



**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**

**February 23, 2021 Government Records Council Meeting**

David Scott Carew  
Complainant

Complaint No. 2018-47

v.

City of Woodbury (Gloucester)  
Custodian of Record

At the February 23, 2021 public meeting, the Government Records Council (“Council”) considered the February 16, 2021 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The current Custodian complied with the Council’s January 26, 2021 Interim Order because she responded in the prescribed time frame providing records and simultaneously provided certified confirmation of compliance to the Executive Director.
2. Although the Custodian improperly redacted a portion of the records responsive to the Complainant’s December 27, 2017 OPRA request, she lawfully denied access to the remainder. 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 23<sup>rd</sup> Day of February 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: February 25, 2021**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
February 23, 2021 Council Meeting**

**David Scott Carew<sup>1</sup>  
Complainant**

**GRC Complaint No. 2018-47**

**v.**

**City of Woodbury (Gloucester)<sup>2</sup>  
Custodial Agency**

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

Electronic communications, including but not limited to e-mails and text messages, to or from the following individuals:

- Mayor Jessica Floyd
- Council President Tracey Parker
- Councilman William Fleming
- Councilman Ken McIlvaine
- Councilman Dave Swanson
- Councilwoman Karlene O'Connor
- Council Ted Johnson
- Councilwoman Danielle Carter
- Police Chief Tom Ryan
- CFO Robert Law
- Clerk Daneen Fuss

Containing the following subject matter:

- Scott Carew
- The position of City Administrator for Woodbury
- The position of Interim City Administrator for Woodbury

With the records sent or received between the dates of June 1, 2017 and December 27, 2017.

**Custodian of Record:** Daneen Fuss<sup>3</sup>

**Request Received by Custodian:** December 27, 2017

**Response Made by Custodian:** January 8, 2018; February 23, 2018

**GRC Complaint Received:** March 22, 2018

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

<sup>2</sup> Represented by Timothy D. Scaffidi, Esq., of the Law Office of Timothy D. Scaffidi, Esq., (Woodbury, NJ). Previously represented by John A. Alice, Esq.

<sup>3</sup> The current Custodian of Record is Cassidy Swanson.

## Background

### January 26, 2021 Council Meeting:

At its January 26, 2021 public meeting, the Council considered the January 19, 2021 *In Camera* Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian did not fully comply with the Council's February 26, 2020 Interim Order because although she timely provided her certified confirmation of compliance to the Executive Director, she failed to provide the GRC with copies of records withheld from disclosure for *in camera* review within the extended time frame.
2. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order. Further, the Custodian shall simultaneously deliver<sup>4</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>5</sup> to the Executive Director.<sup>6</sup>**
3. The Custodian must disclose all of these portions of the responsive e-mails to the Complainant (*i.e.*, sender, recipients, date, time, subject, and salutations where applicable). As to those portions of the requested e-mails, the Custodian has unlawfully denied access. See Ray v. Freedom Acad. Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010). The GRC notes that if the Custodian intends to redact certain information in the categories identified above, she must provide a lawful basis for those redactions.
4. **The Custodian shall comply with conclusion No. 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver<sup>7</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Executive Director.**

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

<sup>5</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

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

<sup>7</sup> The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
6. 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 January 27, 2021, the Council distributed its Interim Order to all parties. On February 3, 2021, the current Custodian responded to the Council's Interim Order, providing certified confirmation of compliance to the Executive Director. The current Custodian also provided certifications from the Custodian as well as Gary M. Marek, Esq.<sup>8</sup>, serving as co-counsel.

The current Custodian certified that on February 3, 2021, she provided the Complainant with each of the records required to be disclosed in accordance with the Council's Interim Order. The current Custodian also certified that no redactions were made to the records except as directed by the Interim Order.

The Custodian certified that in preparing the responsive records at the time of the request, she acted under the supervision and direction of the City of Woodbury's Solicitor at the time.

#### Analysis

#### Compliance

At its January 26, 2021 meeting, the Council ordered the Custodian to comply with the Council's determination based upon the *in camera* examination findings. The Counsel also ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Executive Director. On January 27, 2021 the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on February 3, 2021.

On February 3, 2021 the fifth (5<sup>th</sup>) business day after receipt of the Council's Order, the current Custodian responded in writing, certifying that the Complainant was provided with responsive records in accordance with the Order. The current Custodian also provided a certified confirmation of compliance to the Executive Director.

Therefore, the current Custodian complied with the Council's January 26, 2021 Interim Order because she responded in the prescribed time frame providing records and simultaneously provided certified confirmation of compliance to the Executive Director.

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<sup>8</sup> Mr. Marek certified that he personally delivered the responsive records for *in camera* review to the GRC's offices on March 30, 2020, in contrast with conclusion No. 1 of the Council's January 26, 2021 Interim Order. However, the GRC declines to address the matter since the current Custodian did not submit a request for reconsideration on this issue.

## **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)).

Although the Custodian improperly redacted a portion of the records responsive to the Complainant’s December 27, 2017 OPRA request, she lawfully denied access to the remainder. 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 current Custodian complied with the Council’s January 26, 2021 Interim Order because she responded in the prescribed time frame providing records and simultaneously provided certified confirmation of compliance to the Executive Director.
2. Although the Custodian improperly redacted a portion of the records responsive to the Complainant’s December 27, 2017 OPRA request, she lawfully denied access to the remainder. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing

and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: Samuel A. Rosado  
Staff Attorney

February 16, 2021



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
101 SOUTH BROAD STREET  
PO BOX 819  
TRENTON, NJ 08625-0819

PHILIP D. MURPHY  
Governor

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

INTERIM ORDER

January 26, 2021 Government Records Council Meeting

David Scott Carew  
Complainant

Complaint No. 2018-47

v.

City of Woodbury (Gloucester)  
Custodian of Record

At the January 26, 2021 public meeting, the Government Records Council (“Council”) considered the January 19, 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. Order because although she timely provided her certified confirmation of compliance to the Executive Director, she failed to provide the GRC with copies of records withheld from disclosure for *in camera* review within the extended time frame.
2. **On the basis of the Council’s determination in this matter, the Custodian shall comply with the Council’s Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order. Further, the Custodian shall simultaneously deliver<sup>1</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>2</sup> to the Executive Director.<sup>3</sup>**
3. The Custodian must disclose all of these portions of the responsive e-mails to the Complainant (*i.e.*, sender, recipients, date, time, subject, and salutations where applicable). As to those portions of the requested e-mails, the Custodian has unlawfully denied access. See Ray v. Freedom Acad. Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010). The GRC notes that if the Custodian intends to redact certain information in the categories identified above, she must provide a lawful basis for those redactions.

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

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

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



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

Interim Order Rendered by the  
Government Records Council  
On The 26<sup>th</sup> Day of January 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: January 27, 2021**

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

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director  
January 26, 2021 Council Meeting**

**David Scott Carew<sup>1</sup>  
Complainant**

**GRC Complaint No. 2018-47**

**v.**

**City of Woodbury (Gloucester)<sup>2</sup>  
Custodial Agency**

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

Electronic communications, including but not limited to e-mails and text messages, to or from the following individuals:

- Mayor Jessica Floyd
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- Councilman William Fleming
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- Councilwoman Karlene O'Connor
- Council Ted Johnson
- Councilwoman Danielle Carter
- Police Chief Tom Ryan
- CFO Robert Law
- Clerk Daneen Fuss

Containing the following subject matter:

- Scott Carew
- The position of City Administrator for Woodbury
- The position of Interim City Administrator for Woodbury

With the records sent or received between the dates of June 1, 2017 and December 27, 2017.

