div. 2005).
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 deliver⁸ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁹ to the Council Staff.¹⁰**
3. As to the sender, recipients, date, time, subject, and salutations (where applicable) contained 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). Thus, the Custodian must disclose all of these portions of the responsive e-mails to the Complainant.
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, and simultaneously provide 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: Samuel A. Rosado
Staff Attorney

April 23, 2019

⁸ 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.

⁹ "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."

¹⁰ 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.

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

August 28, 2018 Government Records Council Meeting

Scott M. Halliwell and Anthony G. Pennant
Complainant

Complaint No. 2016-201

v.

Borough of Brooklawn (Camden)
Custodian of Record

At the August 28, 2018 public meeting, the Government Records Council ("Council") considered the August 21, 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 Custodian's response to Item No. 1 of the Complainant's OPRA request was sufficient in that it provided a specific lawful basis for denying access to e-mails and other correspondence. Therefore, the Custodian did not violate OPRA under N.J.S.A. 47:1A-5(g). See D'Appolonio v. Borough of Deal (Monmouth), GRC Complaint No. 2008-62 (September 2009), and Bellan-Boyer v. N.J. Dep't of Cmty. Affairs, Comm'rs Office, GRC Complaint No. 2007-114 (October 2007).
2. The GRC must conduct an *in camera* review of the sixty-four (64) responsive e-mails to determine the validity of the Custodian's assertion that the records are exempt in their entirety under OPRA pursuant to attorney-client privilege. 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).
3. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 2 above), a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 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.**

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."



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

Interim Order Rendered by the
Government Records Council
On The 28th Day of August, 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: August 29, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
August 28, 2018 Council Meeting**

**Scott M. Halliwell and Anthony G. Pennant¹
Complainant**

GRC Complaint No. 2016-201

v.

**Borough of Brooklawn (Camden)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies of:

1. All correspondence (e-mails, letters, faxes, and memos) that were to or from the Custodian, Custodian's Counsel, Mayor Branella, Councilman Mevoli, Former Chief Fran McKinney, Current Chief Shamus Ellis, Sgt. Hirst, Officer Stires or Officer Nicolas between April 20, 2013 to present regarding the subject matter Scott Halliwell or Anthony Pennant.
2. Internal Affairs Annual Summary Reports for 2013-2015 including all Tables and Executive Summaries
3. All closed/executive session minutes of the Borough Council from May 1, 2013 to December 31, 2015.
4. The eight most recently released reports to the public that give a brief synopsis of all complaints where a fine or suspension of 10 days or more was assessed to an agency member. (These reports are required by the AG's Internal Affairs Guidelines, Requirement 10).

Custodian of Record: Ryan Giles

Requests Received by Custodian: June 15, 2016

Response Made by Custodian: June 15, 2016; July 6, 2016; July 14, 2016

GRC Complaint Received: July 18, 2016

Background³

Request and Response:

On June 15, 2015, the Complainant⁴ submitted an Open Public Records Act (OPRA") request seeking the above-mentioned records.⁵ That same day, the Custodian responded via e-mail,

¹ No representation listed on record.

² Represented by Timothy Higgins of the Law Office of Timothy Higgins (Cherry Hill, 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.

⁴ Although comprised of two (2) individuals, "Complainant" hereafter shall refer to Mr. Scott Halliwell.

⁵ The Complainant also sought these records under the common law right of access.

Scott M. Halliwell and Anthony G. Pennant v. Borough of Brooklawn (Camden), 2016-201 – Findings and Recommendations of the Council Staff

providing records responsive to Item No. 3. The Custodian also stated that an extension of time was needed for Item No. 1, and that records responsive to Item Nos. 2 and 4 would be provided when made available from the police department. Further, the Custodian stated that there may be a charge created from printing the e-mails and requested that the Complainant provide an amount he's willing to pay for the costs.

That same day, the Complainant responded to the Custodian, asserting that, based upon the advice of counsel, the Custodian could not charge a fee for electronic copies of e-mails. Additionally, the Complainant told the Custodian that he needed to provide a specific date when making requiring an extension of time to respond. Lastly, the Complainant stated that an IT professional or someone with access to the server should be performing the search for records, asserting that records in a user's local e-mail box may be deleted by that user. In response, the Custodian stated that the Borough of Brooklawn ("Borough") used Microsoft Exchange, and that he would be conducting the search. Additionally, the Custodian stated that he could charge a special service fee depending on the circumstances. The Custodian also stated that July 19, 2016 was the new deadline. Lastly, the Custodian stated that he did not know how to collect the responsive e-mails without printing them out, thus validating the imposition of a copying charge.

