



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

PHILIP D. MURPHY  
Governor

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

**FINAL DECISION**

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

Alberto Larotonda  
Complainant

Complaint No. 2019-97

v.

Borough of Red Bank (Monmouth)  
Custodian of Record

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

1. The Custodian did not comply fully with the Council’s November 10, 2020 Interim Order. Specifically, although the Custodian provided, by legal certification, a document index identifying those e-mails responsive to the Complainant’s OPRA request and stating that the New Jersey Department of Environmental Protection already disclosed them, she failed to do so in the prescribed time frame.
2. The Custodian unlawfully denied access to the bodies of two (2) e-mails, the March 23, 2018 letter, and all non-privileged information contained in those e-mails (*i.e.*, sender, recipients, date, time, subject, and salutations where applicable). N.J.S.A. 47:1A-6; Ray v. Freedom Acad. Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010). However, the Custodian lawfully denied access to the remainder of the e-mail bodies, which contained “inter-agency or intra-agency advisory, consultative, or deliberative” conversations between the Borough and the New Jersey Department of Environmental Protection regarding their Plan. N.J.S.A. 47:1A-1.1; Educ. Law Ctr. v. N.J. Dep’t of Educ., 198 N.J. 274 (App. Div. 2009). Notwithstanding this finding, the GRC need no order disclosure because the Complainant received the responsive records from New Jersey Department of Environmental Protection prior to the filing of this complaint and as part of the Statement of Information here.
3. The Custodian unlawfully denied access to a portion of the responsive records. N.J.S.A. 47:1A-6. Further, the Custodian did not timely comply with the Council’s November 10, 2020 Interim Order. However, the Custodian did disclose the responsive e-mails as part of the Statement of Information to support that the New Jersey Department of Environmental Protection already disclosed them. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s

actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk's Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the  
Government Records Council  
On The 23<sup>rd</sup> Day of February 2021

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: February 25, 2021**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Alberto Larotonda<sup>1</sup>  
Complainant**

**GRC Complaint No. 2019-97**

v.

**Borough of Red Bank (Monmouth)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies via e-mail of all e-mail messages and attachments sent or received by Thomas Branch, Kristen Hansen, Erin Schumacher, Nicole Maslanich, Larry Cyr, Patricia Gardner, and Rai Belonzi regarding lead and copper testing from January 1, 2018 through December 21, 2018.

**Custodian of Record:** Pamela Borghi

**Request Received by Custodian:** December 21, 2018

**Response Made by Custodian:** January 7, 2019

**GRC Complaint Received:** May 20, 2019

**Background**

**November 10, 2020 Council Meeting:**

At its November 10, 2020 public meeting, the Council considered the October 27, 2020 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian shall provide to the GRC a complete document index indicating each e-mail or e-mail chain responsive to the subject OPRA request, the purported exemption, and whether same was disclosed by the New Jersey Department of Environmental Protection. If certain e-mails or e-mail chains were not part of the universe of records disclosed by the New Jersey Department of Environmental Protection, the Custodian shall indicate such and provide same for an *in camera* review to determine the validity of her assertion that same is exempt from disclosure under OPRA. Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).
2. **The Custodian shall comply with conclusion No. 1 above within five (5) business days from receipt of the Council's Interim Order. Further, the Custodian shall**

---

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

<sup>2</sup> Represented by Gregory J. Cannon, Esq., of Sobel, Han & Cannon, LLP (Aberdeen, NJ).

**simultaneously deliver<sup>3</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>4</sup> to the Executive Director.<sup>5</sup> Where applicable, the Custodian shall deliver<sup>6</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 1 above) and a legal certification from the Custodian, in accordance with R. 1:4-4, 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 November 12, 2020, the Council distributed its Interim Order to all parties. On December 1, 2020, the Custodian responded to the Council's Interim Order. Therein, the Custodian certified that all e-mail correspondence attached to the SOI (and previously disclosed by the New Jersey Department of Environmental Protection ("DEP")) represented all responsive records that existed. The Custodian included a document index identifying each e-mail chain and noting that were all attached as an exhibit to the Statement of Information ("SOI").<sup>7</sup>

### Analysis

#### Compliance

At its November 10, 2020 meeting, the Council ordered the Custodian to provide a complete document index identifying each e-mail responsive to the request, the applicable exemption, and whether the e-mail was disclosed by DEP. The Council further ordered those records not disclosed by DEP to be submitted for an *in camera* review, where applicable. Finally, the Council ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Executive Director. On November 12, 2020, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply

---

<sup>3</sup> The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

<sup>4</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

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

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

<sup>7</sup> The GRC endeavored to obtain clarification based on Custodian Counsel's cover letter indicating that "documents requested . . . for *in camera* review" were "enclosed." On February 4, 2021, Counsel responded clarifying that no other responsive records existed beyond those attached to the SOI.

with the terms of said Order. Thus, the Custodian's response was due by close of business on November 19, 2020.

