



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

April 27, 2021 Government Records Council Meeting

Judson Moore
Complainant

Complaint No. 2018-309

v.

Commercial Township (Cumberland)
Custodian of Record

At the April 27, 2021 public meeting, the Government Records Council (“Council”) considered the March 23, 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 Complainant has failed to establish in his request for reconsideration of the Council’s August 25, 2020 Interim Order that either 1) the Council's decision is based upon a “palpably incorrect or irrational basis;” or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The Complainant failed to establish that the complaint should be reconsidered based on a mistake and extraordinary circumstances. The Complainant has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Specifically, the Complainant failed to prove that the records in question were not related to the complaints filed against him. Thus, the Complainant’s request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D’Atria v. D’Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).
2. The Custodian complied with the Council’s August 25, 2020 Interim Order because she responded in the prescribed time frame providing sufficient copies of the responsive minutes for *in camera* review. and simultaneously provided certified confirmation of compliance to the Executive Director.
3. **The *In Camera* Examination set forth in the above table reveals the Custodian has lawfully denied access to the redacted portions of the records listed in the document index pursuant to N.J.S.A. 47:1A-6.**
4. Because no unlawful denial of access occurred, the Council should decline to address whether the Custodian knowingly and willfully violated OPRA 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 27th Day of April 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: April 29, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Reconsideration & *In Camera*
Findings and Recommendations of the Executive Director
April 27, 2021 Council Meeting**

**Judson Moore¹
Complainant**

GRC Complaint No. 2018-309

v.

**Commercial Township (Cumberland)²
Custodial Agency**

Records Relevant to Complaint: Copies of:³

1. All executive session minutes from December 1, 2016 through December 31, 2017.
2. Employee interviews conducted by Custodian's Counsel regarding a harassment complaint between four (4) Commercial Township ("Township") employees and the Complainant.⁴

Custodian of Record: Hannah Nichols

Request Received by Custodian: January 2, 2018

Response Made by Custodian: January 2, 2018

GRC Complaint Received: December 17, 2018

Records Submitted for *In Camera* Examination: December 15, 2016 and January 24, 2017 executive session minutes.

Background

August 25, 2020 Council Meeting:

At its August 25, 2020 public meeting, the Council considered the August 18, 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 December 15, 2016 and January 24, 2017 executive session minutes responsive to the Complainant's OPRA request

¹ No legal representation listed on record.

² Represented by Thomas E. Seeley, Esq. of Seeley Law Office, LLC. (Bridgeton, NJ).

³ The Complainant also included a second OPRA request dated December 10, 2018 seeking contract records that he originally included in this complaint. The Complainant subsequently withdrew this portion of the complaint in an e-mail to the GRC on January 14, 2019.

⁴ The Complainant sought additional records that are not at issue in this complaint.

- item No. 1 in order to validate the Custodian's assertions that the redactions are, in fact, exempt from disclosure based on OPRA's attorney-client/work product privilege exemptions. N.J.S.A. 47:1A-1; Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).
2. **The Custodian shall deliver⁵ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 1 above), nine (9) copies of the redacted records, a document or redaction index⁶, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,⁷ 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. Because the requested statements related to a grievance "by or on behalf of . . . public employees," same are exempt from disclosure under OPRA. N.J.S.A. 47:1A-1.1; Keyser v. Morris Sch. Dist. (Morris), GRC Complaint No. 2015-189 (January 2017). Thus, the Custodian lawfully denied access to the Complainant's OPRA request item No. 2. N.J.S.A. 47:1A-6.
 4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On August 26, 2020, the Council distributed its Interim Order to all parties on. On September 1, 2020, the Government Records Council ("GRC") received the Custodian's response to the Council's Interim Order. Therein, the Custodian certified that she was providing nine (9) copies of the redacted and unredacted executive session minutes sought for an *in camera* review. The Custodian noted that these minutes were redacted to remove attorney-client privileged and personnel information.⁸ N.J.S.A. 47:1A-1.1; N.J.S.A. 10:4-12.