**Custodian of Record:** Daneen Fuss

**Request Received by Custodian:** December 27, 2017

**Response Made by Custodian:** January 8, 2018; February 23, 2018

**GRC Complaint Received:** March 22, 2018

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

<sup>2</sup> Represented by Timothy D. Scaffidi, Esq., of the Law Office of Timothy D. Scaffidi, Esq., (Woodbury, NJ). Previously represented by John A. Alice, Esq.

**Records Submitted for *In Camera* Examination:** Nine (9) unredacted copies of e-mail chains amongst multiple parties pertaining to the Complainant dated between June 1, 2017 through December 27, 2017.

### Background

#### February 26, 2020 Council Meeting:

At its February 26, 2020 public meeting, the Council considered the January 21, 2020<sup>3</sup> 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's response to the Complainant's December 27, 2017 OPRA request was sufficient in that it provided a specific lawful basis for denying access to e-mails and other correspondence. See D'Appolonio v. Borough of Deal (Monmouth), GRC Complaint No. 2008-62 (September 2009), and Lear, III v. City of Cape May (Cape May), GRC Complaint No. 2014-426 (Interim Order dated November 17, 2015). Additionally, the Custodian provided a specific lawful basis for redacting personal e-mail addresses, addresses, and cell phone numbers. See Paff v. Borough of Lavallette, GRC Complaint No. 2007-209 (Interim Order dated June 25, 2008). Therefore, the Custodian did not violate OPRA under N.J.S.A. 47:1A-5(g).
2. There is insufficient evidence to show that the Complainant had full knowledge of his confidentiality rights under N.J.S.A. 47:1A-10 regarding his personnel records effectively waived those rights. See Fleming v. Greenwich Twp. (Warren), GRC Complaint No. 2015-18 (Interim Order dated January 31, 2017), McGee v. Twp. of East Amwell (Hunterdon), GRC Complaint No. 2007-305 (March 2011). Thus, there was no unlawful denial of access on these grounds. N.J.S.A. 47:1A-6. However, because the Complainant indicated his waiver of those protections in correspondence dated April 26, 2018, the Custodian shall release those records withheld as personnel records which are not otherwise precluded from disclosure.
3. **The Custodian shall comply with conclusion No. 2 above within five (5) business days from receipt of the Council's Interim Order. Further, the Custodian shall simultaneously deliver<sup>4</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>5</sup> to the Executive Director.<sup>6</sup>**

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<sup>3</sup> This complaint was prepared for adjudication at the Council's January 28, 2020 meeting, but could not be adjudicated due to a lack of quorum.

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

<sup>5</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

<sup>6</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the

4. The GRC must conduct an *in camera* review of the redacted records and records withheld in their entirety to determine the validity of the Custodian's assertion that the redactions or denials are valid under OPRA's exemptions for advisory, consultative, or deliberative material and/or attorney-client privileged communications. N.J.S.A. 47:1A-1.1. See Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).
5. **The Custodian shall deliver<sup>7</sup> to the Council in a sealed envelope nine (9) copies of the requested records withheld entirely, nine (9) copies of the redacted records in both redacted and unredacted form (see conclusion No. 4 above), a document or redaction index<sup>8</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,<sup>9</sup> that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
6. 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 February 28, 2020, the Council distributed its Interim Order to all parties. That same day, the Custodian's Counsel requested an extension of time to respond to the Interim Order. The Government Records Council ("GRC") replied, granting an extension until March 13, 2020. On March 11, 2020, Counsel requested a second extension of time to respond. That same day, the GRC granted the extension until March 20, 2020.

On March 18, 2020, Counsel requested a third extension of time to respond due to the COVID-19 pandemic causing a shutdown of local government services. On the same day, the GRC considered the extraordinary circumstances presented and extended the time frame until March 27, 2020 to comply with the Council's Interim Order. On March 27, 2020, Counsel requested another extension to March 30, 2020, to coordinate the signatures needed for the certifications and final delivery. The GRC granted the request that same day.

On March 30, 2020, the Custodian provided two (2) separate certifications in response to the Council's Interim Order. The Custodian first certified that she provided the Complainant with copies of records withheld solely on the basis that they comprised the Complainant's personnel records.

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

<sup>7</sup> The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives them by the deadline.

<sup>8</sup> The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

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

The Custodian also certified that she provided copies of records withheld as personnel records concerning individuals other than the Complainant, as well as copies of records withheld on other grounds for *in camera* inspection. The Custodian asserted that the records were withheld pursuant to OPRA's exemption for attorney-client privileged communications and the attorney work-product exemption. N.J.S.A. 47:1A-1.1. Further, the Custodian asserted that some of the records were protected under OPRA's exemption for records containing advisory, consultative, or deliberative material. N.J.S.A. 47:1A-1.1.

On April 6, 2020, the Custodian delivered nine (9) unredacted copies of the requested e-mail correspondence between multiple parties pertaining to the Complainant and positions within the City of Woodbury ("City").

## Analysis

### Compliance

At its February 26, 2020 meeting, the Council ordered the Custodian to provide records withheld from access on the sole basis that they were personnel records of the Complainant. The Council also required the Custodian provide nine (9) unredacted copies of records withheld on other grounds for *in camera* review. The Council ordered compliance within five (5) business days from receipt of the Council's Interim Order, and simultaneously provide certified confirmation of compliance to the Executive Director." On February 28, 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 March 6, 2020.

On February 28, 2020, the date of receipt of the Council's Interim Order, Counsel requested an extension of time to respond to the Council's Order. The GRC responded that same day, granting an initial extension until March 13, 2020. On March 11, 2020, Counsel requested a second extension of time, to which the GRC granted through March 20, 2020. On March 20, 2020, Counsel requested another extension of time in response to the disruption caused by the COVID-19 pandemic. The GRC granted the extension to March 27, 2020. On March 27, 2020, Counsel requested a final extension to March 30, 2020 to coordinate signatures and delivery. The GRC granted the final extension that same day.

On March 30, 2020, the Custodian provided certifications in response to the Council's Interim Order. The Custodian first certified that she provided the Complainant with responsive records as per conclusion No. 3 of the Order. The Custodian also certified that she provided the GRC with nine (9) unredacted copies of records withheld from access for *in camera* review. However, the GRC did not receive the copies of withheld records until April 6, 2020, five (5) business days after the extension's expiration. Thus, the Custodian did not fully comply with the Council's Interim Order.

Therefore, the Custodian did not fully comply with the Council's February 26, 2020 Interim Order because although she timely provided her certified confirmation of compliance to the Executive Director, she failed to provide the GRC with copies of records withheld from disclosure for *in camera* review within the extended time frame.