On December 1, 2020, the eleventh (11<sup>th</sup>) business day after receipt of the Council's Order, the Custodian provided the GRC a document index identifying all e-mails attached to the SOI and indicating that each was disclosed by DEP. The Custodian further noted that all records in the table represented all records that existed. Although the Custodian ultimately responded to the Council's Order, her failure to do so in timely manner resulted in a compliance violation.

Therefore, the Custodian did not comply fully with the Council's November 10, 2020 Interim Order. Specifically, although the Custodian provided, by legal certification, a document index identifying those e-mails responsive to the Complainant's OPRA request and stating that DEP already disclosed them, she failed to do so in the prescribed time frame.

### **Unlawful Denial of Access**

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

OPRA provides that the definition of a government record "shall not include . . . inter-agency or intra-agency advisory, consultative, or deliberative [(“ACD”)] material." N.J.S.A. 47:1A-1.1. 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. N.J. Dep't of Educ., 198 N.J. 274, 285 (App. Div. 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.

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

Further, 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. Specifically, the Council has held that even if a custodian lawfully denied access to the bodies of e-mails, they were still required to disclose other portions of the responsive e-mails to the Complainant (*i.e.*, sender, recipients, date, time, subject, and salutations where applicable). See Ray v. Freedom Acad. Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010); Ehrenreich v. N.J. Dep't of Trans., GRC Complaint No. 2016-192 (Interim Order dated July 30, 2019).

The GRC received confirmation through the Custodian's certification that all records disclosed by DEP and attached to the SOI are all records responsive to the subject OPRA request. Based on this, the GRC can review those records attached to the SOI and address the Complainant's contention that the Borough unlawfully denied access to them.

In the Denial of Access Complaint, the Complainant contended that he had a right to access the responsive e-mails to determine whether DEP was properly enforcing applicable laws. The Complainant further noted that although a request to DEP yielded the responsive records, he questioned whether the Borough's denial was lawful. In the SOI, the Custodian argued that her denial of access was lawful because the responsive e-mails related to "drafting [and] revising of" the Borough's utilities. The Custodian noted, however, that DEP "inexplicably disclosed" the responsive e-mails, which she attached to the SOI.

Upon review of the e-mails, the GRC finds that almost every e-mail body contains discussions regarding the submission of Lead & Copper Sampling Plan that DEP originally deemed to be insufficient. The extensive discussions contained suggestions on revisions and information-sharing between the parties to reach a final, appropriate Plan. However, the GRC also finds that the March 23, 2018 letter from DEP to the Borough was not part of this ACD conversation. While it may have started the ensuing discussions, the letter was a definitive decision by DEP to reject the Borough's initial submission. Additionally, the GRC identified two (2) e-mails dated March 20, 2018 ("Thanks very much. Have a safe snow!") and February 25, 2018 ("Bobby: FYI") that contained otherwise non-privileged messages. Further, as per the Council's prior decisions, the Custodian unlawfully denied access to those non-privileged parts of the e-mails that should have been disclosed to the Complainant. See Ray, GRC 2009-185.<sup>8</sup>

Accordingly, the Custodian unlawfully denied access to the bodies of two (2) e-mails, the March 23, 2018 letter, and all non-privileged information contained in those e-mails (*i.e.*, sender, recipients, date, time, subject, and salutations where applicable). N.J.S.A. 47:1A-6; Ray, GRC 2009-185. However, the Custodian lawfully denied access to the remainder of the e-mail bodies,

---

<sup>8</sup> The Complainant noted in his Denial of Access Complaint that he "sought monetary compensation from the Borough" for time and effort spent trying to obtain responsive records. Whether this statement is a request for the GRC to award the Complainant fees as part of this process is unclear. However, it should be noted that attorney's fees are not at issue here because the Complainant is not represented by legal counsel. See e.g. Feld v. City of Orange Twp., 2019 N.J. Super. Unpub. LEXIS 903 (App. Div. April 18, 2019). Further, OPRA does provide complainants an opportunity to receive an award of fees in any other circumstances. N.J.S.A. 47:1A-1, *et seq.*

which contained ACD conversations between the Borough and DEP regarding their Plan. N.J.S.A. 47:1A-1.1; Educ. Law Ctr., 198 N.J. 274. Notwithstanding this finding, the GRC need no order disclosure because the Complainant received the responsive records from DEP prior to the filing of this complaint and as part of the SOI here.

