



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

September 29, 2022 Government Records Council Meeting

Jennifer Bondarew
Complainant

Complaint No. 2020-54

v.

Township of Howell (Monmouth)
Custodian of Record

At the September 29, 2022 public meeting, the Government Records Council (“Council”) considered the September 22, 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 Custodian complied with the Council’s August 30, 2022 Interim Order because she responded in the prescribed time frame disclosing to the Complainant the responsive records in accordance with the *In Camera* Examination and simultaneously providing certified confirmation of compliance to the Executive Director.
2. The Custodian’s response was insufficient because she failed to provide a specific lawful basis for denying access to the responsive e-mails. N.J.S.A. 47:1A-5(g). Further, the Custodian unlawfully denied access to portions of the responsive e-mails and an attachment. N.J.S.A. 47:1A-6. However, the Custodian did lawfully deny access to a majority of the e-mail bodies. Further, the Custodian timely complied with both the Council’s April 27, 2021 and August 30, 2022 Interim Orders. Additionally, the evidence of record does not indicate that the Custodian’s violations 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 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 6, 2022

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Jennifer Bondarew¹
Complainant**

GRC Complaint No. 2020-54

v.

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

Records Relevant to Complaint: Hardcopies via pickup of all e-mails from Township of Howell (“Township”) official Tom Savino regarding the Complainant’s last name and a specific block and lot from 2007 to present.³

Custodian of Record: Donna Belton
Request Received by Custodian: February 3, 2020
Response Made by Custodian: February 6, 2020
GRC Complaint Received: February 27, 2020

Background

August 30, 2022 Council Meeting:

At its August 30, 2022 public meeting, the Council considered the August 23, 2022 *In Camera* Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian complied with the Council’s April 27, 2021 Interim Order because she responded in the prescribed time frame providing nine (9) unredacted copies of the responsive e-mail chains, a document index, and 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**

¹ No legal representation listed on record.

² Represented by Caitlin Harney, Esq., of Gluck, Walrath, LLP. (Freehold, NJ).

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

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

3. The Custodian must disclose all other portions of the responsive e-mail chains 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 August 31, 2022, the Council distributed its Interim Order to all parties. On September 8, 2022, the Custodian responded to the Council's Interim Order. Therein, the Custodian certified that she was disclosing to the Complainant the responsive e-mails and attachments with redactions in accordance with the Council's *In Camera* Examination.

Analysis

Compliance

At its August 30, 2022 meeting, the Council ordered the Custodian to comply with its *In Camera* Examination Findings and to submit certified confirmation of compliance, in accordance with R. 1:4-4, to the Executive Director. On August 31, 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 due by close of business on September 8, 2022.

On September 8, 2022, the fifth (5th) business day after receipt of the Council's Order, the Custodian disclosed to the Complainant the responsive records in accordance with the Council's

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.

In Camera Examination. The Custodian also provided certified confirmation of compliance to the Executive Director. Thus, the Custodian has properly complied with the Council’s Order.

Therefore, the Custodian complied with the Council’s August 30, 2022 Interim Order because she responded in the prescribed time frame disclosing to the Complainant the responsive records in accordance with the *In Camera* Examination and simultaneously providing certified confirmation of compliance to the Executive Director.

Knowing & Willful

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

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

In the instant matter, the Custodian’s response was insufficient because she failed to provide a specific lawful basis for denying access to the responsive e-mails. N.J.S.A. 47:1A-5(g). Further, the Custodian unlawfully denied access to portions of the responsive e-mails and an attachment. N.J.S.A. 47:1A-6. However, the Custodian did lawfully deny access to a majority of the e-mail bodies. Further, the Custodian timely complied with both the Council’s April 27, 2021 and August 30, 2022 Interim Orders. Additionally, the evidence of record does not indicate that the Custodian’s violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's August 30, 2022 Interim Order because she responded in the prescribed time frame disclosing to the Complainant the responsive records in accordance with the *In Camera* Examination and simultaneously providing certified confirmation of compliance to the Executive Director.
2. The Custodian's response was insufficient because she failed to provide a specific lawful basis for denying access to the responsive e-mails. N.J.S.A. 47:1A-5(g). Further, the Custodian unlawfully denied access to portions of the responsive e-mails and an attachment. N.J.S.A. 47:1A-6. However, the Custodian did lawfully deny access to a majority of the e-mail bodies. Further, the Custodian timely complied with both the Council's April 27, 2021 and August 30, 2022 Interim Orders. Additionally, the evidence of record does not indicate that the Custodian's violations 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

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

August 30, 2022 Government Records Council Meeting

Jennifer Bondarew
Complainant

Complaint No. 2020-54

v.

