



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**

**November 12, 2019 Government Records Council Meeting**

Robert S. Daniel  
Complainant

Complaint No. 2017-164

v.

NJ Transit  
Custodian of Record

At the November 12, 2019 public meeting, the Government Records Council (“Council”) considered the October 30, 2019 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian failed to comply with the Council’s July 30, 2019 Interim Order because although she responded in the prescribed time frame, she failed to provide enough unredacted copies of the requested meeting minutes. The Custodian also failed to provide any redacted copies of the requested meeting minutes in accordance with the Council’s Order.
2. **The *In Camera* Examination set forth in the above table reveals the Custodian has lawfully redacted portions of the records listed in the document index pursuant to N.J.S.A. 47:1A-6.**
3. The Custodian failed to timely respond to the Complainant’s February 18, 2017 OPRA request. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Additionally, the Custodian failed to fully comply with the Council’s July 30, 2019 Interim Order. However, the Custodian lawfully redacted the four (4) requested meeting minutes. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. 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 12<sup>th</sup> Day of November 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: November 15, 2019**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director  
November 12, 2019 Council Meeting**

**Robert S. Daniel<sup>1</sup>  
Complainant**

**GRC Complaint No. 2017-164**

v.

**N.J. Transit<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies of: “all records and correspondence, meeting minutes, e-mails and inter-office, inter-agency correspondence regarding the determination to cancel the bid 16-014X – Portal Bridge Preparatory which was due on July 12, 2016. It was work for ‘Temporary Fiber Optics Poles, Construction Access Finger Pier and 138KV Monopoles, Utility Protection Structure.’”

**Custodian of Record:** Rebeca Hernandez

**Request Received by Custodian:** February 18, 2017

**Response Made by Custodian:** March 2, 2017; March 23, 2017; April 27, 2017; May 26, 2017; June 23, 2017; July 7, 2017; July 14, 2017

**GRC Complaint Received:** August 2, 2017

**Records Submitted for *In Camera* Examination:** Nine (9) redacted and unredacted copies of the four (4) meeting minutes containing advisor, consultative, or deliberative (“ACD”) material. N.J.S.A. 47:1A-1.1.

**Background**

**July 30, 2019 Council Meeting:**

At its July 30, 2019 public meeting, the Council considered the July 23, 2019 Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant’s February 18, 2017 OPRA request based on unwarranted and unsubstantiated extensions. N.J.S.A. 47:1A-6; Rodriguez v. Kean Univ., GRC Complaint No. 2016-296 (November 2018). As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access,

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Deputy Attorney General Aziz O. Nekoukar.

within the statutorily mandated seven (7) business days or a reasonably necessary extension thereof, results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

2. The GRC must conduct an *in camera* review of the four (4) redacted meeting minutes to determine the validity of the Custodian’s assertion that the redactions are valid under OPRA’s exemption for advisory, consultative, and/or deliberative material. N.J.S.A. 47:1A-1.1. See Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).
3. **The Custodian shall deliver<sup>3</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 2 above), nine (9) copies of the redacted records, a document or redaction index<sup>4</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,<sup>5</sup> 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 1, 2019, the Council distributed its Interim Order to all parties on. On August 8, 2019, the Custodian responded to the Council’s Interim Order. The Custodian provided four (4) unredacted copies of the four (4) responsive meeting minutes, as well as a redaction index. The Custodian also provided a certified confirmation of compliance to the Council Staff.<sup>6</sup>

#### Analysis

#### Compliance

At its July 30, 2019 meeting, the Council ordered the Custodian to provide nine (9) redacted and unredacted copies of the four (4) responsive meeting minutes for *in camera* review. Further the Council ordered the Custodian to provide a redaction index and submit certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the GRC. On August 1, 2019, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days

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<sup>3</sup> The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives them by the deadline.

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

<sup>5</sup> "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."

<sup>6</sup> On October 18, 2019, at the GRC’s request, the Custodian provided five (5) additional unredacted copies and nine (9) redacted copies of the requested records for *in camera* review.

to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on August 8, 2019.

On August 8, 2019, the fifth (5<sup>th</sup>) business day after receipt of the Council's Order, the Custodian delivered four (4) unredacted copies of the requested minutes to the GRC for *in camera* review, along with a redaction index and certification. However, the Custodian failed to provide the five (5) additional copies as requested. The Custodian also failed to provide any redacted copies of the requested minutes for in camera review.

