



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

December 13, 2022 Government Records Council Meeting

Lynn Petrovich
Complainant

Complaint No. 2019-226

v.

Township of Ocean (Monmouth)
Custodian of Record

At the December 13, 2022 public meeting, the Government Records Council (“Council”) considered the December 6, 2022 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 September 29, 2022 Interim Order. Specifically, the current Custodian responded in the extended time frame disclosing the responsive e-mails with redactions consistent with the Council’s *In Camera* Examination. Further, the current Custodian simultaneously provided certified confirmation of compliance to the Executive Director.
2. The Custodian’s failure to timely respond resulted in a “deemed” denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the Custodian failed to submit a Statement of Information, thus violating N.J.S.A. 5:105-2.4(a). However, the *In Camera* Examination revealed that the Custodian lawfully denied access to a majority of the information contained in the responsive e-mail chains. N.J.S.A. 47:1A-6. 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 13th Day of December 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: December 15, 2022

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
December 13, 2022 Council Meeting**

**Lynn Petrovich¹
Complainant**

GRC Complaint No. 2019-226

v.

**Township of Ocean (Monmouth)²
Custodial Agency**

Records Relevant to Complaint:

OPRA Request No. 1: Electronic copies via e-mail of the following regarding “Ocean Glades Condominium”:

1. “Lis Pendens” and/or summonses and complaints in foreclosure action served upon prior owners.
2. Deed transferring ownership to the Township of Ocean (“Ocean”).

OPRA Request No. 2: Electronic copies via e-mail of the following regarding “Ocean Glades Condominium”:

1. Resolution authorizing award to Groundwater & Environmental Services, Inc. (“GES”).
2. All e-mails to and from the Mayor and Council.
3. Estimated cost to remediate the current environmental regulations for construction.
4. Statement from financial officer as to GES’ availability of funds.

Custodian of Record: Vincent Buttiglieri³
Request Received by Custodian: September 3, 2019
Response Made by Custodian: October 8, 2019
GRC Complaint Received: November 8, 2019

Background

September 29, 2022 Council Meeting:

At its September 29, 2022 public meeting, the Council considered the September 22, 2022 *In Camera* Findings and Recommendations of the Executive Director and all related

¹ No legal representation listed on record.

² No legal representation listed on record.

³ The Custodian retired on December 31, 2021. The current Custodian of Record is Jessie M. Joseph.

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 complied with the Council's May 19, 2020 Interim Order because he responded in the prescribed time frame providing a complete *in camera* package and simultaneously provided certified confirmation of compliance to the Executive Director.
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 deliver⁴ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁵ to the Executive Director.**
3. The Custodian must disclose all other portions of the both the redacted and wholly denied e-mails to the Complainant (*i.e.*, sender, recipients, date, time, subject, and salutations where applicable). As to those portions of the responsive e-mail chains, the Custodian has unlawfully denied access. See Ray v. Freedom Acad. Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010).
4. **The Custodian shall comply with conclusion No. 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously deliver certified confirmation of compliance, in accordance with R. 1:4-4, to the Executive Director.**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On October 4, 2022, the Council distributed its Interim Order to all parties. On October 18, 2022, the current Custodian e-mailed the Government Records Council ("GRC") advising that she received the Interim Order on October 14, 2022. The current Custodian advised of the Custodian's retirement and sought an extension of time to respond to the Order. On October 21, 2022, the GRC granted an extension of time through October 28, 2022.

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.

On October 26, 2022, the current Custodian responded to the Council's Interim Order. Therein, the current Custodian certified that she disclosed to the Complainant via e-mail on the same day e-mail chain Nos. 1, 15, 28 and 30, and 4 and 5 with redactions consistent with the Council's *In Camera* Examination conclusions. On the same day, the GRC e-mailed the current Custodian advising that her compliance response was incomplete because she did not disclose multiple e-mail chains in accordance with conclusion Nos. 3 and 4 of the Council's Order. The GRC stated that to fully comply with the Order, the current Custodian must cure this deficiency by the end of the day on October 28, 2022.

On October 27, 2022, the current Custodian submitted a supplemental response to the Council's Order. Therein, the current Custodian certified that she disclosed to the Complainant via e-mail on the same day every e-mail chain with redactions consistent with the Council's *In Camera* Examination conclusions.

Analysis

Compliance

At its September 29, 2022 meeting, the Council ordered the Custodian to comply with the Council's *In Camera* Examination Findings and to submit certified confirmation of compliance, in accordance with R. 1:4-4, to the Executive Director. On October 4, 2022, 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 originally due by close of business on October 12, 2022.