Township of Howell (Monmouth)
Custodian of Record

At the August 30, 2022 public meeting, the Government Records Council (“Council”) considered the August 23, 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 April 27, 2021 Interim Order because she responded in the prescribed time frame providing nine (9) unredacted copies of the responsive e-mail chains, a document index, and 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 responsive e-mail chains 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 30th Day of August 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: August 31, 2022

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
August 30, 2022 Council Meeting**

**Jennifer Bondarew¹
Complainant**

GRC Complaint No. 2020-54

v.

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

Records Relevant to Complaint: Hardcopies via pickup of all e-mails from Township of Howell (“Township”) official Tom Savino regarding the Complainant’s last name and a specific block and lot from 2007 to present.³

Custodian of Record: Donna Belton
Request Received by Custodian: February 3, 2020
Response Made by Custodian: February 6, 2020
GRC Complaint Received: February 27, 2020

Records Submitted for *In Camera* Examination: Fourteen (14) e-mail chains and attachments where applicable.

Background

April 27, 2021 Council Meeting:

At its April 27, 2021 public meeting, the Council considered the April 20, 2021 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. Because the Custodian failed to provide a specific lawful basis denying access to the responsive e-mails, her response to the Complainant’s OPRA request was insufficient. N.J.S.A. 47:1A-5(g).
2. The GRC must conduct an *in camera* review of the twelve (12) e-mail chains responsive to the Complainant’s OPRA request to validate the Custodian’s assertion that the records were exempt from disclosure under the attorney-client privilege and

¹ No legal representation listed on record.

² Represented by Caitlin Harney, Esq., of Gluck, Walrath, LLP. (Freehold, NJ).

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

“inter-agency or intra-agency advisory, consultative, or deliberative [“(ACD”)”] material” exemptions. See Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005); N.J.S.A. 47:1A-1.1.

3. **The Custodian shall deliver⁴ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 2 above), a document or redaction index⁵, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,⁶ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council’s Interim Order.**
4. 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 April 28, 2021, the Council distributed its Interim Order to all parties. On May 5, 2021, the Government Records Council (“GRC”) received the Custodian’s response to the Council’s Interim Order. Therein, the Custodian averred that although the Council’s Order sought production of twelve (12) e-mail chains for an *in camera* review, fourteen (14) e-mail chains represented the correct number of records withheld from disclosure. The Custodian further certified that she was providing nine (9) copies of those fourteen (14) e-mail chains for *in camera* review and a privilege log. The Custodian noted that these e-mails were primarily withheld under the attorney-client privilege, but also as ACD material.

Analysis

Compliance

At its April 27, 2021 meeting, the Council ordered the Custodian to submit nine (9) unredacted copies of the twelve (12) e-mail chains at issue in this complaint 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 April 28, 2021, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian’s response was due by close of business on May 5, 2021.

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

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

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

On May 5, 2021, the fifth (5th) business day after receipt of the Council’s Order, the GRC received the Custodian’s response to the Order. Therein, the Custodian certified that she was providing nine (9) copies of fourteen (14), and not twelve (12), unredacted e-mail chains for an *in camera* review. The Custodian also included 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 April 27, 2021 Interim Order because she responded in the prescribed time frame providing nine (9) unredacted copies of the responsive e-mail chains, a document index, and 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.

OPRA also provides that the definition of a government record “shall not include . . . [ACD] material.” When the exception is invoked, a governmental entity may “withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated.” Educ. Law Ctr. v. Dep’t of Educ., 198 N.J. 274, 285 (2009) (citing NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975)). The New Jersey Supreme Court has also ruled that a record that contains or involves factual components is entitled to deliberative-process protection under the exemption in OPRA when it was used in decision-making process *and* its disclosure would reveal deliberations that occurred during that process. Educ. Law Ctr., 198 N.J. 274.

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. See Educ. Law Ctr., 198 N.J. at 286. 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.

The GRC conducted an *in camera* examination on the submitted record. Upon review, almost every e-mail body within the chains contain a combination of attorney-client discussions and ACD material related to the Complainant and a Planning Board issue. Thus, a vast majority of the e-mail bodies are exempt from disclosure under the attorney-client and attorney-work product exemption. N.J.S.A. 47:1A-1.1.

However, the GRC has identified a few e-mail bodies that contain content that would not be considered exempt under the above exemptions. The GRC lists those e-mails requiring disclosure of the bodies in the following table:

Record No.	Record Name/Date	Description of Record	Custodian’s Explanation/ Citation for Non-disclosure	Findings of the <i>In Camera</i> Examination⁷
E-mail Chain No. 1 Note: E-mail also included in E-mail Chain No. 2.	E-mail from Todd A. Cohen, Esq. to McKenna Kingdon, Esq. dated November 24, 2014 (11:04 a.m.)(with attachment).	Mr. Cohen, who represented the Complainant and Nicholas Bondarew in the Planning Board issue, sent a letter to Ms. Kingdon regarding that issue.	Attorney-client privilege; <u>State v. Sanders</u> , 260 N.J. Super. 491, 497 (App. Div. 1992); <u>Wargacki v. Cnty. of Bergen</u> , GRC Complaint No. 2011-198 (January 2013).	The contents of the e-mail body and attachment cannot be said to contain either attorney-client privileged information. Instead, this specific e-mail was sent from Complainant’s attorney to the Township attaching a letter regarding the Bondarew Planning Board issue. Thus, Custodian unlawfully denied

