



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

Richard E. Salkin
Complainant

Complaint No. 2017-191

v.

City of Hackensack (Bergen)
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 complied with the Council’s September 24, 2019 Interim Order because she responded in the prescribed time frame providing the Council the appropriate record ordered for an *in camera* review. Additionally, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.
2. **The *In Camera* Examination set forth above reveals the Custodian has lawfully redacted portions of the requested e-mail correspondence under the exemption for records containing inter-agency or intra-agency advisory, consultative, or deliberative material pursuant to N.J.S.A. 47:1A-1.1. N.J.S.A. 47:1A-6.**
3. Because there has been no unlawful denial of access here, the Council should decline to address whether a knowing and willful violation occurred.

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



Final Decision Rendered by the
Government Records Council
On The 12th 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**

**Richard E. Salkin¹
Complainant**

GRC Complaint No. 2017-191

v.

**City of Hackensack (Bergen)²
Custodial Agency**

Records Relevant to Complaint: “All emails and other preserved communications, or notes memorializing same, authored by the City Manager or his office to . . . the City Council, any employee/official of the City of Hackensack, Linda Sylvestri, Scott Vickery. And any such communications from those parties to the City Manager, City Council, or other officials/employees of the City, or above-named individuals pertaining to the following subject matter from 1/1/2016 through the present:

- A. Farrington Landscaping
- B. John Farrington
- C. 174 Ross Avenue, Hackensack, NJ and/or the owner thereof”

Custodian of Record: Deborah Karlsson

Request Received by Custodian: August 30, 2017

Response Made by Custodian: September 8, 2017; September 26, 2017

GRC Complaint Received: September 26, 2017

Records Submitted for *In Camera* Examination: Nine (9) redacted and unredacted copies of the e-mail correspondence dated November 16, 2016, alleged to contain advisory, consultative and deliberative (“ACD”) material. N.J.S.A. 47:1A-1.1.

Background

September 24, 2019 Council Meeting:

At its September 24, 2019 public meeting, the Council considered the September 17, 2019 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The GRC must conduct an *in camera* review of the redacted e-mail to determine the validity of the Custodian’s assertion that the redaction is valid under OPRA’s

¹ No legal representation listed on record.

² Represented by Bradley D. Tishman, Esq., of Cleary Giacobbe Alfieri Jacobs, LLC (Oakland, NJ).

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).

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

Procedural History:

On September 26, 2019, the Council distributed its Interim Order to all parties. On October 3, 2019, the Custodian responded to the Council's Interim Order. The Custodian provided nine (9) redacted and unredacted copies of the e-mail correspondence, as well as a redaction index. The Custodian also provided a certified confirmation of compliance to the Executive Director.

The Custodian maintained that the redaction was valid under OPRA's exemption for ACD material. N.J.S.A. 47:1A-1.1.

Analysis

Compliance

At its September 24, 2019 meeting, the Council ordered the Custodian to provide nine (9) redacted and unredacted copies of the e-mail correspondence 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 Executive Director. On September 26, 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 October 3, 2019.

On October 3, 2019, the fifth (5th) business day after receipt of the Council's Order, the Custodian delivered nine (9) redacted and unredacted copies of the e-mail to the GRC for an *in*

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 the GRC physically receives them 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."

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

Therefore, the Custodian complied with the Council's September 24, 2019 Interim Order because she responded in the prescribed time frame providing the Council the appropriate record ordered for an *in camera* review. Additionally, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.

Unlawful Denial of Access

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

OPRA provides that the definition of a government record "shall not include . . . [ACD] material." N.J.S.A. 47:1A-1.1. 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 GRC conducted an *in camera* examination of the submitted record. The record is an e-mail correspondence from Ted Ehrenburg to Kathleen Canestrino and Al Borrelli, with copy to Jan McBride and Jaclyn Stout regarding Farrington Landscaping dated November 10, 2016.

