



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

July 26, 2022 Government Records Council Meeting

Shirley A. Brown
Complainant

Complaint No. 2018-293

v.

NJ Department of Treasury,
Division of Lottery
Custodian of Record

At the July 26, 2022 public meeting, the Government Records Council (“Council”) considered the July 19, 2022 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 May 31, 2022 Interim Order because she responded in the extended time frame abiding by the *In Camera* Examination findings and simultaneously providing certified confirmation of compliance to the Executive Director.
2. The Custodian unlawfully denied access to several e-mail bodies and other non-exempt portions of the remaining e-mails. N.J.S.A. 47:1A-6. However, the Custodian lawfully denied access to the remaining e-mail bodies and attachments. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9(b); R. 4:10-2(c). Further, the Custodian timely complied with both the Council’s September 29, 2020 and May 31, 2022 Interim Orders. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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



Final Decision Rendered by the
Government Records Council
On The 26th Day of July 2022

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 28, 2022

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
July 26, 2022 Council Meeting**

**Shirley A. Brown¹
Complainant**

GRC Complaint No. 2018-293

v.

**NJ. Department of Treasury,
Division of Lottery²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of “any document(s) relative to Claim No. 18062071280 including all e[-]mails.”³

Custodian of Record: Jill Dawson
Request Received by Custodian: September 10, 2018
Response Made by Custodian: September 19, 2018
GRC Complaint Received: November 26, 2018

Background

May 31, 2022 Council Meeting:

At its May 31, 2022 public meeting, the Council considered the May 24, 2022 *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 complied with the Council’s September 29, 2020 Interim Order because she responded in the extended time frame providing nine (9) copies of the unredacted records for an *in camera* review with a document index 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**

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Robert E. Kelly.

³ The Complainant sought additional records not at issue in this complaint.

Custodian shall simultaneously deliver⁴ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁵ to the Executive Director.⁶

3. The Custodian must disclose all other 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 responsive e-mail chains, 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).
4. **The Custodian shall comply with conclusion No. 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously deliver⁷ certified confirmation of compliance, in accordance with N.J. Court Rule R. 1:4-4,⁸ to the Executive Director.⁹**
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 1, 2022, the Council distributed its Interim Order to all parties. On June 6, 2022, Custodian's Counsel e-mailed the Government Records Council ("GRC") seeking an extension of time through June 15, 2022 to respond to the Order. On June 7, 2022, the GRC responded granting the requested extension of time. On June 14, 2022, Custodian's Counsel e-mailed the GRC seeking a second extension of time through June 23, 2022 due to several circumstances delaying their response. On June 16, 2022, the GRC responded stating that it was granting the requested second extension after consideration of the presented circumstances.

⁴ 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 "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."

⁶ 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.

⁷ 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.

⁸ "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."

⁹ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

On June 23, 2022, the Custodian responded to the Council's Interim Order. Therein, the Custodian certified that she was disclosing to the Complainant the responsive records in accordance with the Council's *In Camera* Examination. The Custodian further certified that she was providing certified confirmation of compliance as required by the Order.

Analysis

Compliance

At its May 31, 2022 meeting, the Council ordered the Custodian to comply with the Council's *In Camera* Examination findings and submit certified confirmation of compliance, in accordance with R. 1:4-4, to the Executive Director. On June 1, 2022, 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 June 8, 2022.

On June 6, 2022, the third (3rd) business day after receipt of the Council's Order, Custodian's Counsel sought a five (5) business day extension of the compliance time frame, which the GRC granted. Prior to the expiration of the extension, Custodian's Counsel again sought and was granted a second extension of time through June 23, 2022 to respond to the Council's Order. On June 23, 2022, the Custodian responded to the Council's Order. Therein, she certified that she disclosed to the Complainant the responsive records in accordance with the *In Camera* Examination findings. The Custodian further affirmed that she was providing certified confirmation of compliance to the Executive Director. Upon review of the submissions, the GRC is satisfied that the Custodian has complied with the Order.

