



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

PHILIP D. MURPHY  
Governor

TAHESHA L. WAY  
Lieutenant Governor

JACQUELYN A. SUÁREZ  
Acting Commissioner

## INTERIM ORDER

### March 26, 2024 Government Records Council Meeting

Marybeth Maida  
Complainant

Complaint No. 2021-229

v.

Borough of Red Bank (Monmouth)  
Custodian of Record

At the March 26, 2024 public meeting, the Government Records Council (“Council”) considered the March 19, 2024 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 did not fully comply with the Council’s November 9, 2022 Interim Order. Specifically, the current Custodian did not provide the requested records for *in camera* review and certified confirmation of compliance to the Executive Director until after the expiration of the compliance time frame. Further, the current Custodian did not address conclusion No. 3 as part of her response to the Interim Order.
2. **On the basis of the Council’s determination in this matter, the current Custodian shall comply with the Council’s Findings of the *In Camera* Examination set forth in the above table within ten (10) business days from receipt of this Order. Further, the current 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>**
3. Compliance for conclusion No. 3 of the Council’s Order remains outstanding because the current Custodian’s failed to address it in her response at all. Thus, the current Custodian is being provided a final opportunity to respond to conclusion No. 3 by performing a search to locate and disclose any records responsive to the Complainant’s

<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.

September 17, 2021 OPRA request. If the current Custodian believes the content of a particular record is exempt from disclosure, she must identify the specific lawful basis for any applicable redactions and disclose the remainder of the record. If the current Custodian does not locate any responsive records, she must certify to this fact, inclusive of a detailed explanation of her search.

4. **The current Custodian shall comply with conclusion No. 3 above within ten (10) 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, if applicable. Further, the current Custodian shall 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 26<sup>th</sup> Day of March 2024

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: March 28, 2024**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director  
March 26, 2024 Council Meeting**

**Marybeth Maida<sup>1</sup>  
Complainant**

**GRC Complaint No. 2021-229**

v.

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

**Records Relevant to Complaint:**

September 2, 2021 OPRA request: Copies of:

1. All correspondence, attachments, and supporting documents from Borough of Red Bank (“Borough”) Chief Financial Officer (“CFO”) Peter O’Reilly to former Business Administrator (“BA”) Ziad Shehady regarding concerns about the Finance Department (“Department”) between January 1, 2019 and September 1, 2021.
2. All correspondence, replies, attachments, and supporting documents from former BA Shehady to CFO O’Reilly regarding concerns about the Department between January 1, 2019 and May 15, 2021.
3. All correspondence, documents, and attachments to and from CFO O’Reilly and current BA Darren McConnell regarding concerns about the Department from April 1, 2021 through September 1, 2021.
4. All correspondence, documents, and attachments to and from CFO O’Reilly and Mayor Pasquale Menna regarding concerns about the Department from January 1, 2019 through September 1, 2021.
5. All correspondence, documents, and attachments to and from CFO O’Reilly and Hazim Yassin, Kate Triggiano, and Erik Yngstrom of the Finance Committee (“Committee”) regarding concerns about the Finance Department from January 1, 2021 through September 1, 2021.
6. All minutes and notes, including attendance, for all Committee meetings from January 1, 2021 through September 1, 2021.
7. All correspondence, documents, and attachments to and from CFO O’Reilly and Borough Council regarding concerns about the Department from January 1, 2019 through September 1, 2021.

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<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). Previously represented by Daniel Antonelli, Esq. of Antonelli, Kantor, P.C. (Livingston, NJ).

September 17, 2021 OPRA request: Copies of:

1. All Facebook, Direct Message, Instagram, and Whatsapp communications between CFO O'Reilly and former BA Shehady regarding concerns about the Department between January 1, 2019 and September 1, 2021.
2. All Facebook, Direct Message, Instagram, and Whatsapp communications between CFO O'Reilly and current BA McConnell regarding concerns about the Finance Department between April 1, 2021 and May 15, 2021.
3. All Facebook, Direct Message, Instagram, and Whatsapp communications between CFO O'Reilly and Mayor Menna regarding concerns about the Department from January 1, 2021 through September 1, 2021.
4. All Facebook, Direct Message, Instagram, and Whatsapp communications between CFO O'Reilly and the Committee regarding concerns about the Finance Department from January 1, 2019 through September 1, 2021.
5. All Facebook, Direct Message, Instagram, and Whatsapp communications between CFO O'Reilly and Borough Council regarding concerns about the Finance Department from January 1, 2019 through September 1, 2021.
6. All Facebook, Direct Message, Instagram, and Whatsapp communications between Borough Council and former BA Shehady regarding concerns about the Finance Department from January 1, 2019 through September 1, 2021.
7. All Facebook, Direct Message, Instagram, and Whatsapp communications between Mayor Menna, Borough Council, and former BA Shehady regarding concerns about the Finance Department from January 1, 2019 through September 1, 2021.
8. All Facebook, Direct Message, Instagram, and Whatsapp communications between Mayor Menna, Borough Council, and current BA McConnell regarding concerns about the Finance Department from April 1, 2021 through September 1, 2021.