Request for Reconsideration:

On September 4, 2020, the Complainant filed a request for reconsideration of the Council's Interim Order based on a mistake and extraordinary circumstances. The Complainant contended that while OPRA exempts access to "information generated by public employees pertaining to a grievance," the records sought here were not part of any such action. The Complainant further argued that no grievance was filed on the forms as required under the union contract, nor was a

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

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

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

⁸ The Custodian identified the personnel exemption next to a redacted paragraph in the January 24, 2017 minutes.

complaint submitted to the union. The Complainant contended that instead, the responsive records were employee responses to questionnaires formulated by the Township's attorney to solicit negative comments to force the Complainant to resign from public office. The Complainant asserted that these questionnaires were used against him in several meetings and were "made part of the case as a disposition."

The Complainant further contended that the response questionnaires were official records because they were forms provided by the Township Solicitor to employees. The Complainant further argued that the responsive records were subject to disclosure because the employees submitted them through the "shop steward" instead of through the formal grievance process. The Complainant noted that the accusations against him originated with the "shop steward," who then convinced other employees to file harassment complaints against him. The Complainant further noted that the Township solicitor alleged that he violated New Jersey's anti-discrimination laws, but that the "N.J. Office of Discrimination" found no such violations. The Complainant thus argued that the records should be disclosed to him, with employees' names redacted if needed.

Analysis

Reconsideration

Pursuant to N.J.A.C. 5:105-2.10, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. Requests must be in writing, delivered to the Council and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. N.J.A.C. 5:105-2.10(a) – (e).

In the matter before the Council, the Complainant filed the request for reconsideration of the Council's August 25, 2020 Interim Order on September 4, 2020, seven (7) business days from the issuance of the Council's Order.

Applicable case law holds that:

"A party should not seek reconsideration merely based upon dissatisfaction with a decision." D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D'Atria, . . . 242 N.J. Super. at 401. "Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement." Ibid.

[In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).]

The Complainant alleged that the Council made a mistake in determining that the requested employee statements were exempt from disclosure and that extraordinary circumstances warranted a different outcome. The Complainant argued that the statements were not part of a former union grievance and were instead intended to provide a basis for his dismissal. The Complainant further argued that the statements were actually form-based questionnaires created by the Township's solicitor and filed through a "shop steward" without going through the formal grievance process. The Complainant finally argued that he should receive the records because the "N.J. Office of Discrimination" cleared him of discrimination allegations; the Custodian may redact employee names.

However, the above does not provide any persuasive arguments proving that the Council made a mistake or that extraordinary circumstances rendered the Council's decision arbitrary or capricious. Both parties confirm the existence of four (4) employee complaints against the Complainant alleging "internal harassment/hostile work environment." See Twp. of Commercial v. Moore, Docket No. CUM-L-240-17, ¶ H. Further, the requested employee statements are clearly associated with those complaints. Thus, the Council's decision to uphold the denial of access here was not arbitrary or capricious.

As the moving party, the Complainant was required to establish either of the necessary criteria set forth above: either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. See Cummings, 295 N.J. Super. at 384. The Complainant failed to establish that the complaint should be reconsidered based on a mistake and extraordinary circumstances. The Complainant has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. See D'Atria, 242 N.J. Super. at 401. Specifically, the Complainant failed to prove that the records in question were not related to the complaints filed against him. Thus, the Complainant's request for reconsideration should be denied. Cummings, 295 N.J. Super. at 384; D'Atria, 242 N.J. Super. at 401; Comcast, 2003 N.J. PUC at 5-6.

Compliance

At its August 25, 2020 meeting, the Council ordered the Custodian to provide for *in camera* review nine (9) redacted and unredacted copies of the December 15, 2016 and January 24, 2017 executive session minutes responsive to the Complainant's OPRA request item No. 1. The Council further ordered the Custodian to simultaneously deliver certified confirmation of compliance, in accordance with R. 1:4-4, to the Executive Director. On August 26, 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 September 2, 2020.

On September 1, 2020, the fourth (4th) business day after receipt of the Council's Order, the GRC received the Custodian's response to the Council's Order. Therein, the Custodian certified that she was providing the nine (9) redacted and unredacted copies of the responsive minutes for an *in camera* review.

