



**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**

**July 27, 2021 Government Records Council Meeting**

Wayne Levante  
Complainant

Complaint No. 2018-127

v.

Town of Newton (Sussex)  
Custodian of Record

At the July 27, 2021 public meeting, the Government Records Council (“Council”) considered the July 20, 2021 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 June 29, 2021 Interim Order because she responded in the prescribed time frame providing records and simultaneously provided certified confirmation of compliance to the Executive Director.
2. The Custodian unlawfully denied access to the Complainant’s OPRA request in part. N.J.S.A. 47:1A-6. Additionally, the Custodian failed to fully comply with the Council’s May 19, 2020 Interim Order. However, the Custodian complied with the Council’s June 29, 2021 Interim Order by demonstrating that she provided the Complainant with responsive records in accordance with the Council’s *in camera* examination. 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 27<sup>th</sup> Day of July 2021

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: July 29, 2021**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
July 27, 2021 Council Meeting**

**Wayne Levante<sup>1</sup>  
Complainant**

**GRC Complaint No. 2018-127**

v.

**Town of Newton (Sussex)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies of:

June 7, 2018 OPRA Request:

E-mails listed within a Vaughn index<sup>3</sup> provided in response to a separate OPRA request dated March 5, 2018. See Exhibit A.

June 14, 2018 OPRA Request:<sup>4</sup>

1. Personal cell phone records (calls placed/received to/from as well as call times and call length) of Daniel Flynn, Kevin Elvidge, Helen Le Frois, and Sandy Diglio (“Councilmembers”) from February 21, 2018 to March 10, 2018 between themselves, town professionals, and reporters.
2. All text messages of Councilmembers from February 21, 2018 to March 10, 2018 between themselves, town professionals, and reporters pertaining to Wayne Levante, the March 5, 2018 public hearing, the censure resolution, and all related matters.

**Custodian of Record:** Lorraine A. Read

**Request Received by Custodian:** June 7, 2018; June 14, 2018

**Response Made by Custodian:** June 15, 2018; June 25, 2018

**GRC Complaint Received:** July 5, 2018

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

<sup>2</sup> Represented by Tara Ann St. Angelo, Esq., of Gebhardt & Kiefer, P.C. (Clinton, N.J.).

<sup>3</sup> The term *Vaughn* index is derived from *Vaughn v. Rosen*, 484 F.2d 820, 826-28, 157 U.S. App. D.C. 340 (D.C. Cir. 1973), cert. denied, 415 U.S. 977, 94 S. Ct. 1564, 39 L. Ed. 2d 873 (1974). See *Paff v. Div. of Law*, 412 N.J. Super. 140, 161 n. 9, 988 A.2d 1239 (App. Div. 2010), certif. denied, 202 N.J. 45, 994 A.2d 1040 (2010). A *Vaughn* index provides details justifying non-disclosure of documents based on an asserted privileged. *Ibid.*

<sup>4</sup> The Complainant sought additional records that are not at issue in this complaint.

## Background

### June 29, 2021 Council Meeting:

At its June 29, 2021 public meeting, the Council considered the June 22, 2021 *In Camera* 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 Custodian failed to comply with the Council's May 19, 2020 Interim Order because she did not respond within the prescribed time frame providing records for *in camera* review, and simultaneously providing certified confirmation of compliance to the Executive Director.
2. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order. Further, the Custodian shall simultaneously deliver<sup>5</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>6</sup> to the Executive Director.<sup>7</sup>**
3. The Custodian must disclose all of these portions of the responsive e-mails to the Complainant (*i.e.*, sender, recipients, date, time, subject, and salutations where applicable). As to those portions of the requested e-mails, the Custodian has unlawfully denied access. See Ray v. Freedom Acad. Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010). The GRC notes that if the Custodian intends to redact certain information in the categories identified above, she must provide a lawful basis for those redactions.
4. **The Custodian shall comply with conclusion No. 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver<sup>8</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Executive Director.**

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<sup>5</sup> The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

<sup>6</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>7</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

<sup>8</sup> The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

5. 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 June 30, 2021, the Council distributed its Interim Order to all parties. That same day, the Custodian requested an extension until July 14, 2021 to respond to the Interim Order. On July 1, 2021, the GRC granted the Custodian's extension request.

On July 8, 2021, the Custodian responded to the Council's Interim Order. The Custodian provided a copy of an e-mail sent to the Complainant that same day containing responsive records previously reviewed for disclosure. The Custodian also provided certified confirmation of compliance to the Executive Director. The Custodian certified that the records were provided to the Complainant in accordance with the Council's Interim Order.

### Analysis

#### Compliance

At its June 29, 2021 meeting, the Council ordered the Custodian to comply with the findings of the *in camera* examination of the records at issue and to submit certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Executive Director. On June 30, 2021, 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 July 8, 2021, accounting for the Independence Day holiday.

On July 8, 2021, the fifth (5<sup>th</sup>) business day after receipt of the Council's Order, the Custodian e-mailed the Complainant providing copies of the responsive records as attachments in accordance with the Council's *in camera* examination. The Custodian also provided a certified confirmation of compliance to the Executive Director.

Therefore, the Custodian complied with the Council's June 29, 2021 Interim Order because she responded in the prescribed time frame providing records and simultaneously provided certified confirmation of compliance to the Executive Director.

#### Knowing & Willful

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

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a "knowing and willful" violation of OPRA. The following statements must be true for a determination that the Custodian "knowingly and willfully" violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (*id.*; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

In the matter before the Council, the Custodian unlawfully denied access to the Complainant's OPRA request in part. N.J.S.A. 47:1A-6. Additionally, the Custodian failed to fully comply with the Council's May 19, 2020 Interim Order. However, the Custodian complied with the Council's June 29, 2021 Interim Order by demonstrating that she provided the Complainant with responsive records in accordance with the Council's *in camera* examination. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's June 29, 2021 Interim Order because she responded in the prescribed time frame providing records and simultaneously provided certified confirmation of compliance to the Executive Director.
2. The Custodian unlawfully denied access to the Complainant's OPRA request in part. N.J.S.A. 47:1A-6. Additionally, the Custodian failed to fully comply with the Council's May 19, 2020 Interim Order. However, the Custodian complied with the Council's June 29, 2021 Interim Order by demonstrating that she provided the Complainant with responsive records in accordance with the Council's *in camera* examination. 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

July 20, 2021



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**

**June 29, 2021 Government Records Council Meeting**

Wayne Levante  
Complainant

Complaint No. 2018-127

v.

