



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

April 28, 2020 Government Records Council Meeting

Thomas Chichester
Complainant

Complaint No. 2018-74

v.

Cinnaminson Township (Burlington)
Custodian of Record

At the April 28, 2020 public meeting, the Government Records Council (“Council”) considered the April 3, 2020 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian complied with the Council’s February 26, 2020 Interim Order because she responded in the prescribed time frame disclosing to the Complainant a copy of the March 19, 2018 Closed Session II minutes without redactions via e-mail and regular mail. Additionally, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.
2. Although the Custodian unlawfully denied access to the redacted excerpt in the March 19, 2018 Closed Session II minutes, she lawfully redacted each paragraph in the Closed Session I minutes. N.J.S.A. 47:1A-6. Further, although the Custodian did not comply fully with the Council’s January 7, 2020 Interim Order, she complied with the February 26, 2020 Interim Order. 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 28th Day of April 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: April 30, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
April 28, 2020 Council Meeting**

**Thomas Chichester¹
Complainant**

GRC Complaint No. 2018-74

v.

**Cinnaminson Township (Burlington)²
Custodial Agency**

Records Relevant to Complaint: On-site inspection of closed session minutes for the Cinnaminson Township (“Township”) Committee meeting of March 19, 2018.

Custodian of Record: Lisa Passione

Request Received by Custodian: April 2, 2018

Response Made by Custodian: April 12, 2018

GRC Complaint Received: April 24, 2018

Background

February 26, 2020 Council Meeting:

At its February 26, 2020 public meeting, the Council considered the February 19, 2020 *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 comply fully with the Council’s January 7, 2020 Interim Order. Specifically, the Custodian responded in the prescribed time frame providing nine (9) copies of the required unredacted minutes and simultaneously providing certified confirmation of compliance to the Executive Director. However, the Custodian did not include nine (9) copies of the redacted records or a document index, as the Order required.
2. **On the basis of the Council’s determination in this matter, the Custodian shall comply with the Council’s Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order. Further, the**

¹ No legal representation listed on record.

² Represented by Eric J. Riso, Esq. of Platt & Riso, P.C. (Stratford, NJ). Previously represented by Kelly Grant, Esq. of Capehart & Scatchard, P.A. (Trenton, NJ).

Custodian shall simultaneously deliver³ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁴ to the Executive Director.⁵

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

Procedural History:

On February 27, 2020, the Council distributed its Interim Order to all parties. On March 3, 2020, the Custodian responded to the Council's Interim Order. Therein, the Custodian certified that on that day, she disclosed a copy of the unredacted March 19, 2018 Closed Session II minutes to the Complainant via e-mail and regular mail. The Custodian noted that she attached documentation supporting her compliance.

Analysis

Compliance

At its February 26, 2020 meeting, the Council ordered the Custodian to comply with the results of the *In Camera* Examination and to submit certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Executive Director. On February 27, 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 5, 2020.

On March 3, 2020, the third (3rd) business day after receipt of the Council's Order, the Custodian certified that she disclosed a copy of the unredacted March 19, 2018 Closed Session II minutes to the Complainant via e-mail and regular mail. The Custodian also provided documentation supporting her compliance. Based on a review of this submission, the GRC is satisfied that the Custodian complied with the Council's Order in full.

Therefore, the Custodian complied with the Council's February 26, 2020 Interim Order because she responded in the prescribed time frame disclosing to the Complainant a copy of the March 19, 2018 Closed Session II minutes without redactions via e-mail and regular mail. Additionally, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.

³ 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.

⁴ "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."

⁵ 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.

Knowing & Willful

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

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

In the matter before the Council, although the Custodian unlawfully denied access to the redacted excerpt in the March 19, 2018 Closed Session II minutes, she lawfully redacted each paragraph in the Closed Session I minutes. N.J.S.A. 47:1A-6. Further, although the Custodian did not comply fully with the Council’s January 7, 2020 Interim Order, she complied with the February 26, 2020 Interim Order. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council’s February 26, 2020 Interim Order because she responded in the prescribed time frame disclosing to the Complainant a copy of the March 19, 2018 Closed Session II minutes without redactions via e-mail and regular mail. Additionally, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.
2. Although the Custodian unlawfully denied access to the redacted excerpt in the March 19, 2018 Closed Session II minutes, she lawfully redacted each paragraph in the Closed Session I minutes. N.J.S.A. 47:1A-6. Further, although the Custodian did not comply

fully with the Council's January 7, 2020 Interim Order, she complied with the February 26, 2020 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: Frank F. Caruso
Executive Director

April 3, 2020



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101 SOUTH BROAD STREET
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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

Thomas Chichester
Complainant

Complaint No. 2018-74

v.

