



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

December 18, 2018 Government Records Council Meeting

Luis F. Rodriguez
Complainant
v.
Kean University
Custodian of Record

Complaint No. 2017-90

At the December 18, 2018 public meeting, the Government Records Council (“Council”) considered the December 11, 2018 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 November 13, 2018 Interim Order because she responded in the extended time frame provided the appropriate number of redacted and unredacted copies of the responsive e-mail chain. Further, the Custodian simultaneously provided certified confirmation of compliance to the Council Staff.
2. **The *In Camera* Examination set forth above reveals the Custodian has lawfully denied access to the redacted portions of the responsive e-mail under the attorney-client privilege pursuant to 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 18th Day of December, 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: December 20, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Council Staff
December 18, 2018 Council Meeting**

**Luis F. Rodriguez¹
Complainant**

GRC Complaint No. 2017-90

v.

**Kean University²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of any correspondence from Shirley Horbatt or Kimberly Fraone sent to Geri Benedetto or any other member of Kean University (“Kean”) Counsel’s Office, Jeffrey Toney, Kean Police Department, Phil Connelly, Dawood Farahi, Faruque Chowdhury, or any member of Human Resources related to an e-mail disclosed as part of a March 3, 2004 Union Township summons.

Custodian of Record: Laura Barkley-Haelig
Request Received by Custodian: June 13, 2016
Response Made by Custodian: June 22, 2016
GRC Complaint Received: April 27, 2017

Record Submitted for *In Camera* Examination: E-mail chain inclusive of redacted e-mail dated February 26, 2014 from Kimberly Fraone to Geri Benedetto, Esq.

Background

November 13, 2018 Council Meeting:

At its November 13, 2018 public meeting, the Council considered the November 7, 2018 Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The GRC must conduct an *in camera* review of two (2) page e-mail chain to determine the validity of the Custodian’s assertion that the February 26, 2014 e-mail content was exempt under OPRA under the attorney-client privilege and/or “inter-agency or intra-agency, advisory, consultative, or deliberative material” exemptions. N.J.S.A. 47:1A-1.1. See Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Kerry Soranno. Previously represented by Deputy Attorney General Eric L. Apar.

2. **The Custodian shall deliver³ to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see 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 GRC within five (5) business days from receipt of the Council's Interim Order.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On November 14, 2018, the Council distributed its Interim Order to all parties on. On November 19, 2018, Custodian's Counsel sought an extension of time through November 23, 2018 to comply with the Council's Order. On the same day, the Government Records Council ("GRC") granted said request.

On November 21, 2018, the Custodian responded to the Council's Interim Order. Therein, the Custodian certified that she was providing nine (9) copies of the redacted and unredacted e-mail chain responsive to the subject OPRA request for an *in camera* review.

Analysis

Compliance

At its November 13, 2018 meeting, the Council ordered the Custodian to provide nine (9) copies of the redacted and unredacted e-mail chain for an *in camera* review. Further, the Council ordered the Custodian to simultaneously provide certified confirmation of compliance to the Council Staff. On November 14, 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 November 21, 2018.

On November 19, 2018, the third (3rd) business day after receipt of the Council's Order, Custodian's Counsel sought an extension through November 23, 2018 to respond to the Order, which the GRC granted. On November 21, 2018, still within the extended time frame to respond, the Custodian responded to the Interim Order. Therein, she provided the requested nine (9) copies of the e-mail chain in both redacted and unredacted formats. Further, the Custodian simultaneously provided certified confirmation of compliance to the Council Staff.

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."

Therefore, the Custodian complied with the Council's November 13, 2018 Interim Order because she responded in the extended time frame provided the appropriate number of redacted and unredacted copies of the responsive e-mail chain. Further, the Custodian simultaneously provided certified confirmation of compliance to the Council Staff.

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 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).

The GRC conducted an *in camera* examination on the submitted record. The results of this examination are as follows. The redacted e-mail in question is from Ms. Fraone, at that time an employee for Kean, and Ms. Benedetto, who was serving as General Counsel. The e-mail is a brief discussion of a forwarded e-mail from the Complainant. Both parties have acknowledged the existence of a "no contact" order. Further, the Complainant acknowledged that his e-mail would subsequently become the focal point of an investigation by Kean's Police Department. See Complainant's e-mail dated May 23, 2017.

