



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

June 28, 2011 Government Records Council Meeting

Marilou Halvorsen
Complainant

Complaint No. 2010-114

v.

New Jersey Department of Law & Public Safety,
Division of Consumer Affairs
Custodian of Record

At the June 28, 2011 public meeting, the Government Records Council (“Council”) considered the June 21, 2011 *In Camera* Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the amended findings and recommendations. The Council, therefore, finds that:

1. The Custodian has complied with the Council’s October 26, 2010 Interim Order by providing the Council with all records set forth in Paragraph two (2) of the Order within five (5) business days of receiving the Council’s Order.
2. The GRC’s *in camera* examination of the requested memorandum from Scott Jenkins to Cindy Miller dated April 13, 2010 regarding the Complainant revealed that the memorandum did not contain recommendations, opinions, or advice about agencies policies or decisions and as such is not exempt from disclosure as adversary, consultative or deliberative material pursuant to N.J.S.A. 47A:1.1 as asserted by Custodian. However, the requested record should have been denied as a record of complaint under the New Jersey State Policy Prohibiting Discrimination in the Workplace (*N.J.A.C. 4A:7-3.1 et seq.*) pursuant to Executive Order 26 (McGreevey 2002) and N.J.S.A. 47:1A-9.a.



| Record or Redaction Number | Record Name/Date | Description of Record or Redaction | Custodian's Explanation/ Citation for Non-disclosure or Redactions | Findings of the <i>In Camera</i> Examination¹ |
|-----------------------------------|--|---|---|---|
| 1 | Memo from Scott T. Jenkins, Chief of Investigation to Cindy K. Miller, Bureau Chief, dated April 13, 2010 regarding Marilou Halvorsen. | Access to this record was denied in its entirety. | This record is exempt from disclosure as advisory, consultative or deliberative materials pursuant to <u>N.J.S.A. 47:1A-1.1</u> . | Withhold the record in its entirety, because although it does not contain recommendations, opinions, or advice about agencies policies or decisions, since the record is a factual account of a conversation between Mr. Jenkins and the Complainant written to Mr. Jenkins's supervisor, Mr. Jenkins stated in the record that he believed he was being harassed and threatened by the Complainant. Thus the record responsive is not disclosable pursuant to Executive Order 26 (McGreevey), <u>N.J.S.A. 47:1A-9.a</u> and <u>N.J.S.A. 4A:7-1 et seq.</u> |

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.

¹ **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.

Final Decision Rendered by the
Government Records Council
On The 28th Day of June, 2011

Robin Berg Tabakin, Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: July 12, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
June 28, 2011 Council Meeting**

**Marilou Halvorsen¹
Complainant**

GRC Complaint No. 2010-114

v.

**New Jersey Department of Law & Public Safety
Division of Consumer Affairs²
Custodian of Records**

Records Relevant to Complaint: A written copy of an e-mail memorandum titled “Incident Commissioner Halvorsen” written by Chief Inspector Scott Jenkins, sent in early April to Cindy Miller, Thomas Hower, Governor’s Authorities Unit and other individuals.

Request Made: May 10, 2010

Response Made: May 17, 2010

Custodian: Bruce J. Solomon

GRC Complaint Filed: June 1, 2010

Records Submitted for *In Camera* Examination: Memorandum from Scott T. Jenkins, (“Mr. Jenkins”) Chief of Investigation to Cindy K. Miller, (“Ms. Miller”) Bureau Chief, Division of Consumer Affairs (DCA) dated April 13, 2010 regarding Marilou Halvorsen, Commissioner, Legalized Games of Chance Control Commission (LGCCC).

Background

October 26, 2010

Government Records Council’s Interim Order. At the October 26, 2010 public meeting, the Government Records Council (“Council”) considered the September 13, 2010 Executive Director’s Findings and Recommendations 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. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the requested record (memorandum dated April 13, 2010 from Mr. Scott Jenkins to Ms. Cindy Miller) to determine the validity of the Custodian’s assertion that the record contains advisory, consultative or deliberative material which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

¹ Represented by Michael Borneo, Esq. of Respoli, Borneo, & Suthard, P.C. (Elizabeth, NJ).

² Represented by DAG Steven N. Flanzman, on behalf of the NJ Attorney General.

2. **The Custodian must deliver³ to the Council in a sealed envelope nine (9) copies of the requested unredacted document (see #1 above), a document or redaction index⁴, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4⁵, that the document provided is the document requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

October 28, 2010

Council's Interim Order ("Order") distributed to the parties.