Town of Newton (Sussex)  
Custodian of Record

At the June 29, 2021 public meeting, the Government Records Council (“Council”) considered the June 22, 2021 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 failed to comply with the Council’s May 19, 2020 Interim Order because she did not respond within the prescribed time frame providing records for *in camera* review, and simultaneously providing certified confirmation of compliance to the Executive Director.
2. **On the basis of the Council’s determination in this matter, the Custodian shall comply with the Council’s Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order. Further, the Custodian shall simultaneously deliver<sup>1</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>2</sup> to the Executive Director.<sup>3</sup>**
3. The Custodian must disclose all of these portions of the responsive e-mails to the Complainant (*i.e.*, sender, recipients, date, time, subject, and salutations where applicable). As to those portions of the requested e-mails, the Custodian has unlawfully denied access. See Ray v. Freedom Acad. Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010). The GRC notes that if the Custodian intends to redact certain information in the categories identified above, she must provide a lawful basis for those redactions.

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

<sup>2</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>3</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

4. **The Custodian shall comply with conclusion No. 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver<sup>4</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Executive Director.**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the  
Government Records Council  
On The 29<sup>th</sup> Day of June 2021

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: June 30, 2021**

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



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director  
June 29, 2021 Council Meeting**

**Wayne Levante<sup>1</sup>  
Complainant**

**GRC Complaint No. 2018-127**

**v.**

**Town of Newton (Sussex)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies of:

June 7, 2018 OPRA Request:

E-mails listed within a Vaughn index<sup>3</sup> provided in response to a separate OPRA request dated March 5, 2018. See Exhibit A.

June 14, 2018 OPRA Request:<sup>4</sup>

1. Personal cell phone records (calls placed/received to/from as well as call times and call length) of Daniel Flynn, Kevin Elvidge, Helen Le Frois, and Sandy Diglio (“Councilmembers”) from February 21, 2018 to March 10, 2018 between themselves, town professionals, and reporters.
2. All text messages of Councilmembers from February 21, 2018 to March 10, 2018 between themselves, town professionals, and reporters pertaining to Wayne Levante, the March 5, 2018 public hearing, the censure resolution, and all related matters.

**Custodian of Record:** Lorraine A. Read

**Request Received by Custodian:** June 7, 2018; June 14, 2018

**Response Made by Custodian:** June 15, 2018; June 25, 2018

**GRC Complaint Received:** July 5, 2018

**Records Submitted for *In Camera* Examination:** E-mails listed within a Vaughn index provided in response to a separate OPRA request.

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

<sup>2</sup> Represented by Tara Ann St. Angelo, Esq., of Gebhardt & Kiefer, P.C. (Clinton, N.J.).

<sup>3</sup> The term *Vaughn* index is derived from *Vaughn v. Rosen*, 484 F.2d 820, 826-28, 157 U.S. App. D.C. 340 (D.C. Cir. 1973), cert. denied, 415 U.S. 977, 94 S. Ct. 1564, 39 L. Ed. 2d 873 (1974). See *Paff v. Div. of Law*, 412 N.J. Super. 140, 161 n. 9, 988 A.2d 1239 (App. Div. 2010), certif. denied, 202 N.J. 45, 994 A.2d 1040 (2010). A *Vaughn* index provides details justifying non-disclosure of documents based on an asserted privileged. *Ibid.*

<sup>4</sup> The Complainant sought additional records that are not at issue in this complaint.

## Background

### May 19, 2020 Council Meeting:

At its May 19, 2020 public meeting, the Council considered the May 12, 2020 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 e-mails identified in the Vaughn index to determine the validity of the Custodian's assertion that the redactions were valid under OPRA's exemptions for advisory, consultative and deliberative material and/or attorney-client privileged 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 deliver<sup>5</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 1 above), a document or redaction index<sup>6</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,<sup>7</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.**
3. The Custodian has borne her burden of proof that she lawfully denied access to the Complainant's June 14, 2018 OPRA request based on the Custodian's certification and the evidence of record indicating that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005); Verry v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2014-387 (July 2015). Additionally, because no responsive records exist the Council declines to address the remaining defenses raised by the Custodian.
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 May 20, 2020, the Council distributed its Interim Order to all parties. On July 7, 2020, the Custodian responded to the Council's Interim Order, providing nine (9) unredacted copies of

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<sup>5</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>6</sup> The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

<sup>7</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."

the requested e-mails for *in camera* review, along with a document index. The Custodian also provided a certified confirmation of compliance to the Executive Director.

The Custodian maintained that the e-mails were properly withheld from disclosure under OPRA's attorney-client privilege and deliberative process privilege. N.J.S.A. 47:1A-1.1.

### **Analysis**

#### **Compliance**

At its May 19, 2020 meeting, the Council ordered the Custodian to submit nine (9) unredacted copies of the requested e-mails within five (5) business days from receipt of the Council's Interim Order, and simultaneously provide certified confirmation of compliance to the Executive Director." On May 20, 2020, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on May 27, 2020.

On July 7, 2020, the thirty-second (32<sup>nd</sup>) business day after receipt of the Council's Order, the Custodian provided nine (9) unredacted copies of the requested e-mails for *in camera* review, along with a certified confirmation of compliance to the Executive Director. The Custodian provided no explanation for the delay in compliance.

Therefore, the Custodian failed to comply with the Council's May 19, 2020 Interim Order because she did not respond within the prescribed time frame providing records for *in camera* review, and simultaneously providing 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.