⁷ **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.

				access to the body of this e-mail and attachment and must disclose same in both chains. <u>N.J.S.A. 47:1A-6.</u>
E-mail Chain No. 7 Note: E-mail also included in E-mail Chain No. 8.	E-mail from Jim Herman to Engineer Coordinator Thomas Savino dated March 12, 2018 (2:44 p.m.)	Mr. Herman forwards an “Ask the Mayor and Council” inquiry submitted by Mr. Bondarew to Mr. Savino with no additional commentary.	ACD material. <u>Educ. Law Ctr., 198 N.J.</u> at 280.	This e-mail body contains no ACD material. Instead, the entirety of the e-mail is Mr. Bondarew’s inquiry seeking assistance on an issue with his property. This e-mail does not meet either prong necessary to qualify as ACD material. Thus, Custodian unlawfully denied access to the body of this e-mail and must disclose same in both chains. <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, she unlawfully denied access to the body of the specific e-mails 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 responsive e-mail chains 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).

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 April 27, 2021 Interim Order because she responded in the prescribed time frame providing nine (9) unredacted copies of the responsive e-mail chains, a document index, and 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 responsive e-mail chains 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.

Prepared By: Frank F. Caruso
Executive Director

August 23, 2022

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.



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

April 27, 2021 Government Records Council Meeting

Jennifer Bondarew
Complainant

Complaint No. 2020-54

v.

Township of Howell (Monmouth)
Custodian of Record

At the April 27, 2021 public meeting, the Government Records Council (“Council”) considered the April 20, 2021 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Custodian failed to provide a specific lawful basis denying access to the responsive e-mails, her response to the Complainant’s OPRA request was insufficient. N.J.S.A. 47:1A-5(g).
2. The GRC must conduct an *in camera* review of the twelve (12) e-mail chains responsive to the Complainant’s OPRA request to validate the Custodian’s assertion that the records were exempt from disclosure under the attorney-client privilege and “inter-agency or intra-agency advisory, consultative, or deliberative material” exemptions. See Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005); N.J.S.A. 47:1A-1.1.
3. **The Custodian shall deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 2 above), a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,³ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council’s Interim Order.**

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

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

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

4. 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 27th Day of April 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: April 28, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 27, 2021 Council Meeting**

**Jennifer Bondarew¹
Complainant**

GRC Complaint No. 2020-54

v.

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

Records Relevant to Complaint: Hardcopies via pickup of all e-mails from Township of Howell (“Township”) official Tom Savino regarding the Complainant’s last name and a specific block and lot from 2007 to present.³

Custodian of Record: Donna Belton
Request Received by Custodian: February 3, 2020
Response Made by Custodian: February 6, 2020
GRC Complaint Received: February 27, 2020

Background⁴

Request and Response:

On February 2, 2020, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On February 6, 2020, the Custodian responded in writing obtaining an extension of time to respond through February 26, 2020 due to the size of the request and the possibility for assessment of a special service charge. On February 7, 2020, the Complainant asked if the Township could produce the records on a compact disc. The Custodian responded stating that it would be “no problem.”

On February 19, 2020, the Custodian responded disclosing multiple e-mails to the Complainant. The Custodian noted that “some e-mails . . . were not released that were privileged.” On February 21, 2020, the Complainant e-mailed the Custodian seeking clarification on the e-mails withheld from disclosure. The Custodian responded advising that she would provide a privilege log. The Complainant replied advising that there was “no need to create a log” because she was filing a complaint.

¹ No legal representation listed on record.

² Represented by Caitlin Harney, Esq., of Gluck, Walrath, LLP. (Freehold, NJ).

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

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

Denial of Access Complaint:

On February 27, 2020, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant contended that the Custodian withheld access to several e-mails without providing a specific lawful basis for her denial. The Complainant contended that the denial appeared to be a “cover-up of wrongdoing due to an ongoing land dispute.” The Complainant asserted that she submitted the subject OPRA request to identify the individual(s) responsible for delaying this dispute to her financial detriment. The Complainant thus contended that even if the Township ultimately disclosed the withheld records, she would not believe that this response would comprise all responsive e-mails without a third party witnessing the transaction.

Statement of Information:⁵

On September 15, 2020, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on February 3, 2020. The Custodian certified that her search included asking the Township’s Information Technology Department to perform a search for responsive e-mails. The Custodian certified that certified that following an extension of time, she responded in writing on February 19, 2020 granting access in part and denying access in part.