Therefore, the Custodian complied with the Council's May 31, 2022 Interim Order because she responded in the extended time frame abiding by the *In Camera* Examination findings and simultaneously providing 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 several e-mail bodies and other non-exempt portions of the remaining e-mails. N.J.S.A. 47:1A-6. However, the Custodian lawfully denied access to the remaining e-mail bodies and attachments. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9(b); R. 4:10-2(c). Further, the Custodian timely complied with both the Council's September 29, 2020 and May 31, 2022 Interim Orders. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's May 31, 2022 Interim Order because she responded in the extended time frame abiding by the *In Camera* Examination findings and simultaneously providing certified confirmation of compliance to the Executive Director.
2. The Custodian unlawfully denied access to several e-mail bodies and other non-exempt portions of the remaining e-mails. N.J.S.A. 47:1A-6. However, the Custodian lawfully denied access to the remaining e-mail bodies and attachments. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9(b); R. 4:10-2(c). Further, the Custodian timely complied with both the Council's September 29, 2020 and May 31, 2022 Interim Orders. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: Frank F. Caruso
Executive Director

July 19, 2022



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
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INTERIM ORDER

May 31, 2022 Government Records Council Meeting

Shirley A. Brown
Complainant

Complaint No. 2018-293

v.

NJ Department of Treasury,
Division of Lottery
Custodian of Record

At the May 31, 2022 public meeting, the Government Records Council (“Council”) considered the May 24, 2022 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 September 29, 2020 Interim Order because she responded in the extended time frame providing nine (9) copies of the unredacted records for an *in camera* review with a document index 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 deliver¹ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,² to the Executive Director.³**
3. the Custodian must disclose all other 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 responsive e-mail chains, 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).

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

² "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

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

4. **The Custodian shall comply with conclusion No. 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously deliver⁴ certified confirmation of compliance, in accordance with N.J. Court Rule R. 1:4-4,⁵ to the Executive Director.⁶**
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 31st Day of May 2022

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 1, 2022

⁴ 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 "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."

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

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
May 31, 2022 Council Meeting**

**Shirley A. Brown¹
Complainant**

GRC Complaint No. 2018-293

v.

**NJ. Department of Treasury,
Division of Lottery²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of “any document(s) relative to Claim No. 18062071280 including all e[-]mails.”³

Custodian of Record: Jill Dawson
Request Received by Custodian: September 10, 2018
Response Made by Custodian: September 19, 2018
GRC Complaint Received: November 26, 2018

Records Submitted for *In Camera* Examination: 133 e-mails and applicable attachments (196 pages).

Background

September 29, 2020 Council Meeting:

At its September 29, 2020 public meeting, the Council considered the September 22, 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 133 pages of e-mails responsive to the Complainant’s OPRA request (less those pages already provided) to validate the Custodian’s assertion that the records were exempt from disclosure under the attorney-client privilege and attorney work product exemptions. See Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005); N.J.S.A. 47:1A-1.1; N.J. Court Rules, R. 4:10-2(c).

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Robert E. Kelly.

³ The Complainant sought additional records not at issue in this complaint.

2. **The Custodian shall deliver⁴ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 1 above), a document or redaction index⁵, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,⁶ 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 Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On September 30, 2020, the Council distributed its Interim Order to all parties on. On October 5, 2020, Custodian's Counsel contacted the Government Records Council ("GRC") to obtain an extension of time to respond to the Council's Order. On the same day, the GRC granted an extension of time to respond through October 15, 2020. On October 14, 2020, Custodian's Counsel sought a second (2nd) extension of time to respond due to current workload and technological issues. On October 15, 2020, the Complainant e-mailed the GRC objecting to Counsel's request for an extension because of the N.J. Department of Treasury's ("Treasury") pattern of obtaining past extensions. The GRC responded granting the requested extension of time to respond through October 22, 2020 due to the on-going COVID-19 public health emergency's impact on agency operations.