#### **Advisory, Consultative, or Deliberative ("ACD") Material**

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

A custodian claiming an exception to the disclosure requirements under OPRA on that basis must initially satisfy two conditions: 1) the document must be pre-decisional, meaning that the document was generated prior to the adoption of the governmental entity's policy or decision; and 2) the document must reflect the deliberative process, which means that it must contain opinions, recommendations, or advice about agency policies. Id. at 286 (internal citations and quotations omitted). The key factor in this determination is whether the contents of the document reflect “formulation or exercise of . . . policy-oriented judgment or the process by which policy is formulated.” Id. at 295 (adopting the federal standard for determining whether material is “deliberative” and quoting Mapother v. Dep't of Justice, 3 F.3d 1533, 1539 (D.C. Cir. 1993)). Once the governmental entity satisfies these two threshold requirements, a presumption of confidentiality is established, which the requester may rebut by showing that the need for the materials overrides the government's interest in confidentiality. Id. at 286-87.

### Attorney-Client Communications

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 Envtl. Ins. Declaratory Judgment Actions, 259 N.J. Super. 308, 313 (App. Div. 1992).

The GRC conducted an *in camera* examination on the submitted records. The results of this examination are set forth in the following table. The GRC notes that the table identifies only those e-mail bodies where the GRC determined the asserted exemptions do not apply (in whole or in part). The GRC will not list any e-mails to which it deems that the exemptions raised by the Custodian were properly applied to same:

<b>Record Date and Packet Page Number</b>	<b>Record Name</b>	<b>Description of Record</b>	<b>Custodian's Explanation/ Citation for Non-disclosure</b>	<b>Findings of the <i>In Camera</i> Examination<sup>8</sup></b>
March 1, 2018 at 1:11 PM  (pgs. 3-4, 58-59)	From: Ursula Leo  To: Lorraine A. Read; Thomas S. Russo, Jr.; Jennifer Dodd  <b>Note: The e-mail does not include attachment contained within.</b>	Mr. Leo stating, "Revised meeting notice attached. Thank you."	Attorney-client privilege; deliberative process privilege. <u>N.J.S.A. 47:1A-1.1.</u>	The body of the e-mail does not contain ACD material or attorney-client privileged communications. <b>Thus, the Custodian shall disclose this e-mail.</b>
March 1, 2018 at 3:57 PM  (pgs. 5, 24, 49)	From: Thomas S. Russo, Jr.  To: Ursula Leo; Mike Richards  Bcc: Jennifer Dodd  <b>Note: The e-mail does not include attachment</b>	Mr. Russo providing Town officials a copy of a censure resolution.	Attorney-client privilege; deliberative process privilege. <u>N.J.S.A. 47:1A-1.1.</u>	The body of the e-mail does not contain ACD material or attorney-client privileged communications. <b>Thus, the Custodian shall disclose this e-mail.</b>

<sup>8</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.

	<b>contained within.</b>			
March 1, 2018 at 1:56 PM  (pgs. 18, 39, 60)	From: Thomas S. Russo, Jr.  To: Ursula Leo  <b>Note: The e-mail does not include attachment contained within.</b>	The body of the e-mail is blank.	Attorney-client privilege; deliberative process privilege. <u>N.J.S.A. 47:1A-1.1.</u>	The body of the e-mail does not contain ACD material or attorney-client privileged communications. <b>Thus, the Custodian shall disclose this e-mail.</b>
March 1, 2018 at 2:26 PM  (pgs. 19, 61)	From: Lorraine A. Read  To: Thomas S. Russo, Jr.  <b>Note: One (1) additional e-mail is included in the e-mail chain including the e-mail below.</b>	The body of the e-mail is blank.	Attorney-client privilege; deliberative process privilege. <u>N.J.S.A. 47:1A-1.1.</u>	The body of the e-mail does not contain ACD material or attorney-client privileged communications. <b>Thus, the Custodian shall disclose this e-mail.</b>
March 1, 2018 at 3:04 PM  (pgs. 19, 61)	From: Lorraine A. Read  To: Donna Hendricks  Cc: Thomas S. Russo, Jr.; Ursula Leo; Jenn Dodd  <b>Note: One (1) additional e-mail is included in the e-mail</b>	Ms. Lorraine requesting Ms. Hendricks to publish the attached notice on March 4, 2018.	Attorney-client privilege; deliberative process privilege. <u>N.J.S.A. 47:1A-1.1.</u>	The body of the e-mail does not contain ACD material or attorney-client privileged communications. <b>Thus, the Custodian shall disclose this e-mail.</b>

	<b>chain including the e-mail above.</b>			
March 1, 2018 at 3:55 PM  (pg. 23)	From: Thomas S. Russo, Jr.  To: Ursula Leo; Mike Richards; Jennifer Dodd  <b>Note: The e-mail does not include attachment contained within.</b>	The body of the e-mail is blank.	Attorney-client privilege; deliberative process privilege. <u>N.J.S.A. 47:1A-1.1.</u>	The body of the e-mail does not contain ACD material or attorney-client privileged communications. <b>Thus, the Custodian shall disclose this e-mail.</b>
March 1, 2018 at 4:40 PM  (pg. 25)	From: Wayne Levante  To: Jennifer Dodd  Cc: Thomas S. Russo, Jr.  <b>Note: One (1) additional e-mail is included in the e-mail chain.</b>	Mr. Levante discussing the upcoming Town meeting.	Attorney-client privilege; deliberative process privilege. <u>N.J.S.A. 47:1A-1.1.</u>	The body of the first (1 <sup>st</sup> ) e-mail does not contain ACD material or attorney-client privileged communications. <b>Thus, the Custodian shall disclose this e-mail.</b>  The remaining e-mail body and was properly withheld as comprising attorney-client privileged communications. <u>N.J.S.A. 47:1A-1.1.</u>
March 2, 2018 at 6:11 PM  (pgs. 35-38, 43-46, 50-51, 65-68, 69-70)	From: Ursula Leo  To: Wayne Levante; Kevin Elvidge; Helen Le Frois; Daniel	Mr. Leo providing Town officials a copy of the meeting agenda and proposed resolution. Alternate versions of same	Attorney-client privilege; deliberative process privilege. <u>N.J.S.A. 47:1A-1.1.</u>	None of the e-mail bodies contained attorney-client privileged communications or ACD material. <b>Thus, the Custodian shall</b>