The Custodian argued that she lawfully denied access to twelve (12)⁶ separate e-mail chains under the attorney-client privilege exemption. N.J.S.A. 47:1A-1.1. State v. Sanders, 260 N.J. Super. 491, 497 (App. Div. 1992); Wargacki v. Cnty. of Bergen, GRC Complaint No. 2011-198 (January 2013). The Custodian contended that each e-mail comprised of communications between the Township and its attorney seeking legal advice and interpretation on multiple issues. The Custodian noted that in at least one of the responsive records, a Township staff member directly invoked the attorney-client privilege exemption.

The Custodian further argued that some of the responsive e-mails also fell within the “inter-agency or intra-agency advisory, consultative, or deliberative [(“ACD”)] material” exemption. N.J.S.A. 47:1A-1.1; Educ. Law Ctr. v. N.J. Dep’t of Educ., 198 N.J. 274, 280 (2009). The Custodian argued that those applicable e-mails contained consultative and deliberative discussions related to the resolution of an easement issue.

⁵ On March 17, 2020, this complaint was referred to mediation. On July 15, 2020, this complaint was referred back to the GRC for adjudication.

⁶ The Custodian included a description of actions that occurred while this complaint was in mediation. The GRC notes that pursuant to the Uniform Mediation Act, N.J.S.A. 2A:23C-1 *et seq.*, communications that take place during the mediation process are not deemed to be public records subject to disclosure under OPRA. N.J.S.A. 2A:23C-2. All communications that occur during the mediation process are privileged from disclosure and may not be used in any judicial, administrative, or legislative proceeding, or in any arbitration, unless all parties and the mediator waive the privilege. N.J.S.A. 2A:23C-4.

Analysis

Sufficiency of Response

OPRA provides that if a “custodian is unable to comply with a request for access, the custodian *shall indicate the specific basis therefor . . .* on the request form and promptly return it to the requestor.” N.J.S.A. 47:1A-5(g) (emphasis added). A custodian’s failure to do so results in an insufficient response and a violation of OPRA. See Schwarz v. N.J. Dep’t of Human Serv., GRC Complaint No. 2004-60 (February 2005) (setting forth the proposition that specific citations to the law that allows a denial of access are required at the time of the denial); Renna v. Union Cnty. Improvement Auth., GRC Complaint No. 2008-86 (May 2010) (noting that N.J.S.A. 47:1A-5(g) requires a custodian of record to indicate the specific basis for noncompliance).

Here, the Custodian denied access to multiple e-mail chains stating that they were “privileged.” Factually, there are no exemptions in OPRA that allow for such a denial. Although the Custodian subsequently offered to provide a privilege log to Complainant, she had already failed to include any specific lawful basis for this denial at the time of her denial. Thus, the forgoing evidence of record here supports a finding that the Custodian’s response was insufficient.

Accordingly, because the Custodian failed to provide a specific lawful basis denying access to the responsive e-mails, her response to the Complainant’s OPRA request was insufficient. N.J.S.A. 47:1A-5(g).

Unlawful Denial of Access

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

In Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the 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.’

⁷ Paff v. NJ Dep’t of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

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.]

Here, the Custodian denied access to twelve (12) e-mail chains. The Custodian argued in the SOI that the records were exempt from disclosure under the attorney-client privilege and ACD exemptions. N.J.S.A. 47:1A-1.1. However, a “meaningful review” is necessary to determine whether the denied e-mail chains fall within the asserted exemptions. Further, the GRC has routinely reviewed e-mails *in camera* in complaints with facts like the present complaint. See e.g. Pouliot v. N.J. Dep’t of Educ., GRC Complaint No. 2015-281 (Interim Order dated January 31, 2017). Thus, the GRC must review same to determine the full applicability of the cited exemptions.

Therefore, the GRC must conduct an *in camera* review of the twelve (12) e-mail chains responsive to the Complainant’s OPRA request to validate the Custodian’s assertion that the records were exempt from disclosure under the attorney-client privilege and ACD material exemptions. See Paff, 379 N.J. Super. at 346; N.J.S.A. 47:1A-1.1.

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. Because the Custodian failed to provide a specific lawful basis denying access to the responsive e-mails, her response to the Complainant’s OPRA request was insufficient. N.J.S.A. 47:1A-5(g).
2. The GRC must conduct an *in camera* review of the twelve (12) e-mail chains responsive to the Complainant’s OPRA request to validate the Custodian’s assertion

that the records were exempt from disclosure under the attorney-client privilege and “inter-agency or intra-agency advisory, consultative, or deliberative material” exemptions. See Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005); N.J.S.A. 47:1A-1.1.

3. **The Custodian shall deliver⁸ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 2 above), 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.**
4. 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

April 20, 2021

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."