Thus, the crux of this complaint is whether the redacted e-mail falls within the attorney-client privilege. Initially, and contrary to the Complainant's past assertions, there was a clear attorney-client relationship between Ms. Fraone and Ms. Benedetto. This is especially true because Ms. Benedetto was serving in a capacity as Kean General Counsel and Ms. Fraone is a Kean employee. Thus, the attorney-client privilege extends to Ms. Fraone as a member of the body Ms. Benedetto was tasked with representing.

However, the forgoing in and of itself is not enough to render the redacted e-mail *per se* exempt under the attorney-client privilege. The e-mail must also show “circumstances indicating the intention of secrecy.” State v. Schubert, 235 N.J. Super. at 220-21. Further, redaction of otherwise public documents is appropriate where protection of privileged or confidential subject matters is a concern. South Jersey Publishing Co., Inc. v. N. J. Expressway Authority, 124 N.J. 478, 488-9 (1991). Moreover, whether the matter contained in the requested documents pertains to pending or closed cases is important, because the need for confidentiality is greater in pending matters. Keddie v. Rutgers, State University, 148 N.J. 36, 54 (1997). Nevertheless, “[e]ven in closed cases. . .attorney work-product and documents containing legal strategies may be entitled to protection from disclosure.” Id.

Here, the evidence of record indicates an ongoing litigious relationship between Kean and the Complainant. First, and as previously noted, both parties confirmed that the Complainant was issued a “no contact” order barring him from communicating with Kean employees. The Complainant himself admits as much in the e-mail chain. It is further clear that the Complainant’s e-mail, which Ms. Fraone forwarded to Ms. Benedetto, was an attempt to work around the “no contact” order. It is also clear that this e-mail became a focal point of a subsequent investigation by Kean Police Department.

It is thus reasonable to conclude that Ms. Fraone sent the redacted e-mail to Ms. Benedetto in confidence given the sensitive nature of the subject matter. For these reasons, the GRC is persuaded that the Custodian lawfully denied access to the excerpt under this exemption given the nature of the e-mail chain and the facts surrounding the redacted e-mail. The GRC also notes that the Complainant advanced multiple arguments in his May 23, 2017 e-mail as to why the record could not fall within the attorney-client privilege. However, those arguments are not compelling here.

Thus, the Custodian lawfully denied access to the redacted e-mail because it fell within the attorney-client privilege exemption. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. For this reason, no disclosure is warranted. Additionally, the GRC need not address whether the record was also exempt under the “inter-agency or intra-agency, advisory, consultative, or deliberative material” exemption because the record is exempt from disclosure under the attorney-client privilege exemption.

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

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. The Custodian complied with the Council’s November 13, 2018 Interim Order because she responded in the extended time frame provided the appropriate number of redacted and unredacted copies of the responsive e-mail chain. Further, the Custodian simultaneously provided certified confirmation of compliance to the Council Staff.

2. **The *In Camera* Examination set forth above reveals the Custodian has lawfully denied access to the redacted portions of the responsive e-mail under the attorney-client privilege pursuant to 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: Frank F. Caruso
Communications Specialist/Resource Manager

December 11, 2018



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

November 13, 2018 Government Records Council Meeting

Luis F. Rodriguez
Complainant
v.
Kean University
Custodian of Record

Complaint No. 2017-90

At the November 13, 2018 public meeting, the Government Records Council (“Council”) considered the November 7, 2018 Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The GRC must conduct an *in camera* review of two (2) page e-mail chain to determine the validity of the Custodian’s assertion that the February 26, 2014 e-mail content was exempt under OPRA under the attorney-client privilege and/or “inter-agency or intra-agency, advisory, consultative, or deliberative material” exemptions. 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 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 GRC within five (5) business days from receipt of the Council’s Interim Order.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

¹ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as 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 13th Day of November, 2018

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: November 14, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
November 13, 2018 Council Meeting**

**Luis F. Rodriguez¹
Complainant**

GRC Complaint No. 2017-90

v.

**Kean University²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of any correspondence from Shirley Horbatt or Kimberly Fraone sent to Geri Benedetto or any other member of Kean University (“Kean”) Counsel’s Office, Jeffrey Toney, Kean police Department, Phil Connelly, Dawood Farahi, Faruque Chowdhury, or any member of Human Resources related to an e-mail disclosed as part of a March 3, 2004 Union Township summons.