	<p>G. Flynn; S. Diglio</p> <p>Cc: Thomas S. Russo, Jr.; Lorraine A. Read; M. Richards</p> <p><b>Note: Four (4) additional e-mails are included in the e-mail chain. Additionally, the e-mails do not include attachments contained within.</b></p>	<p>were attached when some officials were unable to open the original documents.</p>		<p><b>disclose this e-mail.</b></p>
<p>March 5, 2018 (pgs. 52-55)</p>	<p>From: Terri Oswin</p> <p>To: Ursula Leo</p> <p>Cc: Heather A. Sheurs; Thomas S. Russo, Jr.; Lorraine A. Read; Michelle Estremera; Janien Roberts</p> <p><b>Note: One (1) additional e-mail is included in the chain.</b></p>	<p>E-mails discussing a related OPRA request.</p>	<p>Attorney-client privilege. <u>N.J.S.A. 47:1A-1.1.</u></p>	<p>The portion of the first (1<sup>st</sup>) e-mail containing the forwarded OPRA request and news article does not contain attorney-client privileged communications. <b>Thus, the Custodian shall disclose this portion of the first (1<sup>st</sup>) e-mail.</b></p> <p>The main body of the first (1<sup>st</sup>) e-mail and the body of the second (2<sup>nd</sup>) e-mail were properly withheld as comprising attorney-client privileged</p>



				communications. <u>N.J.S.A. 47:1A-1.1.</u>
March 2, 2018 at 5:00 PM  (pg. 71)	From: Helen LeFrois  To: Kevin Elvidge  <b>Note: The e- mail does not include attachment contained within.</b>	E-mail states, “Final? Please advise.”	Deliberative process privilege. <u>N.J.S.A.</u> 47:1A-1.1.	The body of the e- mail does not contain ACD material or attorney-client privileged communications. <b>Thus, the Custodian shall disclose this e- mail.</b>
March 2, 2018 at 3:34 PM  (pg. 72)	From: Helen LeFrois  To: Kevin Elvidge  <b>Note: The e- mail does not include attachment contained within.</b>	E-mail states, “Final Draft?”	Deliberative process privilege. <u>N.J.S.A.</u> 47:1A-1.1.	The body of the e- mail does not contain ACD material or attorney-client privileged communications. <b>Thus, the Custodian shall disclose this e- mail.</b>
March 2, 2018 at 2:37 PM  (pg. 73)	From: Helen LeFrois  To: Kevin Elvidge  <b>Note: The e- mail does not include attachment contained within.</b>	E-mail states, “Revised. Please review.”	Deliberative process privilege. <u>N.J.S.A.</u> 47:1A-1.1.	The body of the e- mail does not contain ACD material or attorney-client privileged communications. <b>Thus, the Custodian shall disclose this e- mail.</b>
March 2, 2018 at 1:19 PM  (pg. 74)	From: Helen LeFrois  To: Kevin Elvidge  <b>Note: The e- mail does not</b>	The body of the e-mail is blank.	Deliberative process privilege. <u>N.J.S.A.</u> 47:1A-1.1.	The body of the e- mail does not contain ACD material or attorney-client privileged communications. <b>Thus, the</b>

	<b>include attachment contained within.</b>			<b>Custodian shall disclose this e-mail.</b>
March 2, 2018 at 4:55 PM  (pg. 75)	From: Ursula Leo  To: Helen LeFrois  <b>Note: The e-mail does not include attachment contained within.</b>	E-mail states, "Please see attached final final. Thank you."	Deliberative process privilege. <u>N.J.S.A. 47:1A-1.1.</u>	The body of the e-mail does not contain ACD material or attorney-client privileged communications. <b>Thus, the Custodian shall disclose this e-mail.</b>
March 2, 2018 at 3:14 PM  (pg. 76)	From: Ursula Leo  To: Helen LeFrois  <b>Note: The e-mail does not include attachment contained within.</b>	E-mail states, "Please see attached final draft for approval. Thank you."	Deliberative process privilege. <u>N.J.S.A. 47:1A-1.1.</u>	The body of the e-mail does not contain ACD material or attorney-client privileged communications. <b>Thus, the Custodian shall disclose this e-mail.</b>
March 2, 2018 at 2:27 PM  (pg. 77)	From: Ursula Leo  To: Helen LeFrois  <b>Note: The e-mail does not include attachment contained within.</b>	E-mail states, "Thank you."	Deliberative process privilege. <u>N.J.S.A. 47:1A-1.1.</u>	The body of the e-mail does not contain ACD material or attorney-client privileged communications. <b>Thus, the Custodian shall disclose this e-mail.</b>

For all the e-mails not listed above, the asserted exemptions apply, and the Custodian lawfully denied access to the body of each e-mail. N.J.S.A. 47:1A-6. Specifically, the e-mails contain discussions regarding draft resolutions and notices pertaining to the Complainant in advance of an upcoming Town meeting. These e-mails are exactly the type of records that the ACD exemption was intended to protect. Further, many of the e-mails contain attorney-client

privileged communications between the Town's attorney and its employees and are directly linked with the draft documents.

Additionally, consistent with N.J.S.A. 47:1A-5(g), if the custodian of a government record asserts that part of a particular record is exempt from public access pursuant to OPRA, the custodian must delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and must promptly permit access to the remainder of the record. In prior decisions, the Council has routinely required disclosure of certain information contained within e-mails, to include sender, recipients, date, time, subject, and salutations (where applicable). See Ray v. Freedom Acad. Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010); Verry v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-287 (Interim Order dated June 30, 2015).

Thus, the Custodian must disclose all of these portions of the responsive e-mails to the Complainant (*i.e.*, sender, recipients, date, time, subject, and salutations where applicable). As to those portions of the requested e-mails, the Custodian has unlawfully denied access. See Ray, GRC 2009-185. The GRC notes that if the Custodian intends to redact certain information in the categories identified above, she must provide a lawful basis for those redactions.