Therefore, the Custodian failed to comply with the Council's July 30, 2019 Interim Order because although she responded in the prescribed time frame, she failed to provide enough unredacted copies of the requested meeting minutes. The Custodian also failed to provide any redacted copies of the requested meeting minutes in accordance with the Council's Order.

### **Unlawful Denial of Access**

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

OPRA provides that the definition of a government record "shall not include . . . [ACD] material." It is evident that this phrase is intended to exclude from the definition of a government record the types of documents that are the subject of the "deliberative process privilege." See O'Shea v. West Milford Bd. of Educ., GRC Complaint No. 2004-93 (April 2006). When the exception is invoked, a governmental entity may "withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated." Educ. Law Ctr. v. N.J. Dep't of Educ., 198 N.J. 274, 285 (2009) (citing NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975)). The New Jersey Supreme Court has also ruled that a record that contains or involves factual components is entitled to deliberative-process protection under the exemption in OPRA when it was used in decision-making process and its disclosure would reveal deliberations that occurred during that process. Educ. Law Ctr., 198 N.J. at 297.

A custodian claiming an exception to the disclosure requirements under OPRA on that basis must initially satisfy two conditions: 1) the document must be pre-decisional, meaning that the document was generated prior to the adoption of the governmental entity's policy or decision; and 2) the document must reflect the deliberative process, which means that it must contain opinions, recommendations, or advice about agency policies. Id. at 286 (internal citations and quotations omitted). The key factor in this determination is whether the contents of the document reflect "formulation or exercise of . . . policy-oriented judgment or the process by which policy is formulated." Id. at 295 (adopting the federal standard for determining whether material is "deliberative" and quoting Mapother v. Dep't of Justice, 3 F.3d 1533, 1539 (D.C. Cir. 1993)). Once the governmental entity satisfies these two threshold requirements, a presumption of

confidentiality is established, which the requester may rebut by showing that the need for the materials overrides the government's interest in confidentiality. Id. at 286-87.

The Council has also repeatedly held that draft records of a public agency fall within the deliberative process privilege. In Dalesky v. Borough of Raritan (Somerset), GRC Complaint No. 2008-61 (November 2009), the Council, in upholding the custodian's denial as lawful, determined that the requested record was a draft document and that draft documents in their entirety are ACD material pursuant to N.J.S.A. 47:1A-1.1. Subsequently, in Shea v. Village of Ridgewood (Bergen), GRC Complaint No. 2010-79 (February 2011), the custodian certified that a requested letter was a draft that had not yet been reviewed by the municipal engineer. The Council, looking to relevant case law, concluded that the requested letter was exempt from disclosure under OPRA as ACD material. See also Libertarians for Transparent Gov't v. Gov't Records Council, 453 N.J. Super. 83 (App. Div. 2018) (draft meeting minutes exempt from disclosure); Ciesla v. N.J. Dep't of Health and Senior Servs., GRC Complaint No. 2010-38 (May 2011), aff'd Ciesla v. N.J. Dep't of Health & Senior Servs., 429 N.J. Super. 127 (App. Div. 2012) (draft staff report).

The GRC conducted an *in camera* examination on the submitted records. The results of this examination are set forth in the following table:

<b>Record Number</b>	<b>Record Name/Date</b>	<b>Description of Record or Redaction</b>	<b>Custodian's Explanation/ Citation for Non-disclosure or Redactions</b>	<b>Findings of the <i>In Camera</i> Examination<sup>7</sup></b>
1.	N.J. Transit Capital Planning, Policy & Privatization Committee ("Committee") Meeting Minutes, dated August 16, 2016 (4 pgs.).	The redactions contain questions and responses amongst the members regarding an unawarded contract as well as awarded contracts. The redactions also	They are pre-decisional, as they address matters of project forecasting, staffing issues, hiring of consultants, purchasing snags, and other planning	As the redactions contain opinions, advice, and recommendations on policy actions, as well as providing factual information used by the Committee in its

<sup>7</sup> **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.