Custodian of Record: Laura Barkley-Haelig
Request Received by Custodian: June 13, 2016
Response Made by Custodian: June 22, 2016
GRC Complaint Received: April 27, 2017

Background³

Request and Response:

On June 13, 2016, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On June 22, 2016, the Custodian responded in writing stating that an extension of time until July 6, 2016 was required. On July 6, 2016, the Custodian responded in writing providing access to a two (2) pages of record. The Custodian noted that redactions were made in accordance in “N.J.S.A. 47:1A-1.1 (8).”

Denial of Access Complaint:

On April 27, 2017, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant disputed the redactions made to the

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Eric L. Apar.

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.

responsive record.⁴ The Complainant argued that the Custodian failed to bear her burden of proving that the disclosed record was lawfully redacted. The Complainant requested that the GRC conduct an *in camera* review to determine whether the Custodian lawfully redacted the responsive record.

Statement of Information:

On May 19, 2017, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on June 13, 2016. The Custodian certified that she received a copy of the record in question during the initial time frame. The Custodian certified that she responded in writing on June 22, 2016 obtaining an extension to conduct a further search and review the only record deemed to be responsive. The Custodian certified that upon reviewing the record, it was determined to contain attorney-client privileged information. The Custodian affirmed that she redacted the record appropriately and disclosed same on July 6, 2016.

The Custodian stated that OPRA’s exemptions include the attorney-client privilege exemption, which protects from disclosure communications between a lawyer and their clients in “the course of that relationship and in professional confidence.” N.J.S.A. 2A:84A-20(1); New Jersey Court Rules R. 504(1). The Custodian stated that the Appellate Division has held that the privilege applies to individuals; however, in organizational situations the privilege “belongs to the institution and covers confidential communications between the entity attorneys *and its employees*.” Hedden v. Kean Univ., 434 N.J. Super. 1, 11 (App. Div. 2013) (emphasis added).

The Custodian contended that she properly redacted the February 26, 2014 e-mail body at issue here under the attorney-client privilege exemption. N.J.S.A. 47:1A-1.1. The Custodian argued that the redacted e-mail was from Ms. Fraone, a Kean employee, to Ms. Benedetto, General Counsel for Kean, during “the course of a professional relationship and in confidence.” Id. The Custodian requested that the GRC take note that included in the chain was an e-mail from the Complainant that even he noted violated a no contact order. The Custodian argued that she thus redacted Ms. Fraone’s e-mail to Ms. Benedetto in accordance with OPRA.

The Custodian also argued that the redactions were lawful under the “inter-agency or intra-agency, advisory, consultative, or deliberative [(“ACD”)] material” exemption. N.J.S.A. 47:1A-1.1. The Custodian explained that this exemption protected pre-decisional and deliberative records from disclosure. Educ. Law Ctr. v. N.J. Dep’t of Educ., 198 N.J. 274, 285 (2009)’ In Re: Liquidation of Integrity Ins. Co., 165 N.J. 75, 84-85 (2000). The Custodian argued that the redacted e-mail body was part of an internal deliberation process involving matters of potential significant legal issues. The Custodian argued that required disclosure of the redacted material would chill this process, which was indispensable to Kean’s decision-making process.

⁴ The Complainant asserted that the Custodian cited to the administrative or technical exemption. However, if the Custodian’s use of the number “(8)” referred to the GRC’s “OPRA Exemptions” document on its website, the exemption at “(8)” is the attorney-client privilege. See [https://www.state.nj.us/grc/meetings/present/OPRA%20Exemptions%20\(2015\).pdf](https://www.state.nj.us/grc/meetings/present/OPRA%20Exemptions%20(2015).pdf) (accessed October 29, 2018).