**Custodian of Record:** Pamela Borghi<sup>3</sup>

**Request Received by Custodian:** September 2, 2021; September 17, 2021

**Response Made by Custodian:** September 14, 2021; September 23, 2021

**GRC Complaint Received:** September 27, 2021

**Records Submitted for *In Camera* Examination:** One (1) e-mail chain, four (4) memoranda, and two (2) letters.

### **Background**

November 9, 2022 Council Meeting:

At its November 9, 2022 public meeting, the Council considered the October 27, 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, found that:

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<sup>3</sup> Ms. Borghi retired on March 1, 2022. The current Custodian of Record is Laura Reinertsen.

1. The GRC must conduct an *in camera* review of the responsive redacted e-mail, as well as those e-mails and memoranda withheld in their entirety, to determine the validity of the Custodian's assertion that those records were exempt under the cited exemptions. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-10. See Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346, 355 (App. Div. 2005).
2. **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), nine (9) copies of the redacted e-mail, a document or redaction index<sup>5</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,<sup>6</sup> that the record 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 Custodian may have unlawfully denied access to records responsive to the Complainant's September 17, 2021 OPRA request. N.J.S.A. 47:1A-6; Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-76 (Interim Order dated June 26, 2012); Demitroff v. Buena Vista Twp. (Atlantic), GRC Complaint No. 2017-169 (Interim Order dated November 12, 2019). Specifically, there is insufficient evidence in the record to determine whether the Custodian's assertion that no records exist is appropriate. Thus, the Custodian must search for and disclose any responsive records located. If the Custodian believes the content of a particular record is exempt from disclosure, she must identify the specific lawful basis for any applicable redactions and disclose the remainder of the record. If the Custodian does not locate any responsive records, she must certify to this fact, inclusive of a detailed explanation of her search.
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, if applicable. Further, the Custodian shall simultaneously deliver certified confirmation of compliance, in accordance with N.J. Court Rules, 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.

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<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.

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

<sup>6</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."

### Procedural History:

On November 10, 2022, the Council distributed its Interim Order to all parties. On December 1, 2022, the Government Records Council (“GRC”) e-mailed the current Custodian advising that the last day to comply with the Council’s Order was November 18, 2022. The GRC stated that to date, no response has been received and the current Custodian has not sought an extension of the compliance time frame. The GRC requested an update on the Borough’s compliance response, noting that failure to comply could result in the complaint being adjudicated absent said submission. On the same day, Custodian’s Counsel sought an extension of time, noting that compliance was not submitted because of the current Custodian’s absence due to an annual conference, the Thanksgiving holiday, and lengthy vacation.

On December 5, 2022, the GRC responded stating that although the compliance time frame had expired, an extension until December 9, 2022 was granted. On December 14, 2022, the Complainant e-mailed the GRC asking whether the current Custodian complied within the newly set time frame.

On December 19, 2022, the GRC received the Custodian’s response to the Council’s Interim Order, which was dated December 15, 2022. Therein, the current Custodian certified that in accordance with conclusion No. 1 of the Order, she was providing nine (9) copies of the redacted and unredacted e-records requested for an *in camera* review along with a document index. In the cover letter, former Custodian’s Counsel noted that the Borough was unable to locate a “redacted e-mail.” The current Custodian did not address conclusion No. 3 related to the September 17, 2021 OPRA request.

### Additional Submissions:

On February 16, 2024, the GRC sent a request for additional information to the current Custodian seeking to obtain nine (9) new copies of the e-mail chain because the ones provided were unreviewable. The GRC requested that the new copies of the chain be provided by February 26, 2024. On February 26, 2024, Custodian’s Counsel sought and extension of time to until March 4, 2024 to respond to the request for additional information. On February 27, 2024, the GRC responded granting the extension.