## Unlawful Denial of Access

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

## Advisory, Consultative, or Deliberative (“ACD”) Material

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

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

The Council has also repeatedly held that draft records of a public agency fall within the deliberative process privilege. In Dalesky v. Borough of Raritan (Somerset), GRC Complaint No. 2008-61 (November 2009), the Council, in upholding the custodian’s denial as lawful, determined that the requested study of the local police department was a draft document and that draft documents in their entirety are ACD material pursuant to N.J.S.A. 47:1A-1.1. Subsequently, in Shea v. Village of Ridgewood (Bergen), GRC Complaint No. 2010-79 (February 2011), the custodian certified that a requested letter was in draft form and had not yet been reviewed by the municipal engineer. The Council, looking to relevant case law, concluded that the requested letter was exempt from disclosure under OPRA as ACD material. See also Libertarians for Transparent Gov't v. Gov't Records Council, 453 N.J. Super. 83 (App. Div. 2018); Ciesla v. N.J. Dep't of Health and Senior Serv., GRC Complaint No. 2010-38 (May 2011), *aff'd*, Ciesla v. N.J. Dep't of

Health and Senior Serv., 429 N.J. Super. 127 (App. Div. 2012) (draft staff report was exempt from disclosure as ACD material).

#### Attorney-Client Communications/Work Product

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 the context of public entities, the attorney-client privilege extends to communications between the public body, the attorney retained to represent it, necessary intermediaries and agents through whom communications are conveyed, and co-litigants who have employed a lawyer to act for them in a common interest. See Tractenberg v. Twp. of W. Orange, 416 N.J. Super. 354, 376 (App. Div. 2010); In re Envtl. Ins. Declaratory Judgment Actions, 259 N.J. Super. 308, 313 (App. Div. 1992).

#### Personnel Records

OPRA 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).

#### Employee Applications and Information

Additionally, OPRA provides that its provisions:

[S]hall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to [OPRA]; any other statute; resolution of either or both Houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; *Executive Order of the Governor*; Rules of Court; any federal law; federal regulation; or federal order.

[N.J.S.A. 47:1A-9(a) (emphasis added).]

Executive Order No. 26 (Gov. McGreevey, 2002) (“EO 26”) provides that:

No public agency shall disclose the resumes, applications for employment or other information concerning job applicants while a recruitment search is ongoing. The resumes of successful candidates shall be disclosed once the successful candidate is hired. The resumes of unsuccessful candidates may be disclosed after the search has been concluded and the position has been filled, but only where the unsuccessful candidate has consented to such disclosure.



[Id.]

EO 26 is clear on the disclosability of resumes at the conclusion of the recruitment process: successful candidate resumes must be disclosed. Id. However, EO 26 is less clear on applications and “other information concerning job applicants.” To this end, the Council has previously held that employment applications were not disclosable, reasoning that EO 26 made no mention of employment applications being disclosed after the completion of the recruitment search. See Toscano v. N.J. Dep’t of Human Serv., Div. of Health Serv., GRC Complaint No. 2010-147 (May 2011). The Council further equated applications to “personnel records” not among the enumerated list of releasable records set forth at N.J.S.A. 47:1A-10 (allowing for limited disclosure of certain personnel information). See also Deutsch v. N.J. Civil Serv. Comm’n, GRC Complaint No. 2011-361 (March 2013).

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

<b>Record or Redaction Number</b>	<b>Record Name/Date</b>	<b>Description of Record or Redaction</b>	<b>Custodian’s Explanation/ Citation for Non-disclosure or Redactions</b>	<b>Findings of the <i>In Camera</i> Examination<sup>10</sup></b>
62	October 2, 2017 E-mail from Thomas Ryan to Scott Carew, Michael DiPiero, Esq. Cc: Jessica Floyd, Tracy Parker	Mr. Ryan acknowledges his participation in a conference call.	Personnel Records. <u>N.J.S.A. 47:1A-10</u> . Attorney-Client Privilege. <u>N.J.S.A. 47:1A-1.1</u> .	The body of the e-mail does not contain any personnel records or attorney-client privileged communications warranting non-disclosure. <b>Thus,</b>

<sup>10</sup> **Unless expressly identified for redaction, everything in the record shall be disclosed.** For purposes of identifying redactions, unless otherwise noted a paragraph/new paragraph begins whenever there is an indentation and/or a skipped space(s). The paragraphs are to be counted starting with the first whole paragraph in each record and continuing sequentially through the end of the record. If a record is subdivided with topic headings, renumbering of paragraphs will commence under each new topic heading. Sentences are to be counted in sequential order throughout each paragraph in each record. Each new paragraph will begin with a new sentence number. If only a portion of a sentence is to be redacted, the word in the sentence which the redaction follows or precedes, as the case may be, will be identified and set off in quotation marks. If there is any question as to the location and/or extent of the redaction, the GRC should be contacted for clarification before the record is redacted. The GRC recommends the redactor make a paper copy of the original record and manually "black out" the information on the copy with a dark colored marker, then provide a copy of the blacked-out record to the requester.

	<p><b>Note: Five (5) additional e-mails are included in the e-mail chain, including Nos. 63 and 64 below.</b></p>			<p><b>the Custodian must disclose this portion of the e-mail chain.</b></p> <p>Except as stated for item Nos. 63 and 64 below, the remaining e-mail bodies were properly withheld as comprising personnel records and under the attorney-client privileged communications. <u>N.J.S.A. 47:1A-10</u>; <u>N.J.S.A. 47:1A-1.1</u>.</p>
63	<p>October 2, 2017 E-mail from Scott Carew to Michael DiPiero, Esq. Cc: Jessica Floyd, Tracy Parker, Thomas Ryan</p> <p><b>Note: Five (5) additional e-mails are included in the e-mail chain, including Nos. 62 above and 64 below.</b></p>	Mr. Carew suggests a time to hold a conference call.	Personnel Records. <u>N.J.S.A. 47:1A-10</u> . Attorney-Client Privilege. <u>N.J.S.A. 47:1A-1.1</u> .	<p>The body of the e-mail does not contain any personnel records or attorney-client privileged communications warranting non-disclosure. <b>Thus, the Custodian must disclose this portion of the e-mail chain.</b></p> <p>Except as stated for item Nos. 62 above and 64 below, the remaining e-mail bodies were properly withheld as comprising personnel records and under the attorney-client privileged communications.</p>

				<u>N.J.S.A. 47:1A-10;</u> <u>N.J.S.A. 47:1A-1.1.</u>
64	<p>October 2, 2017 E-mail from Michael DiPiero, Esq. to Scott Carew Cc: Jessica Floyd, Tracy Parker, Thomas Ryan</p> <p><b>Note: Three (3) additional e-mails are included in the e-mail chain.</b></p>	Mr. DiPiero agrees with Mr. Carew to hold a conference call.	Personnel Records. <u>N.J.S.A. 47:1A-10.</u> Attorney-Client Privilege. <u>N.J.S.A. 47:1A-1.1.</u>	<p>The body of the e-mail does not contain any personnel records or attorney-client privileged communications warranting non-disclosure. <b>Thus, the Custodian must disclose this portion of the e-mail chain.</b></p> <p>The remaining three (3) e-mail bodies were properly withheld as comprising personnel records and under the attorney-client privileged communications. <u>N.J.S.A. 47:1A-10;</u> <u>N.J.S.A. 47:1A-1.1.</u></p>
98	<p>November 21, 2017 E-mail from Scott Carew to Robin London-Zeitz Cc: Gregory Jacovini, Marc Rubinsohn</p> <p><b>Note: Three (3) additional e-mails are included in the chain.</b></p>	Mr. Carew responds to an inquiry from a third party.	Advisory, Consultative, Deliberative. <u>N.J.S.A. 47:1A-1.1.</u>	<p>The second sentence of the e-mail body does not contain ACD material warranting nondisclosure. <b>Thus, the Custodian must disclose this portion of the e-mail chain.</b></p> <p>The remainder of the e-mail body as well as the bodies of the three (3) remaining e-mails were properly</p>