Therefore, the Custodian complied with the Council's August 25, 2020 Interim Order because she responded in the prescribed time frame providing sufficient copies of the responsive minutes for *in camera* review. and simultaneously provided certified confirmation of compliance to the Executive Director.

Unlawful Denial of Access

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

OPRA provides that 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).

OPRA also provides that:

Notwithstanding the provisions [OPRA] or any other law to the contrary, the personnel or pension records of any individual in the possession of a public agency, including but not limited to records relating to any grievance filed by or against an individual, shall not be considered a government record and shall not be made available for public access . . .

[N.J.S.A. 47:1A-10.]

OPRA begins with a presumption against disclosure and “proceeds with a few narrow exceptions that . . . need to be considered.” Kovalcik v. Somerset Cnty. Prosecutor’s Office, 206 N.J. 581, 594 (2011). These are:

[A]n individual’s name, title, position, salary, payroll record, length of service, date of separation and the reason therefore, and the amount and type of any pension received shall be government record;

[P]ersonnel or pension records of any individual shall be accessible when required to be disclosed by another law, when disclosure is essential to the performance of official duties of a person duly authorized by this State or the United States, or when authorized by an individual in interest; and

[D]ata contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension, but not including any detailed medical or psychological information, shall be a government record.

[Id.]

Further, the Council has determined that records involving employee discipline or investigations into employee misconduct are properly classified as personnel records exempt from disclosure under N.J.S.A. 47:1A-10. In Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (March 2004), the Council found that records of complaints or internal reprimands against a municipal police officer were properly classified as personnel records encompassed within the provisions of N.J.S.A. 47:1A-10. For this reason, the Council concluded that “. . . records of complaints filed against [the police officer] and/or reprimands [the officer] received are not subject to public access.” Id. See also Wares v. Twp. of West Milford (Passaic), GRC Complaint No. 2014-274 (May 2015).

OPRA further provides that its provisions “. . . shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to [OPRA]; any other statute . . .” N.J.S.A. 47:1A-9(a). To the extent that the Open Public Meetings Act (“OPMA”) provides exemptions to the disclosure of government records, those exemptions are recognized by OPRA. Id. More specifically, OPMA provides that:⁹

A public body may exclude the public only from that portion of a meeting at which the public body discusses . . .

(8) Any matter involving the employment, appointment, termination of employment, terms and conditions of employment, evaluation of the performance of, promotion or disciplining of any specific prospective public officer or employee or current public officer or employee employed or appointed by the public body,

⁹ The GRC notes that the Custodian previously alluded to the personnel exemption included in OPRA and/or OPMA. However, the Custodian did include in her Interim Order response an OPMA citation in support of her redaction in the January 24, 2017 minutes.

unless all the individual employees or appointees whose rights could be adversely affected request in writing that such matter or matters be discussed at a public meeting.

[N.J.S.A.10:4-12(b).]

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

Record No.	Record Name/Date	Description of Redaction	Custodian's Explanation/ Citation for Redactions	Findings of the <i>In Camera</i> Examination¹⁰
1.	December 15, 2016 Executive Session Minutes, Page 2, 13 th Paragraph.	Custodian's Counsel provides advice on legal avenues for Mr. Miller.	<u>N.J.S.A. 47:1A-1.1</u> (attorney-client privilege); <u>R. 4:10-2(c)</u> (work product privilege).	The redacted passage contained comments levied by Custodian's Counsel to Mr. Miller in his capacity as the attorney for the Township. Additionally, the statements included opinions about potential litigation. Thus, the Custodian lawfully redacted this portion of the minutes. <u>N.J.S.A. 47:1A-6.</u>
2.	December 15, 2016 Executive Session Minutes, Page 3, 11 th Paragraph	Counsel provides advice on potential legal processes for Mr. Miller and the Township.	<u>N.J.S.A. 47:1A-1.1</u> (attorney-client privilege); <u>R. 4:10-2(c)</u> (work product privilege).	The redacted passage contained comments levied by Custodian's Counsel to Mr. Miller in his capacity as the attorney for the Township. Additionally,

¹⁰ **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.