On March 4, 2024, the current Custodian e-mailed to the parties her response to the request for additional information. Therein, the current Custodian certified that she was providing nine (9) new copies of the e-mail chain as requested. On March 6, 2024, the GRC received the current Custodian’s response via mail, which include all nine (9) copies of the requested e-mail chain.

## Analysis

### Compliance

At its November 9, 2022 meeting, the Council ordered the Custodian to provide to the Council for *in camera* review nine (9) copies of the redacted and unredacted records and a document index. The Council also ordered the Custodian to search for, locate and disclose records

responsive to the September 17, 2021 OPRA request, identify the specific lawful basis for exempting access to any response records, or certify (inclusive of a detailed search explanation) if no responsive records existed. The Custodian was also required to simultaneously provide certified confirmation of compliance to the Executive Director. R. 1:4-4. On November 10, 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 November 18, 2022.

On December 1, 2022, the GRC e-mailed the current Custodian seeking an update on her compliance response because it had not yet received one. On the same day, the seventh (7<sup>th</sup>) business day after receipt of the Council's Order, former Custodian's Counsel sought an extension of time. On December 5, 2022, the GRC granted same through December 9, 2022 while noting that the compliance response time frame had already expired. It was not until December 19, 2022 that the GRC actually received the current Custodian's response. Therein, the current Custodian only addressed conclusion No. 1 and did not address conclusion No. 3.

Therefore, the current Custodian did not fully comply with the Council's November 9, 2022 Interim Order. Specifically, the current Custodian did not provide the requested records for *in camera* review and certified confirmation of compliance to the Executive Director until after the expiration of the compliance time frame. Further, the current Custodian did not address conclusion No. 3 as part of her response to the Interim Order.

### **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 provides that:

Notwithstanding the provisions [OPRA] or any other law to the contrary, the personnel or pension records of any individual in the possession of a public agency, including but not limited to records relating to any grievance filed by or against an

individual, shall not be considered a government record and shall not be made available for public access . . .

[N.J.S.A. 47:1A-10.]

OPRA begins with a presumption against disclosure and “proceeds with a few narrow exceptions that . . . need to be considered.” Kovalcik v. Somerset Cnty. Prosecutor’s Office, 206 N.J. 581, 594 (2011). These are:

[A]n individual’s name, title, position, salary, payroll record, length of service, date of separation and the reason therefore, and the amount and type of any pension received shall be government record;

[P]ersonnel or pension records of any individual shall be accessible when required to be disclosed by another law, when disclosure is essential to the performance of official duties of a person duly authorized by this State or the United States, or when authorized by an individual in interest; and

[D]ata contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension, but not including any detailed medical or psychological information, shall be a government record.

[Id. at 25-26 (*citing* N.J.S.A. 47:1A-10).]

Additionally, while OPRA does not expressly define what is covered by “personnel record,” courts have favored the protection of employee confidentiality. See McGee v. Twp. of East Amwell, 416 N.J. Super. 602, 615 (App. Div. 2010). In McGee, the complainant asserted that e-mails between supervisors regarding employee performance were not covered by the exemption because they were not part of the file. Id. at 616. The court disagreed, finding that an employee would expect such communications to remain confidential, even if they’re not memorialized in the employee’s personnel file. Id.

Further, the Council has previously held that resignation letters are subject to disclosure upon *in camera* review. See Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2011-173 (Interim Order dated August 28, 2012); Collinson v. Unity Charter Sch. (Morris), GRC Complaint No. 2016-226 (Interim Order dated May 21, 2019).

The GRC conducted an *in camera* examination on the submitted records. The GRC notes that the records provided to by the current Custodian match those identified in the SOI document index as withheld from disclosure. The results of this examination are set forth 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> Examination <sup>7</sup>
1.	E-mail chain between BA Shehady, CFO O'Reilly, and Councilman Michael Ballard dated November 4, 2019 (with attachment) (2 pages)	BA Shehady forwarded to Councilman Ballard an November 3, 2019 e-mail he sent to BA O'Reilly regarding a memorandum received on the same day (addressed later below in Record No. 4).	Personnel exemption. <u>N.J.S.A. 47:1A-10.</u>	<p>The body of the November 4, 2019 e-mail acknowledges receipt of the "another" memorandum. However, the e-mail body does not contain any inherent personnel information, but instead identifies the submission of correspondence under review in this <i>in camera</i>.</p> <p>The first and second paragraphs of the November 3, 2019 e-mail body contain express personnel discussions that are exemption from disclosure under <u>N.J.S.A. 47:1A-10</u>. However, the third paragraph speaks only to meeting availability, which is not personnel information similarly exempt as the forgoing paragraphs.</p> <p>Accordingly, the Custodian lawfully denied access to the first two (2) paragraphs of the November 3, 2019 e-mail under the personnel exemption. <b>However, the Custodian unlawfully denied access to the remainder of the e-mail bodies. The current Custodian</b></p>

<sup>7</sup> **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.