				withheld as comprising ACD material. <u>N.J.S.A. 47:1A-1.1.</u>
116	<p>December 26, 2017 E-mail from James Pierson, Esq. to Tracy Parker, Jessica Floyd Cc: Deann Smith</p> <p><b>Note: Two (2) additional e-mails are included in the chain.</b></p>	Mr. Pierson forwarding his response to an inquiry from Mr. Law.	Attorney-Client Privilege. <u>N.J.S.A. 47:1A-1.1.</u>	<p>The first sentence of the e-mail body does not comprise attorney-client privileged communications. <b>Thus, the Custodian must disclose this portion of the e-mail chain.</b></p> <p>The remainder of the e-mail body as well as the bodies of the two (2) remaining e-mails were properly withheld as comprising attorney-client privileged communications. <u>N.J.S.A. 47:1A-1.1.</u></p>
138	<p>September 27, 2017 E-mail from Scott Carew to Christine O’Hearn, Esq., Michael DiPiero, Esq.</p> <p><b>Note: Two (2) additional e-mails are included in the e-mail chain.</b></p>	There is nothing contained in the body of the e-mail.	Personnel Records. <u>N.J.S.A. 47:1A-10.</u> Attorney-Client Privilege. <u>N.J.S.A. 47:1A-1.1.</u>	<p>There is nothing in the e-mail body to warrant non-disclosure under the personnel records exemption. <b>Thus, the Custodian must disclose this portion of the e-mail chain.</b></p> <p>The remaining two (2) e-mail bodies were properly withheld as comprising personnel records <u>N.J.S.A. 47:1A-10.</u></p>

165	December [19], 2017 E-mail from [Lou] Ogaard to Robert Law  <b>Note: The e-mail does not include attachments contained within.</b>	Contains a requested salary.	Personnel Records. <u>N.J.S.A. 47:1A-10.</u>	The requested salary reasonably qualifies as “other information concerning job applicants,” and was therefore properly withheld under EO 26 and <u>N.J.S.A. 47:1A-9(a).</u>
166	December [19], 2017 E-mail from Harry [Staven] to Robert Law  <b>Note: The e-mail does not include attachments contained within.</b>	References attached application materials for the City Administrator position; includes personal phone number.	Personnel Records. <u>N.J.S.A. 47:1A-10.</u>	The personal phone number of the candidate reasonably qualifies as “other information concerning job applicants,” and was therefore properly withheld under EO 26 and <u>N.J.S.A. 47:1A-9(a).</u>
167	December 19, 2017 E-mail Ted Taylor to Robert Law  <b>Note: The e-mail does not include attachments contained within.</b>	Cover letter regarding the City Administrator position.	Personnel Records. <u>N.J.S.A. 47:1A-10.</u>	The body of the e-mail comprises “other information concerning job applicants,” and was therefore properly withheld under EO 26 and <u>N.J.S.A. 47:1A-9(a).</u>
168	December 20, 2017 E-mail from Marc Seemon to Robert Law  <b>Note: The e-mail does not include attachments contained within.</b>	References attached application materials for the City Administrator position; includes personal phone number.	Personnel Records. <u>N.J.S.A. 47:1A-10.</u>	The personal phone number of the candidate reasonably qualifies as “other information concerning job applicants,” and was therefore properly withheld under EO 26 and

				<u>N.J.S. A. 47:1A-9(a).</u>
169	December 20, 2017 E-mail from Jim Mallon to Robert Law  <b>Note: The e-mail does not include attachments contained within.</b>	References attached application materials for the City Administrator position; includes personal phone number.	Personnel Records. <u>N.J.S.A. 47:1A-10.</u>	The personal phone number of the candidate reasonably qualifies as “other information concerning job applicants,” and was therefore properly withheld under EO 26 and <u>N.J.S. A. 47:1A-9(a).</u>
170	December 24, 2017 E-mail from Jay Delaney to Robert Law  <b>Note: The e-mail does not include attachments contained within.</b>	References attached application materials for the City Administrator position; includes personal phone number.	Personnel Records. <u>N.J.S.A. 47:1A-10.</u>	The personal phone number of the candidate reasonably qualifies as “other information concerning job applicants,” and was therefore properly withheld under EO 26 and <u>N.J.S. A. 47:1A-9(a).</u>
171	December 26, 2017 E-mail from Michael Kwasizur to Robert Law  <b>Note: The e-mail does not include attachments contained within.</b>	References attached application materials for the City Administrator position.	Personnel Records. <u>N.J.S.A. 47:1A-10.</u>	The body of the e-mail does not contain personnel information. <b>Thus, the Custodian must disclose this portion of the e-mail.</b>
172	December 27, 2017 E-mail from Mimi Marlors to Robert Law  <b>Note: The e-mail does not include attachments contained within.</b>	References attached application materials for the City Administrator position; includes	Personnel Records. <u>N.J.S.A. 47:1A-10.</u>	The personal phone number of the candidate reasonably qualifies as “other information concerning job applicants,” and was therefore

		personal phone number.		properly withheld under EO 26 and <u>N.J.S.A. 47:1A-9(a)</u> .
173	December 27, 2017 E-mail from Alyse Portera to Robert Law  <b>Note: The e-mail does not include attachments contained within.</b>	Nothing contained in the body of the e-mail. Application materials are attached.	Personnel Records. <u>N.J.S.A. 47:1A-10.</u>	The body of the e-mail does not contain personnel information. <b>Thus, the Custodian must disclose this portion of the e-mail.</b>
174	December 27, 2017 E-mail from Surendra Jakhar to Robert Law  <b>Note: The e-mail does not include attachments contained within.</b>	References attached resume for the City Administrator position.	Personnel Records. <u>N.J.S.A. 47:1A-10.</u>	The body of the e-mail does not contain personnel information. <b>Thus, the Custodian must disclose this portion of the e-mail.</b>
197	October 15, 2017 E-mail from Thomas Ryan  <b>Note: four (4) additional e-mails are included in the chain.</b>	Nothing contained in the body of the e-mail.	Personnel Records. <u>N.J.S.A. 47:1A-10.</u>	There is nothing in the e-mail body to warrant non-disclosure under the personnel records exemption. <b>Thus, the Custodian must disclose this portion of the e-mail chain.</b>  The remaining four (4) e-mail bodies were properly withheld as comprising personnel records <u>N.J.S.A. 47:1A-10.</u>
226	December 19, 2017 E-mail from James Pierson, Esq. to Tracy Parker, Jessica Floyd, Ken	Mr. Pierson states "For your information."	Attorney-Client Privilege. <u>N.J.S.A. 47:1A-1.1.</u>	The body of the e-mail does not contain any attorney-client privileged communications

	<p>McIlvanie, and Bill Fleming. CC: Deann Smith</p> <p><b>Note: Two (2) additional e-mails are included in the e-mail chain.</b></p>			<p>warranting nondisclosure. <b>Thus, the Custodian must disclose this portion of the e-mail chain.</b></p> <p>The remaining two (2) e-mail bodies were properly withheld as attorney-client privileged communications. <u>N.J.S.A. 47:1A-1.1.</u></p>
248	<p>December 22, 2017 E-mail from Bill Fleming to James Pierson, Esq.</p> <p><b>Note: Two (2) additional e-mails are included in the e-mail chain.</b></p>	<p>Mr. Fleming acknowledges advise and analysis provided by Mr. Pierson.</p>	<p>Attorney-Client Privilege. <u>N.J.S.A. 47:1A-1.1.</u></p>	<p>The first and third sentence of the e-mail do not contain attorney-client privileged communications. <b>Thus, the Custodian must disclose this portion of the e-mail chain.</b></p> <p>The remaining two (2) e-mail bodies were properly held as attorney-client privileged communications. <u>N.J.S.A. 47:1A-1.1.</u></p>

For all e-mails not listed above, the asserted exemptions apply and the Custodian lawfully denied access to the body of each e-mail. N.J.S.A. 47:1A-6. Specifically, the e-mails contain a mixture of internal discussions regarding the Complainant, his position as Business Administrator with the City, and replacement. These e-mails are exactly the type of records that the ACD and personnel records exemptions were intended to protect. Further, many of the e-mails contain attorney-client privileged communications between the Custodian's Counsel and City employees. These communications are directly linked to pending actions with the Complainant. Further, a number of the communications include attorney work-product from Custodian's Counsel to the City.