On June 22, 2016, the Complainant responded to the Custodian, asserting that the Custodian was required to provide a fee estimate that the Complainant could accept or reject. Additionally, the Complainant felt the extension to July 19, 2016 was excessive and would not agree to it. On June 23, 2016, the Custodian replied to the Complainant, offering a new deadline of July 6, 2016, and waiving the fee for "technology use." On June 27, 2016, the Complainant responded to the Custodian, agreeing to the July 6, 2016 deadline.

On June 28, 2016, the Custodian e-mailed the Complainant, requesting clarification on Item No. 1 of the OPRA request. The Custodian inquired as to whether the Complainant desired copies of e-mails and correspondence to which they already possess, either directly or via carbon-copy. The Complainant replied that same day, informing the Custodian that he does not require those e-mails.

On July 6, 2016, the Custodian responded to the Complainant's request via e-mail. The Custodian asserted that some of the records responsive to Item No. 1 were withheld from access as containing attorney-client privileged material pursuant to N.J.S.A. 47:1A-1.1. Additionally, the Custodian stated that all e-mails from 2013 and some e-mails from 2014 could not be recovered due to a server crash that occurred in 2014. The Custodian also provided records responsive to Item Nos. 2 and 3. Lastly, the Custodian asserted that no responsive records exist for Item No. 4.

On July 11, 2016, the Complainant replied to the Custodian. The Complainant asserted that the Custodian's response was not thorough and omitted responsive e-mails and correspondence. Additionally, the Complainant requested that the Custodian provide a 'Vaughn'⁶ index for the records withheld under attorney-client privilege, and noted that the Custodian's failure to provide

⁶ The term *Vaughn* index is derived from Vaughn v. Rosen, 484 F.2d 820, 826-28, 157 U.S. App. D.C. 340 (D.C. Cir. 1973), cert. denied, 415 U.S. 977, 94 S. Ct. 1564, 39 L. Ed. 2d 873 (1974). See Paff v. Div. of Law, 412 N.J. Super. 140, 161 n. 9, 988 A.2d 1239 (App. Div. 2010), certif. denied, 202 N.J. 45, 994 A.2d 1040 (2010).

A *Vaughn* index provides detailed justifications for the refusal to disclose documents claimed privileged. Ibid. Scott M. Halliwell and Anthony G. Pennant v. Borough of Brooklawn (Camden), 2016-201 – Findings and Recommendations of the Council Staff

one rendered his response insufficient. Lastly, the Complainant asserted that he did not receive a response regarding his common law right of access request.

On July 14, 2016, the Custodian responded to the Complainant, stating that all responsive records had been provided to the Complainant.

Denial of Access Complaint:

On July 18, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian’s response to Item No. 1 were withheld without including a Vaughn index. Additionally, the Complainant asserted that the Custodian failed to provide a response to his common law right of access request.

Statement of Information:

On August 5, 2016, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on June 15, 2016. The Custodian certified that he searched for responsive e-mails using “Halliwell” and “Pennant” as keywords. The Custodian also certified that he reached out to an IT person to help him be able to search for any responsive e-mails within the mailboxes of the other individuals simultaneously. Thereafter, the Custodian certified that he printed all of the responsive e-mails and cross-referenced them with e-mails he had already located from his own mailbox. The Custodian also certified that he worked with Chief Ellis of the Borough Police Department to find the Internal Affairs reports, as well as conduct a search for responsive e-mails on their server. Thereafter, the Custodian certified that he pulled all of the responsive executive minutes and created copies. The Custodian certified that he responded in writing on July 6, 2016.

The Custodian certified that sixty-four (64) pages of e-mails responsive to Item No. 1 were withheld from access pursuant to N.J.S.A. 47:1A-1.1, which protects records containing attorney-client privileged material from disclosure.