				<b>must disclose the entire e-mail chain redacting only the above-mentioned two (2) paragraphs. <u>N.J.S.A. 47:1A-6.</u></b>
2.	Letter from CFO O'Reilly to BA Shehady dated September 29, 2019 (4 pages)	CFO O'Reilly discusses current and long-standing work/personnel issues within the Finance Department.	Personnel exemption. <u>N.J.S.A. 47:1A-10.</u>	This memorandum discussing and detailing internal personnel issues within the Finance Office is clearly exempt under the personnel record exemption. <u>N.J.S.A. 47:1A-10.</u> Thus, the Custodian lawfully denied access to the memorandum. <u>N.J.S.A. 47:1A-6.</u>
3.	Memorandum from CFO O'Reilly to Mayor Menna cc'ing current BA McConnell, Chief of Police, Interim BA, Custodian's Counsel, and Auditor Charles Fallon dated August 17, 2021 (with attachments) (9 pages)	CFO O'Reilly discusses current and long-standing work/personnel issues within the Finance Department and attaching a Finance Department Organizational Chart and January 3, 2019 "Assistant Treasurer" job specification.	Attorney-client privilege and personnel exemptions. <u>N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-10.</u>	<p>This memorandum authored by CFO O'Reilly detailing internal personnel issues in the Finance Office is clearly exempt under the personnel record exemption. <u>N.J.S.A. 47:1A-10.</u></p> <p>The attached organizational chart, which includes the "name, title, [and] position", as well as functional duties of Finance Office employees exclusively contain personnel information required to be disclosed under <u>N.J.S.A. 47:1A-10.</u> Further, the job specification is generic and was alleged by CFO O'Reilly to have been posted in 2019. Thus, the specifications are also not exempt under the "personnel" exemption.</p> <p>Accordingly, the Custodian lawfully denied access to August 17, 2021 memorandum under the personnel exemption. <b>However, the Custodian unlawfully denied access to the two (2) memorandum attachments. The current Custodian must disclose this those attachments. <u>N.J.S.A. 47:1A-6.</u></b></p>

4.	<p>Memorandum from CFO O'Reilly to BA Shehady dated November 3, 2019 (6 pages)</p> <p><b>Note: This record was the attachment to Record No. 1 above.</b></p>	CFO O'Reilly discussed current work/personnel issues within the Finance Department.	Personnel exemption. <u>N.J.S.A. 47:1A-10.</u>	This memorandum authored by CFO O'Reilly detailing internal personnel issues in the Finance Office is clearly exempt under the personnel record exemption. <u>N.J.S.A. 47:1A-10.</u> Thus, the Custodian lawfully denied access to the memorandum. <u>N.J.S.A. 47:1A-6.</u>
5.	Letter from CFO O'Reilly to current BA McConnell dated August 28, 2021 (1 page)	CFO O'Reilly's letter of resignation.	Personnel exemption. <u>N.J.S.A. 47:1A-10.</u>	<p>The first paragraph of the resignation letter contains information related CFO O'Reilly's "date of separation and the reason therefor," which is expressly disclosable under OPRA. <u>N.J.S.A. 47:1A-10</u>; see <u>Verry, GRC 2011-173.</u></p> <p>The second and third paragraphs contain personnel discussions regarding CFO O'Reilly's operations leading up to his final day of work. Therefore, these two paragraphs are exempt from disclosure. <u>N.J.S.A. 47:1A-10.</u></p> <p>Accordingly, the Custodian lawfully denied access to the last two (2) paragraphs of the resignation letter under the personnel exemption. <b>However, the Custodian unlawfully denied access to the remainder of the resignation letter. The current Custodian must disclose same redacting only the above-mentioned two (2) paragraphs. <u>N.J.S.A. 47:1A-6.</u></b></p>
6.	Memorandum from CFO O'Reilly to	CFO O'Reilly expresses concern over current	Personnel exemption.	This memorandum authored by CFO O'Reilly detailing internal personnel issues in the Finance