	(continuing into Page 4).			the statements included opinions about potential litigation. Thus, the Custodian lawfully redacted this portion of the minutes. <u>N.J.S.A. 47:1A-6.</u>
3.	December 15, 2016 Executive Session Minutes, Page 5, 12 th Full Paragraph.	Counsel discusses legal differences between certain laws.	<u>N.J.S.A. 47:1A-1.1</u> (attorney-client privilege); <u>R. 4:10-2(c)</u> (work product privilege).	The redacted passage contained comments levied by Custodian’s Counsel to Mr. Miller in his capacity as the attorney for the Township. Additionally, the statements included opinions about potential litigation. Thus, the Custodian lawfully redacted this portion of the minutes. <u>N.J.S.A. 47:1A-6.</u>
4.	January 24, 2017 Executive Session Minutes, Page 1, 4 th Paragraph	Committeeman Vizzard’s discussion of issues arising in two (2) offices within the Township.	Personnel. <u>N.J.S.A. 10:4-12</u> (personnel discussions).	The redacted passage contains comments regarding potential personnel issues within two (2) offices based on information provided to him. The comments reasonably refer to a specific subset of employees within those two (2) offices and potential performance evaluation issues. Thus, the Custodian lawfully redacted this portion of the minutes. <u>N.J.S.A. 47:1A-6.</u>

Thus, the Custodian lawfully denied access to the redacted portions of the minutes based on the exemptions cited on the minutes, in the Statement of Information, and as part of her certified

response to the Council's Interim Order. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-10; N.J.S.A. 47:1A-9; N.J.S.A. 10:4-12; R. 4:10-2(c).

Further, because no unlawful denial of access occurred, the Council should decline to address whether the Custodian knowingly and willfully violated OPRA under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Complainant has failed to establish in his request for reconsideration of the Council's August 25, 2020 Interim Order that either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The Complainant failed to establish that the complaint should be reconsidered based on a mistake and extraordinary circumstances. The Complainant has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Specifically, the Complainant failed to prove that the records in question were not related to the complaints filed against him. Thus, the Complainant's request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).
2. The Custodian complied with the Council's August 25, 2020 Interim Order because she responded in the prescribed time frame providing sufficient copies of the responsive minutes for *in camera* review. and simultaneously provided certified confirmation of compliance to the Executive Director.
3. **The *In Camera* Examination set forth in the above table reveals the Custodian has lawfully denied access to the redacted portions of the records listed in the document index pursuant to N.J.S.A. 47:1A-6.**
4. Because no unlawful denial of access occurred, the Council should decline to address whether the Custodian knowingly and willfully violated OPRA under the totality of the circumstances.

Prepared By: Frank F. Caruso
Executive Director

March 23, 2021¹¹

¹¹ This complaint was scheduled for adjudication at the Council's March 30, 2021 meeting, but was table for additional review.



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

August 25, 2020 Government Records Council Meeting

Judson Moore
Complainant

Complaint No. 2018-309

v.

Commercial Township (Cumberland)
Custodian of Record

At the August 25, 2020 public meeting, the Government Records Council (“Council”) considered the August 18, 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 December 15, 2016 and January 24, 2017 executive session minutes responsive to the Complainant’s OPRA request item No. 1 in order to validate the Custodian’s assertions that the redactions are, in fact, exempt from disclosure based on OPRA’s attorney-client/work product privilege exemptions. N.J.S.A. 47:1A-1; Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).
2. **The Custodian shall deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 1 above), nine (9) copies of the redacted records, 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. Because the requested statements related to a grievance “by or on behalf of . . . public employees,” same are exempt from disclosure under OPRA. N.J.S.A. 47:1A-1.1; Keyser v. Morris Sch. Dist. (Morris), GRC Complaint No. 2015-189 (January 2017). Thus, the Custodian lawfully denied access to the Complainant’s OPRA request item No. 2. N.J.S.A. 47:1A-6.

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."

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 25th Day of August 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: August 26, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
August 25, 2020 Council Meeting**

**Judson Moore¹
Complainant**

GRC Complaint No. 2018-309

v.