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

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

### **Knowing & Willful**

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

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not fully comply with the Council's February 26, 2020 Interim Order because although she timely provided her certified confirmation of compliance to the Executive Director, she failed to provide the GRC with copies of records withheld from disclosure for *in camera* review within the extended time frame.
2. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order. Further, the Custodian shall simultaneously deliver<sup>11</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>12</sup> to the Executive Director.<sup>13</sup>**

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<sup>11</sup> The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

<sup>12</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

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

3. The Custodian must disclose all of these portions of the responsive e-mails to the Complainant (*i.e.*, sender, recipients, date, time, subject, and salutations where applicable). As to those portions of the requested e-mails, the Custodian has unlawfully denied access. See Ray v. Freedom Acad. Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010). The GRC notes that if the Custodian intends to redact certain information in the categories identified above, she must provide a lawful basis for those redactions.
4. **The Custodian shall comply with conclusion No. 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver<sup>14</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Executive Director.**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Samuel A. Rosado  
Staff Attorney

January 19, 2021

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<sup>14</sup> The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
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TRENTON, NJ 08625-0819

PHILIP D. MURPHY  
Governor

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

**INTERIM ORDER**

**February 26, 2020 Government Records Council Meeting**

Scott Carew  
Complainant

Complaint No. 2018-47

v.

City of Woodbury (Gloucester)  
Custodian of Record

At the February 26, 2020 public meeting, the Government Records Council (“Council”) considered the January 21, 2020 Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian’s response to the Complainant’s December 27, 2017 OPRA request was sufficient in that it provided a specific lawful basis for denying access to e-mails and other correspondence. See D’Appolonio v. Borough of Deal (Monmouth), GRC Complaint No. 2008-62 (September 2009), and Lear, III v. City of Cape May (Cape May), GRC Complaint No. 2014-426 (Interim Order dated November 17, 2015). Additionally, the Custodian provided a specific lawful basis for redacting personal e-mail addresses, addresses, and cell phone numbers. See Paff v. Borough of Lavallette, GRC Complaint No. 2007-209 (Interim Order dated June 25, 2008). Therefore, the Custodian did not violate OPRA under N.J.S.A. 47:1A-5(g).
2. There is insufficient evidence to show that the Complainant had full knowledge of his confidentiality rights under N.J.S.A. 47:1A-10 regarding his personnel records effectively waived those rights. See Fleming v. Greenwich Twp. (Warren), GRC Complaint No. 2015-18 (Interim Order dated January 31, 2017), McGee v. Twp. of East Amwell (Hunterdon), GRC Complaint No. 2007-305 (March 2011). Thus, there was no unlawful denial of access on these grounds. N.J.S.A. 47:1A-6. However, because the Complainant indicated his waiver of those protections in correspondence dated April 26, 2018, the Custodian shall release those records withheld as personnel records which are not otherwise precluded from disclosure.
3. **The Custodian shall comply with conclusion No. 2 above within five (5) business days from receipt of the Council’s Interim Order. Further, the Custodian shall**

**simultaneously deliver<sup>1</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>2</sup> to the Executive Director.<sup>3</sup>**

4. The GRC must conduct an *in camera* review of the redacted records and records withheld in their entirety to determine the validity of the Custodian's assertion that the redactions or denials are valid under OPRA's exemptions for advisory, consultative, or deliberative material and/or attorney-client privileged communications. N.J.S.A. 47:1A-1.1. See Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).
5. **The Custodian shall deliver<sup>4</sup> to the Council in a sealed envelope nine (9) copies of the requested records withheld entirely, nine (9) copies of the redacted records in both redacted and unredacted form (see conclusion No. 4 above), a document or redaction index<sup>5</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,<sup>6</sup> that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
6. 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 26<sup>th</sup> Day of February 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: February 28, 2020**

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

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

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

<sup>4</sup> The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives them by the deadline.

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

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

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
February 26, 2020 Council Meeting**

**David Scott Carew<sup>1</sup>  
Complainant**

**GRC Complaint No. 2018-47**

v.

**City of Woodbury (Gloucester)<sup>2</sup>  
Custodial Agency**

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

Electronic communications, including but not limited to e-mails and text messages, to or from the following individuals:

- Mayor Jessica Floyd
- Council President Tracey Parker
- Councilman William Fleming
- Councilman Ken McIlvaine
- Councilman Dave Swanson
- Councilwoman Karlene O'Connor
- Council Ted Johnson
- Councilwoman Danielle Carter
- Police Chief Tom Ryan
- CFO Robert Law
- Clerk Daneen Fuss

Containing the following subject matter:

- Scott Carew
- The position of City Administrator for Woodbury
- The position of Interim City Administrator for Woodbury

With the records sent or received between the dates of June 1, 2017 and December 27, 2017.

**Custodian of Record:** Daneen Fuss

**Request Received by Custodian:** December 27, 2017

**Response Made by Custodian:** January 8, 2018; February 23, 2018

**GRC Complaint Received:** March 22, 2018

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

<sup>2</sup> Represented by Timothy D. Scaffidi, Esq., of the Law Office of Timothy D. Scaffidi, Esq., (Woodbury, NJ). Previously represented by John A. Alice, Esq.

## **Background**<sup>3</sup>

### Request and Response:

On December 27, 2017, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On January 8, 2018, the Complainant e-mailed the Custodian, requesting an anticipated return date for his OPRA request. That same day, the Custodian responded in writing, stating that due to inclement weather she was at home for two (2) work days. The Custodian also attached a letter seeking a time extension of six (6) or seven (7) weeks to respond. The Complainant objected to the length of the time extension, but the parties agreed to extend the time to respond to February 23, 2018.

On February 23, 2018, the Custodian responded in writing via e-mail, attaching responsive records. The Custodian stated that redactions to personal e-mail addresses, home addresses, and cell phone numbers were made pursuant to N.J.S.A. 47:1A-1.1. The Custodian added that some e-mails and text messages were withheld from access as constituting personnel records under N.J.S.A. 47:1A-1.1 and -10. The Custodian also noted that some e-mails and text messages were withheld as constituting advisory, consultative, and deliberative (“ACD”) material as well as protected under the attorney-client privilege. N.J.S.A. 47:1A-1.1.