### **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 Custodian failed to comply with the Council's May 19, 2020 Interim Order because she did not respond within the prescribed time frame providing records for *in camera* review, and simultaneously providing certified confirmation of compliance to the Executive Director.
2. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order. Further, the Custodian shall simultaneously deliver<sup>9</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>10</sup> to the Executive Director.<sup>11</sup>**

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<sup>9</sup> The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

<sup>10</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>11</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the

3. The Custodian must disclose all of these portions of the responsive e-mails to the Complainant (*i.e.*, sender, recipients, date, time, subject, and salutations where applicable). As to those portions of the requested e-mails, the Custodian has unlawfully denied access. See Ray v. Freedom Acad. Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010). The GRC notes that if the Custodian intends to redact certain information in the categories identified above, she must provide a lawful basis for those redactions.
4. **The Custodian shall comply with conclusion No. 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver<sup>12</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Executive Director.**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Samuel A. Rosado  
Staff Attorney

June 22, 2021

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record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

<sup>12</sup> The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.



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

May 19, 2020 Government Records Council Meeting

Wayne Levante  
Complainant

Complaint No. 2018-127

v.

Town of Newton (Sussex)  
Custodian of Record

At the May 19, 2020 public meeting, the Government Records Council (“Council”) considered the May 12, 2020 Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The GRC must conduct an *in camera* review of the e-mails identified in the Vaughn index to determine the validity of the Custodian’s assertion that the redactions were valid under OPRA’s exemptions for advisory, consultative and deliberative material and/or attorney-client privileged 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 deliver<sup>1</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 1 above), 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 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 Custodian has borne her burden of proof that she lawfully denied access to the Complainant’s June 14, 2018 OPRA request based on the Custodian’s certification and the evidence of record indicating that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005); Verry v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2014-387 (July 2015). Additionally, because no responsive records exist the Council declines to address the remaining defenses raised by the Custodian.

<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."

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 19<sup>th</sup> Day of May 2020

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: May 20, 2020**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
May 19, 2020 Council Meeting**

**Wayne Levante<sup>1</sup>  
Complainant**

**GRC Complaint No. 2018-127**

v.

**Town of Newton (Sussex)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies of:

June 7, 2018 OPRA Request:

E-mails listed within a Vaughn index provided in response to a separate OPRA request dated March 5, 2018.<sup>3</sup> See Exhibit A.

June 14, 2018 OPRA Request:<sup>4</sup>

1. Personal cell phone records (calls placed/received to/from as well as call times and call length) of Daniel Flynn, Kevin Elvidge, Helen Le Frois, and Sandy Diglio (“Councilmembers”) from February 21, 2018 to March 10, 2018 between themselves, town professionals, and reporters.
2. All text messages of Councilmembers from February 21, 2018 to March 10, 2018 between themselves, town professionals, and reporters pertaining to Wayne Levante, the March 5, 2018 public hearing, the censure resolution, and all related matters.

**Custodian of Record:** Lorraine A. Read

**Request Received by Custodian:** June 7, 2018; June 14, 2018

**Response Made by Custodian:** June 15, 2018; June 25, 2018

**GRC Complaint Received:** July 5, 2018

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

<sup>2</sup> Represented by Tara Ann St. Angelo, Esq., of Gebhardt & Kiefer, P.C. (Clinton, N.J.).

<sup>3</sup> The term *Vaughn* index is derived from *Vaughn v. Rosen*, 484 F.2d 820, 826-28, 157 U.S. App. D.C. 340 (D.C. Cir. 1973), cert. denied, 415 U.S. 977, 94 S. Ct. 1564, 39 L. Ed. 2d 873 (1974). See *Paff v. Div. of Law*, 412 N.J. Super. 140, 161 n. 9, 988 A.2d 1239 (App. Div. 2010), certif. denied, 202 N.J. 45, 994 A.2d 1040 (2010). A *Vaughn* index provides details justifying non-disclosure of documents based on an asserted privileged. *Ibid*.

<sup>4</sup> The Complainant sought additional records that are not at issue in this complaint.

## **Background**<sup>5</sup>

### June 7, 2018 OPRA Request and Response:

On June 7, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On June 15, 2018, the Custodian responded in writing stating that access to the requested e-mails were denied for the same reasons listed in the Vaughn index; that the e-mails were protected from disclosure under the attorney-client privilege and/or the deliberative process privilege. N.J.S.A. 47:1A-1.1. The Custodian also included the complete response that accompanied the Vaughn index, provided in response to a third-party OPRA request.

### June 14, 2018 OPRA Request and Response:

On June 14, 2018, the Complainant submitted an OPRA request to the Custodian seeking the above-mentioned records. On June 25, 2018, the Custodian responded in writing, providing separate responses for each request item.

For Item No. 1, the Custodian stated that the criteria set forth in Burnett v. Cnty. of Bergen, 198 N.J. 408, 425 (2009) disfavored disclosure of work-related calls made from private cell phones, referencing Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2011-280 (June 2015). The Custodian also stated that none of the Councilmembers listed by the Complainant possessed a cell phone issued by the Town of Newton (“Newton”) or received a stipend from Newton for their personal cell phones.

For Item No. 2, the Custodian stated that no responsive records exist.

### Denial of Access Complaint:

On July 5, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the e-mails responsive to the June 7, 2018 OPRA request pertained to discussions and deliberations that occurred prior to a March 5, 2018 public hearing. The Complainant asserted that the deliberative process privilege identified under N.J.S.A. 10:4-12(b)(9) of the Open Public Meetings Act (“OPMA”) applied only to deliberations occurring after a public hearing. The Complainant asserted that the Councilmembers’ participation in the requested e-mails constituted a quorum, and according to OPMA’s rules the deliberative process privilege was inapplicable. The Complainant also asserted that if the attorney-client privilege exemption was a valid basis, then as Mayor of Newton at the time of the request he was the “client” and had the authority to seek records to protect the public’s interest and investigate misconduct.