On October 18, 2022, the current Custodian e-mailed the GRC advising that she did not receive the Interim Order until October 14, 2022 and that the Custodian retired in December 2021. The current Custodian also sought an extension of time to address the Order, which the GRC granted through October 28, 2022. On October 26, 2022, the current Custodian submitted a response to the GRC. Therein, the current Custodian certified to disclosing only a portion of the e-mail chains with redactions consistent with the *In Camera* Examination. On October 27, 2022, after the GRC advised of deficiencies with the first response, the current Custodian submitted a supplemental response satisfying the remainder of the Interim Order.

A review of the facts presented here support that the current Custodian complied with the Council's Interim Order. Regarding the timeliness of the response, the evidence of record supports that the current Custodian's response was timely. Specifically, it is reasonable that the current Custodian did not receive the Order until October 14, 2022. This is because the GRC only had the original Custodian's e-mail address for electronic delivery and no other parties could have alerted the current Custodian to the Order prior to her receiving the hard copy via U.S. mail. Thus, the actual initial deadline date was October 21, 2022; the current Custodian timely responded on October 18, 2022 seeking an extension of time to respond that was granted through October 28, 2022. Regarding the disclosure requirement, the current Custodian disclosed to the Complainant on October 26, and 27, 2022 the e-mails with the proper redactions set forth by the Interim Order. Finally, the current Custodian simultaneously submitted certified confirmation of compliance on both occasions.

Therefore, the current Custodian complied with the Council's September 29, 2022 Interim Order. Specifically, the current Custodian responded in the extended time frame disclosing the responsive e-mails with redactions consistent with the Council's *In Camera* Examination. 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 and 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. 1983)); 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)).

Here, the Custodian's failure to timely respond resulted in a “deemed” denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the Custodian failed to submit a Statement of Information, thus violating N.J.S.A. 5:105-2.4(a). However, the *In Camera* Examination revealed that the Custodian lawfully denied access to a majority of the information contained in the responsive e-mail chains. N.J.S.A. 47:1A-6. 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 September 29, 2022 Interim Order. Specifically, the current Custodian responded in the extended time frame disclosing the

responsive e-mails with redactions consistent with the Council's *In Camera* Examination. Further, the current Custodian simultaneously provided certified confirmation of compliance to the Executive Director.

2. The Custodian's failure to timely respond resulted in a "deemed" denial of access. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). Further, the Custodian failed to submit a Statement of Information, thus violating N.J.S.A. 5:105-2.4(a). However, the *In Camera* Examination revealed that the Custodian lawfully denied access to a majority of the information contained in the responsive e-mail chains. N.J.S.A. 47:1A-6. 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

December 6, 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

September 29, 2022 Government Records Council Meeting

Lynn Petrovich
Complainant

Complaint No. 2019-226

v.

Township of Ocean (Monmouth)
Custodian of Record

At the September 29, 2022 public meeting, the Government Records Council (“Council”) considered the September 22, 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 May 19, 2020 Interim Order because he responded in the prescribed time frame providing a complete *in camera* package and simultaneously provided certified confirmation of compliance to the Executive Director.
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 Custodian must disclose all other portions of the both the redacted and wholly denied e-mails to the Complainant (*i.e.*, sender, recipients, date, time, subject, and salutations where applicable). As to those portions of the responsive e-mail chains, the Custodian has unlawfully denied access. See Ray v. Freedom Acad. Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010).

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.

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

Interim Order Rendered by the
Government Records Council
On The 29th Day of September 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: October 4, 2022

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
September 29, 2022 Council Meeting**

**Lynn Petrovich¹
Complainant**

GRC Complaint No. 2019-226

v.

**Township of Ocean (Monmouth)²
Custodial Agency**

Records Relevant to Complaint:

OPRA Request No. 1: Electronic copies via e-mail of the following regarding “Ocean Glades Condominium”:

1. “Lis Pendens” and/or summonses and complaints in foreclosure action served upon prior owners.
2. Deed transferring ownership to the Township of Ocean (“Ocean”).

OPRA Request No. 2: Electronic copies via e-mail of the following regarding “Ocean Glades Condominium”:

1. Resolution authorizing award to Groundwater & Environmental Services, Inc. (“GES”).
2. All e-mails to and from the Mayor and Council.
3. Estimated cost to remediate the current environmental regulations for construction.
4. Statement from financial officer as to GES’ availability of funds.

Custodian of Record: Vincent Buttiglieri

Request Received by Custodian: September 3, 2019

Response Made by Custodian: October 8, 2019

GRC Complaint Received: November 8, 2019

Records Submitted for *In Camera* Examination: Sixteen (16) e-mail chains.

Background

May 19, 2020 Council Meeting:

At its May 19, 2020 public meeting, the Council considered the May 12, 2020 Findings and Recommendations of the Executive Director and all related documentation submitted by the

¹ No legal representation listed on record.