### Additional Correspondence:

On February 23, 2018, the Complainant replied to the Custodian, objecting to the reasons given for denying access. The Complainant stated that under N.J.S.A. 47:1A-10, information such as, “an individual’s name, title, position, salary, payroll record, length of service, date of separation and the reason for such separation,” are exceptions to the exemption against access to personnel records. The Complainant stated that the Custodian would be in violation of OPRA if she omitted records containing the reason why he was not reappointed as Business Administrator for the City.

Next, the Complainant stated that the Custodian separately provided him with a text sent from Mayor Floyd to the Custodian where she stated that she was advised to not speak with the Complainant. The Complainant added the Mayor asked the Custodian to reach out to him regarding an unspecified matter. The Complainant stated that while the advice from the City Attorney to the Mayor may fall under the attorney-client privilege, the text from the Mayor to the Custodian would not fall under the privilege. The Complainant also stated that he was informed that the Mayor and Council President had sent or received texts about himself to other members of the City Council, the Chief of Police, the Planning Board Chair, and others. The Complainant stated that those text messages should have been provided.

Later that same day, the Complainant sent another e-mail to the Custodian, stating that the claimed exemptions from access were too broad for the response to be satisfactory. The Complainant stated that he wanted the Custodian to provide an itemized list of all communications withheld from access.

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<sup>3</sup> The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

On February 27, 2018, the Custodian responded to the Complainant, acknowledging receipt of his correspondence and stated she would reply shortly.

On March 5, 2018, the Complainant sent an e-mail to the Custodian, stating that he had not received a response from the Custodian as promised in the February 27, 2018 e-mail. The Complainant noted that he reached out to the Government Records Council (“GRC”) for guidance and would determine his next steps depending on the GRC’s response.

On March 6, 2018, the Complainant e-mailed the Custodian, stating that OPRA’s personnel records exemption includes an exception when access to the personnel records are “authorized by an individual of[sic] interest,” citing N.J.S.A. 47:1A-10. The Complainant also cited McGee v. Twp. of East Amwell,<sup>4</sup> stating that the case defined an “individual in interest” as the person who is the subject of the personnel file and that person may accept to waive their privacy right and authorize the disclosure of their personnel records.

On March 8, 2018, the Custodian responded to the Complainant, stating that if he wished to waive the disclosure protections under N.J.S.A. 47:1A-10, he must communicate the waiver in writing and explicitly authorize the disclosure of personnel records responsive to his December 27, 2017 OPRA request. The Custodian stated that if the Complainant provided the written waiver, she would conduct an additional review and provide those documents withheld as personnel records and not otherwise precluded from disclosure.

On March 9, 2018, the Complainant responded to the Custodian stating that according to the GRC in McGee, he did not have to take an additional step of communicating an explicit, written waiver of the disclosure protections under N.J.S.A. 47:1A-10. The Complainant stated that his previous e-mail satisfied any requirements, and the Custodian should have provided the records accordingly. Furthermore, the Complainant stated that the Custodian still has not provided detailed list explaining the basis for denying access to each record.

On March 12, 2018, the Custodian responded to the Complainant stating that the Complainant only partially cited McGee and noted that the decision required the individual waiving a right to do so with complete clarity. The Custodian stated that because of the sensitive nature of personnel records, she requested a more explicit waiver rather than infer same from the Complainant’s previous correspondence. The Custodian stated that upon receipt of the waiver, she would act accordingly as stated in her March 8, 2018 e-mail.

That same day, the Complainant replied to the Custodian, stating that he would let the GRC or a judge decide the issue. The Complainant also made note of his previous requests for an itemized list of reasons for each withheld record and asked if the Custodian was going to fulfill that request. The Complainant also stated that he previously pointed out examples of text messages that should have been provided and that the Custodian knew of other withheld records that were subject to access.

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<sup>4</sup> The Complainant did not provide a complete citation.

### Denial of Access Complaint:

On March 22, 2018, the Complainant filed a Denial of Access Complaint with the GRC. The Complainant asserted that he was the Interim Administrator for the City during the latter half of 2017 and was told by the Mayor and Council President that they wished to appoint him permanently at the City's reorganization meeting in 2018 but needed the support of the remaining councilmembers. The Complainant asserted that he submitted his terms for permanent appointment to the City Council in early December 2017. The Complainant contended that he did not receive a response from the Mayor, and on December 13, 2017, the City Solicitor informed him that he would not be appointed permanently. The Complainant asserted that no reason was provided, and only two (2) councilmembers would communicate with him about the matter. The Complainant asserted that because no one would explain why wasn't being permanently appointment he filed the OPRA request at issue.

The Complainant contended that the Custodian's response failed to include text messages he was aware of as a participant that should have been provided. The Complainant maintained that the Custodian's reasons for denial were insufficiently broad and questioned the claim that several withheld records were classified as "personnel records." The Complainant contended that he asked multiple times for a more detailed explanation for withholding the records, but the Custodian failed to provide one. The Complainant also noted that as a person of interest, he was entitled to those withheld records under N.J.S.A. 47:1A-10.

### Statement of Information:

On April 24, 2018, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on December 27, 2017. The Custodian certified that she initially reached out to the City's IT department and contractor to locate records. The Custodian then certified that she was informed that numerous City officials had e-mails that were sent to their City accounts forwarded to their personal accounts for convenience of access and that these e-mails were never on or retained by the City's e-mail servers. The Custodian then certified that on January 3, 2018, she notified all the named individuals that their text messages and e-mails were being requested and to provide her with the relevant documentation. The Custodian then certified that on January 8, 2018, she requested an extension of time through February 23, 2018 due to the intensive process required to coordinate the collection of records from many City officials. The Custodian then certified that on January 9, 2018, the IT department confirmed to her that Councilmembers' e-mail addresses were only relays, and therefore the City's servers did not store any information.

The Custodian certified that she reviewed thousands of text messages and e-mails to determine if they pertaining to the OPRA request's identified subject matters. The Custodian certified that most documents received did not contain any relevant subject matter. The Custodian certified that as an example, the Chief of Police's e-mails were searched with the keywords "Scott," "Carew," "Administrator," and "Interim" and resulted in approximately 1,670 e-mails, not including e-mails within a chain. The Custodian certified that only nine (9) of those e-mails arguably fell within the scope of the request. The Custodian certified that she responded to the



Complainant's request on February 23, 2018, providing responsive e-mails and text messages that were not exempt under OPRA.

The Custodian asserted that when the Complainant contended that he was a person in interest seeking access to his own personnel records, she requested an explicit waiver from the Complainant. The Custodian contended that she was not trying to make it difficult for the Complainant, but to ensure she was properly adhering to the requirements set forth under OPRA and McGee v. Twp. of East Amwell, 416 N.J. Super. 602 (App. Div. 2010). The Custodian also stated that while preparing the SOI, she discovered that the Complainant's official cell phone had not been purged or reused since his departure. The Custodian asserted that she was in the process of reviewing the text messages between the Complainant and the identified parties in his request and would supplement the SOI if additional responsive records were located.

As to the records themselves, the Custodian asserted that the scope of the request primarily pertained to two (2) interview processes involving the Complainant, with the first being his appointment as Interim Administrator for the City, and the second being the Complainant's desire to be permanently appointed as Administrator. The Custodian contended that as of the date of the SOI, the latter process had yet to conclude. The Custodian asserted that while not all the requested records were related to the two (2) interview processes, those which did fall under Executive Order No. 26 (Gov. McGreevy, 2002) ("EO 26") pertained to resumes and applications during active recruitment. The Custodian argued that since the recruitment search for the permanent appointment was ongoing at the time of the response, EO 26 precluded disclosure of the Complainant's records as an applicant. The Custodian also asserted that even upon the conclusion of the processes, the communications among government officials related to those processes fell under the ACD exemption.