**Commercial Township (Cumberland)²
Custodial Agency**

Records Relevant to Complaint: Copies of:³

1. All executive session minutes from December 1, 2016 through December 31, 2017.
2. Employee interviews conducted by Custodian's Counsel regarding a harassment complaint between four (4) Commercial Township ("Township") employees and the Complainant.⁴

Custodian of Record: Hannah Nichols
Request Received by Custodian: January 2, 2018
Response Made by Custodian: January 2, 2018
GRC Complaint Received: December 17, 2018

Background⁵

Request and Response:

On January 1, 2018, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On January 2, 2018, the Custodian responded in writing stating that she forwarded the subject OPRA request to Custodian's Counsel. The Custodian noted that Counsel advised that the Complainant was supposed to send "a new case law . . . to get executive session minutes" responsive to OPRA request item No. 1. The Custodian further noted that Counsel advised that OPRA request item No. 2 was exempt under the attorney-client privilege exemption. On the same day, the Complainant e-mailed the Custodian stating that the case "was for something else." The Complainant argued that it is common knowledge that executive session minutes were disclosable "once a case is settled." The Complainant asserted that

¹ No legal representation listed on record.

² Represented by Thomas E. Seeley, Esq. of Seeley Law Office, LLC. (Bridgeton, NJ).

³ The Complainant also included a second OPRA request dated December 10, 2018 seeking contract records that he originally included in this complaint. The Complainant subsequently withdrew this portion of the complaint in an e-mail to the GRC on January 14, 2019.

⁴ The Complainant sought additional records that are not at issue in this complaint.

⁵ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

the Township previously lost a court case regarding executive session minutes that cost it \$8,000. The Complainant thus requested that Counsel should decide on disclosure and he would proceed accordingly.

Denial of Access Complaint:

On December 17, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant stated that for background information, four (4) employees signed harassment complaints against him during his mayoral term stemming from a healthcare dispute. The Complainant contended that rather than interview the involved employees, Counsel decided to obtain statements from all fifteen (15) employees to strengthen the Township’s position against him. The Complainant argued that Counsel made multiple statements in executive session regarding the interviews to force him to resign, which he ultimately did.

The Complainant contended that the Custodian unlawfully denied access to redacted portions of the minutes responsive to OPRA request item No. 1. The Complainant contended that Counsel’s redactions did not allow him to view the responsive executive session minutes in their full context. The Complainant also argued that no formal denial existed; rather, Counsel merely hand-wrote “attorney-client privilege/work product” next to each redaction. The Complainant argued that the Township had no right to redact the minutes given that “the case was resolved several years ago.” The Complainant also contended that Custodian unlawfully denied access to the employee interviews responsive to OPRA request item No. 2. The Complainant argued that because the interview statements were part of the “hearing process” and used against him, they should be made public and he should receive a copy of them. The Complainant thus requested that the GRC find that an unlawful denial of access occurred and order disclosure of all responsive records without redactions.

Statement of Information:

On January 14, 2019, the Custodian filed a Statement of Information (“SOI”).⁶ The Custodian certified that she received the Complainant’s OPRA request on January 2, 2018⁷ and responded in writing on the same day seeking additional information in OPRA request item No. 1 and denying access to item No. 2 under the attorney-client privilege exemption. The Custodian noted that the Township previously denied access to these records in a similar manner and was sued in Superior Court. Libertarians for Transparent Gov’t v. Commercial Twp., Docket No. CUM-L-402-16 (holding that the statements were “already deemed [them] protected”).⁸

⁶ The Custodian originally submitted the SOI on January 8, 2019; however, it was returned as incomplete because she did not include the SOI form as part of her submission.

⁷ The Custodian certified to receiving an OPRA request on December 21, 2018 and responding on December 27, 2018. The dates may be confused with the date she received the instant complaint and the date that the Township provided additional records not at issue here. Notwithstanding, the Custodian also incorporated in the SOI copies of her response to the subject OPRA request.