² No legal representation listed on record.

parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian's failure to provide a completed Statement of Information to the Government Records Council, despite more than one request and an extension of time, results in a violation of N.J.A.C. 5:105-2.4(a). Moreover, the Custodian's failure to respond additionally obstructed the GRC in its efforts to "receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian . . ." N.J.S.A. 47:1A-7(b).
2. The Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
3. The GRC must conduct an *in camera* review of the sixteen (16) e-mails to determine the validity of the Custodian's purported assertion that they were exempt in part or whole under the attorney-client privilege or other asserted exemptions. 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).
4. **The Custodian shall deliver³ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 3 above), nine (9) copies of those e-mails that were redacted, 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 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.**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On May 20, 2020, the Council distributed its Interim Order to all parties on. On May 22, 2020, the Custodian e-mailed the Government Records Council ("GRC") seeking clarification of

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."

the Order so that he may properly comply with it. On May 26, 2020, the GRC responded providing clarification as to those documents required to be provided for an *in camera* review. The GRC further stated that it must physically receive the *in camera* documents by May 28, 2020.

On May 28, 2020, the GRC received the Custodian's response to the Council's Interim Order. Therein, the Custodian certified that he was providing nine (9) copies of the requested e-mails, including redacted and unredacted copies of four (4) of the e-mails, and a document index.

The Custodian further contended that the Complainant's May 7, 2020 e-mail disputing the exempted material contained "some factual misstatements." The Custodian averred that Mary Beth Lonergan was not a Township official but had been hired as a Professional Planner with expertise in Council on Affordable Housing ("COAH") matters. The Custodian noted that the Township contracted with Ms. Lonergan because it was engaged in several litigation matters related to COAH. The Custodian also averred that Greg Fehrenbach was employed as Interim Township Manager from March 6, 2017 and June 29, 2017. The Custodian noted that Mr. Fehrenbach remained with the Township for a short time thereafter.

Analysis

Compliance

At its May 19, 2020 meeting, the Council ordered the Custodian to submit nine (9) unredacted copies of the unredacted e-mails at issue in this complaint, as well as redacted copies of the four (4) redacted e-mails disclosed to the Complainant, for *in camera* review. The Council also ordered the Custodian to simultaneously provide certified confirmation of compliance, in accordance with R. 1:4-4, to the Executive Director. On May 20, 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 May 28, 2020.

On May 28, 2020, the fifth (5th) business day after receipt of the Council's Order, the GRC received the Custodian's compliance package. Therein, the Custodian provided nine (9) copies of the e-mails sought for *in camera* review, including redacted and unredacted copies of four (4) e-mails disclosed to the Complainant. Additionally, the Custodian provided a document index and certified confirmation of compliance. Thus, the evidence of record supports that compliance was achieved here.

Therefore, the Custodian complied with the Council's May 19, 2020 Interim Order because he responded in the prescribed time frame providing a complete *in camera* package and simultaneously provided certified confirmation of compliance to the Executive Director.

Unlawful Denial of Access

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

“with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful. N.J.S.A. 47:1A-6.

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

The GRC conducted an *in camera* examination on the submitted record. The results of this examination are set forth in the following table, noting that additional e-mails within the redacted chains will not be addressed therein because they were already disclosed:

Record No.	Record Name/Date	Description of Record	Custodian’s Explanation/ Citation for Redaction or Non-disclosure	Findings of the <i>In Camera</i> Examination⁶
E-mail Chain No. 1 (Redacted)	E-mail from Martin J. Arbus, Esq. to Township Manager Andrew Brannen and others dated July 18, 2013 (5:33 p.m.). E-mail from Mr. Brannen to multiple	Redacted e-mail header and signature information, as well as e-mail bodies discussing potential actions on the Ocean Gate Condominium Property.	Attorney-client privilege. <u>N.J.S.A.</u> 47:1A-1.1.	The bodies of both e-mails were properly redacted under the attorney-client exemption as Ocean’s attorney provided advice on the topic discussed. Thus, no unlawful denial of access to the bodies of either e-mail occurred. <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.