Upon review, the record supports the Custodian's contention that the redacted paragraph within the e-mail constituted ACD material. The paragraph contains the opinion and recommendation of the author regarding an enacted city ordinance based upon previously received information. Thus, the paragraph satisfies both prongs in that it contained the opinion and recommendation on a city's ordinance subject to amendment by the city council.

Thus, the Custodian lawfully redacted the e-mail responsive to the Complainant's August 30, 2017 OPRA request, as the redacted paragraph fell within OPRA's ACD exemption. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-1.1; Educ. Law Ctr., 198 N.J. at 285-86. For this reason, no disclosure is warranted.

Knowing & Willful

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's September 24, 2019 Interim Order because she responded in the prescribed time frame providing the Council the appropriate record ordered for an *in camera* review. Additionally, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.
2. **The *In Camera* Examination set forth above reveals the Custodian has lawfully redacted portions of the requested e-mail correspondence under the exemption for records containing inter-agency or intra-agency advisory, consultative, or deliberative material pursuant to N.J.S.A. 47:1A-1.1. N.J.S.A. 47:1A-6.**
3. Because there has been no unlawful denial of access here, the Council should decline to address whether a knowing and willful violation occurred.

Prepared By: 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

September 24, 2019 Government Records Council Meeting

Richard E. Salkin
Complainant
v.
City of Hackensack
Custodian of Record

Complaint No. 2017-191

At the September 24, 2019 public meeting, the Government Records Council (“Council”) considered the September 17, 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 GRC must conduct an *in camera* review of the redacted e-mail to determine the validity of the Custodian’s assertion that the redaction is 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).
2. **The Custodian shall deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see conclusion No. 1 above), nine (9) copies of the redacted record, a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,³ that the record provided is the record requested by the Council for the *in camera* inspection. Such delivery must be received by the Executive Director within five (5) business days from receipt of the Council’s Interim Order.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

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

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

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

Interim Order Rendered by the
Government Records Council
On The 24th Day of 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 26, 2019

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Richard E. Salkin¹
Complainant**

GRC Complaint No. 2017-191

v.

**City of Hackensack²
Custodial Agency**

Records Relevant to Complaint: “All emails and other preserved communications, or notes memorializing same, authored by the City Manager or his office to . . . the City Council, any employee/official of the City of Hackensack, Linda Sylvestri, Scott Vickery. And any such communications from those parties to the City Manager, City Council, or other officials/employees of the City, or above-named individuals pertaining to the following subject matter from 1/1/2016 through the present:

- A. Farrington Landscaping
- B. John Farrington
- C. 174 Ross Avenue, Hackensack, NJ and/or the owner thereof”

Custodian of Record: Deborah Karlsson

Request Received by Custodian: August 30, 2017

Response Made by Custodian: September 8, 2017; September 26, 2017

GRC Complaint Received: September 26, 2017

Background³

Request and Response:

On August 30, 2017, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On September 8, 2017, the Custodian responded in writing stating that the request was overly broad and failed to seek identifiable records pursuant to MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2015). The Custodian also stated that the request failed to identify individual senders and/or recipients as required for e-mail correspondence under Elcavage v. West Milford Twp., GRC Complaint No. 2009-07 (April 2010).

¹ No legal representation listed on record.

² Represented by Bradley D. Tishman, Esq., of Cleary Giacobbe Alfieri Jacobs, LLC (Oakland, 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 Executive Director the submissions necessary and relevant for the adjudication of this complaint.

The Custodian then stated that notwithstanding the invalidity of the request, a good faith search was conducted for responsive records authored or received by the City Manager containing the search parameters. The Custodian noted that several of the records were redacted to protect home addresses, personal e-mail addresses, license plate numbers, and Social Security numbers.

The Custodian also stated that several redactions were made to protect records containing inter-agency or intra-agency advisory, consultative, or deliberative (“ACD”) material, citing N.J.S.A. 47:1A-1.1, and the deliberative process privilege. Educ. Law Ctr. v. N.J. Dep’t of Educ., 198 N.J. 274 (2009).