Cinnaminson Township (Burlington)
Custodian of Record

At the February 26, 2020 public meeting, the Government Records Council (“Council”) considered the February 19, 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 did not comply fully with the Council’s January 7, 2020 Interim Order. Specifically, the Custodian responded in the prescribed time frame providing nine (9) copies of the required unredacted minutes and simultaneously providing certified confirmation of compliance to the Executive Director. However, the Custodian did not include nine (9) copies of the redacted records or a document index, as the Order required.
2. **On the basis of the Council’s determination in this matter, the Custodian shall comply with the Council’s Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order. Further, the Custodian shall simultaneously deliver¹ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,² to the Executive Director.³**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

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

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

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

Interim Order Rendered by the
Government Records Council
On The 26th 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

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Thomas Chichester¹
Complainant**

GRC Complaint No. 2018-74

v.

**Cinnaminson Township (Burlington)²
Custodial Agency**

Records Relevant to Complaint: On-site inspection of closed session minutes for the Cinnaminson Township (“Township”) Committee meeting of March 19, 2018.

Custodian of Record: Lisa Passione

Request Received by Custodian: April 2, 2018

Response Made by Custodian: April 12, 2018

GRC Complaint Received: April 24, 2018

Records Submitted for *In Camera* Examination: March 19, 2018 Closed Session I and II minutes.

Background

January 7, 2020 Council Meeting:

At its January 7, 2020 public meeting, the Council considered the December 10, 2019 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The GRC must conduct an *in camera* review of the disclosed record in order to validate the Custodian’s assertions that the redactions made by the Custodian are, in fact, exempt from disclosure based on OPRA’s exemptions for personnel records and attorney-client privileged material, pursuant to N.J.S.A. 47:1A-1.1, N.J.S.A. 47:1A-9(a), N.J.S.A. 10:4-12, and Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).

¹ No legal representation listed on record.

² Represented by Eric J. Riso, Esq. of Platt & Riso, P.C. (Stratford, NJ). Previously represented by Kelly Grant, Esq. of Capehart & Scatchard, P.A. (Trenton, NJ).

2. **The Custodian shall deliver³ to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see Conclusion No. 1 above), nine (9) copies of the redacted record, a document or redaction index⁴, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,⁵ that the record provided is the record requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's complainant with the Council's Interim Order.

Procedural History:

On January 8, 2020, the Council distributed its Interim Order to all parties on. On January 15, 2020, the Government Records Council ("GRC") received the Custodian's response to the Council's Interim Order. Therein, the Custodian certified that she was providing to the GRC nine unredacted (9) copies of the March 19, 2018 closed session minutes for *in camera* review.

Analysis

Compliance

At its January 7, 2020 meeting, the Council ordered the Custodian to submit nine (9) copies of the redacted and unredacted March 19, 2018 closed session minutes, as well as a document index. The Council further ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rule, R. 1:4-4, to the Executive Director. On January 8, 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 January 15, 2020.

On January 15, 2020, the fifth (5th) business day after receipt of the Council's Order, the GRC received the Custodian's response. Therein, the Custodian provided nine (9) copies of the unredacted March 19, 2018 minutes for *in camera* review. The Custodian also included certified confirmation of compliance to the Executive Director.

However, the Council's Order also required the Custodian to provide nine (9) redacted copies of the minutes or a document index: she omitted both in her response. Based on this omission, the GRC is persuaded that the Custodian did not comply with the Council's Order fully.

³ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives them by the deadline.

⁴ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

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

Therefore, the Custodian did not comply fully with the Council’s January 7, 2020 Interim Order. Specifically, the Custodian responded in the prescribed time frame providing nine (9) copies of the required unredacted minutes and simultaneously providing certified confirmation of compliance to the Executive Director. However, the Custodian did not include nine (9) copies of the redacted records or a document index, as the Order required.