⁸ In plaintiff’s article published on TransparencyNJ.com, it noted that the Township was ordered to disclose minutes, but “that . . . the notes of interviews between [Complainant’s] alleged victims and Township officials were exempt from disclosure.” <https://transparencynj.com/2016/09/05/judge-rules-in-cumberland-county-open-public-records-act-opra-case/> (accessed July 23, 2020). However, the GRC was unable to locate a specific provision within the judge’s order addressing the disclosure of the requested records under OPRA.

The Custodian certified that she disclosed to the Complainant two (2) sets of executive session minutes dated December 15, 2016 and January 24, 2017 with five (5) redactions. The Custodian asserted that said redactions were lawful under the attorney-client privilege and work product exemptions. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-3.⁹ The Custodian noted that each redaction withheld advice regarding potential litigation with the Complainant, as well as personnel implications. The Custodian noted that litigation continued at the time of the SOI filing.

The Custodian further contended that she lawfully denied access to the responsive interview statements under N.J.S.A. 47:1A-1. The Custodian noted that these statements were related to grievances filed against the Complainant. The Custodian argued that each employee had a privacy interest in not having their statements regarding litigation against the Complainant disclosed.

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.

OPRA Request item No. 1 – Executive Session Minutes

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 GRC, which dismissed the complainant by accepting the custodian’s legal conclusion for the denial of access without further review. The court stated 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.

[Paff, 379 N.J. Super. at 354.]

The court also stated that:

The statute . . . 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 10:4-21, it also provides that the GRC “may go into

⁹ The Custodian may have asserted additional exemptions in the SOI in the form of the following numbers: “13(a), 13(b), and 13(c)” and “13(b) 23, 24” However, the GRC was unable to identify the exemptions contained in these numbers or the material the Custodian used to arrive at these nondescript “exemption” numbers.

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 stated that:

We hold only that 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 for privileged information as a result of in camera review by the GRC. The GRC’s obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7(f), which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.

[Id.]

Here, the Complainant argued that the Township unlawfully redacted portions of the December 15, 2016 and January 24, 2017 executive session minutes responsive to OPRA request item No. 1. The Complainant argued that the redacted material related to him and a case that “was resolved several years ago.” The Custodian argued in the SOI that she lawfully redacted the executive session minutes under the attorney-client/work product privilege. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-3. The Custodian did include a broad description of the redacted material; however, the GRC cannot conduct the “meaningful review of the basis for an agency’s decision to withhold government records” without inspecting the disclosed records. Id. at 354.

Therefore the GRC must conduct an *in camera* review of the December 15, 2016 and January 24, 2017 executive session minutes responsive to the Complainant’s OPRA request item No. 1 in order to validate the Custodian’s assertions that the redactions are, in fact, exempt from disclosure based on OPRA’s attorney-client/work product privilege exemptions. N.J.S.A. 47:1A-1.1; Paff, 379 N.J. Super. at 346.

OPRA Request item No. 2 – Employee Statements

The Council is permitted to raise additional defenses regarding the disclosure of records pursuant to Paff v. Twp. of Plainsboro, 2007 N.J. Super. Unpub. LEXIS 2135 (App. Div. 2007)(certif. denied 193 N.J. 292 (2007)).¹⁰ In Paff, the complainant challenged the GRC’s authority to uphold a denial of access for reasons never raised by the custodian. Specifically, the Council did not uphold the basis for the redactions cited by the custodian. The Council, on its own initiative, determined that the Open Public Meetings Act prohibited the disclosure of the redacted portions to the requested executive session minutes. The Council affirmed the custodian’s denial to portions of the executive session minutes but for reasons other than those cited by the custodian. The complainant argued that the GRC did not have the authority to do anything other than determine whether the custodian’s cited basis for denial was lawful. The Court held that:

¹⁰ On appeal from Paff v. Township of Plainsboro, GRC Complaint No. 2005-29 (March 2006).