On September 11, 2017, the Complainant responded to the Custodian, challenging the redactions made to thirteen (13) e-mails purported to contain ACD material. The Complainant stated that the e-mails do not fall under the ACD exemption and should be produced.

On September 15, 2017, the Complainant sent another e-mail to the Custodian, seeking additional records but also following up from his September 11, 2017 correspondence. The Complainant noted that while the Custodian listed thirteen (13) redacted e-mails, they appear to be copies of one (1) e-mail that was reproduced thirteen (13) times.

On September 26, 2017, the Custodian responded to the Complainant, stating that she was treating the September 15, 2017 correspondence as a clarification of the August 30, 2017 OPRA request. The Custodian stated that no additional records were located as a result. Additionally, the Custodian stated that the disputed e-mail referenced in prior correspondence was redacted under the deliberative process privilege. The Custodian asserted that the redactions were made because they related to a potential ordinance, and thus were pre-decisional and deliberative in nature. The Custodian added that any further explanation would waive the privilege.

Denial of Access Complaint:

On September 26, 2017, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian improperly redacted an e-mail that was included as part of the Custodian’s response.

Statement of Information:

On November 8, 2017, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on August 30, 2017. The Custodian certified that she searched the e-mails of all identified senders and recipients using the parameters provided by the Complainant. The Custodian certified that she responded in writing on September 8, 2017, providing the e-mail at issue with redactions pursuant to the deliberative process privilege.

The Custodian asserted that redacted e-mail pertained to a potential ordinance amendment. The Custodian contended that the ACD exemption “shields from disclosure documents ‘deliberative in nature, containing opinions, recommendations, or advice about agency policies,’ and ‘generated before the adoption of an agency’s policy or decision.’” Bent v. Stafford Police

Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005) (quoting Gannett N.J. Partners, LP v. Cnty. of Middlesex, 379 N.J. Super. 205, 219 (App. Div. 2005)).

The Custodian also asserted that the GRC has repeatedly held that draft records of a public agency fall within the deliberative process privilege. See Anonymous v. Ocean City Historic Preservation, GRC Complaint No. 2015-02 (June 2015). The Custodian noted the Council previously held in favor of nondisclosure of proposed ordinances, citing O'Shea v. Twp. of West Milford (Passaic), GRC Complaint No. 2007-237 (Interim Order dated July 30, 2008), Dalesky v. Borough of Raritan (Somerset), GRC Complaint No. 2008-61 (November 2009), and Shea v. Vill. of Ridgewood (Bergen), GRC Complaint No. 2010-79 (February 2011).

Analysis

Unlawful Denial of Access

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

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

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

[Id. at 355.]

Further, the Court found that:

We hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal There is no reason for concern about unauthorized disclosure of exempt documents or privileged

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

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 e-mail contains ACD material and is therefore not subject to access under OPRA. N.J.S.A. 47:1A-1.1. As part of the SOI, the Custodian stated that the content of the e-mail pertained to a proposed change to an ordinance.

Notwithstanding the Custodian's description, a "meaningful review" is necessary to determine whether the redacted e-mail fell within the ACD exemption. The GRC must therefore 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 redacted e-mail to determine the validity of the Custodian's assertion that the redaction is 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 Executive Director respectfully recommends the Council find that:

1. The GRC must conduct an *in camera* review of the redacted e-mail to determine the validity of the Custodian's assertion that the redaction is 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).
2. **The Custodian shall deliver⁵ to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see conclusion No. 1 above), nine (9) copies of the redacted record, a document or redaction index⁶, as well as a legal certification**

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

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

from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,⁷ that the record provided is the record requested by the Council for the *in camera* inspection. Such delivery must be received by the Executive Director within five (5) business days from receipt of the Council's Interim Order.

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

Prepared By: Samuel A. Rosado
Staff Attorney

September 17, 2019

⁷ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."