Unlawful Denial of Access

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

OPRA provides that “[a] government record shall not include . . . any record within the attorney-client privilege.” N.J.S.A. 47:1A-1.1. To assert attorney-client privilege, a party must show that there was a confidential communication between lawyer and client in the course of that relationship and in professional confidence. N.J.R.E. 504(1). Such communications are only those “which the client either expressly made confidential or which [one] could reasonably assume under the circumstances would be understood by the attorney to be so intended.” State v. Schubert, 235 N.J. Super. 212, 221 (App. Div. 1989). However, merely showing that “the communication was from client to attorney does not suffice, but the circumstances indicating the intention of secrecy must appear.” Id. at 220-21.

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

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

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

(8) Any matter involving the employment, appointment, termination of employment, terms and conditions of employment, evaluation of the performance of, promotion or disciplining of any specific prospective public officer or employee or current public officer or employee employed or appointed by the public body, unless all the individual employees or appointees whose rights could be adversely

affected request in writing that such matter or matters be discussed at a public meeting.

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

The GRC conducted an *in camera* examination on the submitted record. The results of this examination are set forth in the following table. The GRC notes that it had to rely on the Custodian’s Statement of Information (“SOF”) document index to determine which exemptions she asserted applied to the redacted paragraphs:

Redaction No.	Record Name/Date	Description of Redaction	Custodian’s Explanation/ Citation for Redactions	Findings of the <i>In Camera</i> Examination ⁶
1.	March 19, 2018 Closed Session I, Paragraph 1	Discussion of an ongoing personnel matter and previous Counsel’s legal advice.	<u>N.J.S.A.</u> 47:1A-1.1 (attorney-client privilege); <u>N.J.S.A.</u> 10:4-12 (personnel discussions).	The redacted paragraph describes a personnel issue and previous Counsel’s legal advice given to Committee members regarding that issue. Prior Counsel’s advice was clearly within the confines of a professional legal relationship. Further, the fact that the Committee went into closed session to receive advice on this personnel issue indicates the “intention of secrecy . . .” <u>Schubert</u> , 235 <u>N.J. Super.</u> at 220-221. Thus, the Custodian lawfully denied access to this paragraph. <u>N.J.S.A.</u> 47:1A-6.

⁶ **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.

2.	March 19, 2018 Closed Session I, Paragraph 1	Discussion of an ongoing personnel matter.	<u>N.J.S.A. 47:1A-1.1</u> (attorney-client privilege); <u>N.J.S.A. 10:4-12</u> (personnel discussions).	The redacted paragraph discusses a personnel issue about two (2) specific individuals and the Committee’s actions regarding that issue. The paragraph clearly falls within the cited OPMA exemption. Thus, the Custodian lawfully denied access to this paragraph. <u>N.J.S.A. 47:1A-6.</u>
3.	March 19, 2018 Closed Session II, Paragraph 1	Presentation and discussion regarding a potential redevelopment project.	N/A (the SOI does not identify any exemption for this paragraph).	The redacted paragraph neither addresses a personnel issue, nor includes information reasonably construed as legal advice. Based on this, as well as the lack of any additional citations in the SOI, the GRC is persuaded that this paragraph should have been disclosed. Thus, the Custodian unlawfully denied access to the redacted paragraph and must disclose the minutes without redaction. <u>N.J.S.A. 47:1A-6.</u>

In accordance with the *In Camera* Examination, the Custodian lawfully denied access to both redacted paragraphs contained in the March 19, 2018 Closed Session I minutes. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9(a); N.J.S.A. 10:4-12(b)(8). However, the Custodian unlawfully denied access to the redacted paragraph contained in the March 19, 2018 Closed Session II minutes and must disclose same to the Complainant. N.J.S.A. 47:1A-6.

Knowing & Willful

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not comply fully with the Council's January 7, 2020 Interim Order. Specifically, the Custodian responded in the prescribed time frame providing nine (9) copies of the required unredacted minutes and simultaneously providing certified confirmation of compliance to the Executive Director. However, the Custodian did not include nine (9) copies of the redacted records or a document index, as the Order required.
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 deliver⁷ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁸ to the Executive Director.⁹**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Executive Director

February 19, 2020

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

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

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



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INTERIM ORDER

January 7, 2020 Government Records Council Meeting

Thomas Chichester
Complainant

Complaint No. 2018-74

v.

