



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

January 26, 2021 Government Records Council Meeting

Rashaun Barkley
Complainant

Complaint No. 2019-15

v.

Essex County Prosecutor's Office
Custodian of Record

At the January 26, 2021 public meeting, the Government Records Council ("Council") considered the January 19, 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 December 15, 2020 Interim Order because he responded in the extended time frame redacting and disclosing to the Complainant via U.S. mail the responsive jury lists. Further, the current Custodian simultaneously provided certified confirmation of compliance to the Executive Director.
2. The Custodian unlawfully denied access to the responsive jury lists (except for the notes contained therein). N.J.S.A. 47:1A-6. However, the current Custodian ultimately disclosed the responsive lists with redactions in accordance with the Council's *In Camera* Examination and December 15, 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 26th 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 28, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Rashaun Barkley¹
Complainant**

GRC Complaint No. 2019-15

v.

**Essex County Prosecutor's Office²
Custodial Agency**

Records Relevant to Complaint: Hard copies via U.S. mail of the jury duty panel called to Essex County Superior Court on March 23, and 24, 1994 in State v. Barkley, Indictment No. 1390-4-93.

Custodian of Record: LeeAnn Cunningham³
Request Received by Custodian: December 13, 2018
Response Made by Custodian: December 19, 2018
GRC Complaint Received: January 24, 2019

Background

December 15, 2020 Council Meeting:

At its December 15, 2020 public meeting, the Council considered the December 8, 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 current Custodian complied with the Council's August 25, 2020 Interim Order because he responded in the prescribed time frame providing nine (9) unredacted copies of the responsive petit juror lists for an *in camera* review. Further, the current Custodian simultaneously provided certified confirmation of compliance to the Executive Director.
2. **On the basis of the Council's determination in this matter, the current Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth above within five (5) business days from receipt of this Order. Further, the current**

¹ No legal representation listed on record.

² Represented by Courtney M. Gaccione, Esq. (Newark, NJ).

³ The current "Custodian of Record" is Assistant Prosecutor Stephen Pogany, Esq.

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

3. The 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 December 16, 2020, the Council distributed its Interim Order to all parties. On December 21, 2020, the current Custodian e-mailed the Government Records Council ("GRC") seeking an extension of time through January 8, 2021 due to extraordinary circumstances. On December 22, 2020, the GRC responded via e-mail granting the requested extension.

On January 8, 2021, the GRC received the current Custodian's January 4, 2021 response to the Interim Order. Therein, the current Custodian noted that he was not the custodian of record at the time of the subject OPRA request. The current Custodian certified that upon receipt of the Order, he redacted and disclosed to the Complainant via U.S. mail the responsive jury lists with redactions in accordance with the Council's *In Camera* Findings.

Analysis

Compliance

At its December 15, 2020 meeting, the Council ordered the current Custodian to comply with its *In Camera* Examination Findings and to submit certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Executive Director. On December 16, 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 December 23, 2020.

On December 22, 2020, the fourth (4th) business day after receipt of the Council's Order, the current Custodian sought and obtained an extension of time through January 8, 2021 to respond. On January 8, 2021, the last business day of the extended time frame, the GRC received the current Custodian's compliance response. Therein, the current Custodian certified that he complied with the Council's Order by redacting and disclosing to the Complainant via U.S. mail the responsive jury lists. The current Custodian also included certified confirmation of compliance to the Executive Director.

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

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

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

Therefore, the current Custodian complied with the Council's December 15, 2020 Interim Order because he responded in the extended time frame redacting and disclosing to the Complainant via U.S. mail the responsive jury lists. Further, the current Custodian simultaneously provided certified confirmation of compliance to the Executive Director.

Knowing & Willful

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

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

In the matter before the Council, the Custodian unlawfully denied access to the responsive jury lists (except for the notes contained therein). N.J.S.A. 47:1A-6. However, the current Custodian ultimately disclosed the responsive lists with redactions in accordance with the Council's *In Camera* Examination and December 15, 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 current Custodian complied with the Council's December 15, 2020 Interim Order because he responded in the extended time frame redacting and disclosing to the Complainant via U.S. mail the responsive jury lists. Further, the current Custodian

simultaneously provided certified confirmation of compliance to the Executive Director.

2. The Custodian unlawfully denied access to the responsive jury lists (except for the notes contained therein). N.J.S.A. 47:1A-6. However, the current Custodian ultimately disclosed the responsive lists with redactions in accordance with the Council's *In Camera* Examination and December 15, 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

January 19, 2021



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PHILIP D. MURPHY
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LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

December 15, 2020 Government Records Council Meeting

Rashaun Barkley
Complainant

Complaint No. 2019-15

v.