### **Knowing & Willful**

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

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

In the matter before the Council, the Custodian unlawfully denied access to a portion of the responsive records. N.J.S.A. 47:1A-6. Further, the Custodian did not timely comply with the Council’s November 10, 2020 Interim Order. However, the Custodian did disclose the responsive e-mails as part of the SOI to support that DEP already disclosed them. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not comply fully with the Council’s November 10, 2020 Interim Order. Specifically, although the Custodian provided, by legal certification, a document index identifying those e-mails responsive to the Complainant’s OPRA request and

stating that the New Jersey Department of Environmental Protection already disclosed them, she failed to do so in the prescribed time frame.

2. The Custodian unlawfully denied access to the bodies of two (2) e-mails, the March 23, 2018 letter, and all non-privileged information contained in those e-mails (*i.e.*, sender, recipients, date, time, subject, and salutations where applicable). N.J.S.A. 47:1A-6; Ray v. Freedom Acad. Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010). However, the Custodian lawfully denied access to the remainder of the e-mail bodies, which contained “inter-agency or intra-agency advisory, consultative, or deliberative” conversations between the Borough and the New Jersey Department of Environmental Protection regarding their Plan. N.J.S.A. 47:1A-1.1; Educ. Law Ctr. v. N.J. Dep’t of Educ., 198 N.J. 274 (App. Div. 2009). Notwithstanding this finding, the GRC need no order disclosure because the Complainant received the responsive records from New Jersey Department of Environmental Protection prior to the filing of this complaint and as part of the Statement of Information here.
3. The Custodian unlawfully denied access to a portion of the responsive records. N.J.S.A. 47:1A-6. Further, the Custodian did not timely comply with the Council’s November 10, 2020 Interim Order. However, the Custodian did disclose the responsive e-mails as part of the Statement of Information to support that the New Jersey Department of Environmental Protection already disclosed them. 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

February 16, 2021





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

PHILIP D. MURPHY  
Governor

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

INTERIM ORDER

November 10, 2020 Government Records Council Meeting

Alberto Larotonda  
Complainant

Complaint No. 2019-97

v.

Borough of Red Bank (Monmouth)  
Custodian of Record

At the November 10, 2020 public meeting, the Government Records Council (“Council”) considered the October 27, 2020 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian shall provide to the GRC a complete document index indicating each e-mail or e-mail chain responsive to the subject OPRA request, the purported exemption, and whether same was disclosed by the New Jersey Department of Environmental Protection. If certain e-mails or e-mail chains were not part of the universe of records disclosed by the New Jersey Department of Environmental Protection, the Custodian shall indicate such and provide same for an *in camera* review to determine the validity of her assertion that same is exempt from disclosure under OPRA. Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).
2. **The Custodian shall comply with conclusion No. 1 above within five (5) business days from receipt of the Council’s Interim Order. Further, the Custodian shall simultaneously deliver<sup>1</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>2</sup> to the Executive Director.<sup>3</sup> Where applicable, the Custodian shall deliver<sup>4</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 1 above) and a legal certification from the Custodian, in accordance with R. 1:4-4, that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery**

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

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

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

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

**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.

Interim Order Rendered by the  
Government Records Council  
On The 10<sup>th</sup> Day of November 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: November 12, 2020**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
November 10, 2020 Council Meeting**

**Alberto Larotonda<sup>1</sup>  
Complainant**

**GRC Complaint No. 2019-97**

v.

**Borough of Red Bank (Monmouth)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies via e-mail of all e-mail messages and attachments sent or received by Thomas Branch, Kristen Hansen, Erin Schumacher, Nicole Maslanich, Larry Cyr, Patricia Gardner, and Rai Belonzi regarding lead and copper testing from January 1, 2018 through December 21, 2018.

**Custodian of Record:** Pamela Borghi  
**Request Received by Custodian:** December 21, 2018  
**Response Made by Custodian:** January 7, 2019  
**GRC Complaint Received:** May 20, 2019

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

**Request and Response:**

On December 21, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On January 7, 2019, the Custodian responded in writing denying access to the Complainant’s OPRA request under the “inter-agency or intra-agency advisory, consultative, or deliberative [(“ACD”)] material” exemption. N.J.S.A. 47:1A-1.1.

**Denial of Access Complaint:**

On May 20, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian unlawfully denied him access to the e-mails sought. The Complainant contended that the New Jersey Department of Environmental Protection (“DEP”) already advised him that the Borough of Red Bank’s (“Borough”) Water Department lead testing was deficient. The Complainant further

---

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

<sup>2</sup> Represented by Gregory J. Cannon, Esq., of Sobel, Han & Cannon, LLP (Aberdeen, NJ).