Analysis

Insufficient Response

OPRA provides that a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g). Further, in Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008), the GRC held that “[t]he Custodian’s response was legally insufficient because he failed to respond to each request item individually. Therefore, the Custodian has violated N.J.S.A. 47:1A-5(g).”

Further, OPRA provides that if a “custodian is unable to comply with a request for access, the custodian *shall indicate the specific basis therefor . . .* on the request form and promptly return it to the requestor.” N.J.S.A. 47:1A-5(g) (emphasis added). The Council has held that for a denial of access to be in compliance with OPRA, it must be specific and sufficient to prove that a custodian’s denial is authorized by OPRA. See D’Appolonio v. Borough of Deal (Monmouth),

GRC Complaint No. 2008-62 (September 2009); Lear, III v. City of Cape May (Cape May), GRC Complaint No. 2014-426 (Interim Order dated November 17, 2015).

However, in Bellan-Boyer v. N.J. Dep't of Cmty. Affairs, Comm'rs Office, GRC Complaint No. 2007-114 (October 2007), the complainant asserted that the custodian was required to provide a Vaughn index in accordance with Paff v. N.J. Dep't of Labor, 392 N.J. Super. 334 (App. Div. 2007). The Council disagreed, finding that the requirements set forth in Paff applied to the Custodian's SOI and accompanying certification under R. 1:4-4, and not at the time of the Custodian's response to the OPRA request.

Here, the Custodian responded to all four (4) items of the Complainant's ORPA request individually, in accordance with Paff, GRC 2007-272. The Custodian asserted that responsive records for Item No. 1 were withheld under attorney-client privilege under N.J.S.A. 47:1A-1.1, satisfying the requirement under D'Appolonio, GRC 2008-62. Although the Complainant asserted that the Custodian's failure to provide a Vaughn index for those withheld records is a violation, the Custodian was not required to produce the index at the time of the response. Bellan-Boyer, GRC 2007-114.

Accordingly, the Custodian's response to Item No. 1 of the Complainant's OPRA request was sufficient in that it provided a specific lawful basis for denying access to e-mails and other correspondence. Therefore, the Custodian did not violate OPRA under N.J.S.A. 47:1A-5(g). See D'Appolonio, GRC 2007-272, and Bellan-Boyer, GRC 2007-114.

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 Council⁷ 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

⁷ Paff v. N.J. Dep't of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

Scott M. Halliwell and Anthony G. Pennant v. Borough of Brooklawn (Camden), 2016-201 – Findings and Recommendations of the Council Staff

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 original Custodian denied the Complainant access to sixty-four (64) pages of e-mails and correspondence between several individuals and the Custodian’s Counsel regarding the Complainant based on the attorney-client privilege. N.J.S.A. 47:1A-1.1. The Complainant subsequently filed this complaint, arguing that the Custodian’s blanket assertion that the attorney client privilege exemption applied was insufficiently detailed. Thus, the GRC must review *in camera* the pages containing the disputed redactions in order to determine the full applicability of the cited exemptions.

Therefore, the GRC must conduct an *in camera* review of the sixty-four (64) responsive e-mails to determine the validity of the Custodian’s assertion that the records are exempt in their entirety under OPRA pursuant to attorney-client privilege. 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 Custodian’s response to Item No. 1 of the Complainant’s OPRA request was sufficient in that it provided a specific lawful basis for denying access to e-mails and other correspondence. Therefore, the Custodian did not violate OPRA under N.J.S.A. 47:1A-5(g). See D’Appolonio v. Borough of Deal (Monmouth), GRC Complaint No.

2008-62 (September 2009), and Bellan-Boyer v. N.J. Dep't of Cmty. Affairs, Comm'rs Office, GRC Complaint No. 2007-114 (October 2007).

2. The GRC must conduct an *in camera* review of the sixty-four (64) responsive e-mails to determine the validity of the Custodian's assertion that the records are exempt in their entirety under OPRA pursuant to attorney-client privilege. 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).
3. **The Custodian must deliver⁸ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 2 above), a document or redaction index⁹, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,¹⁰ 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.**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Samuel A. Rosado
Staff Attorney

August 21, 2018

⁸ 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.

⁹ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

¹⁰ "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."

Scott M. Halliwell and Anthony G. Pennant v. Borough of Brooklawn (Camden), 2016-201 – Findings and Recommendations of the Council Staff