Essex County Prosecutor's Office
Custodian of Record

At the December 15, 2020 public meeting, the Government Records Council ("Council") considered the December 8, 2020 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The current Custodian complied with the Council's August 25, 2020 Interim Order because he responded in the prescribed time frame providing nine (9) unredacted copies of the responsive petit juror lists for an *in camera* review. Further, the current Custodian simultaneously provided certified confirmation of compliance to the Executive Director.
2. **On the basis of the Council's determination in this matter, the current Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth above within five (5) business days from receipt of this Order. Further, the current 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 15th Day of December 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: December 16, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
December 15, 2020 Council Meeting**

**Rashaun Barkley¹
Complainant**

GRC Complaint No. 2019-15

v.

**Essex County Prosecutor's Office²
Custodial Agency**

Records Relevant to Complaint: Hard copies via U.S. mail of the jury duty panel called to Essex County Superior Court on March 23, and 24, 1994 in State v. Barkley, Indictment No. 1390-4-93.

Custodian of Record: LeeAnn Cunningham³
Request Received by Custodian: December 13, 2018
Response Made by Custodian: December 19, 2018
GRC Complaint Received: January 24, 2019

Records Submitted for *In Camera* Examination: Petite juror lists dated March 23, and 24, 1994.⁴

Background

August 25, 2020 Council Meeting:

At its August 25, 2020 public meeting, the Council considered the August 18, 2020 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The GRC must conduct an *in camera* review of the responsive jury list containing handwritten notes in order to validate the Custodian's assertions that they are, in fact, exempt from disclosure based on the attorney work-product doctrine. N.J.S.A. 47:1A-9; N.J. Court Rules, R. 3:13-3(d); 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 Courtney M. Gaccione, Esq. (Newark, NJ).

³ The current "Custodian of Record" is Assistant Prosecutor Stephen Pogany, Esq.

⁴ The current Custodian also included juror lists from multiple other dates not sought by the Complainant.

2. **The Custodian shall deliver⁵ to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see No. 1 above), 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 compliance with the Council's Interim Order.

Procedural History:

On August 26, 2020, the Council distributed its Interim Order to all parties.

On September 2, 2020, the Complainant sent a letter to the Government Records Council ("GRC") advising that he received the Council's decision. The Complainant noted that he wished to alert the GRC to the fact that State v. Thompson, 224 N.J. 324 (2016) was overturned by in Foster v. Chatman, 136 S.Ct. 1737, 195 (2016).

On September 8, 2020, the GRC received the current Custodian's response to the Council's Interim Order. The current Custodian certified that he was not the "custodian of record" at the time of the OPRA request and initial adjudication of this complaint. The current Custodian certified that he reviewed the Council's decision and has provided nine (9) unredacted copies of the responsive petit juror lists for *in camera* review via certified mail on August 31, 2020.

Analysis

Compliance

At its August 25, 2020 meeting, the Council ordered the Custodian to submit for an *in camera* review nine (9) unredacted copies of the responsive petit juror lists and a document index. The Council also ordered the Custodian to simultaneously provide certified confirmation of compliance to the Executive Director. On August 26, 2020, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on September 2, 2020.

On August 31, 2020, the current Custodian caused the *in camera* package to the GRC via certified mail. On September 8, 2020, the GRC received the current Custodian's *in camera* package. Therein, he certified that he was submitting the required nine (9) copies of the unredacted

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."

petit juror lists and a document index. The current Custodian also provided certified confirmation of compliance to the Executive Director.

In determining whether the current Custodian complied with the Council's Order, the GRC first notes that he submitted nine (9) unredacted copies of the records required for an *in camera* review. Notwithstanding, the GRC must address the timing of the *in camera* package because footnote No. 4 of the Council's decision clearly stated that the GRC must "physically receive[it] by the deadline." It is clear that the current Custodian caused production of the *in camera* package on August 31, 2020 via certified mail. In utilizing delivery information resources available from a USPS-approved vendor,⁸ the current Custodian's response should have been received prior to the expiration of the prescribed time frame. However, given the current health crisis and its impact on operations within the GRC, it is plausible that the package timely arrived, but was not received until the following Tuesday. Based on these specific facts, the GRC believes it appropriate to exercise leniency here and accept the *in camera* package as received within time.