On October 22, 2020, the Custodian responded to the Council's Interim Order. The Custodian certified that she was providing for *in camera* review 196 pages of unredacted records comprising the e-mails to which she denied access, as well as applicable attachments included therein. The Custodian noted that the partially redacted e-mail previously disclosed to the Complainant is located at pages 115-116 of the *in camera* packet.

Additional Submissions:

On October 30, 2020, the Complainant submitted a letter brief refuting the Custodian's response to the Council's Order. Specifically, the Complainant argued that the Custodian's certification and privilege log was in error because the total pages of responsive records grew from 133 pages in the Statement of Information to 196 pages in the Custodian's response to the Interim Order. The Complainant contended that this addition is in violation of the N.J.A.C. 5:105-2.4(f) because the GRC has not ordered or approved the inclusion of the extra pages through "additional submissions."

⁴ 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.

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

⁶ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

The Complainant also contended that the document index is deficient because it does not identify an investigation report dated June 28, 2018 identified in sworn testimony from in Moore v. Div. of Lottery, Claim No. 18062071280. The Complainant contended that although that report was “inextricably intertwined” with Moore, it was not identified in the index. The Complainant also argued that the Custodian did not include in said index records that were provided to her in June and July 2018. The Complainant also identified several other records related to the game number “intertwined” that was the subject of Claim No. 18062071280 that were not disclosed until submission of another OPRA request. The Complainant alleged that omitting records that did not precisely match the subject of the OPRA request was unlawful, while noting that custodians are not required to perform an “open-ended analysis. Burke v. Brandes, 429 N.J. Super. 169, 177 (App. Div. 2012). The Complainant attached these documents to her letter as Exhibits B through G.

Analysis

Compliance

At its September 29, 2020 meeting, the Council ordered the Custodian to submit nine (9) unredacted copies of responsive 133 pages of e-mail correspondence withheld from disclosure for *in camera* review. The Council also ordered the Custodian to simultaneously provide certified confirmation of compliance, in accordance with R. 1:4-4, to the Executive Director. On September 30, 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 October 7, 2020.

On October 22, 2020, the last day of the second approved extension of time to comply, the Custodian responded to the Council’s Order providing nine (9) copies of the responsive unredacted e-mails for an *in camera* review, a document index, and certified confirmation of compliance. Thus, compliance has been achieved here.

Therefore, the Custodian complied with the Council’s September 29, 2020 Interim Order because she responded in the extended time frame providing nine (9) copies of the unredacted records for an *in camera* review with a document index 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.

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.

Further, “[t]he provisions of [OPRA] shall not abrogate or erode any . . . grant of confidentiality . . . recognized by . . . court rule.” N.J.S.A. 47:1A-9(b). As such, OPRA does not allow for the disclosure of attorney work product, consisting of “the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.” R. 4:10-2(c).

In Laporta v. Gloucester Cnty. Bd. of Chosen Freeholders, 340 N.J. Super. 245 (App. Div. 2001), the Appellate Division explained that “[t]he work-product doctrine was first recognized by the Supreme Court of the United States . . . and protects from disclosure those documents and other tangible things that a party or a party's representative prepares in anticipation of litigation.” Id. at 259 (internal citation omitted). The court went on to determine that a memorandum composed by the County and sent to a Freeholder still fell under the attorney work product exemption because it was “prepared in the context of [County Counsel’s] preparation for the defense of the litigation brought by plaintiff against the County for reinstatement and damages.” Id. at 260.

The GRC conducted an *in camera* examination on the submitted record. Upon review, it is clear that many of the conversations and attachments related to litigation against the Division of Lottery and its DAG’s attempt to obtain records in furtherance of their defense. Thus, a vast majority of the e-mail bodies and every attachment are exempt from disclosure under the attorney-client and attorney-work product exemption. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9(b); R. 4:10-2(c).