Regarding the June 14, 2018 request, the Complainant asserted that the Councilmembers regularly used their personal cell phones for official business. The Complainant also asserted that

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<sup>5</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 Executive Director the submissions necessary and relevant for the adjudication of this complaint.



responsive text messages did exist, and attached exhibits demonstrating that Newton administrators and Councilmembers utilized text messages and social media to discuss official business.

The Complainant requested the Council order Newton to retrieve and release all withheld records including personal cell phone logs and text messages so that the events surrounding the March 5, 2018 public hearing could be investigated in full.<sup>6</sup>

#### Statement of Information:

On August 1, 2018, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA requests on June 7, 2018 and June 14, 2018, respectively.

Regarding the June 7, 2018 request, the Custodian certified that the requested e-mails were those withheld in response to a third-party OPRA request dated March 5, 2018. The Custodian certified that she resubmitted the listed e-mails to Newton’s legal counsel for review. The Custodian then certified that she responded in writing on June 15, 2018, maintaining the same basis for denial as stated in response to the third-party request and within the Vaughn index.

Regarding the June 14, 2018 request, the Custodian certified that she contacted the Councilmembers individual to obtain copies of their cell phone records, including call logs and text messages for the period between February 1, 2018 and March 10, 2018. The Custodian certified that each Councilmember informed her that their cell phones no longer contained information for the requested period. The Custodian certified that the lack of information was a result of either their phone settings being on “auto-delete” or the limitations of older cell phone models. The Custodian certified that Newton contacted Verizon Wireless, and they advised her that they retained call logs and text logs for only ninety (90) days. The Custodian also certified that Verizon informed her that text logs did not contain the message’s contents, but only the time, date, and recipient number. The Custodian certified that she asked Verizon to provide this information in writing but was refused. The Custodian certified that she also contacted a representative at the New Jersey Division of Archives and Records Management (“DARM”)<sup>7</sup> who informed her that there was no Records Disposition Schedule for personal cell phone records. The Custodian certified that she responded in writing on June 25, 2018, stating that personal cell phone logs were not government records, and that no responsive records exist for the requested text messages.

#### June 7, 2018 OPRA Request

The Custodian asserted that the requested e-mails were lawfully withheld from access because they contained advisory, consultative, or deliberative (“ACD”) material. The Custodian

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<sup>6</sup> The Complainant expanded his request to seek access to “Facebook Messenger” threads within the stated period. However, access to Facebook messages was not part of the Complainant’s original requests. For this reason, the GRC declines to address whether the Complainant was unlawfully denied access to these records.

<sup>7</sup> Now known as Records Management Services with the New Jersey Department of Treasury, Division of Revenue and Enterprise Services.

contended that the e-mails discussed drafts of a resolution to censure the Complainant in his capacity as Mayor. The Custodian also contended that the Complainant's reliance on N.J.S.A. 10:4-12(b)(9) was inapplicable to interpretations of OPRA's ACD exemption.

The Custodian argued that the requested e-mails satisfied the test under Educ. Law Ctr. v. N.J. Dep't of Educ., 198 N.J. 274, 285 (2009), in that they were pre-decisional and reflected the deliberative process regarding government policy. The Custodian asserted that the e-mails dated March 1 and 2, 2018 contained discussions amongst Newton officials regarding a draft resolution to censure the Complainant, as well as a draft agenda for the March 5, 2018 public hearing. The Custodian also asserted that three (3) of the responsive e-mails dated March 5, 2018 were in fact dated March 6 and 9, 2018, but were mislabeled. The Custodian asserted that those e-mails contained discussions surrounding Newton's response to the third-party OPRA request.

The Custodian argued that the March 1 and 2, 2018 e-mails and attached draft documents were exchanged prior to the March 5, 2018 public hearing, and thereby satisfied the first criteria. The Custodian then asserted that the e-mails reflected comments and suggestions by Newton officials on the contents of the resolution, agenda, and meeting notice, thus satisfied the second criteria under Educ. Law Ctr., 198 N.J. at 285.

Regarding the March 6 and 9, 2018 e-mails, the Custodian asserted that the discussions were exchanged prior to Newton's response and contained comments and suggestions regarding Newton's response to the third party OPRA request. The Custodian contended that the e-mails thus satisfied the relevant criteria under Educ. Law Ctr., 198 N.J. at 285.

The Custodian argued that once the criteria has been satisfied, the burden shifts to the Complainant to overcome a presumption of confidentiality. In the instant matter, the Complainant did not provide any evidence to challenge the presumption. The Custodian asserted that the Complainant's suspicions of abuse of power and collusion against Newton officials were vague and lacked specificity. The Custodian argued that the Complainant's reference to a Facebook discussion between Mr. Flynn and a Newton resident appeared on its face as a conversation between a political candidate and constituent rather than evidence of wrongdoing.

The Custodian also asserted that the Complainant's reference to potential OPMA violations contained within the responsive e-mails were false. The Custodian contended that the e-mail exchanges were between no more than two (2) Councilmembers, and therefore would not have constituted a quorum under OPMA. N.J.S.A. 10:4-8. The Custodian also contended that all responsive e-mails that included more than one (1) Council member copied the Complainant, and thus he would be in possession of those e-mails.

Regarding the Complainant's contention that as Mayor he was the "client" and therefore entitled to access, the Custodian argued that such a request was outside the scope of OPRA, and thus outside the GRC's jurisdiction. Additionally, the Custodian asserted that OPRA did not accord special treatment to a requestor based upon their status as a government official. The Custodian argued that attorney-client privilege can only be waived by agents of the organization acting within the scope and authority of their official duties. Hedden v. Kean Univ., 434 N.J. Super. 1, 16 (App. Div. 2013). The Custodian asserted that although the Complainant was an agent of Newton at the

time of the request, he was not acting within the scope and authority of his position. The Custodian noted that the Complainant submitted his OPRA request after he had lost the election held on May 8, 2018 and there were only two (2) Newton Council meetings remaining (June 11 and 25, 2018) where he still held his position. The Custodian asserted that the agendas for those meetings did not contain topics relevant to the requested e-mails, and she attached copies of the agendas to the SOI. The Custodian asserted that it was clear that the Complainant was seeking access to the responsive e-mails in his individual capacity for personal reasons, and thus did not have the authority to waive the attorney-client privilege.