Therefore, the current Custodian complied with the Council's August 25, 2020 Interim Order because he responded in the prescribed time frame providing nine (9) unredacted copies of the responsive petit juror lists for an *in camera* review. Further, the current Custodian simultaneously provided certified confirmation of compliance to the Executive Director.

Unlawful Denial of Access

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

The GRC first notes that the *in camera* package contained several lists that were not responsive to the subject OPRA request. The responsive lists are comprised of the final four (4) pages of the packet. Thus, the GRC will only review and address those four (4) pages below.

OPRA also provides that:

The provisions of [OPRA] shall 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).]

⁸ <https://www.stamps.com/whitepapers/how-to-send-certified-mail.pdf> (accessed November 24, 2020).

Additionally, N.J. Court Rules, R. 3:13-3(D) provides that:

This rule does not require discovery of a party's work product consisting of internal reports, memoranda or documents made by that party or the party's attorney or agents, in connection with the investigation, prosecution or defense of the matter nor does it require discovery by the State of records or statements, signed or unsigned, of defendant made to defendant's attorney or agents.

[Id.]

However, the Council has precedent addressing the potential disclosure of records where redactions can be made to handwritten notes. Specifically, in Lotito v. N.J. Dep't of Labor, Div. of Unemployment Ins., GRC Complaint No. 2013-67 (Interim Order dated March 25, 2014), the Council ordered an *in camera* review of certain responsive records, including seven (7) pages of examiner's notes, as well as a telephone hearing script and hearing messages containing notes. Upon review, the Council held that the custodian lawfully denied access to the examiner's notes under the "inter-agency or intra-agency advisory, consultative or deliberative ["ACD"] material." N.J.S.A. 47:1A-1.1. Id. at 5. However, the Council required disclosure of those portions of the script and messages not comprising of handwritten notes. Id. at 6.

The GRC conducted an *in camera* examination on the submitted petit juror lists for March 23, and 24, 1994. Upon review, the GRC finds that said lists should have been disclosed with minor redactions to shield the minimal attorney notations contained on the first page of the responsive lists. While the GRC agrees that these notes reasonably fall within the attorney work product doctrine, same can be protected through redactions. N.J.S.A. 47:1A-9(a); R. 3:13-3(D). The GRC acknowledges that although Lotito, GRC 2013-67 addressed noted within the ACD exemption, the same tenet is applicable to information denied under the attorney-client privilege and work-product doctrine. See e.g. N.J.S.A. 47:1A-1.1 (requiring disclosure of attorney billing records with redactions where applicable); N.J.S.A. 47:1A-5(g) (allowing a custodian to redact records where only certain information is exempt). Further, neither the Custodian nor current Custodian have presented a valid lawful basis for denying access to the entire list under OPRA. Based on the forgoing, the Custodian should have redacted and disclosed the petit juror lists sought by the complaint but failed to do so.

Accordingly, the Custodian unlawfully denied access to the requested petit juror lists because same could have been easily redacted and disclosed. N.J.S.A. 47:1A-6; See Lotito, GRC 2013-67. Thus, the current Custodian shall redact the attorney's notes included on the first page of the responsive petit juror lists and disclose them to the Complainant. N.J.S.A. 47:1A-9(a); R. 3:13-3(D).

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 current Custodian complied with the Council's August 25, 2020 Interim Order because he responded in the prescribed time frame providing nine (9) unredacted copies of the responsive petit juror lists for an *in camera* review. Further, the current Custodian simultaneously provided certified confirmation of compliance to the Executive Director.
2. **On the basis of the Council's determination in this matter, the current Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth above within five (5) business days from receipt of this Order. Further, the current Custodian shall simultaneously deliver⁹ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,¹⁰ to the Executive Director.¹¹**
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

December 8, 2020

⁹ 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.

¹⁰ "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."

¹¹ 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

August 25, 2020 Government Records Council Meeting

Rashaun Barkley
Complainant

Complaint No. 2019-15

v.

Essex County Prosecutor's Office
Custodian of Record

At the August 25, 2020 public meeting, the Government Records Council ("Council") considered the August 18, 2020 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The GRC must conduct an *in camera* review of the responsive jury list containing handwritten notes in order to validate the Custodian's assertions that they are, in fact, exempt from disclosure based on the attorney work-product doctrine. N.J.S.A. 47:1A-9; N.J. Court Rules, R. 3:13-3(d); 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 No. 1 above), a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,³ that the 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 compliance with the Council's Interim Order.

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

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

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

Interim Order Rendered by the
Government Records Council
On The 25th Day of August 2020

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: August 26, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Rashaun Barkley¹
Complainant**

GRC Complaint No. 2019-15

v.