	recipients and cc'ing Mr. Arbus dated July 18, 2013 (5:28 p.m.)			However, the Custodian also redacted e-mail header and signature information that is not exempt from disclosure per <u>Ray v. Freedom Acad. Charter Sch. (Camden)</u> , GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010). That issue will be addressed after this table.
E-mail Chain No. 15 (Redacted)	E-mail from Mary Beth Lonergan to Mr. Arbus, other Ocean officials, and attorneys from Surenian Law Firm dated October 19, 2018 (7:02 p.m.).	Redacted e-mail header and signature information, as well as e-mail body discussing tax credits associated with an affordable housing matter.	Attorney-client privilege. <u>N.J.S.A. 47:1A-1.1.</u>	The body of this e-mail was properly redacted under the attorney-client exemption as Ms. Lonergan, Ocean's contracted professional planner, addressed a tax credit issue connected to affordable housing litigation. <u>N.J.S.A. 47:1A-6.</u> However, the Custodian also redacted e-mail header and signature information that is not exempt from disclosure per <u>Ray v. Freedom Acad. Charter Sch. (Camden)</u> , GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010). That issue will be addressed after this table.
E-mail Chain Nos. 28 and 30 (Redacted)	E-mail from Township Manager Mike Muscillo to Mr. Arbus dated	Redacted e-mail header and signature information , as well as three (3) e-mail bodies	Attorney-client privilege. <u>N.J.S.A. 47:1A-1.1.</u>	The bodies of the first two (2) e-mails were properly redacted under the attorney-client exemption based on the nature of the discussion

	<p>January 30, 2019 (4:36 p.m.).</p> <p>E-mail from Mr. Arbus to Mr. Muscillo dated January 30, 2019 (4:33 p.m.).</p> <p>E-mail forward from Mr. Muscillo to Mr. Arbus dated January 30, 2019 (4:01 p.m.).</p>	<p>addressing a forwarded e-mail from GES, Inc. on remedial time frame extension and Mr. Arbus’s legal questions and opinions of it.</p>		<p>therein. <u>N.J.S.A. 47:1A-6</u>.</p> <p>However, the third (3) e-mail simply states: “FYI.” There is no content within this brief e-mail that could be considered attorney-client privileged. Thus, Custodian unlawfully denied access to the body of this e-mail and must disclose same. <u>N.J.S.A. 47:1A-6</u>.</p> <p>Further, the Custodian also redacted e-mail header and signature information that is not exempt from disclosure per <u>Ray v. Freedom Acad. Charter Sch. (Camden)</u>, GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010). That issue will be addressed after this table.</p>
<p>E-mail Chain Nos. 4 and 5 (with attachment).</p>	<p>E-mail from John Napolitani to Deputy Mayor Rob Acerra cc’ing Mr. Arbus and other Ocean officials dated April 21, 2017 (6:51 a.m.).</p> <p>E-mail from Deputy Mayor Acerra to Mr. Fehrenbach dated April 21, 2017 (5:24 a.m.).</p>	<p>These e-mail chains, withheld in their entirety, discuss a memorandum describing Mr. Fehrenbach’s meeting with a local association and liability issues.</p>	<p>Attorney-client privilege. <u>N.J.S.A. 47:1A-1.1</u>.</p>	<p>The bodies of the first two (2) e-mails and the attachment properly fall under the attorney-client exemption based on the nature of the discussion therein. The GRC notes that any dispute over Mr. Fehrenbach’s association with Ocean at that time is settled by the fact that he utilized a municipal e-mail address for</p>

	E-mail from Mr. Fehrenbach to Deputy Mayor Acerra and other Ocean officials cc'ing Mr. Arbus dated April 20, 2017 (7:31 p.m.) (with attachment).			communications. <u>N.J.S.A. 47:1A-6.</u> However, the third (3) e-mail generic identifies that the memo is attached. Thus, there is no content within this e-mail except that could be considered attorney-client privileged. Thus, Custodian unlawfully denied access to the body of this e-mail and must disclose same. <u>N.J.S.A. 47:1A-6.</u>
E-mail Chain No. 6	E-mail from Ms. Lonergan to Mr. Arbus and other Ocean officials dated July 6, 2018 (6:12 p.m.) (with attachment).	This e-mail and attached report relate to a potential settlement in ongoing litigation.	Attorney-client privilege. <u>N.J.S.A. 47:1A-1.1.</u>	The e-mail body and attachment fall within the attorney-client privilege exemption and thus access was lawfully denied. <u>N.J.S.A. 47:1A-6.</u>
E-mail Chain No. 8	E-mail from Mayor Christopher P. Siciliano to Mr. Arbus dated October 5, 2018 (4:50 p.m.) E-mail from Mr. Arbus to Mayor Siciliano and other Ocean officials dated October 5, 2018 (3:14 p.m.) E-mail from Associate Director Adam M. Gordon (Fair Share Housing	This e-mail chains contains discussion of a potential settlement in ongoing litigation.	Attorney-client privilege. <u>N.J.S.A. 47:1A-1.1.</u>	The e-mail bodies within this chain fall within the attorney-client privilege exemption and thus access was lawfully denied. <u>N.J.S.A. 47:1A-6.</u>