However, the GRC has identified a few e-mails that contain general information and not any content that would be considered exempt under the above exemptions. The GRC lists those e-mails requiring disclosure of the bodies in the following table:

Record No.	Record Name/Date	Description of Record	Custodian’s Explanation/ Citation for Non-disclosure	Findings of the <i>In Camera</i> Examination ⁷
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⁷ **Unless expressly identified for redaction, everything in the record shall be disclosed.** For purposes of identifying redactions, unless otherwise noted a paragraph/new paragraph begins whenever there is an indentation and/or a skipped space(s). The paragraphs are to be counted starting with the first whole paragraph in each record and continuing sequentially through the end of the record. If a record is subdivided with topic headings, renumbering of paragraphs will commence under each new topic heading. Sentences are to be counted in sequential order throughout each paragraph in each record. Each new paragraph will begin with a new sentence number. If only a portion of a sentence is to be redacted, the word in the sentence which the redaction follows or precedes, as the case may be, will be identified and set off in quotation marks. If there is any question as to the location and/or extent of the redaction,

Page No. 011	Automatic Reply from Michael DeCheser to James Carey dated July 31, 2018 (4:24pm).	Automatic reply acknowledging absence from work.	Attorney-client privilege; attorney work product – “executing legal instructions.”	This e-mail is an autoreply and contains no attorney-client or work product information. Instead, the e-mail simply informs senders that Mr. Decheser is absent from work. Thus, Custodian unlawfully denied access to the body of this e-mail and must disclose same. <u>N.J.S.A. 47:1A-6.</u>
Page No. 065	E-mail from Daniel O’Brien to Nicole Roberts dated August 1, 2018 (9:32am).	Mr. O’Brien states “Thank you.”	Attorney-client privilege; attorney work product – “executing legal instructions.”	This e-mail body contains no attorney-client or work product information. Thus, Custodian unlawfully denied access to the body of this e-mail and must disclose same. <u>N.J.S.A. 47:1A-6.</u>
Page No. 081	Automatic Reply from DAG Robert Kelly to Mr. Carey dated August 1, 2018 (10:13am).	Automatic reply acknowledging absence from work.	Attorney-client privilege; attorney work product	This e-mail is an autoreply and contains no attorney-client or work product information. Instead, the e-mail simply informs senders that DAG Kelly is absent from work. Thus, Custodian unlawfully denied access to the body of this e-mail and must disclose same. <u>N.J.S.A. 47:1A-6.</u>
Page No. 109	E-mail from Regina Arcuri to Frances Edwards dated August 1, 2018 (11:52am).	Ms. Arcuri states “Thank you Fran!”	Attorney-client privilege; attorney work product – “executing legal instructions.”	This e-mail body contains no attorney-client or work product information. Thus, Custodian unlawfully

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.

				denied access to the body of this e-mail and must disclose same. <u>N.J.S.A. 47:1A-6.</u>
Page No. 113	E-mail from Regina Arcuri to Kaitlyn Cunning dated August 1, 2018 (11:52am).	Ms. Arcuri states "Thanks!"	Attorney-client privilege; attorney work product – "executing legal instructions."	This e-mail body contains no attorney-client or work product information. Thus, Custodian unlawfully denied access to the body of this e-mail and must disclose same. <u>N.J.S.A. 47:1A-6.</u>
Page No. 117 Note: e-mail also present on page No. 119 below.	E-mail from Ms. Arcuri to Melissa Williams dated August 1, 2018 (11:53am).	Ms. Arcuri states "Thank you!"	Attorney-client privilege; attorney work product – "executing legal instructions."	This e-mail body contains no attorney-client or work product information. Thus, Custodian unlawfully denied access to the body of this e-mail and must disclose same. <u>N.J.S.A. 47:1A-6.</u>
Page No. 119	E-mail from Ms. Williams to Ms. Arcuri dated August 1, 2018 (11:53am).	Ms. Williams states "No problem."	Attorney-client privilege; attorney work product – "executing legal instructions."	This e-mail body contains no attorney-client or work product information. Thus, Custodian unlawfully denied access to the body of this e-mail and must disclose same. <u>N.J.S.A. 47:1A-6.</u>
Page No. 156	E-mail from Ms. Arcuri to the Custodian dated August 2, 2018 (8:59am).	Ms. Arcuri states "Thank you!"	Attorney-client privilege; attorney work product – "executing legal instructions."	This e-mail body contains no attorney-client or work product information. Thus, Custodian unlawfully denied access to the body of this e-mail and must disclose same. <u>N.J.S.A. 47:1A-6.</u>
Page No. 181	Automatic Reply from Aimee Manocchio Nason to Mr. O'Brien dated	Automatic reply acknowledging absence from work.	Attorney-client privilege; attorney work product	This e-mail is an autoreply and contains no attorney-client or work product information. Instead, the e-mail simply