	Mayor Menna dated December 6, 2020 (2 pages)	personnel processes and issues within the Borough.	<u>N.J.S.A. 47:1A-10.</u>	Office is clearly exempt under the personnel record exemption. <u>N.J.S.A. 47:1A-10.</u> Thus, the Custodian lawfully denied access to the memorandum. <u>N.J.S.A. 47:1A-6.</u>
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Thus, the Custodian lawfully denied access to the September 29, 2019 letter, three (3) memoranda, and portions of the remaining records under N.J.S.A. 47:1A-10. However, the Custodian unlawfully denied access to a portion of the e-mail chain, resignation letter, and attachments to the November 3, 2019 memorandum because same are not exempt as personnel information. N.J.S.A. 47:1A-6.

Finally, the GRC has previously provided custodians a “final opportunity to disclose [records required to be disclosed] and/or provide comprehensive arguments as to why same are not subject to disclosure.” See Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2014-218, *et seq.* (Interim Order dated April 26, 2016) at 4. In Carter, the custodian submitted compliance in response to the Council’s September 29, 2015 Interim Order. However, in reviewing that compliance, it became evident that it was incomplete. Specifically, several attachments were not disclosed, and the custodian did not provide an explanation for the nondisclosure. The Council thus held that the custodian did not comply fully with its Order and provided him “a ‘final opportunity. . .’” to comply. Carter, GRC 2014-218 (citing Verry v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-287 (Interim Order dated April 28, 2015) at 7.

Here, compliance for conclusion No. 3 of the Council’s Order remains outstanding because the current Custodian’s failed to address it in her response at all. Thus, the current Custodian is being provided a final opportunity to respond to conclusion No. 3 by performing a search to locate and disclose any records responsive to the Complainant’s September 17, 2021 OPRA request. If the current Custodian believes the content of a particular record is exempt from disclosure, she must identify the specific lawful basis for any applicable redactions and disclose the remainder of the record. If the current Custodian does not locate any responsive records, she must certify to this fact, inclusive of a detailed explanation of her search.

**Knowing & Willful**

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

**Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The current Custodian did not fully comply with the Council’s November 9, 2022 Interim Order. Specifically, the current Custodian did not provide the requested records for *in camera* review and certified confirmation of compliance to the Executive

Director until after the expiration of the compliance time frame. Further, the current Custodian did not address conclusion No. 3 as part of her response to the Interim Order.

2. **On the basis of the Council’s determination in this matter, the current Custodian shall comply with the Council’s Findings of the *In Camera* Examination set forth in the above table within ten (10) business days from receipt of this Order. Further, the current Custodian shall simultaneously deliver<sup>8</sup> certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,<sup>9</sup> to the Executive Director.<sup>10</sup>**
3. Compliance for conclusion No. 3 of the Council’s Order remains outstanding because the current Custodian’s failed to address it in her response at all. Thus, the current Custodian is being provided a final opportunity to respond to conclusion No. 3 by performing a search to locate and disclose any records responsive to the Complainant’s September 17, 2021 OPRA request. If the current Custodian believes the content of a particular record is exempt from disclosure, she must identify the specific lawful basis for any applicable redactions and disclose the remainder of the record. If the current Custodian does not locate any responsive records, she must certify to this fact, inclusive of a detailed explanation of her search.
4. **The current Custodian shall comply with conclusion No. 3 above within ten (10) 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, if applicable. Further, the current Custodian shall 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

March 19, 2024

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<sup>8</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>9</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>10</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.



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 9, 2022 Government Records Council Meeting

Marybeth Maida  
Complainant

Complaint No. 2021-229

v.

Borough of Red Bank (Monmouth)  
Custodian of Record

At the November 9, 2022 public meeting, the Government Records Council (“Council”) considered the October 27, 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 GRC must conduct an *in camera* review of the responsive redacted e-mail, as well as those e-mails and memoranda withheld in their entirety, to determine the validity of the Custodian’s assertion that those records were exempt under the cited exemptions. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-10. See Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346, 355 (App. Div. 2005).
2. **The Custodian shall deliver<sup>1</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 1 above), nine (9) copies of the redacted e-mail, a document or redaction index<sup>2</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,<sup>3</sup> that the record 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 Custodian may have unlawfully denied access to records responsive to the Complainant’s September 17, 2021 OPRA request. N.J.S.A. 47:1A-6; Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-76 (Interim Order dated June 26, 2012); Demitroff v. Buena Vista Twp. (Atlantic), GRC Complaint No. 2017-169 (Interim Order dated November 12, 2019). Specifically, there is insufficient evidence in the record to determine whether the Custodian’s assertion that no records exist is appropriate. Thus, the Custodian must search for and disclose any responsive

<sup>1</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>2</sup> The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

<sup>3</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."

records located. If the Custodian believes the content of a particular record is exempt from disclosure, she must identify the specific lawful basis for any applicable redactions and disclose the remainder of the record. If the Custodian does not locate any responsive records, she must certify to this fact, inclusive of a detailed explanation of her search.