	Center) to Mr. Arbus, Ms. Lonergan, and other Ocean officials dated October 5, 2018 (2:16 p.m.).			
E-mail Chain No. 9	<p>E-mail from Mr. Arbus to Mayor Siciliano dated October 9, 2018 (12:00 p.m.).</p> <p>E-mail from Director of Community Development Ronald Kirk to Mr. Arbus, Ms. Lonergan and other Ocean officials dated October 5, 2018 (12:25 p.m.).</p> <p>E-mail from Rebecca Watson of Surenian Law Firm to Ms. Lonergan, Mr. Kirk, other Ocean officials and cc'ing Mr. Arbus dated October 5, 2018 (11:50 a.m.).</p>	Discussion of ongoing affordable housing litigation.	Attorney-client privilege. <u>N.J.S.A. 47:1A-1.1.</u>	The e-mail bodies within this chain fall within the attorney-client privilege exemption and thus access was lawfully denied. <u>N.J.S.A. 47:1A-6.</u>
E-mail Chain Nos. 13, 18, 19, and 22	E-mails between Ms. Lonergan and Mayor Siciliano and cc'ing Mr. Arbus and Mr. Kirk from October 24, 2018 dating back to October 19,	Discussion of ongoing affordable housing litigation.	Attorney-client privilege. <u>N.J.S.A. 47:1A-1.1.</u>	The e-mail bodies within this chain fall within the attorney-client privilege exemption and thus access was lawfully denied. <u>N.J.S.A. 47:1A-6.</u>

	2018 (various times).			
E-mail Chain No. 16	E-mail from Ms. Lonergan to Mayor Siciliano, Mr. Arbus and other Ocean officials dated October 25, 2018 (2:33 p.m.) (with attachment).	Ms. Lonergan updates recipients on an aspect of a potential settlement in ongoing litigation and attaches a revised plan associated therewith.	Attorney-client privilege. <u>N.J.S.A. 47:1A-1.1.</u>	The e-mail body falls within the attorney-client privilege exemption and thus access was lawfully denied. <u>N.J.S.A. 47:1A-6.</u>
E-mail Chain Nos. 25 and 26	E-mail chains between Ms. Lonergan, Mr. Arbus, Mr. Gordon, Surenian Law Firm, and other Ocean officials dated from December 7, 2018 through January 16, 2019 (various times) (with attachment).	Ms. Lonergan and Mr. Gordon engage in descriptive ongoing settlement negotiations regarding affordable housing litigation. Ms. Lonergan includes as part of her January 16, 2019 e-mail a draft settlement agreement. ⁷	Attorney-client privilege. <u>N.J.S.A. 47:1A-1.1.</u>	The e-mail bodies and attachment within this chain fall within the attorney-client privilege exemption and thus access was lawfully denied. <u>N.J.S.A. 47:1A-6.</u>

Thus, while the Custodian lawfully denied access to a majority of the e-mail bodies responsive to the subject OPRA request, he unlawfully denied access to the body of the specific e-mails as identified in the above table.

However, and consistent with N.J.S.A. 47:1A-5(g), if the custodian of a government record asserts that part of a particular record is exempt from public access pursuant to OPRA, the custodian must delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and must promptly permit access to the remainder of the record.

Thus, the Custodian must disclose all other portions of the both the redacted and wholly denied e-mails to the Complainant (*i.e.*, sender, recipients, date, time, subject, and salutations

⁷ The GRC notes that case law also supports that draft settlement agreements are exempt from disclosure under the “inter-agency, intra-agency advisory, consultative, or deliberative material” exemption. N.J.S.A. 47:1A-1.1; Libertarians for Transparent Gov’t v. William Paterson Univ., 2018 N.J. Super. Unpub. LEXIS 843 (App. Div. 2018) Paff v. City of Union City (Hudson), GRC Complaint No. 2012-262 (August 2013); Libertarians for Transparent Gov’t v. Borough of Westwood (Bergen), GRC Complaint No. 2016-214 (October 2018).

where applicable). As to those portions of the responsive e-mail chains, the Custodian has unlawfully denied access. See Ray, GRC 2009-185.

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 complied with the Council's May 19, 2020 Interim Order because he responded in the prescribed time frame providing a complete *in camera* package and simultaneously provided certified confirmation of compliance to the Executive Director.
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 deliver⁸ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁹ to the Executive Director.¹⁰**
3. The Custodian must disclose all other portions of the both the redacted and wholly denied e-mails to the Complainant (*i.e.*, sender, recipients, date, time, subject, and salutations where applicable). As to those portions of the responsive e-mail chains, the Custodian has unlawfully denied access. See Ray v. Freedom Acad. Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010).
4. **The Custodian shall comply with conclusion No. 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously deliver certified confirmation of compliance, in accordance with R. 1:4-4, to the Executive Director.**

⁸ 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.