	August 23, 2018 (12:28pm).			informs senders that Ms. Manocchio Nason is absent from work. Thus, Custodian unlawfully denied access to the body of this e-mail and must disclose same. N.J.S.A. 47:1A-6.
Page No. 182	Automatic Reply from DAG George Loeser to Mr. O'Brien dated August 23, 2018 (12:28pm).	Automatic reply acknowledging absence from work.	Attorney-client privilege; attorney work product	This e-mail is an autoreply and contains no attorney-client or work product information. Instead, the e-mail simply informs senders that DAG Loeser is absent from work. Thus, Custodian unlawfully denied access to the body of this e-mail and must disclose same. N.J.S.A. 47:1A-6.

Thus, while the Custodian lawfully denied access to a majority of the e-mail bodies responsive to the subject OPRA request, she unlawfully denied access to the body of the specific e-mails identified in the above table.

However, and 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.

Thus, the Custodian must disclose all other 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 responsive e-mail chains, 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).

In closing, the GRC rejects the Complainant's multiple objections from her October 30, 2020 submission. Therein, the Complainant disputed the increase in quantity of responsive pages and that the Custodian failed to disclose additional records.

Regarding the record quantity increase, the GRC notes that the Council has long held that e-mail attachments are part and parcel of a responsive e-mail. Lewen v. Robbinsville Pub. Sch. Dist. (Mercer), GRC Complaint No. 2008-211 (Interim Order dated December 22, 2009); Verry

v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-287 (Interim Order, dated April 28, 2015). Thus, it is proper for the Custodian to included the attachments in the universe of responsive records.

Regarding the assertion of missing records, the Complainant identifies those that were not specifically requested in her OPRA request: an investigation report that appears to have preceded Moore, Claim No. 18062071280, and e-mails concerning the underlying game ticket. The Complainant contended that the Custodian's failure to disclose records that did not precisely match the request was unlawful per Burke, 429 N.J. Super. 169, 177. Contrary to the Complainant's assertions, the disclosure of records a requestor specifically identifies is exactly what OPRA requires. See MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005). Thus, the Custodian was under no obligation to infer the Complainant sought the investigation report or other records regarding the underlying ticket because she did not identify them in the subject OPRA request. See also Feiler-Jampel v. Somerset Cnty. Prosecutor's Office, GRC Complaint No. 2007-190 (Interim Order dated March 26, 2008) (holding that a request seeking generic "documents" is invalid).

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 complied with the Council's September 29, 2020 Interim Order because she responded in the extended time frame providing nine (9) copies of the unredacted records for an *in camera* review with a document index 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 deliver⁸ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁹ to the Executive Director.¹⁰**

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

⁹ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

¹⁰ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

3. the Custodian must disclose all other 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 responsive e-mail chains, 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).
4. **The Custodian shall comply with conclusion No. 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously deliver¹¹ certified confirmation of compliance, in accordance with N.J. Court Rule R. 1:4-4,¹² to the Executive Director.**¹³
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: Frank F. Caruso
Executive Director

May 24, 2022

¹¹ 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.

¹² "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."

¹³ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.



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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

September 29, 2020 Government Records Council Meeting

Shirley A. Brown
Complainant

Complaint No. 2018-293

v.