		contain the advice and recommendations regarding compliance with a specific federal law.	questions. They are deliberative insofar as there is commentary from relevant staff documenting their opinions and advice about how to proceed on these pre-decisional matters. <u>N.J.S.A. 47:1A-1.1.</u>	decision-making process, the Custodian properly redacted the record. <u>N.J.S.A. 47:1A-1.1.</u>
2.	N.J. Transit Combined Chairman's Agenda Review & Capitol Planning, Police & Privatization Committee, dated January 23, 2017 (7 pgs.).	The redactions contain advice and recommendations regarding an amendment to a contract. The redactions also pertain to recommendations and advice on contract awards and extensions.	They are pre-decisional, as they address matters of project forecasting, staffing issues, hiring of consultants, purchasing snags, and other planning questions. They are deliberative insofar as there is commentary from relevant staff documenting their opinions and advice about how to proceed on these pre-decisional matters. <u>N.J.S.A. 47:1A-1.1.</u>	As the redactions contain opinions, advice, and recommendations on policy actions, as well as providing factual information used by the Committee in its decision-making process, the Custodian properly redacted the record. <u>N.J.S.A. 47:1A-1.1.</u>
3.	Board Meeting Executive Session Minutes, dated March 8, 2017 (11 pgs.).	The redactions contain advice and recommendations regarding federal law adherence as well as personnel issues. The redactions also pertained to an upcoming contract award and a draft document detailing the award. Pgs. 6-	They are pre-decisional, as they address matters of project forecasting, staffing issues, hiring of consultants, purchasing snags, and other planning questions. They are deliberative insofar as there is commentary from	As the redactions contain opinions, advice, and recommendations on policy actions, as well as providing factual information used by the Committee in its decision-making process, the Custodian properly

		11 of the record is a copy of the draft document.	relevant staff documenting their opinions and advice about how to proceed on these pre-decisional matters. <u>N.J.S.A. 47:1A-1.1.</u>	redacted the record. <u>N.J.S.A. 47:1A-1.1.</u>  The draft document detailing the award was also properly redacted. <u>N.J.S.A. 47:1A-1.1.</u>
4.	N.J. Transit Capital Planning, Policy & Privatization Committee Meeting Minutes, dated February 21, 2016 (6 pgs.).	The redactions contain advice and recommendations regarding contract amendments and upcoming proposals. The redactions also contain opinions and advice on a pending contract award.	They are pre-decisional, as they address matters of project forecasting, staffing issues, hiring of consultants, purchasing snags, and other planning questions. They are deliberative insofar as there is commentary from relevant staff documenting their opinions and advice about how to proceed on these pre-decisional matters. <u>N.J.S.A. 47:1A-1.1.</u>	As the redactions contain opinions, advice, and recommendations on policy actions, as well as providing factual information used by the Committee in its decision-making process, the Custodian properly redacted the record. <u>N.J.S.A. 47:1A-1.1.</u>

Thus, the Custodian lawfully redacted portions of the requested meeting minutes because they contained opinions, advice, and recommendations pertaining to several policy actions under the Committee’s control. Such actions included review and alteration of contracts and contract awards. The redactions also included a draft document announcing a contract award that was attached to one (1) of the meeting minutes.

Accordingly, the Custodian lawfully redacted the four (4) meeting minutes because they contained ACD material as well as a draft document. N.J.S.A. 47:1A-1.1.; Ciesla, 429 N.J. Super. at 127. Thus, there was no unlawful denial of access. N.J.S.A. 47:1A-6.

**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 failed to timely respond to the Complainant’s February 18, 2017 OPRA request. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Additionally, the Custodian failed to fully comply with the Council’s July 30, 2019 Interim Order. However, the Custodian lawfully redacted the four (4) requested meeting minutes. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. 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 failed to comply with the Council’s July 30, 2019 Interim Order because although she responded in the prescribed time frame, she failed to provide enough unredacted copies of the requested meeting minutes. The Custodian also failed to provide any redacted copies of the requested meeting minutes in accordance with the Council’s Order.
2. **The *In Camera* Examination set forth in the above table reveals the Custodian has lawfully redacted portions of the records listed in the document index pursuant to N.J.S.A. 47:1A-6.**
3. The Custodian failed to timely respond to the Complainant’s February 18, 2017 OPRA request. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Additionally, the Custodian failed to fully comply with the Council’s July 30, 2019 Interim Order. However, the Custodian lawfully redacted the four (4) requested meeting minutes. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. 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