⁹ "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."

¹⁰ 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.

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

Prepared By: Frank F. Caruso
Executive Director

September 22, 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

May 19, 2020 Government Records Council Meeting

Lynn Petrovich
Complainant

Complaint No. 2019-226

v.

Township of Ocean (Monmouth)
Custodian of Record

At the May 19, 2020 public meeting, the Government Records Council (“Council”) considered the May 12, 2020 Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian’s failure to provide a completed Statement of Information to the Government Records Council, despite more than one request and an extension of time, results in a violation of N.J.A.C. 5:105-2.4(a). Moreover, the Custodian’s failure to respond additionally obstructed the GRC in its efforts to “receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian . . .” N.J.S.A. 47:1A-7(b).
2. The Custodian did not bear his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
3. The GRC must conduct an *in camera* review of the sixteen (16) e-mails to determine the validity of the Custodian’s purported assertion that they were exempt in part or whole under the attorney-client privilege or other asserted exemptions. 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).
4. **The Custodian shall deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 4 above), nine (9) copies of those e-mails**

that were redacted, 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.

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

Interim Order Rendered by the
Government Records Council
On The 19th Day of May 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: May 20, 2020

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
May 19, 2020 Council Meeting**

**Lynn Petrovich¹
Complainant**

GRC Complaint No. 2019-226

v.

**Township of Ocean (Monmouth)²
Custodial Agency**

Records Relevant to Complaint:

OPRA Request No. 1: Electronic copies via e-mail of the following regarding “Ocean Glades Condominium”:

1. “Lis Pendens” and/or summonses and complaints in foreclosure action served upon prior owners.
2. Deed transferring ownership to the Township of Ocean (“Ocean”).

OPRA Request No. 2: Electronic copies via e-mail of the following regarding “Ocean Glades Condominium”:

1. Resolution authorizing award to Groundwater & Environmental Services, Inc. (“GES”).
2. All e-mails to and from the Mayor and Council.
3. Estimated cost to remediate the current environmental regulations for construction.
4. Statement from financial officer as to GES’ availability of funds.

Custodian of Record: Vincent Buttiglieri
Request Received by Custodian: September 3, 2019
Response Made by Custodian: October 8, 2019
GRC Complaint Received: November 8, 2019

Background³

Request and Response:

On September 3, 2019, the Complainant submitted two (2) Open Public Records Act

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.

(“OPRA”) requests to the Custodian seeking the above-mentioned records. On October 8, 2019, the Complainant purportedly⁴ e-mailed the Custodian seeking a status update. On October 8, 2019, the twenty fifth (25th) business day after receipt of the OPRA request, the Custodian purportedly⁵ responded in writing stating that he was on vacation and would address the subject OPRA requests upon his return.

Denial of Access Complaint:

On November 8, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant stated that she submitted two (2) OPRA requests on September 3, 2019. The Complainant asserted that on October 8, 2019, she e-mailed the Custodian asking “for a response.” The Complainant asserted that the Custodian responded stating that he was on vacation and would address the OPRA requests upon his return. The Complainant stated that on November 5, 2019, after not receiving a response, she called the Custodian and left a message regarding the subject OPRA requests. The Complainant stated that to date, she received no response from the Custodian.

Statement of Information:

On December 13, 2019, the GRC requested a completed Statement of Information (“SOI”) from the Custodian.

Additional Submissions:

On December 23, 2019, the Complainant e-mailed the GRC noting that following this complaint, the Custodian allowed her to come to the Township and review several records. The Complainant stated that based on her inspection, which occurred on December 16, 2019, the following records were still outstanding:

1. E-mails to and from the Mayor and Council regarding “Ocean Glades Condominium.
2. Estimated cost to remediate the current environmental regulations for construction.
3. Statement from financial officer as to GES’ availability of funds.
4. Any the consulting agreements with GES, as noted in an August 29, 2019 legal notice.

Statement of Information (cont’d):

On December 30, 2019, the GRC resent the request for a completed SOI to the Custodian, noting that it received a delay “undeliverable” receipt. The GRC stated that the SOI deadline was extended to January 7, 2020. On January 10, 2020, the GRC resent the request for a completed SOI to the Custodian via facsimile due to another delayed “undeliverable” receipt. The GRC stated that the SOI deadline was extended to January 17, 2020.

⁴ The Complainant referenced this correspondence in her Denial of Access Complaint but did not provide a copy as part of her filing.

⁵ Ibid.