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, if applicable. Further, the Custodian shall simultaneously deliver certified confirmation of compliance, in accordance with N.J. Court Rules, 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 9<sup>th</sup> Day of November 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: November 10, 2022**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
November 9, 2022 Council Meeting**

**Marybeth Maida<sup>1</sup>  
Complainant**

**GRC Complaint No. 2021-229**

v.

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

**Records Relevant to Complaint:**

September 2, 2021 OPRA request: Copies of:

1. All correspondence, attachments, and supporting documents from Borough of Red Bank (“Borough”) Chief Financial Officer (“CFO”) Peter O’Reilly to former Business Administrator (“BA”) Ziad Shehady regarding concerns about the Finance Department (“Department”) between January 1, 2019 and September 1, 2021.
2. All correspondence, replies, attachments, and supporting documents from former BA Shehady to CFO O’Reilly regarding concerns about the Department between January 1, 2019 and May 15, 2021.
3. All correspondence, documents, and attachments to and from CFO O’Reilly and current BA Darren McConnell regarding concerns about the Department from April 1, 2021 through September 1, 2021.
4. All correspondence, documents, and attachments to and from CFO O’Reilly and Mayor Pasquale Menna regarding concerns about the Department from January 1, 2019 through September 1, 2021.
5. All correspondence, documents, and attachments to and from CFO O’Reilly and Hazim Yassin, Kate Triggiano, and Erik Yngstrom of the Finance Committee (“Committee”) regarding concerns about the Finance Department from January 1, 2021 through September 1, 2021.
6. All minutes and notes, including attendance, for all Committee meetings from January 1, 2021 through September 1, 2021.
7. All correspondence, documents, and attachments to and from CFO O’Reilly and Borough Council regarding concerns about the Department from January 1, 2019 through September 1, 2021.

September 17, 2021 OPRA request: Copies of:

1. All Facebook, Direct Message, Instagram, and Whatsapp communications between CFO

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<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).



- O'Reilly and former BA Shehady regarding concerns about the Department between January 1, 2019 and September 1, 2021.
2. All Facebook, Direct Message, Instagram, and Whatsapp communications between CFO O'Reilly and current BA McConnell regarding concerns about the Finance Department between April 1, 2021 and May 15, 2021.
  3. All Facebook, Direct Message, Instagram, and Whatsapp communications between CFO O'Reilly and Mayor Menna regarding concerns about the Department from January 1, 2021 through September 1, 2021.
  4. All Facebook, Direct Message, Instagram, and Whatsapp communications between CFO O'Reilly and the Committee regarding concerns about the Finance Department from January 1, 2019 through September 1, 2021.
  5. All Facebook, Direct Message, Instagram, and Whatsapp communications between CFO O'Reilly and Borough Council regarding concerns about the Finance Department from January 1, 2019 through September 1, 2021.
  6. All Facebook, Direct Message, Instagram, and Whatsapp communications between Borough Council and former BA Shehady regarding concerns about the Finance Department from January 1, 2019 through September 1, 2021.
  7. All Facebook, Direct Message, Instagram, and Whatsapp communications between Mayor Menna, Borough Council, and former BA Shehady regarding concerns about the Finance Department from January 1, 2019 through September 1, 2021.
  8. All Facebook, Direct Message, Instagram, and Whatsapp communications between Mayor Menna, Borough Council, and current BA McConnell regarding concerns about the Finance Department from April 1, 2021 through September 1, 2021.

**Custodian of Record:** Pamela Borghi

**Request Received by Custodian:** September 2, 2021; September 17, 2021

**Response Made by Custodian:** September 14, 2021; September 23, 2021

**GRC Complaint Received:** September 27, 2021

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

#### **Request and Response:**

On September 2, 2021, the Complainant submitted the first (1<sup>st</sup>) Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On September 14, 2021, the Custodian responded in writing obtaining a seven (7) business day extension of time to undergo “attorney review.”