Cinnaminson Township (Burlington)
Custodian of Record

At the January 7, 2020 public meeting, the Government Records Council (“Council”) considered the December 10, 2019 Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The GRC must conduct an *in camera* review of the disclosed record in order to validate the Custodian’s assertions that the redactions made by the Custodian are, in fact, exempt from disclosure based on OPRA’s exemptions for personnel records and attorney-client privileged material, pursuant to N.J.S.A. 47:1A-1.1, N.J.S.A. 47:1A-9(a), N.J.S.A. 10:4-12, and Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).
2. **The Custodian shall deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see Conclusion No. 1 above), nine (9) copies of the redacted record, a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,³ that the record provided is the record requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council’s Interim Order.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s complainant with the Council’s Interim Order.

¹ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives them by the deadline.

² The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

³ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 7, 2020 Council Meeting**

**Thomas Chichester¹
Complainant**

GRC Complaint No. 2018-74

v.

**Cinnaminson Township (Burlington)²
Custodial Agency**

Records Relevant to Complaint: On-site inspection of closed session minutes for the Cinnaminson Township (“Township”) Committee meeting of March 19, 2018.

Custodian of Record: Lisa Passione

Request Received by Custodian: April 2, 2018

Response Made by Custodian: April 12, 2018

GRC Complaint Received: April 24, 2018

Background³

Request and Response:

On April 2, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On April 12, 2018, the Custodian responded by providing a redacted version of the above-mentioned record.

Denial of Access Complaint:

On April 24, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the redacted version of the record was useless for his review. The Complainant alleged that the “essence of the redacted content had already been revealed [to him] in casual conversation between [the Mayor] and a third party.” The Complainant argued that his OPRA request “has for all practical purposes been denied,” notwithstanding that the Township official had already revealed the information in a “formal setting.” Thus the Complainant asserted that the response to his OPRA request was contradictory.

¹ No legal representation listed on record.

² No legal representation listed on record.

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

Statement of Information:⁴

On September 24, 2018, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on April 2, 2018. The Custodian certified that she responded in writing on April 12, 2018, enclosing a redacted copy of the responsive minutes for March 19, 2018. The Custodian asserted that she provided the record to the Complainant in a timely manner containing redactions of discussions pertaining to personnel matters and protected under attorney-client privilege. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9(a); N.J.S.A. 10:4-12.

Analysis

Unlawful Denial of Access

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

In Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the GRC, which dismissed the complainant by accepting the custodian’s legal conclusion for the denial of access without further review. The court stated that:

OPRA contemplates the GRC’s meaningful review of the basis for an agency’s decision to withhold government records . . . When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers.

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

The court also stated that:

The statute . . . contemplates the GRC’s in camera review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the Open Public Meetings Act, N.J.S.A. 10:4-6 to 10:4-21, it also provides that the GRC “may go into 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.

⁴ On May 14, 2018, this complaint was referred for mediation. On August 29, 2018, this complaint was referred back to the GRC for adjudication.

[Id. at 355.]

Further, the court stated that:

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

[Id.]

Here, the Complainant argued that the response to his OPRA request was contradictory because the redacted material was already revealed to him by way of an alleged conversation of a Township official in a public setting. The Custodian argued in the SOI that the responsive closed session minutes provided to the Complainant were redacted as personnel and attorney-client privileged material. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9(a); N.J.S.A. 10:4-12. Without inspecting the disclosed records, and in light of the Custodian's burden to prove a lawful denial of access, the GRC cannot conduct the "meaningful review of the basis for an agency's decision to withhold government records" contemplated under OPRA. Id. at 354.

Therefore the GRC must conduct an *in camera* review of the disclosed record in order to validate the Custodian's assertions that the redactions made by the Custodian are, in fact, exempt from disclosure based on OPRA's exemptions for personnel records and attorney-client privileged material, pursuant to N.J.S.A. 47:1A-1.1, N.J.S.A. 47:1A-9(a), N.J.S.A. 10:4-12, and Paff, 379 N.J. Super. at 346.

Knowing and 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 complainant with the Council's Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The GRC must conduct an *in camera* review of the disclosed record in order to validate the Custodian's assertions that the redactions made by the Custodian are, in fact, exempt from disclosure based on OPRA's exemptions for personnel records and attorney-client privileged material, pursuant to N.J.S.A. 47:1A-1.1, N.J.S.A. 47:1A-9(a), N.J.S.A. 10:4-12, and Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).

2. **The Custodian shall deliver⁵ to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see Conclusion No. 1 above), nine (9) copies of the redacted record, a document or redaction index⁶, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,⁷ that the record provided is the record requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's complainant with the Council's Interim Order.

Prepared By: Brandon Garcia
Case Manager

December 10, 2019

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

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

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