NJ Department of Treasury,
Division of Lottery
Custodian of Record

At the September 29, 2020 public meeting, the Government Records Council (“Council”) considered the September 22, 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, finds that:

1. The GRC must conduct an *in camera* review of the 133 pages of e-mails responsive to the Complainant’s OPRA request (less those pages already provided) to validate the Custodian’s assertion that the records were exempt from disclosure under the attorney-client privilege and attorney work product exemptions. See Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005); N.J.S.A. 47:1A-1.1; N.J. Court Rules, R. 4:10-2(c).
2. **The Custodian shall deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 1 above), 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 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 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 29th Day of September 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: September 30, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 29, 2020 Council Meeting**

**Shirley A. Brown¹
Complainant**

GRC Complaint No. 2018-293

v.

**NJ. Department of Treasury,
Division of Lottery²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of “any document(s) relative to Claim No. 18062071280 including all e[-]mails.”³

Custodian of Record: Jill Dawson
Request Received by Custodian: September 10, 2018
Response Made by Custodian: September 19, 2018
GRC Complaint Received: November 26, 2018

Background⁴

Request and Response:

On September 10, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On September 19, 2018, Manager Cynthia Jablonski responded in writing on behalf of the Custodian obtaining an extension of time through September 28, 2018 to continue to search for and process responsive records. On September 28, 2018, Ms. Jablonski responded in writing obtaining an extension of time through October 10, 2018 to continue processing the subject OPRA request. On October 10, 2018, Ms. Jablonski responded in writing obtaining an extension of time through October 24, 2018 to continue processing the subject OPRA request. On the same day, the Complainant e-mailed Ms. Jablonski stating that she would not object to the fourth (4th) extension of time. The Complainant nonetheless requested that “someone from this department” contact her and provide an explanation for the delay.

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Robert E. Kelly.

³ The Complainant sought additional records not at issue in this complaint.

⁴ 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.

On October 24, 2018, Ms. Jablonski responded in writing obtaining an extension of time through October [31], 2018 to continue processing the subject OPRA request. On October 31, 2018, the Complainant e-mailed Ms. Jablonski seeking a status update on her OPRA request, for which “numerous extensions [were] allowed.” On the same day, Ms. Jablonski responded in writing obtaining an extension of time through November 16, 2018 to complete processing of the subject OPRA request. On November 16, 2018, Ms. Jablonski responded in writing advising the Complainant that all e-mails responsive to the subject OPRA request were exempt from disclosure under the attorney-client privilege exemption. N.J.S.A. 47:1A-1.1.

Denial of Access Complaint:

On November 26, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian’s blanket denial of the responsive e-mails was insufficient. The Complainant requested that the GRC perform an *in camera* review to validate the Custodian’s assertions that the e-mails were, in fact, exempt from access under OPRA.

Statement of Information:

On May 14, 2019, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on September 10, 2018. The Custodian certified that she located 133 responsive e-mails, converted them to .pdf, and forwarded to Custodian’s Counsel for review. The Custodian affirmed that Custodian’s Counsel advised that the responsive e-mails were exempt from access because they were internal legal correspondence regarding a Lottery claim or instructions regarding defense of the claim. The Custodian certified that following several extensions of time, Ms. Jablonski responded on her behalf denying access to the e-mails under the attorney-client privilege. N.J.S.A. 47:1A-1.1. The Custodian noted that, as a courtesy, she provided to the Complainant pages 52 and 53 of the e-mails, which contained a screenshot of data from Lottery’s computer system. The Custodian noted that she redacted personal information from that screenshot.

The Custodian contended that she lawfully denied access to the responsive e-mails under the attorney-client privilege exemption. N.J.S.A. 47:1A-1.1; O’Boyle v. Borough of Longport, 218 N.J. 168, 183 (2014). The Custodian argued that the e-mails in question were sent to or from Lottery’s Deputy Attorney General in the New Jersey Department of Law & Public Safety, Division of Law (“DOL”) or contained requests from DOL to preserve evidence related to Claim No. 18062071280, which is the subject of a “legal and administrative action.” The Custodian argued that these e-mails were exactly the type of “government record” that the attorney-client privilege protects from disclosure.