Additional Submissions:

On May 23, 2017, the Complainant e-mailed the GRC refuting the Custodian's SOI. The Complainant argued that Ms. Benedetto was not acting as Ms. Fraone's attorney. The Complainant further contended that Ms. Fraone was not seeking legal advice from Ms. Benedetto. The Complainant alleged that Ms. Fraone may have been asked to forward the e-mail by Ms. Benedetto in furtherance of her investigation into his violation of the no contact order.⁵ The Complainant noted that in response to an attorney ethics complaint he filed against Ms. Benedetto, she admitted to only forwarding the responsive e-mail to Kean's Police Department.⁶ The Complainant asserted that the responsive e-mail was thus part of a criminal investigation; however, it was not exempt under the criminal investigatory exemption.⁷

In a second e-mail on May 23, 2017, the Complainant argued that the attorney-client privilege exemption was not absolute. Gonnella: In Re, 238 N.J. Super. 509 (August 28, 1989). The Complainant further asserted that the Gonnella court stated that the attorney-client privilege had "never prevented the disclosure of communications made in furtherance of a crime." Id. at 512.

On May 25, 2018, the Complainant again e-mailed the GRC arguing that Ms. Benedetto included a third-party (Kean's Police Department) in the e-mails; thus, she could not rely on the attorney-client privilege exemption because it was waived. The Complainant also rejected any argument that the e-mail contained ACD material. The Complainant argued that Ms. Fraone was a librarian: it is "far-fetched" to think a librarian could "offer any advice to an attorney on a criminal matter not related to the library."

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 Council⁸ that accepted the custodian's legal

⁵ The Complainant noted that his allegation about Ms. Fraone's action were the result of a lunch meeting they had after Ms. Fraone left Kean.

⁶ The Complainant again asserted that the Custodian cited to the wrong exemption, and that the Custodian's failure to admit this mistake in the SOI suggested conscious wrongdoing. However, it appears that the Complainant curiously relied on the New Jersey Department of Environmental Protection's OPRA exemption list and not the one posted to the GRC's website. See <https://www.nj.gov/dep/opra/exemptions.html> (accessed October 31, 2018).

⁷ The Complainant included multiple arguments regarding Kean's alleged disregard for discovery requests made by the Complainant's attorney in the "no contact order" litigation. The GRC has no authority to address such issues, as discovery is entirely separate from OPRA. N.J.S.A. 47:1A-7(b).

⁸ Paff v. NJ Dep't of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

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

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

[Id. at 355.]

Further, the Court found that:

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

[Id.]

Here, the Complainant sought correspondence from Kean: the Custodian disclosed a two (2) page e-mail chain but redacting to the body of an e-mail from Ms. Fraone to Ms. Benedetto dated February 26, 2014. The Custodian alleged that the excerpt was exempt under OPRA. In the Denial of Access Complaint, the Complainant alleged that the Custodian failed to bear her burden of proof that the redaction was lawful. In the SOI, the Custodian argued that she properly denied access to the redacted information under N.J.S.A. 47:1A-1.1 because the e-mail content was attorney-client privileged and ACD in nature.

Upon reviewing the e-mail chain, a “meaningful review” is necessary to determine whether all redacted content in the February 26, 2014 e-mail reasonably fell under the attorney-client privilege and/or ACD material exemption exemption. Initially, as noted by the Appellate Division in State v. Schubert, 235 N.J. Super. 212 (App. Div. 1989), 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. The evidence of record does not contain any descriptors of the redacted content that would reasonably allow the GRC to accept the redactions as lawful for the reasons cited by the Custodian. Because it is unclear whether the redacted body

of the February 26, 2014 e-mail comprised of attorney-client privileged or ACD material, the GRC must thus review same in order to determine the full applicability of asserted exemption.

Therefore, the GRC must conduct an *in camera* review of two (2) page e-mail chain to determine the validity of the Custodian's assertion that the February 26, 2014 e-mail content was exempt under OPRA under the attorney-client privilege and/or ACD material exemptions. N.J.S.A. 47:1A-1.1. See Paff, 379 N.J. Super. at 346.

Knowing & Willful

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

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. The GRC must conduct an *in camera* review of two (2) page e-mail chain to determine the validity of the Custodian's assertion that the February 26, 2014 e-mail content was exempt under OPRA under the attorney-client privilege and/or "inter-agency or intra-agency, advisory, consultative, or deliberative material" exemptions. 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 deliver⁹ to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see No. 1 above), nine (9) copies of the redacted record, a document or redaction index¹⁰, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,¹¹ that the record provided is the record requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

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

November 7, 2018

⁹ 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.

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

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."