October 30, 2019



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

PHILIP D. MURPHY  
Governor

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

**INTERIM ORDER**

**July 30, 2019 Government Records Council Meeting**

Robert S. Daniel  
Complainant  
v.  
NJ Transit  
Custodian of Record

Complaint No. 2017-164

At the April 30, 2019 public meeting, the Government Records Council (“Council”) considered the July 23, 2019 Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant’s February 18, 2017 OPRA request based on unwarranted and unsubstantiated extensions. N.J.S.A. 47:1A-6; Rodriguez v. Kean Univ., GRC Complaint No. 2016-296 (November 2018). As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, within the statutorily mandated seven (7) business days or a reasonably necessary extension thereof, results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The GRC must conduct an *in camera* review of the four (4) redacted meeting minutes to determine the validity of the Custodian’s assertion that the redactions are valid under OPRA’s exemption for advisory, consultative, and/or deliberative material. N.J.S.A. 47:1A-1.1. See Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).
3. **The Custodian shall deliver<sup>1</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 2 above), nine (9) copies of the redacted records, a document or redaction index<sup>2</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,<sup>3</sup> that the records provided are the records requested by the Council for the *in***

<sup>1</sup> The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives them by the deadline.

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

<sup>3</sup> "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."

***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.

Interim Order Rendered by the  
Government Records Council  
On The 30<sup>th</sup> Day of July 2019

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: August 1, 2019**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Robert S. Daniel<sup>1</sup>  
Complainant**

**GRC Complaint No. 2017-164**

v.

**N.J. Transit<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies of: “all records and correspondence, meeting minutes, e-mails and inter-office, inter-agency correspondence regarding the determination to cancel the bid 16-014X – Portal Bridge Preparatory which was due on July 12, 2016. It was work for ‘Temporary Fiber Optics Poles, Construction Access Finger Pier and 138KV Monopoles, Utility Protection Structure.’”

**Custodian of Record:** Rebeca Hernandez

**Request Received by Custodian:** February 18, 2017

**Response Made by Custodian:** March 2, 2017; March 23, 2017; April 27, 2017; May 26, 2017; June 23, 2017; July 7, 2017; July 14, 2017

**GRC Complaint Received:** August 2, 2017

**Background<sup>3</sup>**

**Request and Response:**

On February 18, 2017, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On March 2, 2017, the Custodian responded in writing stating that an extension of time was needed to provide a response, to until March 23, 2017. On March 23, 2017, the Custodian responded in writing, advising that an extension until April 28, 2017 was necessary to adequately respond to the request. On April 28, 2017, the Custodian responded in writing, advising that an extension until May 26, 2017 was necessary to adequately respond to the request. On May 26, 2017, the Custodian responded in writing, advising that an extension until June 23, 2017 was necessary to adequately respond to the request. On June 23, 2017, the Custodian responded in writing, advising that an extension until July 7, 2017 to adequately respond to the request. On July 7, 2017, the Custodian responded in writing, advising that an extension until July 14, 2017 to adequately respond to the request.

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Deputy Attorney General Aziz O Nekoukar.

<sup>3</sup> 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.

On July 14, 2017, the Custodian responded in writing, denying in part and providing records in part. Regarding the portion of the request seeking “all record and correspondence,” the Custodian denied access, stating that OPRA only requires custodians to disclose online identifiable government records that are specifically described in the request. Gannett N.J. Partners, LP v. Cnty. of Middlesex, 379 N.J. Super. 205, 212 (App. Div. 2005); MAG Entm’t, LLC v Div. of ABC, 375 N.J. Super. 534, 549 (App. Div. 2005); Bent v. Twp. of Stafford, 381 N.J. Super. 30, 37 (App. Div. 2005). The Custodian noted that some correspondence records were provided but stated that clarification was needed to locate the desired records.

Regarding the remainder of the request, the Custodian provided records with some containing redactions. The Custodian stated that the basis for redactions were: 1) to protect personal information such as home addresses; 2) to exclude “information, which if disclosed would give an advantage to competitors or bidders;” 3) to protect “trade secrets and propriety commercial or financial information;” and 4) records that contain “advisory, consultative or deliberative [“ACD”] material” or which are protected by the attorney-client privilege and deemed confidential pursuant to OPRA. N.J.S.A. 47:1A-1.1.

#### Denial of Access Complaint:

On August 2, 2017, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant initially asserted that the numerous postponements constituted a violation of OPRA under N.J.S.A. 47:1A-5(g) and (i). See also Richard v. N.J. Dep’t of Treas., GRC Complaint No. 2015-117 (November 2016) and Ciccarone v. N.J. Dep’t of Treas., GRC Complaint No. 2013-280 (Interim Order dated July 29, 2014).