**Essex County Prosecutor's Office²
Custodial Agency**

Records Relevant to Complaint: Hard copies via U.S. mail of the jury duty panel called to Essex County Superior Court on March 23, and 24, 1994 in State v. Barkley, Indictment No. 1390-4-93.

Custodian of Record: LeeAnn Cunningham

Request Received by Custodian: December 13, 2018

Response Made by Custodian: December 19, 2018

GRC Complaint Received: January 24, 2019

Background³

Request and Response:

On December 13, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On December 19, 2018, the Custodian responded in writing obtaining an extension of time until January 14, 2019 to retrieve and review the relevant case file to locate responsive records dating back to 1994. On January 10, 2019, the Custodian responded in writing denying access to the responsive list because it contained handwritten notes of the Assistant Prosecutor which are exempt from disclosure under the attorney work product doctrine. N.J. Court Rule, R. 3:13-3(d); State v. Thompson, 437 N.J. Super. 266, 275-278 (App. Div. 2014) (rev'd on other grounds, 224 N.J. 324 (2016)).

Denial of Access Complaint:

On January 24, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant argued that the Custodian’s basis for denial was not supported by OPRA. The Complainant further argued that OPRA required full disclosure of the requested record.

¹ No legal representation listed on record.

² Represented by Courtney M. Gaccione, Esq. (Newark, NJ).

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:

On February 8, 2019, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on December 13, 2018. The Custodian certified that her search included reviewing the “voluminous homicide file” pertaining to Indictment No. 1390-4-93. The Custodian noted that the Complainant is serving a life sentence after being found guilty of felony murder, five (5) counts of robbery offenses, and other offenses. The Custodian affirmed that she was able to locate the responsive jury list. The Custodian certified that after obtaining an extension, she responded in writing on January 10, 2019 denying access to the list.

The Custodian argued that she lawfully denied access to the responsive list due to the presence of the assistant attorney’s hand-written notes. R. 3:13-3(d); Thompson, 437 N.J. Super. at 275-278. The Custodian further contended that as an alternative, OPRA is not intended to circumvent the post-judgment discovery process or a discovery tool. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546-549 (App. Div. 2005).

Additional Submissions:

On February 20, 2019, the Complainant sent a letter to the GRC. The Complainant noted that the Custodian did not argue that the list itself was not subject to disclosure. The Complainant argued that the Custodian never suggested redaction and disclosure of jury list as an alternative to disclosure. The Complainant thus requested that the GRC conduct an *in camera* review of the responsive jury list to determine whether same could be disclosed with redactions.

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.

[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 Custodian unlawfully denied access to the responsive jury list. In the SOI, the Custodian argued that she lawfully denied access to the responsive record under R. 3:13-3(d) and Thompson, 437 N.J. Super. 275-278. In response to the SOI, the Complainant asked that the GRC perform an *in camera* review to determine whether the hand-written notes could be redacted and the remainder of the records disclosed.

Upon review of the facts here, the GRC agrees that this matter is ripe for an *in camera* review, which the GRC has performed in the past when addressing a record containing handwritten notes. Lotito v. N.J. Dep’t of Labor, Div. of Unemployment Ins., GRC Complaint No. 2013-67 (Interim Order dated March 25, 2014). The GRC notes that the Custodian’s reliance on Thompson appears not on point here; the court ruled on whether a prosecutor’s notes during a jury selection were disclosable within the discovery process. Further, there is no indication that Thompson addressed a jury list containing handwritten notes; rather, that case appeared to on address just notes. For this reason, the GRC cannot conduct the “meaningful review of the basis for an agency’s decision to withhold government records” without inspecting the disclosed records. Id. at 354.

Therefore, the GRC must conduct an *in camera* review of the responsive jury list containing handwritten notes in order to validate the Custodian’s assertions that they are, in fact,

exempt from disclosure based on the attorney work-product doctrine. N.J.S.A. 47:1A-9; R. 3:13-3(d); 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 GRC must conduct an *in camera* review of the responsive jury list containing handwritten notes in order to validate the Custodian's assertions that they are, in fact, exempt from disclosure based on the attorney work-product doctrine. N.J.S.A. 47:1A-9; N.J. Court Rules, R. 3:13-3(d); Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).
2. **The Custodian shall deliver⁴ to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see No. 1 above), a document or redaction index⁵, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,⁶ that the 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 compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Executive Director

August 18, 2020

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

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

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