



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

May 31, 2022 Government Records Council Meeting

Joseph McDevitt
Complainant

Complaint No. 2019-189

v.

Cape May County Bridge Commission
Custodian of Record

At the May 31, 2022 public meeting, the Government Records Council (“Council”) considered the May 24, 2022 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian complied with the Council’s January 26, 2021 Interim Order because she responded in the prescribed time frame providing nine (9) copies of the requested records for *in camera* review and simultaneously provided certified confirmation of compliance to the Executive Director.
2. **The *In Camera* Examination set forth in the above table reveals the Custodian has lawfully denied access to the withheld plans pursuant to OPRA’s exemption for records constituting “inter-agency or intra-agency advisory, consultative, or deliberative material.” N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-1.1.**
3. Because there has been no unlawful denial of access, the Council should decline to address whether a knowing and willful violation occurred.

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 31st Day of May 2022

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: June 2, 2022

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Joseph McDevitt¹
Complainant**

GRC Complaint No. 2019-189

v.

**Cape May County Bridge Commission²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of:

1. The plan, as discussed by Mr. Rosenello at his last [Cape May County Bridge Commission (“Commission”)] meeting, by stating that a “real plan now exists to replace the Commission bridges.”
2. The plan, as discussed by Mr. Rosenello at his last Commission meeting, by stating that “the [County of Cape May (“County”)] now has a financial plan in place that will allow critical work to move forward.”³

Custodian of Record: Karen Coughlin
Request Received by Custodian: August 21, 2019
Response Made by Custodian: August 27, 2019
GRC Complaint Received: September 11, 2019

Records Submitted for *In Camera* Examination: Nine (9) unredacted copies of the plans discussed during the Commission meetings.

Background

January 26, 2021 Council Meeting:

At its January 26, 2021 public meeting, the 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, found that:

1. The GRC must conduct an *in camera* review of the requested plans responsive to the Complainant’s OPRA request to determine the validity of the Custodian’s assertion that the records fell under OPRA’s exemption for advisory, consultative, and/or

¹ No legal representation listed on record.

² Represented by Marcus Karavan, Esq., of Blaney & Karavan, PC (Wildwood, N.J.).

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

deliberative material. 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).

2. **The Custodian shall deliver⁴ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 1 above), a document or redaction index⁵, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,⁶ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On January 27, 2021, the Council distributed its Interim Order to all parties. On February 2, 2021, the Custodian responded to the Council's Interim Order, providing nine (9) copies of the plans requested by the Complainant for *in camera* review. The Custodian also provided e-mail correspondence to which the records were attached, as well as e-mails discussing the requested records.⁷ The Custodian also provided certified confirmation of compliance to the Executive Director. The Custodian asserted that there was no formal or adopted plan that existed, but instead were documents exchanged between County and Commission officials regarding proposed changes and modifications to the plan. The Custodian therefore maintained that the documents were properly withheld under N.J.S.A. 47:1A-1.1.

Analysis

Compliance

At its January 26, 2021 meeting, the Council ordered the Custodian to provide nine (9) unredacted copies of the requested plans for *in camera* review within five (5) business days from receipt of the Council's Interim Order. The Council also ordered the Custodian to simultaneously provide certified confirmation of compliance 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.

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."

⁷ Because e-mail correspondence was not requested by the Complainant, the GRC declines to conduct an *in camera* review of same for the purposes of disclosure.

On February 1, 2021, the third (3rd) business day after receipt of the Council's Order, the Custodian provided nine (9) copies of the plans requested by the Complainant for *in camera* review. The Custodian also provided certified confirmation of compliance to the Executive Director.

Therefore, the Custodian complied with the Council's January 26, 2021 Interim Order because she responded in the prescribed time frame providing nine (9) copies of the requested records for *in camera* review and simultaneously provided certified confirmation of compliance to the Executive Director.

Unlawful Denial of Access

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

OPRA also provides that the definition of a government record "shall not include . . . "inter-agency or intra-agency advisory, consultative, or deliberative [(“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. v. Dep't of Educ., 198 N.J. 274, 285 (2009) (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.

In Libertarians for Transparent Gov't v. Gov't Records Council, 453 N.J. Super. 83, 89-90 (App. Div.), certif. denied, 233 N.J. 484 (2018), the Appellate Division discussed the deliberative process privilege at length regarding a request for draft meeting minutes, stating:

The applicability of the deliberative process privilege is government by a two-prong test. The judge must determine both that a document is (1) "pre-decisional," meaning it was "generated before the adoption of an agency's policy or decision;" and (2) deliberative, in that it "contain[s] opinions, recommendations, or advice about agency policies." [Educ. Law Ctr., 198 N.J. at 286 (quoting [In re Liquidation of Integrity Ins. Co., 165 N.J. 75, 84-85 (2000)]). If a document stratifies both prongs, it is exempt from disclosure under OPRA pursuant to the deliberative process privilege.