Lynn Petrovich v. Township of Ocean (Monmouth), 2019-226 – Findings and Recommendations of the Executive Director

On January 17, 2020, the Custodian e-mailed the GRC requesting an extension of time through January 24, 2020. The Custodian noted that he previously believed all responsive records were disclosed. The Custodian noted that it appeared he was mistaken and was attempting to provide additional records to the Complainant. On the same day, the GRC granted an extension through January 24, 2020.

On January 22, 2020, the Custodian e-mailed the GRC stating that the Complainant informed him that she would be withdrawing this complaint. The Custodian asked, in the interest of “eliminat[ing]” a need to file the SOI, whether the GRC received a withdrawal notice. On the same day, the GRC stated that it had not received a notice.

Additional Submissions (cont’d):

On January 24, 2020, the Complainant e-mailed the GRC advising that she was communicating via telephone with the Custodian all week. The Complainant stated that based on those conversations, she received additional records on January 22, 2020. The Complainant noted that she had yet to review the records, but that she “[felt] certain it contains copies of the requested records.” On the same day, the GRC requested that the Complainant advise whether she wished to withdraw the instant complaint.

Statement of Information (con’t):

On February 28, 2020, the GRC sent a “No Defense” letter to the Custodian, requesting a completed SOI within three (3) business days of receipt. The GRC also noted that “given that significant time has passed since [it] last attempted to receive an SOI from the [Custodian], no additional extensions” would be permitted.

Additional Submissions (cont’d):

On March 6, 2020, the Complainant notified the GRC that she was in receipt of the e-mails sought in the subject OPRA request. The Complainant noted that these e-mails were the last outstanding portion of her OPRA requests. On the same day, the GRC requested that the Complainant advise whether she wished to withdraw the instant complaint. On March 13, 2020, the GRC again requested that the Complainant advise whether she wished to withdraw the instant complaint. On May 4, 2020, the GRC e-mailed the Complainant confirming receipt of a voicemail wherein she asserted additional issues based on the Custodian’s most recent disclosure. The GRC stated that should the Complainant wish to include those issues on the record, she must do so in writing by May 7, 2020.

On May 7, 2020, the Complainant e-mailed the GRC stating that she took issue with sixteen (16) e-mails that the Custodian either denied in part or whole.

The Complainant stated that the Custodian denied access, in whole, to e-mail Nos. 4, 5, 6, 8, 9, 13, 16, 18, 19, and 22 under the attorney-client privilege exemption. The Complainant further stated that the Custodian redacted e-mail Nos. 1, 15, 28, and 30 also under the attorney-client privilege. The Complainant contended that at least eight (8) of the e-mails include Mary Beth Lonergan, who is not a Township official but “a principal at a private firm.” The Complainant

further asserted that she did not believe Ms. Loneragan was an attorney. Additionally, the Complainant noted that another e-mail included Greg Fehrenbach, who is identified as associated with Ocean Glades Condominium but that it was unclear why he had standing under the attorney-client privilege. The Complainant thus contended that each e-mail should be disclosed to her in total.

The Complainant finally stated that the Custodian also denied access, in whole, to e-mail Nos. 25 and 26 as “Confidential” and citing N.J.S.A. 47:1A-1. The Complainant noted that she reviewed N.J.S.A. 47:1A-1 and found that it addressed personal privacy. The Complainant asserted that her OPRA request did not seek personal information; thus, the Custodian should disclose these e-mails to her.

Analysis

Failure to Submit SOI

OPRA also provides that “Custodians shall submit a completed and signed statement of information (SOI) form to the Council and the complainant simultaneously that details the custodians' position for each complaint filed with the Council[.]” N.J.A.C. 5:105-2.4(a).

OPRA further provides that:

Custodians shall submit a completed and signed SOI for each complaint to the Council's staff and the complainant not later than five business days from the date of receipt of the SOI form from the Council's staff . . . Failure to comply with this time period may result in the complaint being adjudicated based solely on the submissions of the complainant.

[N.J.A.C. 5:105-2.4(f).]

Finally, OPRA provides that “[a] custodian’s failure to submit a completed and signed SOI . . . may result in the Council’s issuing a decision in favor of the complainant.” N.J.A.C. 5:105-2.4(g). In Alterman, Esq. v. Sussex Cnty. Sheriff’s Office, GRC Complaint No. 2013-353 (September 2014), the custodian failed to provide a completed SOI to the GRC within the allotted deadline. Thus, the Council noted the custodian’s failure to adhere to N.J.A.C. 5:1052.4(a). See also Kovacs v. Irvington Police Dep’t (Essex), GRC Complaint No. 2014-196 (January 2015); Howell v. Twp. of Greenwich (Warren), GRC Complaint No. 2015-249 (November 2016).