On September 17, 2021, the Complainant submitted the second (2<sup>nd</sup>) OPRA request to the Custodian seeking the above-mentioned records.

On September 23, 2021, on behalf of the Custodian, Custodian’s Counsel responded in writing to the Complainant’s first (1<sup>st</sup>) OPRA request disclosing a record responsive to item No. 6

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<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.

and two (2) e-mails, one (1) with redactions. Counsel further stated that she was denying access to six (6) additional e-mails, citing the attorney-client privilege and personnel exemptions for all denials. On the same day, the Custodian responded in writing to the Complainant's second (2<sup>nd</sup>) OPRA request stating that no responsive records existed.

#### Denial of Access Complaint:

On September 27, 2021, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant stated that following an executive session meeting on September 1, 2021, the Borough voted to accept CFO O'Reilly's "abrupt resignation" with various comments about the extensive documentation he had disseminated regarding hiring practices in the Finance Department. The Complainant stated that she subsequently filed her first (1<sup>st</sup>) OPRA request to obtain this documentation. The Complainant stated that she later submitted the second (2<sup>nd</sup>) OPRA request seeking "application-based communications" because she had been advised that Borough employees commonly use them to communicate outside of "government-traced or related" communication systems.

The Complainant disputed the Borough's penultimate denial on the "personnel" exemption, arguing that she did not seek any personnel information. The Complainant asserted that the Borough could acceptably redact any actual personnel information; however, she needed the remaining portions of the records to understand the ongoing issues with the Finance Department. The Complainant thus requested that the GRC reverse the Borough's denial and order disclosure of the responsive records.

#### Statement of Information:

On September 30, 2021, the GRC requested a completed Statement of Information ("SOI") from the Custodian. On October 12, 2021, the GRC sent a "No Defense" letter to the Custodian, requesting a completed SOI within three (3) business days of receipt.

On October 19, 2021, albeit after the expiration of the "No Defense" time frame to do so, the Custodian filed an SOI. Therein, the Custodian certified that she received the Complainant's first (1<sup>st</sup>) OPRA request on September 2, 2021.<sup>4</sup> The Custodian certified that her search included contacting all Borough officials named in the OPRA request and CFO O'Reilly to search for potentially responsive records. The Custodian certified that CFO O'Reilly provided records to her on September 9, 2021 and subsequently confirmed that those provided were all records in his possession. The Custodian certified that following an extension of time, Custodian's Counsel responded on her behalf disclosing a few records, on with redactions, and denying access to the rest under the attorney-client privilege and personnel exemptions. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6.

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<sup>4</sup> The Custodian did not address the Complainant's September 17, 2021 OPRA request in her SOI response.

## 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.

#### September 2, 2021 OPRA request:

In Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346, 355 (App. Div. 2005), the complainant appealed a final decision of the Council<sup>5</sup> 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’s September 2, 2021 OPRA request sought correspondence between several Borough officials related to issues in the Finance

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

Department over variable time frames. Custodian's Counsel responded disclosing two (2) records in their entirety, but also disclosing one (1) e-mail with redactions and withholding several other e-mails and memoranda under the attorney-client privilege and personnel exemptions. This complaint followed wherein the Complainant contended that the Custodian's denial was unlawful because she did not seek any personnel information. In the SOI, the Custodian simply noted that access to the multiple records was denied.

Upon review of the evidence of record in the instant complaint, the GRC cannot determine whether the Custodian properly denied access to those e-mails and memoranda deemed to be responsive to the subject OPRA request. The GRC has an obligation to perform an *in camera* review if it cannot glean enough information from the evidence of record to support the redactions. Specifically, there is a question as to whether the responsive e-mails and memoranda contained the type of information that falls within the cited exemptions. Further, it is typical for the GRC to conduct an *in camera* review of these types of communications these exemptions have been asserted. See Pouliot v. N.J. Dep't of Educ., GRC Complaint No. 2015-281 (Interim Order dated January 31, 2017). For these reasons, a "meaningful review" is necessary to determine whether the redactions portions of the responsive minutes fall within the asserted exemptions. Paff, 379 N.J. Super. at 355.

Therefore, the GRC must conduct an *in camera* review of the responsive redacted e-mail, as well as those e-mails and memoranda withheld in their entirety, to determine the validity of the Custodian's assertion that those records were exempt under the cited exemptions. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-10. See Paff, 379 N.J. Super. at 346.