The Custodian also asserted that disclosure would frustrate the purpose of OPRA's ACD exemption. The Custodian asserted that if Newton officials believed their thoughts and ideas expressed during the deliberative process would be subject to disclosure to the Complainant, they would not have felt free to candidly discuss their positions on the surrounding matter.

Additionally, the Custodian contended that the Complainant possessed some of the responsive e-mails, and the Custodian was not required to send a copy of a record already in the Complainant's possession, citing Scutro v. City of Linden (Union), GRC Complaint No. 2012-219 (June 2013), Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609 (App. Div. 2008), and Owoh (on behalf of O.R.) v. West Windsor-Plainsboro Reg'l Sch. Dist. (Mercer), GRC Complaint No. 2012-330 (February 2013).

#### June 14, 2018 OPRA Request

The Custodian first argued that the Complainant's request for personal cell phone logs were properly denied as they were not government records under OPRA. The Custodian contended that in Verry, GRC 2011-280, the Council referred the matter to the Office of Administrative Law ("OAL"). The Custodian asserted that the Council accepted the initial decision of the Administrative Law Judge ("ALJ"), who found that "[t]he mere use of a private cell phone at work to make private calls does not trigger the statute." The Custodian also noted that the ALJ reasoned that the privacy factors under Burnett did not weigh in favor of disclosing personal cell phone records simply because a municipal employee may have used a personal cell phone for municipal purposes on occasion. Id. (citing Burnett, 198 N.J. 408).

The Custodian asserted that these principles also applied to the Complainant's request for text messages from the Councilmembers' personal cell phones. The Custodian noted that the GRC previously held that determining access to text messages was made on a case-by-case basis and that "unmitigated" access was not warranted, citing Verry v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2014-387 (July 2015). The Custodian asserted that because Newton did not issue cell phones to Councilmembers, it could not control access to call logs or text messages, nor did Newton maintain such records. The Custodian asserted that the Complainant's evidence of one (1) text message between himself and Mr. Flynn did not support the proposition that Councilmembers' personal cell phone records should be subject to OPRA.

Lastly, the Custodian argued that a denial of an OPRA request was not unlawful where the requested records did not exist, citing Wolosky v. Twp. of Frankford (Sussex), GRC Complaint

No. 2008-254 (Interim Order dated November 4, 2009), and Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).

The Custodian requested that the Council uphold Newton's denial of access to the Complainant's OPRA requests.

Additional Submissions:

On December 27, 2018, the Complainant filed a response to the Custodian's SOI. The Complainant first asserted that the SOI deflected from addressing the improper communications amongst the Council members. The Complainant asserted that the March 5, 2018 public hearing occurred without due process because any discussion amongst the Councilmembers regarding resolutions and drafts should have been expressed in a public forum.

The Complainant also reiterated that the evidence he provided demonstrated that Newton officials discussed public matters via private venues. The Complainant contended that Newton did not provide evidence that they reached out to Verizon and were unable to recover phone logs and text messages. The Complainant contended that the GRC should not be willing to accept the Custodian's claims without documentation and evidence.

The Complainant argued that the events of the March 5, 2018 meeting were matters of public interest and concern. The Complainant asserted that release of those documents and e-mails would ensure government accountability and show that no improper conduct occurred regarding the March 5, 2018 public hearing.

On April 9, 2020, the GRC requested additional information from the Custodian. Specifically, the GRC requested certifications from the Councilmembers, asking the following:

1. Did you conduct a search of your personal cell phone for any responsive records? If so, please describe the search undertaken.
2. On what specific basis did you inform the Custodian that you did not possess responsive records?

On April 14, 2020, the Custodian e-mailed the GRC requesting an extension of time until May 8, 2020 to respond. That same day, the Complainant responded to the Custodian's e-mail requesting the GRC deny the extension request, asserting that it should not take Newton three (3) weeks to obtain four (4) certifications. The Complainant also stated that he filed an action with the New Jersey Superior Court related to the circumstances surrounding the OPRA request and believed Newton sought the extension to await the results of an upcoming hearing.

On April 15, 2020, the Custodian responded to the Complainant's reply, stating that neither the Councilmembers nor Newton were named as defendants in the action mentioned by the Complainant. The Custodian stated that the basis for the extension was due to the COVID-19 pandemic facing Newton, and the request required the Councilmembers to recall facts from several years ago. That same day, the GRC granted the Custodian's extension request through May 8, 2020.

On May 8, 2020, the Custodian responded to the GRC's request for additional information, providing certifications from Sandra Diglio, Daniel Flynn, Helen Le Frois, and Kevin Elvidge.

Ms. Diglio certified that to the best of her knowledge, she did not receive any text messages concerning Newton business between February 21, 2018 and March 10, 2018. Ms. Diglio also certified that she did not perform a search due to the capabilities of her cell phone at the time. Ms. Diglio certified that she was using a "flip phone" that had little memory and therefore text messages and call logs were not stored for long.

Mr. Flynn certified that at the time of the request, his cell phone was set to "auto delete," and the request sought records nearly four (4) months old. Mr. Flynn certified that in response to the OPRA request, he informed the Custodian that he did not possess responsive records.

Ms. Le Frois certified that in response to the OPRA request, she informed the Custodian that she did not possess responsive records. Ms. Le Frois certified that she did not use her personal cell phone to conduct municipal business via text message, nor did she text other Councilmembers or Newton professionals to conduct municipal business. Ms. Le Frois certified that she primarily used e-mail to communicate with other Councilmembers and Newton professionals. Ms. Le Frois also certified that no records exist pertaining to conversations with reporters, because it was her policy not to speak with reporters regarding personnel matters or potential litigation.

Mr. Elvidge certified that to the best of his recollection, he searched his cell phone for text messages and call logs regarding the OPRA request. Mr. Elvidge certified that he did not receive or send text messages concerning Newton business between February 21, 2018 to March 10, 2018 and informed the Custodian of same.