The Complainant also argued that the Custodian failed to adequately describe the basis of the redactions made to the provided records. Specifically, the Complainant identified four (4) records at issue:

- 1) August 16, 2016 Capital Planning, Policy & Privatization Meeting Minutes
- 2) January 23, 2017 Combined Chairman’s Agenda Review and Capital Planning, Policy & Privatization Committee Meeting Minutes
- 3) February 21, 2016 Capital Planning, Policy & Privatization Committee Meeting Minutes
- 4) March 8, 2017 Executive Session of Board of Directors
  - a. Minutes 50622 - 50625
  - b. Discussion 50628 - 50632

The Complainant requested that the GRC evaluate the redactions to determine whether they were valid. The Complainant also asserted that evaluation was warranted since the subject bid has been canceled and awarded to a new bidder.

#### Statement of Information:

On August 25, 2017, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on February 18, 2017. The Custodian certified that she responded in writing on July 14, 2017, providing records with

redactions made to some, but denied access to the portion of the request seeking “all records and correspondence” as invalid.

The Custodian asserted that the redactions to the records at issue were lawfully redacted the records at issue under the ACD privilege. See N.J.S.A. 47:1A-1.1. The Custodian noted that in order to be considered ACD in nature, a record must meet a two-prong test: 1) the record is pre-decisional (created prior to adoption of a policy); and 2) the record is deliberative (containing opinions, recommendations or advice about that policy). See Educ. Law Ctr. v. Dep’t of Educ., 198 N.J. 274, 286, 299 (2007).

The Custodian contended that the meeting minutes at issue are inherently pre-decisional. The Custodian asserted that the committees are tasked with advising and reporting to the Board members of N.J. Transit. The Custodian contended that the committee minutes were “part of the process by which government decision and policies are formulated.” Id. at 286. The Custodian then argued that minutes at issue were used in the decision-making process. The Custodian asserted that the minutes depicted the deliberations undertaken by Board members and other committee members tasked with reporting to the board. The Custodian therefore asserted that the deliberations were relevant to and informed the decision-making process.

The Custodian also noted that the cancelation of the relevant bid award does not take away the privilege. The Custodian contended that the privilege was intended to ensure “free and uninhibited communication” by governmental agencies. See Ciesla v. N.J. Dep’t of Health & Sr. Servs., 429 N.J. Super. 127, 137 (App. Div. 2012). The Custodian argued that disclosure of deliberations “would impede agency functions by discouraging open and frank discussion and recommendations from agency employees.” Id. at 139. The Custodian thus argued that the privilege generally applies to the deliberative process even after the conclusion of the matter.

The Custodian further contended that she properly responded within each extended time frame providing an anticipated date on which she would respond. Rivera v. City of Plainfield Police Dep’t (Union), GRC Complaint No. 2009-317 (May 2011); Criscione v. Town of Guttenberg (Hudson), GRC Complaint No. 2010-68 (November 2010); Rivera v. Union City Bd. of Educ. (Hudson), GRC Complaint No. 2008-112 (April 2010); O’Shea v. Borough of Hopatcong (Sussex), GRC Complaint No. 2009-223 (December 2010); and Starkey v. NJ Dep’t of Transp., GRC Complaint Nos. 2007-315 through 317 (February 2009).

The Custodian asserted that given that N.J. Transit receives dozens of OPRA requests per day, she properly requested and extension of time to respond in writing, given the scope of the Complainant’s request. The Custodian argued that each extension was requested in writing and included a date certain as required under OPRA. See Paff v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-77 (June 2012). The Custodian thus argued that the Complainant’s argument does not provide a basis for a deemed denial.

## Analysis

### Timeliness

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian's failure to respond within the required seven (7) business days results in a "deemed" denial. Id. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).<sup>4</sup> Thus, a custodian's failure to respond in writing to a complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

In Rivera, GRC 2009-317, the custodian responded in writing to the complainant's request on the fourth (4<sup>th</sup>) business day by seeking an extension of time to respond and providing an anticipated date by which the requested records would be made available. The complainant did not consent to the custodian's request for an extension of time. The Council stated that:

The Council has further described the requirements for a proper request for an extension of time. Specifically, in [Starkey, GRC 2007-315, *et seq.*], the Custodian provided the Complainant with a written response to his OPRA request on the second (2<sup>nd</sup>) business day following receipt of said request in which the Custodian requested an extension of time to respond to said request and provided the Complainant with an anticipated deadline date upon which the Custodian would respond to the request. The Council held that "because the Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated deadline date of when the requested records would be made available, the Custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5(g) [and] N.J.S.A. 47:1A-5(i)."