#### September 17, 2021 OPRA request:

Initially, the Council has previously found that, in light of a custodian's certification that no records responsive to the request exist, no unlawful denial of access occurred. See Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005). However, should a complainant provide competent, credible evidence to refute a legal certification, the Council held that a custodian violated OPRA. See Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-76 (Interim Order dated June 26, 2012).

Moreover, given the records sought by the Complainant, the GRC is compelled to discuss its prior decision addressing the disclosure of social media records. In Demitroff v. Buena Vista Twp. (Atlantic), GRC Complaint No. 2017-169 (Interim Order dated November 12, 2019), the custodian denied access to records from the mayor's GoFundMe page on the basis that the account was private and she did not maintain responsive records. The complainant challenged this denial and the Council was tasked with addressing the novel issue of social media records disclosure under OPRA. The Council first held that social media records could fall within the definition of a "government record" "to the extent that they are 'made, maintained or kept on file . . . or . . . received in the course of . . . official business . . .'" N.J.S.A. 47:1A-1.1." Id. at 4. The Council reasoned that OPRA supported that social media posts related to official business are covered under the definition of a "government record" but that "this determination broadly addresses the characterization of social media posts as 'government records' and notes that exemptions to disclosure may apply on a case-by-case basis." Id.

Having determined that social media records could fall within the definition of a “government record,” the Council next turned to whether the custodian denied unlawfully access to those GoFundMe records sought in the subject OPRA request. Finding Larkin v. Borough of Glen Rock, Docket No. BER-L-2573-18 (June 15, 2018) instructive, the Council applied a similar test and determined that the requested GoFundMe records were “government records” under OPRA and that the custodian unlawfully denied access to them. In reaching this conclusion, the Council reasoned that the GoFundMe campaign was inextricably tied to the mayor’s official business. The Council thus required the custodian to obtain responsive records and disclose them to the complainant.

In this matter, the Custodian responded to the Complainant’s September 17, 2021 OPRA request advising that no responsive records existed in the Borough’s possession. However, the Custodian did not address this request in her SOI. Thus, in the absence of any explanation as to the search performed for the responsive communications and a definitive certification that none exist, the facts here are more consistent with Carter, GRC 2011-76. The GRC notes that Demitroff presents sufficient guidance as to the disclosability of social media records that fall within the definition of a “government record,” as well as the Custodian’s obligation to obtain them from the identified account holders.

Accordingly, the Custodian may have unlawfully denied access to records responsive to the Complainant’s September 17, 2021 OPRA request. N.J.S.A. 47:1A-6; See Carter, 2011-76; Demitroff, GRC 2017-169. Specifically, there is insufficient evidence in the record to determine whether the Custodian’s assertion that no records exist is appropriate. Thus, the Custodian must search for and disclose any responsive records located. If the Custodian believes the content of a particular record is exempt from disclosure, she must identify the specific lawful basis for any applicable redactions and disclose the remainder of the record. If the Custodian does not locate any responsive records, she must certify to this fact, inclusive of a detailed explanation of her search.

### **Knowing & Willful**

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

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The GRC must conduct an *in camera* review of the responsive redacted e-mail, as well as those e-mails and memoranda withheld in their entirety, to determine the validity of the Custodian’s assertion that those records were exempt under the cited exemptions. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-10. See Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346, 355 (App. Div. 2005).

2. **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), nine (9) copies of the redacted e-mail, a document or redaction index<sup>7</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,<sup>8</sup> that the record 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 Custodian may have unlawfully denied access to records responsive to the Complainant's September 17, 2021 OPRA request. N.J.S.A. 47:1A-6; Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-76 (Interim Order dated June 26, 2012); Demitroff v. Buena Vista Twp. (Atlantic), GRC Complaint No. 2017-169 (Interim Order dated November 12, 2019). Specifically, there is insufficient evidence in the record to determine whether the Custodian's assertion that no records exist is appropriate. Thus, the Custodian must search for and disclose any responsive records located. If the Custodian believes the content of a particular record is exempt from disclosure, she must identify the specific lawful basis for any applicable redactions and disclose the remainder of the record. If the Custodian does not locate any responsive records, she must certify to this fact, inclusive of a detailed explanation of her search.
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, if applicable. Further, the Custodian shall simultaneously deliver certified confirmation of compliance, in accordance with N.J. Court Rules, 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

October 27, 2022

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

<sup>8</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."