The Custodian further contended that the responsive e-mails constituted “attorney work-product” and were thus exempt from disclosure under OPRA. N.J. Court Rules, R. 4:10-2(c); O’Boyle, 218 N.J. at 189. The Custodian argued that the e-mails here meet the attorney-work product definition because they were prepared in anticipation of litigation. Miller v. J.B. Hunt Transport, Inc., 339 N.J. Super. 144, 148, 150 (App. Div. 2001) (quoting R. 4:10-2(c)). The Custodian contended that the e-mails related to Claim No. 18062071280, for which the

Complainant's sister sued Lottery in the New Jersey Superior Court, Appellate Division. The Custodian noted that the claim is also the subject of a Federal lawsuit against Lottery employees and the corporations with which they conduct business. The Custodian thus contended that the legal work performed by DAGs on this issue were "in reasonable anticipation of potential litigation" and were exempt accordingly.

Additional Submissions:

On May 20, 2019, the Complainant submitted a letter refuting the SOI. Therein, the Complainant again reiterated that instant complaint warranted an *in camera* review of the withheld e-mails. The Complainant noted that the Custodian failed to provide a more substantive description of those e-mails in the SOI.

The Complainant further argued that in order for the attorney work-product doctrine to apply, the records in question had to be prepared in anticipation of litigation as opposed to in the ordinary course of business. Payton v. N.J. Turnpike Auth., 148 N.J. 524, 554, (1997). See also Dinter v. Sears, Roebuck & Co., 252 N.J. Super. 84, 96 (App. Div. 1991). The Complainant contended that she received other e-mails that "were not generated, nor directed by attorneys representing" the Lottery. The Complainant argued that instead, the e-mails were to and from representatives of Lottery. The Complainant asserted that at the time of those e-mails, the underlying issue "had not even been assigned to an attorney." The Complainant thus contended that the Custodian's defense was "neither persuasive or dispositive."

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 Council⁵ that accepted the custodian's legal conclusion for the denial of access without further review. The Appellate Division noted that "OPRA contemplates the GRC's meaningful review of the basis for an agency's decision to withhold government records When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers." Id. The Court stated that:

[OPRA] also contemplates the GRC's *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the 'Open Public Meetings Act,' N.J.S.A. 10:4-6 to -21, it also

⁵ Paff v. NJ Dep't of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

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 Custodian denied access to 133 total pages of e-mails. The Custodian argued in the SOI that the records were exempt from disclosure under the attorney-client privilege and attorney work product exemptions. N.J.S.A. 47:1A-1.1; R. 4:10-2(c). However, the Complainant does provide a compelling point that the other e-mails disclosed did not appear to fall within the exemption. Further, the GRC has routinely reviewed e-mails *in camera* in complaints with facts similar to the present complaint. See e.g. Pouliot v. N.J. Dep’t of Educ., GRC Complaint No. 2015-281 (Interim Order dated January 31, 2017). Thus, the GRC must review same in order to determine the full applicability of the cited exemptions.

Therefore, the GRC must conduct an *in camera* review of the 133 pages of e-mails responsive to the Complainant’s OPRA request (less those pages already provided) to validate the Custodian’s assertion that the records were exempt from disclosure under the attorney-client privilege and attorney work product exemptions. See Paff, 379 N.J. Super. at 346; N.J.S.A. 47:1A-1.1; R. 4:10-2(c).

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 133 pages of e-mails responsive to the Complainant’s OPRA request (less those pages already provided) to validate the

Custodian's assertion that the records were exempt from disclosure under the attorney-client privilege and attorney work product exemptions. See Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005); N.J.S.A. 47:1A-1.1; N.J. Court Rules, R. 4:10-2(c).

2. **The Custodian shall deliver⁶ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 1 above), a document or redaction index⁷, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,⁸ 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 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
Executive Director

September 22, 2020

⁶ 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.

⁷ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

⁸ "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."