The GRC has an independent obligation to “render a decision as to whether the record which is the subject of the complaint is a government record which must be made available for public access pursuant to’ OPRA . . . The GRC is not limited to assessing the correctness of the reasons given for the custodian’s initial determination; it is charged with determining if the initial decision was correct.” The Court further stated that:

Aside from the clear statutory mandate to decide if OPRA requires disclosure, the authority of a reviewing agency to affirm on reasons not advanced by the reviewed agency is well established. Cf. Bryant v. City of Atl. City, 309 N.J. Super. 596, 629-30 (App. Div. 1998) (citing Isko v. Planning Bd. of Livingston, 51 N.J. 162, 175 (1968) (lower court decision may be affirmed for reasons other than those given below)); Dwyer v. Erie Inv. Co., 138 N.J. Super. 93, 98 (App. Div. 1975) (judgments must be affirmed even if lower court gives wrong reason), certif. denied, 70 N.J. 142 (1976); Bauer v. 141-149 Cedar Lane Holding Co., 42 N.J. Super. 110, 121 (App. Div. 1956) (question for reviewing court is propriety of action reviewed, not the reason for the action) (aff’d, 24 N.J. 139 (1957)).

OPRA provides that “[a] government record shall not include . . . information generated by or on behalf of public employers or public employees in connection . . . with any grievance filed by or against an individual.” N.J.S.A. 47:1A-1.1.

In Keyser v. Morris Sch. Dist. (Morris), GRC Complaint No. 2015-189 (January 2017), the complainant sought access to correspondence and notes between District employees regarding a grievance. The custodian denied access to said request under N.J.S.A. 47:1A-1.1; the complaint followed thereafter. In the SOI, the custodian argued that she lawfully denied access to the requested records and cited Fischer v. N.J. Dep’t of Corr., GRC Complaint No. 2005-170 (May 2006). The Council agreed with the denial, holding that OPRA’s exemption was clear, regardless of whether the complainant sought records relating to a grievance he filed.

In the current matter, OPRA request item No. 2 sought access to interviews conducted with Township employees regarding complaints against the Complainant, who was Mayor of the Township at the time of those filings. The Custodian initially denied access to the responsive records under the attorney-client privilege exemption. This complaint followed, wherein the Complainant argued that he should have access to the responsive records because they were used to force his resignation. In the SOI, the Custodian reasserted the argument that the responsive interviews were exempt from disclosure based on employee privacy rights and pursuant to Libertarians, Docket No. CUM-L-402-16.

Notwithstanding the Custodian’s assertion of privacy, attorney-client privilege, and any additional exemptions nondescriptly referred to in the SOI, the GRC must exercise its *sua sponte* authority to apply a more appropriate exemption to the requested records. Specifically, the evidence of record supports that the underlying issue producing the employee statements were part of a grievance filed against the Complainant. Further, that grievance ultimately resulted in an order barring the Complainant from interacting on a number of levels with employees of the Township. As in Keyser, GRC 2015-189, the record provides adequate support that the requested statements

were part and parcel of the grievance filing. For this reason, the requested statements are exempt from disclosure under OPRA.

Accordingly, because the requested statements related to a grievance “by or on behalf of . . . public employees,” same are exempt from disclosure under OPRA. N.J.S.A. 47:1A-1.1; Keyser, GRC 2015-189. Thus, the Custodian lawfully denied access to the Complainant’s OPRA request item No. 2. N.J.S.A. 47:1A-6.

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 December 15, 2016 and January 24, 2017 executive session minutes responsive to the Complainant’s OPRA request item No. 1 in order to validate the Custodian’s assertions that the redactions are, in fact, exempt from disclosure based on OPRA’s attorney-client/work product privilege exemptions. N.J.S.A. 47:1A-1; Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).
2. **The Custodian shall deliver¹¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 1 above), nine (9) copies of the redacted records, a document or redaction index¹², as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,¹³ 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. Because the requested statements related to a grievance “by or on behalf of . . . public employees,” same are exempt from disclosure under OPRA. N.J.S.A. 47:1A-1.1; Keyser v. Morris Sch. Dist. (Morris), GRC Complaint No. 2015-189 (January 2017). Thus, the Custodian lawfully denied access to the Complainant’s OPRA request item No. 2. N.J.S.A. 47:1A-6.

¹¹ 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.

¹² The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

¹³ "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.

Prepared By: Frank F. Caruso
Executive Director

August 18, 2020