In the instant matter, and after several technological issues, the GRC was able to successfully transmit an SOI request to the Custodian via facsimile on January 10, 2020. Thereafter, the Custodian sought an extension through January 24, 2020 to submit an SOI, which the GRC granted. On January 22, 2020, the Custodian e-mailed the GRC asking whether the Complainant withdrew this complaint thus “eliminat[ing]” the need to submit an SOI. On the same day, the GRC replied advising that the complaint was not withdrawn. The Complainant e-mailed the GRC on January 24, 2020 noting that the Custodian provided an additional response, she did not withdraw the complaint. Notwithstanding, the Custodian did not comply with the GRC’s request for an SOI.

Well after the expiration of the extended deadline, on February 28, 2020, the GRC again attempted to obtain a completed SOI from the Custodian by sending a “No Defense” letter and requesting a completed SOI within three (3) business days of receipt. This transmission also included a copy of the original SOI letter providing detailed instructions on how to properly submit an SOI. The GRC also noted that “given that significant time has passed since [it] last attempted to receive an SOI from the [Custodian], no additional extensions” would be permitted. The GRC received no response thereafter.

Accordingly, the Custodian’s failure to provide a completed SOI to the GRC, despite more than one request and an extension of time, results in a violation of N.J.A.C. 5:105-2.4(a). Moreover, the Custodian’s failure to respond additionally obstructed the GRC in its efforts to “receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian . . .” N.J.S.A. 47:1A-7(b).

Timeliness

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Id. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).⁶ Thus, a custodian’s failure to respond in writing to a complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

The Complainant submitted her OPRA request to the Custodian on September 3, 2019. Thereafter, the Custodian did not respond until he purportedly e-mailed the Custodian on October 8, 2019, approximately twenty-five (25) business days after submission of the OPRA request. Further, in the absence of an SOI, the Custodian failed to identify the date he received the request. N.J.A.C. 5:105-2.4(f). Further, there is no evidence in the record to refute the twenty-five (25) business day delay in responding to the subject OPRA request.

Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11.

Unlawful Denial of Access

OPRA provides that government records made, maintained, kept on file, or received by a

⁶ A custodian’s written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA.

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 Council⁷ that accepted the custodian’s legal conclusion for the denial of access without further review. The Appellate Division noted that “OPRA contemplates the GRC’s meaningful review of the basis for an agency’s decision to withhold government records When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers.” Id. The court stated that:

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

[Id. at 355.]

Further, the court found that:

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 matter before the Council, the Complainant eventually received all records sought in response to her OPRA request. However, the Complainant e-mailed the GRC on May 7, 2020 taking issue with sixteen (16) e-mails the Custodian either withheld or disclosed with redactions. The Complainant noted that the Custodian based his exemptions on the attorney-client privilege, “N.J.S.A. 47:1A-1;” and general confidentiality.

Upon review of the evidence of record here, the GRC cannot determine whether the exemptions applied to the responsive e-mails constitute a lawful basis for denial. The GRC’s review of this issue is further complicated by the Custodian’s failure to submit an SOI. Thus, it is

⁷ Paff v. NJ Dep’t of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).
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evident that a “meaningful review” is necessary to determine whether all withheld and redacted e-mails reasonably fall within the attorney-client privilege or other cited exemptions as purportedly asserted by the Custodian. Thus, the GRC must review all sixteen (16) e-mails in order to determine the full applicability of these exemptions. Such an action is not uncommon, as the GRC will routinely perform an *in camera* review in similar circumstances. See *e.g.* Pouliot v. N.J. Dep’t of Educ., GRC Complaint No. 2015-281 (Interim Order dated January 31, 2017).

Therefore, the GRC must conduct an *in camera* review of the sixteen (16) e-mails to determine the validity of the Custodian’s purported assertion that they were exempt in part or whole under the attorney-client privilege or other asserted exemptions. N.J.S.A. 47:1A-1.1. See Paff, 379 N.J. Super. at 346.

Knowing & Willful

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian’s failure to provide a completed Statement of Information to the Government Records Council, despite more than one request and an extension of time, results in a violation of N.J.A.C. 5:105-2.4(a). Moreover, the Custodian’s failure to respond additionally obstructed the GRC in its efforts to “receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian . . .” N.J.S.A. 47:1A-7(b).
2. The Custodian did not bear his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
3. The GRC must conduct an *in camera* review of the sixteen (16) e-mails to determine the validity of the Custodian’s purported assertion that they were exempt in part or whole under the attorney-client privilege or other asserted exemptions. 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).

4. **The Custodian shall deliver⁸ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 4 above), nine (9) copies of those e-mails that were redacted, a document or redaction index⁹, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,¹⁰ 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.**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Executive Director

May 12, 2020

⁸ 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.

⁹ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

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."

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