Further, in Criscione, GRC 2010-68, the Council held that the custodian did not unlawfully deny access to the requested records, stating in pertinent part that:

[B]ecause the Custodian provided a written response requesting an extension on the sixth (6<sup>th</sup>) business day following receipt of the Complainant's OPRA request and providing a date certain on which to expect production of the records requested, and, notwithstanding the fact that the Complainant did not agree to the extension of time requested by the Custodian, the Custodian's request for an extension of time [to a specific date] to respond to the Complainant's OPRA request was made in writing within the statutorily mandated seven (7) business day response time.

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<sup>4</sup> A custodian's written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.



Moreover, in Werner, GRC 2011-151, the Council again addressed whether the custodian lawfully sought an extension of time to respond to the complainant’s OPRA request. The Council concluded that because the custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated date by which the requested records would be made available, the custodian properly requested the extension pursuant to OPRA. See also Rivera, GRC 2009-317; Criscione, GRC 2010-68; and Starkey, GRC 2007-315, *et seq.*

Although extensions are rooted in well-settled case law, the Council need not find valid every request for an extension containing a clear deadline. In Ciccarone v. N.J. Dep’t of Treasury, GRC Complaint No. 2013-280 (Interim Order dated July 29, 2014), the Council found that the custodian could not lawfully exploit the process by repeatedly rolling over an extension once obtained. In reaching the conclusion that the continuous extensions resulted in a “deemed” denial of access, the Council looked to what is “reasonably necessary.”

In the instant matter, the Custodian sought six (6) extensions for the Complainant’s OPRA request as follows:

<b>Date of Request for Extension</b>	<b>New Deadline for Response</b>	<b>Reason for Extension</b>
March 2, 2017	March 23, 2017	“In order to adequately respond to [the] request . . . .”
March 23, 2017	April 28, 2017	“In order to adequately respond to [the] request . . . .”
April 28, 2017	May 26, 2017	“In order to adequately respond to [the] request . . . .”
May 26, 2017	June 23, 2017	“In order to adequately respond to [the] request . . . .”
June 23, 2017	July 7, 2017	“In order to adequately respond to [the] request . . . .”
July 7, 2017	July 14, 2017	“In order to adequately respond to [the] request . . . .”

The Complainant’s OPRA request sought records and correspondence pertaining to the cancellation of a contract award. The Complainant did not identify senders or recipients of the correspondence or specify a time period. The Custodian extended the response time on six (6) occasions before responding on July 14, 2017, stating that the request was invalid. Those extensions amounted to ninety-three (93) business days.<sup>5</sup> As noted above, a requestor’s approval is not required for a valid extension. The GRC notes, however, that the Complainant did not object to the Custodian’s extensions of time prior to filing this complaint.<sup>6</sup>

<sup>5</sup> The time period is notwithstanding any closures or holidays that might have occurred during the time frame.

<sup>6</sup> In Ciccarone, GRC 2013-280, the complainant allowed for a few extensions before denying the custodian any additional time. Although the complainant’s acquiescence to extensions was a mitigating factor there, it was not the only factor on which the GRC relied to determine whether the requests for extension were reasonable.

To determine if the extended time for a response is reasonable, the GRC must first consider the complexity of the request as measured by the number of items requested, the ease in identifying and retrieving requested records, and the nature and extent of any necessary redactions. Ciccarone, GRC 2013-280. The GRC must next consider the amount of time the custodian already had to respond to the request. Id. Finally, the GRC must consider any extenuating circumstances that could hinder the custodian's ability to respond effectively to the request.<sup>7</sup> Id.