Regarding the first prong, the court stated that "a draft is not a final document. It has been prepared for another person or persons' editing and eventual approval." Id. at 90. Therefore, the court held that draft meeting minutes are pre-decisional since they are subject to revision and not yet approved for public release. Id. at 90-91.

Regarding the second prong, the court held that “the document must be shown to be closely related to the formulation or exercise of . . . policy-oriented judgment or [to] the process by which policy is formulated.” *Id.* at 91 (quoting *Ciesla v. N.J. Dep’t of Health & Sr. Servs.*, 429 N.J. Super. 127, 138 (App. Div. 2012) (internal quotations omitted))⁸. The court found that the requested draft minutes, as compiled by the writer in attendance at the meeting, were subject to additions, suggestions, and other edits from the members of the public body. *Id.* Thus, the draft minutes satisfied the second prong of the test. *Id.* at 92.

The GRC conducted an *in camera* examination on the submitted records, the results of which are set forth in the following table:

Record or Redaction Number	Record Name/Date	Description of Record or Redaction	Custodian’s Explanation/ Citation for Non-disclosure or Redactions	Findings of the <i>In Camera</i> Examination⁹
1.	Capital Plan – May 9, 2019 (4 pages).	Withheld in its entirety.	Advisory, Consultative, or Deliberative material. <u>N.J.S.A. 47:1A-1.1.</u>	The record was properly withheld from disclosure under the ACD exemption since it is a draft document. <u>N.J.S.A. 47:1A-1.1; Libertarians</u> , 453 N.J. Super. 83.
2.	Bridge Plan Timeline and Funding – Revised Version 2 – June 5, 2019 (7 pages).	Withheld in its entirety.	Advisory, Consultative, or Deliberative material. <u>N.J.S.A. 47:1A-1.1.</u>	The record was properly withheld from disclosure under the ACD exemption since it is a draft document. <u>N.J.S.A. 47:1A-1.1;</u>

⁸ Affirming *Ciesla v. N.J. Dep’t of Health and Senior Serv.*, GRC Complaint No. 2010-38 (May 2011).

⁹ **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.

				<u>Libertarians</u> , 453 <u>N.J. Super.</u> 83.
3.	Bridge Replacement Plan – August 13, 2019 (30 pages).	Withheld in its entirety.	Advisory, Consultative, or Deliberative material. <u>N.J.S.A.</u> 47:1A-1.1.	The record was properly withheld from disclosure under the ACD exemption since it is a draft document. <u>N.J.S.A.</u> 47:1A-1.1; <u>Libertarians</u> , 453 <u>N.J. Super.</u> 83.
4.	Bridge Plan Timeline and Funding – August 13, 2019 (5 pages).	Withheld in its entirety.	Advisory, Consultative, or Deliberative material. <u>N.J.S.A.</u> 47:1A-1.1.	The record was properly withheld from disclosure under the ACD exemption since it is a draft document. <u>N.J.S.A.</u> 47:1A-1.1; <u>Libertarians</u> , 453 <u>N.J. Super.</u> 83.
5.	Funding Source – August 13, 2019 (10 pages).	Withheld in its entirety.	Advisory, Consultative, or Deliberative material. <u>N.J.S.A.</u> 47:1A-1.1.	The record was properly withheld from disclosure under the ACD exemption since it is a draft document. <u>N.J.S.A.</u> 47:1A-1.1; <u>Libertarians</u> , 453 <u>N.J. Super.</u> 83.

Thus, the Custodian lawfully denied access to the requested records because the evidence demonstrated that each record was a draft document, and therefore exempt from disclosure under OPRA’s ACD exemption. N.J.S.A. 47:1A-1.1; Libertarians, 453 N.J. Super. 83. Specifically, each page of the “Capital Plan” had “DRAFT – NOT FOR DISTRIBUTION” at the top of each page. Additionally, the “Bridge Replacement Plan” had “DRAFT” on each page as a watermark and included electronic notations and commentary on several pages. Furthermore, the discussions within the corresponding e-mails provided by the Custodian demonstrate that the attached responsive records were draft versions subject to further revision and consideration.