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

contended that he had a right to know the details of DEP's interaction with the Water Department to ensure that enforcement of applicable laws was occurring.

The Complainant stated that he subsequently submitted an OPRA request DEP for the same records at issue here. The Complainant averred that DEP disclosed "extensive e-mail documents of [Mr.] Branch for 2018." The Complainant thus questioned whether DEP was the only agency able to grant or deny access to the requested records, or whether a similar request made to both DEP and Borough would produce the same results.

#### Statement of Information:

On June 17, 2019, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on December 21, 2018. The Custodian certified that her search included contacting all individuals named in the OPRA request and the Borough's Information Technology Department. The Custodian affirmed that she sent all responsive e-mails to Custodian's Counsel for legal review, whereupon it was determined that same were exempt as ACD material. The Custodian certified that she responded in writing on January 7, 2019 denying the Complainant access to responsive e-mails as they related to the process of revising a new Borough lead/copper sampling system.

The Custodian contended that she lawfully denied access to the responsive e-mails under the ACD exemption. N.J.S.A. 47:1A-1.1; Educ. Law Ctr. v. Dep't of Educ., 198 N.J. 274 (2009); Ciesla v. N.J. Dep't of Health & Senior Serv., 429 N.J. Super. 127, 137 (App. Div. 2012); Libertarians for Transparent Gov't v. GRC, 453 N.J. Super. 83 (App. Div. 2018). The Custodian argued that all e-mails contained pre-decisional discussions between the Borough and DEP regarding a lead and copper sampling plan. The Custodian noted that she is aware that DEP "inexplicably disclosed" the records sought here in response to a subsequent OPRA request, which likely caused the instant complaint filing. The Custodian further noted that DEP's response and those responsive records are attached.

### 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.

The focus of this complaint revolves around the disclosability of e-mails (and applicable attachments) responsive to the subject OPRA request. Complicating the matter is the fact that DEP disclosed multiple e-mails and attachments in response to an unrelated OPRA request prior to the filing of this complaint. However, it is not clear whether DEP produced records identical to those denied by the Borough. This is because contrary to the parties' assertions, the requests submitted to each agency are not identical. Specifically, the request at issue here sought e-mails between one

Borough employee, Mr. Branch, and six (6) DEP employees including Ms. Maslanich. Conversely, the OPRA request submitted to DEP sought e-mails between only one of those DEP employees, Ms. Maslanich, and four (4) Borough employees including Mr. Branch. This difference insinuates that the universe of records responsive to the subject OPRA request is different from those disclosed by DEP in response to the unrelated OPRA request. Also complicating this matter is that the Custodian did not provide a more detailed document index as part of the SOI.

Typically, the GRC ordered an *in camera* review in situations where a custodian denied access to e-mails under the ACD or attorney-client privilege exemptions. See Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005); Pouliot v. N.J. Dep't of Educ., GRC Complaint No. 2015-281 (Interim Order dated January 31, 2017); Ehrenreich v. N.J. Dep't of Trans., GRC Complaint No. 2016-192 (Interim Order dated April 24, 2018). It would be possible to determine whether the Custodian unlawfully denied access to the e-mails and attachments disclosed by DEP without engaging an *in camera* review. However, and as addressed above, the question of whether DEP's universe of records is the same as the Borough's universe of records requires a novel approach in this complaint.

Accordingly, the Custodian shall provide to the GRC a complete document index indicating each e-mail or e-mail chain responsive to the subject OPRA request, the purported exemption, and whether same was disclosed by DEP. If certain e-mails or e-mail chains were not part of the universe of records disclosed by DEP, the Custodian shall indicate such and provide same for an *in camera* review to determine the validity of her assertion that same is exempt from disclosure under OPRA. Paff, 379 N.J. Super. 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 shall provide to the GRC a complete document index indicating each e-mail or e-mail chain responsive to the subject OPRA request, the purported exemption, and whether same was disclosed by the New Jersey Department of Environmental Protection. If certain e-mails or e-mail chains were not part of the universe of records disclosed by the New Jersey Department of Environmental Protection, the Custodian shall indicate such and provide same for an *in camera* review to determine the validity of her assertion that same is exempt from disclosure under OPRA. Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).
2. **The Custodian shall comply with conclusion No. 1 above within five (5) business days from receipt of the Council's Interim Order. Further, the Custodian shall**

**simultaneously deliver<sup>4</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>5</sup> to the Executive Director.<sup>6</sup> Where applicable, the Custodian shall deliver<sup>7</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 1 above) and a legal certification from the Custodian, in accordance with R. 1:4-4, 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: Frank F. Caruso  
Executive Director

October 27, 2020

---

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

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

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

<sup>7</sup> The *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.