In determining whether the extensions were ultimately unreasonable, the GRC looks to its prior decision in Rodriguez v. Kean Univ., GRC Complaint No. 2016-296 (November 2018). In Rodriguez, GRC 2016-296, the Council found that the custodian's thirty (30) business day extension to respond that the request was invalid was unreasonable. The Council held that the custodian provided no evidence, such as a search, to justify the need for thirty (30) additional business days to respond that the request was invalid. Additionally, in Rodriguez v. Kean Univ., GRC Complaint No. 2016-88 (April 2017), the complainant sought access to "any document" regarding Kean's itemized expenditures for 2013 and 2014, noting that they would likely be similar to an "Expenditure" report provided as part of a prior request. The custodian sought sixty-three (63) business days of extensions to provide nine (9) pages of responsive Wenzhou expense report screenshots. The Council held that such an extension was unwarranted and unsubstantiated. This is notwithstanding that the custodian's search required additional steps because Kean's new expenditure process did not produce "Expenditure" reports *per se*. The Council, in rendering this decision, noted that there were no "particularly harmful extenuating circumstances that would have warranted such a delay."

The GRC sees the facts here as similar to Rodriguez, GRC 2016-296. Specifically, the Custodian sought substantially more business days in the current matter to ultimately determine that a portion of the request was invalid. Additionally, the Custodian failed to detail the search conducted that may justify the repeated extensions. The Custodian's production of records notwithstanding, based on the evidence of record the GRC finds that extending the response time for the OPRA request to the extent demonstrated in the instant matter was excessive and contrary to OPRA's mandate to "promptly comply" with a records request and to grant or deny access "as soon as possible . . ." N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i).

Therefore, the Custodian did not bear her burden of proof that she timely responded to the Complainant's February 18, 2017 OPRA request based on unwarranted and unsubstantiated extensions. N.J.S.A. 47:1A-6; Rodriguez, GRC 2016-296. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, within the statutorily mandated seven (7) business days or a reasonably necessary extension thereof, results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11.

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<sup>7</sup> "Extenuating circumstances" could include, but not necessarily be limited to, retrieval of records that are in storage or archived (especially if located at a remote storage facility), conversion of records to another medium to accommodate the requestor, emergency closure of the custodial agency, or the custodial agency's need to reallocate resources to a higher priority due to *force majeure*.

## 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 Council<sup>8</sup> that accepted the custodian’s legal conclusion for the denial of access without further review. The Appellate Division noted that “OPRA contemplates the GRC’s meaningful review of the basis for an agency’s decision to withhold government records . . . . When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers.” Id. The Court stated that:

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

[Id. at 355.]

Further, the Court found that:

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

[Id.]

In the instant matter, the Custodian asserted that the redacted portions of the meeting minutes contain ACD material and are therefore not subject to access under OPRA. N.J.S.A. 47:1A-1.1. As part of the SOI, the Custodian provided descriptions of the redacted sections.

Notwithstanding the Custodian’s description, a “meaningful review” is necessary to determine whether all redacted records reasonably fell within the ACD exemption. The GRC must

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<sup>8</sup> Paff v. N.J. Dep’t of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

thus review same in order to determine the full applicability of exemption. Such an action is not uncommon, as the GRC will routinely perform an *in camera* review in similar circumstances. See Pouliot v. N.J. Dep't of Educ., GRC Complaint No. 2015-281 (Interim Order dated January 31, 2017).

Therefore, the GRC must conduct an *in camera* review of the four (4) redacted meeting minutes to determine the validity of the Custodian's assertion that the redactions are valid under OPRA's exemption for ACD material. N.J.S.A. 47:1A-1.1. See Paff, 379 N.J. Super. at 346.

### **Knowing & Willful**

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

### **Conclusions and Recommendations**

The Council Staff respectfully recommends the Council find that:

1. The Custodian did not bear her burden of proof that she timely responded to the Complainant's February 18, 2017 OPRA request based on unwarranted and unsubstantiated extensions. N.J.S.A. 47:1A-6; Rodriguez v. Kean Univ., GRC Complaint No. 2016-296 (November 2018). As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, within the statutorily mandated seven (7) business days or a reasonably necessary extension thereof, results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The GRC must conduct an *in camera* review of the four (4) redacted meeting minutes to determine the validity of the Custodian's assertion that the redactions are valid under OPRA's exemption for advisory, consultative, and/or deliberative material. N.J.S.A. 47:1A-1.1. See Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).
3. **The Custodian shall deliver<sup>9</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 2 above), nine (9) copies of the redacted records, a document or redaction index<sup>10</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,<sup>11</sup> that the records provided are the records requested by the Council for the *in***

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<sup>9</sup> The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives them by the deadline.

<sup>10</sup> The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

<sup>11</sup> "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."

***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.

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July 23, 2019