Knowing & Willful

Because there has been no unlawful denial of access, the Council should decline to address whether a knowing and willful violation occurred.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's January 26, 2021 Interim Order because she responded in the prescribed time frame providing nine (9) copies of the requested records for *in camera* review and simultaneously provided certified confirmation of compliance to the Executive Director.
2. **The *In Camera* Examination set forth in the above table reveals the Custodian has lawfully denied access to the withheld plans pursuant to OPRA's exemption for records constituting "inter-agency or intra-agency advisory, consultative, or deliberative material." N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-1.1.**
3. Because there has been no unlawful denial of access, the Council should decline to address whether a knowing and willful violation occurred.

Prepared By: Samuel A. Rosado
Staff Attorney

May 24, 2022



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

January 26, 2021 Government Records Council Meeting

Joseph McDevitt
Complainant

Complaint No. 2019-189

v.

Cape May County Bridge Commission
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. The GRC must conduct an *in camera* review of the requested plans responsive to the Complainant’s OPRA request to determine the validity of the Custodian’s assertion that the records fell under OPRA’s exemption for advisory, consultative, and/or deliberative material. 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).
2. **The Custodian shall deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 1 above), a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,³ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council’s Interim Order.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

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

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

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

Interim Order Rendered by the
Government Records Council
On The 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 27, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Joseph McDevitt¹
Complainant**

GRC Complaint No. 2019-189

v.

**Cape May County Bridge Commission²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of:

1. The plan, as discussed by Mr. Rosenello at his last [Cape May County Bridge Commission (“Commission”)] meeting, by stating that a “real plan now exists to replace the Commission bridges.”
2. The plan, as discussed by Mr. Rosenello at his last Commission meeting, by stating that “the [County of Cape May (“County”)] now has a financial plan in place that will allow critical work to move forward.”³

Custodian of Record: Karen Coughlin
Request Received by Custodian: August 21, 2019
Response Made by Custodian: August 27, 2019
GRC Complaint Received: September 11, 2019

Background⁴

Request and Response:

On August 21, 2019, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On August 27, 2019, the Custodian responded in writing denying access to the records under OPRA’s exemption for inter-agency or intra-agency advisory, consultative or deliberative material (“ACD”). N.J.S.A. 47:1A-1.1.

Denial of Access Complaint:

On September 11, 2019, the Complainant filed a Denial of Access Complaint with the

¹ No legal representation listed on record.

² Represented by Marcus Karavan, Esq., of Blaney & Karavan, PC (Wildwood, N.J.).

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

⁴ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

Government Records Council (“GRC”). The Complainant asserted that the Commission was part of the County and essentially the same entity. The Complainant asserted that he could not reconcile how the requested records were ACD material.

Statement of Information:

On September 26, 2019, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on August 21, 2019. The Custodian certified that the responsive records were in draft form and that no final document existed for both items. The Custodian certified that she responded in writing on August 27, 2019, stating that the request was denied under OPRA’s ACD exemption.

The Custodian asserted that the requested records were part of a capital bridge plan the County was developing with input from the Commission. The Custodian stated that the document has been in development for several months, and at the time of the request only consisted of draft working papers. The Custodian therefore argued that the requested records were exempt as ACD material. N.J.S.A. 47:1A-1.1.

Analysis

Unlawful Denial of Access

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

In Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the Council⁵ that accepted the custodian’s legal conclusion for the denial of access without further review. The Appellate Division noted that “OPRA contemplates the GRC’s meaningful review of the basis for an agency’s decision to withhold government records When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers.” Id. The Court stated that:

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

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

[Id. at 355.]

Further, the Court found that:

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

[Id.]

In the instant matter, the Custodian asserted that the requested records were in draft form at the time of the request and therefore fell under OPRA's ACD exemption. N.J.S.A. 47:1A-1.1. However, the Custodian did not provide any additional evidence to confirm that the records were in draft form, and the Complainant disputes the assertion. The GRC must thus review the responsive records to determine the full applicability of the exemption. Such an action is not uncommon, as the GRC routinely performs an *in camera* review in similar circumstances. See Giambri v. Sterling High Sch. Dist. (Camden), GRC Complaint No. 2014-393, *et seq.* (Interim Order dated July 28, 2015).

Therefore, the GRC must conduct an *in camera* review of the requested plans responsive to the Complainant's OPRA request to determine the validity of the Custodian's assertion that the records fell under OPRA's exemption for ACD material. 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 GRC must conduct an *in camera* review of the requested plans responsive to the Complainant's OPRA request to determine the validity of the Custodian's assertion that the records fell under OPRA's exemption for advisory, consultative, and/or deliberative material. 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).

2. **The Custodian shall deliver⁶ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 1 above), a document or redaction index⁷, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,⁸ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Samuel A. Rosado
Staff Attorney

January 19, 2021

⁶ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives them by the deadline.

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

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