Next, the Custodian asserted that most of the withheld records are personnel records, and that the very nature of the Complainant's request encompassed personnel records as defined under N.J.S.A. 47:1A-10. The Custodian argued that the exception made for information providing the "date of separation and reason therefore" does not include every record detailing the reasons why the Complainant was not submitted for permanent appointment as administrator. The Custodian asserted that the records the Complainant sought are records which would fall under OPRA's ACD exemption, as they would contain the deliberations amongst government officials in evaluating the Complainant's merits for the appointment.

The Custodian also argued that the personnel records exemption includes records beyond those contained in the employee's personnel file, citing McGee, 416 N.J. Super. at 616. Further, the Custodian also noted that while the party in interest can waive the protections provided under N.J.S.A. 47:1A-10, the waiver must be explicit, and cannot be inferred from the party in interest requesting the records under OPRA. The Custodian maintained that the Complainant failed to provide this explicit waiver in the correspondence preceding the instant complaint.

Regarding the Complainant's claim that the response to his request was insufficiently vague, the Custodian argued that the Complainant was essentially seeking a Vaughn index,<sup>5</sup> where

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<sup>5</sup> The term *Vaughn* index is derived from Vaughn v. Rosen, 484 F.2d 820, 826-28, 157 U.S. App. D.C. 340 (D.C. Cir. 1973), cert. denied, 415 U.S. 977, 94 S. Ct. 1564, 39 L. Ed. 2d 873 (1974). See Paff v. Div. of Law, 412 N.J. Super. David Scott Carew v. City of Woodbury (Gloucester), 2018-47 – Findings and Recommendations of the Executive Director

each individual record is extensively logged and categorized. The Custodian asserted that this index was only required of the custodian when preparing the SOI, and there is no law or case which mandates the custodian to produce a Vaughn index in response to every OPRA request. The Custodian cited D.F. v. Collingswood Bd. of Educ., 2016 N.J. Super. Unpub. LEXIS 2449 (App. Div. Nov. 10, 2016), where the Appellate Division rejected the argument that a custodian must provide a privilege log when asserting a claim of attorney-client privilege in response to an OPRA request. The Custodian also cited N. Jersey Media Grp., Inc. v. Bergen Cnty. Prosecutor's Office, 447 N.J. Super. 182, 200 (App. Div. 2016), where the court held that, "neither OPRA nor FOIA calls for the production of a Vaughn index in every case in which access is denied." The Custodian also argued that her response satisfied the requirement that she specifically indicate the basis for denial or redaction by stating that certain e-mails and text messages constituted personnel records and/or contained ACD material and included the relevant statutory citations.

#### Additional Submissions:

On April 26, 2018, the Complainant provided a response to the Custodian's SOI. Initially, the Complainant asked whether the Custodian was correct in their argument that a confidentiality waiver must be explicit. The Complainant stated that if the Custodian was correct, then by virtue of this response, he was waiving those protections. Next, the Complainant asserted that many of the records identified in the SOI's Item No. 9 Index were not within the scope of his request. The Complainant also asserted that the claim that some of the withheld records contained attorney-client privileged information was inappropriately applied. The Complainant also rejected the claim that communications between members of the Council and the Complainant's subordinates constituted personnel records.

The Complainant also noted that several text messages listed in the index did not contain the sender and/or recipients nor the date sent. The Complainant argued that he should be able to know the individuals involved in those text messages and their respective dates. The Complainant also argued that record nos. 193, 195 and 196 should not constitute a personnel communication since the public official involved was not serving in an official capacity at the time.

### Analysis

#### Sufficiency of Response

OPRA provides that if a "custodian is unable to comply with a request for access, the custodian *shall indicate the specific basis therefor . . .* on the request form and promptly return it to the requestor." N.J.S.A. 47:1A-5(g) (emphasis added). The Council has held that for a denial of access to comply with OPRA, it must be specific and sufficient to prove that a custodian's denial is authorized by OPRA. See D'Appolonia v. Borough of Deal (Monmouth), GRC Complaint No. 2008-62 (September 2009); Lear, III v. City of Cape May (Cape May), GRC Complaint No. 2014-426 (Interim Order dated November 17, 2015). This requirement also applies to redactions made to responsive records. See Paff v. Borough of Lavallette, GRC Complaint No. 2007-209 (Interim Order dated June 25, 2008).

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140, 161 n. 9, 988 A.2d 1239 (App. Div. 2010), certif. denied, 202 N.J. 45, 994 A.2d 1040 (2010). A *Vaughn* index provides details justifying non-disclosure of documents based on an asserted privileged. *Ibid.*

Here, the Complainant asserted that the Custodian's response was too vague and lacked specificity. However, in accordance with Paff, GRC 2007-209, the Custodian cited to N.J.S.A. 47:1A-1.1, as a basis for redacting personal e-mail addresses, addresses, and cell phone numbers. Additionally, in accordance with D'Appolonio, GRC 2008-62 and Lear, III, GRC 2014-426, the Custodian cited N.J.S.A. 47:1A-10 as basis for withholding documents constituting personnel records. Thus, the Custodian's response satisfied the specificity requirements under OPRA.

Accordingly, the Custodian's response to the Complainant's December 27, 2017 OPRA request was sufficient in that it provided a specific lawful basis for denying access to e-mails and other correspondence. See D'Appolonio, GRC 2007-272, and Lear, III, GRC 2014-426. Additionally, the Custodian provided a specific lawful basis for redacting personal e-mail addresses, addresses, and cell phone numbers. See Paff, GRC 2007-209. Therefore, the Custodian did not violate OPRA under N.J.S.A. 47:1A-5(g).

### **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.

### **Confidentiality Waiver**

Regarding requests for personnel information, OPRA mandates that:

[T]he 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.]

Notwithstanding this provision, OPRA also contains exceptions to the personnel record exemption. The following categories are personnel records, which *are* subject to public access:

- [A]n individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefor, and the amount and type of any pension received . . .
- [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.

[N.J.S.A. 47:1A-10 (emphasis added).]

In McGee, 416 N.J. Super. at 618, the Appellate Division held that a complainant’s “act of filing a request for records containing [their] own personnel information may constitute an implied waiver.” However, the court noted that the complainant did not raise the waiver argument at the time the matter was before the GRC. Id. Therefore, the court remanded the case back to the GRC to determine whether the complainant “effectively waived the confidentiality accorded her by the ‘personnel records’ exception or whether there are countervailing concerns or policies that would preclude release of the records.” Id.