### 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.

#### June 7, 2018 OPRA Request

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:

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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).

[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 withheld e-mails contained ACD and/or attorney-client privileged material and were therefore not subject to access under OPRA. N.J.S.A. 47:1A-1.1. As part of the response and SOI, the Custodian provided descriptions of the e-mails listed in the Vaughn index. The Complainant asserted that the e-mails were not subject to the deliberative process privilege because they were discussions held amongst Councilmembers in advance of a public hearing. The Complainant also asserted that for those records withheld under the attorney-client privilege, as Mayor of Newton at the time the OPRA request was made, he had the authority to waive the privilege.

Notwithstanding the Custodian's descriptions, a "meaningful review" is necessary to determine whether all withheld records reasonably fell within the ACD and/or attorney-client exemption. The GRC must thus review same to determine the full applicability of exemptions. 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 e-mails identified in the Vaughn index to determine the validity of the Custodian's assertion that the redactions were valid under OPRA's exemptions for ACD and/or attorney-client privileged material. N.J.S.A. 47:1A-1.1. See Paff, 379 N.J. Super. at 346.

### June 14, 2018 OPRA Request

The Council has previously found that, where a custodian certified that no responsive records exist, no unlawful denial of access occurred. See Pusterhofer, GRC 2005-49. In Verry, GRC 2014-387, the complainant submitted an OPRA request seeking text messages from several public officials dated approximately six (6) months prior. The custodian certified that he reached out to the individuals to conduct a search for responsive records. The custodian certified that the individuals informed him that they did not possess responsive records, either because they no longer possessed the cell phones used back then, or their phones lacked the storage space to retain text messages from that period. The custodian also certified that he reached out to Verizon to confirm they could not retrieve text messages from that period. Citing Pusterhofer, the Council held there was no unlawful denial of access based on the custodian's certification and the complainant's lack of refuting evidence. GRC 2005-49.

Here, the Complainant's June 14, 2018 OPRA request sought cell phone records and text messages between Newton Councilmembers and themselves, Newton officials, and reporters dated between February 21, 2018 through March 10, 2018, approximately four (4) months prior. The Custodian certified that she reached out to the Councilmembers to have them conduct a search for responsive records. Similar to the facts in Verry, GRC 2014-387, the Custodian certified that the Councilmembers informed her that they did not possess any responsive records, either because they did not send or receive text messages or phone calls during that period, or due to the settings or technical limitations of their cell phones. The Custodian also certified that Verizon informed her that they retained call logs and text logs for only ninety (90) days. Moreover, the GRC received individual certifications from the Councilmembers on May 8, 2020, each affirming they did not possess responsive records at the time of the request. Although the Complainant provided evidence indicating that Mr. Flynn utilized his personal cell phone to conduct official business, it was not evidence that Mr. Flynn or the other Councilmembers possessed responsive records at the time of the request.

Accordingly, the Custodian has borne her burden of proof that she lawfully denied access to the Complainant's June 14, 2018 OPRA request based on the Custodian's certification and the evidence of record indicating that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer, GRC 2005-49; Verry, GRC 2014-387. Additionally, because no responsive records exist the Council declines to address the remaining defenses raised by the Custodian.

### **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 e-mails identified in the Vaughn index to determine the validity of the Custodian's assertion that the redactions were valid under OPRA's exemptions for advisory, consultative and deliberative material and/or attorney-client privileged 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 deliver<sup>9</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 1 above), 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 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 Custodian has borne her burden of proof that she lawfully denied access to the Complainant's June 14, 2018 OPRA request based on the Custodian's certification and the evidence of record indicating that no responsive records exist. N.J.S.A. 47:1A-6; see Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005); Verry v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2014-387 (July 2015). Additionally, because no responsive records exist the Council declines to address the remaining defenses raised by the Custodian.
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Samuel A. Rosado  
Staff Attorney

May 12, 2020

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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."



# Item 6 - June 7, 2018 Request

**From:** W. Levante <[wlevante@newtontownhall.com](mailto:wlevante@newtontownhall.com)>  
**Sent:** Thursday, June 7, 2018 9:14 AM  
**To:** Lorraine A. Read <[lread@newtontownhall.com](mailto:lread@newtontownhall.com)>  
**Cc:** Thomas S. Russo, Jr. <[trusso@newtontownhall.com](mailto:trusso@newtontownhall.com)>; Ursula Leo <[uleo@lclaw.com](mailto:uleo@lclaw.com)>  
**Subject:** Document request

Lorraine,

I need copies of all of these documents.

Thank you.

Wayne

Date	To/From/cc's	Description	Basis for Withholding
March 1, 2018	T. Russo, U. Leo, Esq., M. Richards, J. Dodd	Emails discussing draft resolution and draft <u>Rice</u> notice	Attorney-client privilege; deliberative process privilege <u>N.J.S.A. § 47:1A-1.1.</u>
March 1, 2018	T. Russo, U. Leo, Esq., D. Flynn	Emails discussing draft resolution	Attorney-client privilege; deliberative

Date	To/From/cc's	Description	Basis for Withholding
			process privilege <u>N.J.S.A. § 47:1A-1.1.</u>
March 2, 2018	U. Leo, Esq., W. Levante, K. Elvidge, H. Le Frois, D. Flynn, S. Diglio, T. Russo, L. Read, M. Richards	Emails discussing draft resolution	Attorney-client privilege; deliberative process privilege <u>N.J.S.A. § 47:1A-1.1.</u>
March 5, 2018	T. Oswen, U. Leo, Esq., H. Scheurs, T. Russo, L. Read, M. Estremera, J. Roberts	Emails discussing instant OPRA request	Attorney-client privilege, <u>N.J.S.A. § 47:1A-1.1.</u>
March 2, 2018	H. Le Frois, K. Elvidge	Emails exchanging drafts of censure resolution.	Deliberative process privilege <u>N.J.S.A. § 47:1A-1.1.</u>

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Hon. Wayne F. Levante  
Mayor  
Town of Newton  
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Newton, NJ 07860

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