Thereafter, in McGee v. Twp. of East Amwell (Hunterdon), GRC Complaint No. 2007-305 (March 2011), the GRC discussed whether the complainant waived her right of confidentiality regarding four (4) records withheld from disclosure under N.J.S.A. 47:1A-10. The Council found that “[a]n effective waiver requires a party to have full knowledge of his legal rights and intend to surrender those rights. McGee, GRC 2007-305 (citing W. Jersey Title & Guar. Co. v. Indus. Trust Co., 27 N.J. 144, 153 (1958)). “The intent to waive need not be stated expressly, provided the circumstances clearly show that the party knew of the right and then abandoned it, either by design or indifference” McGee, GRC 2007-305 (citing Merchs. Indem. Corp. of N.Y. v. Eggleston, 68 N.J. Super. 235, 254 (App. Div. 1961), aff’d, 37 N.J. 114 (1962)). “The party waiving a known right must do so clearly, unequivocally, and decisively.” McGee, GRC 2007-305 (citing Country Chevrolet, Inc. v. Twp. of New Brunswick Planning Bd., 190 N.J. Super. 376, 380 (App. Div. 1983)). The Council held that there was no evidence in the record demonstrating that the complainant knew of her confidentiality rights and intended to waive them at the time she submitted her OPRA request and when the matter was before the GRC. McGee, GRC 2007-305. Therefore, the custodian lawfully denied access to the records. Id.

Moreover, in Fleming v. Greenwich Twp. (Warren), GRC Complaint No. 2015-18 (Interim Order dated January 31, 2017), the complainant sought a report concerning her termination of employment. The custodian denied access, asserting that the report was a personnel record and therefore not a government record under N.J.S.A. 47:1A-10. Id. The complainant objected to the denial on the basis that she was the subject of the report. Id. However, the Council found that the complainant’s statement constituted an exception for herself as an individual, rather than a waiver for the public at large. Therefore, the Council held that the complainant’s statement was not a clear and unequivocal waiver of her confidentiality rights under McGee. Fleming, GRC 2015-18.

Here, it is not in dispute that the Complainant qualifies as an “individual in interest” under N.J.S.A. 47:1A-10 and raised the issue of waiving confidentiality at the time of his complaint filing. Thus, GRC must determine whether the Complainant effectively waived his confidentiality rights in accordance with prevailing law.

The Complainant argues that he is not required to take the additional step of expressly waiving his confidentiality rights under N.J.S.A. 47:1A-10. While it is true that a waiver need not be expressly stated, the circumstances in this matter are like those in Fleming, GRC 2015-18. The Complainant asserts that in accordance with McGee, GRC 2007-305, he has a right to his personnel records by virtue of being an individual of interest. However, qualifying as an individual in interest does not grant a special right of access to personnel records, but instead grants the power to make their personnel records open to all. See Fleming, GRC 2015-18. Although the Custodian mentioned the consequence of this waiver to the Complainant, the evidence in the record does not indicate that the Complainant had full knowledge of his legal rights under N.J.S.A. 47:1A-10. In McGee and Fleming, the GRC has made it clear that simply qualifying as an individual in interest alone is insufficient to demonstrate that the requestor is clearly and unequivocally waiving their confidentiality rights.

Therefore, there is insufficient evidence to show that the Complainant had full knowledge of his confidentiality rights under N.J.S.A. 47:1A-10 regarding his personnel records effectively waived those rights. See Fleming, GRC 2015-18, McGee, GRC 2007-305. Thus, there was no unlawful denial of access on these grounds. N.J.S.A. 47:1A-6. However, because the Complainant indicated his waiver of those protections in correspondence dated April 26, 2018, the Custodian shall release those records withheld as personnel records which are not otherwise precluded from disclosure.

#### Withheld/Redacted Records

In Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the Council<sup>6</sup> that accepted the custodian's legal conclusion for the denial of access without further review. The Appellate Division noted that "OPRA contemplates the GRC's meaningful review of the basis for an agency's decision to withhold government records . . . . When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers." Id. The Court stated that:

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

[Id. at 355.]

Further, the Court found that:

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<sup>6</sup> Paff v. N.J. Dep't of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

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

[Id.]

In the instant matter, the Custodian asserted that several redacted or withheld records constituted ACD material and are therefore not subject to access under N.J.S.A. 47:1A-1.1. Furthermore, the Custodian asserted that several records contained attorney-client privileged communications. N.J.S.A. 47:1A-1.1. The Custodian listed these exemptions within the SOI’s “Item 9” index. The Complainant countered by arguing that the Custodian liberally applied the above exemptions to prevent disclosure of public records.

Notwithstanding the Custodian’s descriptions, a “meaningful review” is necessary to determine whether the redactions and records withheld entirely fell within the stated exemptions. The GRC must therefore review same in order to determine the full applicability of exemptions. Such an action is not uncommon, as the GRC has routinely performed *in camera* reviews in similar matters. See Pouliot v. N.J. Dep’t of Educ., GRC Complaint No. 2015-281 (Interim Order dated January 31, 2017).

Therefore, the GRC must conduct an *in camera* review of the redacted records and records withheld in their entirety to determine the validity of the Custodian’s assertion that the redactions or denials are valid under OPRA’s exemptions for ACD material and/or attorney-client privileged communications. N.J.S.A. 47:1A-1.1. See Paff, 379 N.J. Super. at 346.

### **Knowing & Willful**

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

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian’s response to the Complainant’s December 27, 2017 OPRA request was sufficient in that it provided a specific lawful basis for denying access to e-mails and other correspondence. See D’Appolonio v. Borough of Deal (Monmouth), GRC Complaint No. 2008-62 (September 2009), and Lear, III v. City of Cape May (Cape May), GRC Complaint No. 2014-426 (Interim Order dated November 17, 2015). Additionally, the Custodian provided a specific lawful basis for redacting personal e-mail addresses, addresses, and cell phone numbers. See Paff v. Borough of Lavallette,

GRC Complaint No. 2007-209 (Interim Order dated June 25, 2008). Therefore, the Custodian did not violate OPRA under N.J.S.A. 47:1A-5(g).

2. There is insufficient evidence to show that the Complainant had full knowledge of his confidentiality rights under N.J.S.A. 47:1A-10 regarding his personnel records effectively waived those rights. See Fleming v. Greenwich Twp. (Warren), GRC Complaint No. 2015-18 (Interim Order dated January 31, 2017), McGee v. Twp. of East Amwell (Hunterdon), GRC Complaint No. 2007-305 (March 2011). Thus, there was no unlawful denial of access on these grounds. N.J.S.A. 47:1A-6. However, because the Complainant indicated his waiver of those protections in correspondence dated April 26, 2018, the Custodian shall release those records withheld as personnel records which are not otherwise precluded from disclosure.
3. **The Custodian shall comply with conclusion No. 2 above within five (5) business days from receipt of the Council's Interim Order. Further, the Custodian shall simultaneously deliver<sup>7</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>8</sup> to the Executive Director.<sup>9</sup>**
4. The GRC must conduct an *in camera* review of the redacted records and records withheld in their entirety to determine the validity of the Custodian's assertion that the redactions or denials are valid under OPRA's exemptions for advisory, consultative, or deliberative material and/or attorney-client privileged communications. N.J.S.A. 47:1A-1.1. See Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).
5. **The Custodian shall deliver<sup>10</sup> to the Council in a sealed envelope nine (9) copies of the requested records withheld entirely, nine (9) copies of the redacted records in both redacted and unredacted form (see conclusion No. 4 above), a document or redaction index<sup>11</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,<sup>12</sup> that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**

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<sup>7</sup> The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

<sup>8</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

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

<sup>10</sup> The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives them by the deadline.

<sup>11</sup> The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

<sup>12</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

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

Prepared By: Samuel A. Rosado  
Staff Attorney

January 21, 2020<sup>13</sup>

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<sup>13</sup> This complaint was prepared for adjudication at the Council's January 28, 2020 meeting, but could not be adjudicated due to a lack of quorum.