November 10, 2010

Certification of the Custodian in response to the Council's Interim Order attaching the memorandum from Mr. Jenkins to Ms. Miller dated April 13, 2010 regarding the Complainant.

The Custodian certifies that the DCA is part of the Department of Law and Public Safety ("LPS"). The Custodian certifies that the Complainant filed an OPRA request on May 10, 2010 for a written copy of an e-mail memo titled 'Incident Commissioner Halvorsen' written by Scott Jenkins, Chief Inspector, LGCCC, sent to Cindy Miller, Office of Consumer Protection, Thomas Hower, Governor's Authorities Unit, as well as other individuals. The Custodian also certifies that the Complainant serves as the Chairperson of LGCC, housed in the DCA. The Custodian certifies that Mr. Jenkins is an investigator in the Office of Consumer Protection, which is also housed in the DCA. The Custodian also certifies that he learned that Mr. Jenkins is involved in a civil suit in which one of the named defendants is Robert Campanelli ("Mr. Campanelli"). Furthermore, the Custodian certifies that Mr. Campanelli serves as the Custodian for DCA, but in order to avoid the appearance of any conflicts of interest, the named Custodian, rather than Mr. Campanelli, handled the Complainant's OPRA request.

The Custodian certifies that he found a hard copy of a memorandum from Mr. Jenkins to Ms. Miller dated April 13, 2010 about the Complainant. Additionally, the Custodian certifies that Ms. Miller serves as Mr. Jenkins's supervisor. The Custodian also certifies that upon review of the record responsive, Mr. Jenkins discussed a number of concerns and issues within the workplace and that the memorandum contained his opinions,

³ The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

⁴ The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

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

recommendations and advice about agency policy and practices. Furthermore, the Custodian certifies that Mr. Jenkins used plain and frank talk and uninhibited expression to communicate to Ms. Miller his opinion that she should examine existing policies and procedures in the Office of Consumer Protection. The Custodian certifies that the facts and opinions contained in the memorandum were so inextricably intertwined that material could not be redacted, thus, the Complainant was denied access to the entire record responsive.

The Custodian certifies that he received the Council's Interim Order dated October 26, 2010 on November 4, 2010. The Custodian also certifies that he has provided the GRC with this certification, a document index, and nine (9) copies of the unredacted records responsive to the Complainant's OPRA request.

December 17, 2010

E-mail from the GRC to the Custodian. The GRC requests a legal certification answering the following questions:

1. Is the record related to the civil suit mentioned in the legal certification dated November 10, 2010?⁶
2. Is there any investigation involving the Complainant?

January 6, 2011

Telephone call from the GRC to the Custodian. The GRC states that they have not yet received the Custodian's legal certification as requested on December 17, 2010.

January 7, 2011

Telephone call from the Custodian to the GRC. The Custodian leaves a voicemail message stating that he must obtain more information regarding whether there are any pending investigations or if the requested record is related to a civil suit.

January 8, 2011

Telephone call from the Custodian to the GRC. The Custodian states that he will find out more information regarding the GRC's request for legal certification and will contact the GRC on January 9, 2011.

February 18, 2011

Telephone call from the GRC to the Custodian. The GRC states that the GRC needs the legal certification to fully adjudicate this complaint. The Custodian states that he will send the legal certification to the GRC later this afternoon.

⁶ The Custodian certifies in his SOI that Mr. Jenkins is a plaintiff in a civil suit in which one of the named defendants is Robert Campanelli, who serves as the Custodian of Records for DCA. Therefore in order to avoid the appearance of a conflict of interest, the named Custodian, Bruce Solomon handled the Complainant's OPRA request and the Denial of Access Complaint.

February 25, 2011

Letter from the Custodian to the GRC, attaching the Custodian's legal certification. The Custodian certifies that he has no personal knowledge of the complaint, answer, any of the court documents, discovery demands, responses to discovery demands, or exhibits entered, if any, in civil legal actions filed by Mr. Jenkins or the Complainant. The Custodian also certifies that he has no personal knowledge of whether the record requested by the Complainant in her OPRA request has been requested in discovery by any party in civil litigation initiated by either Mr. Jenkins or the Complainant. Furthermore, the Custodian certifies that he has no personal knowledge of the relation of the record responsive to the Complainant's OPRA request to any of the civil legal actions filed by Mr. Jenkins or the Complainant. Lastly, the Custodian certifies that he has no personal knowledge of any investigation involving the Complainant.

April 5, 2011

E-mail from the GRC to the Custodian. The GRC requests a legal certification from Ms. Miller certifying the following:

1. Was an investigation opened or initiated regarding any allegations in the responsive memorandum?
2. If so, what was the nature of the investigation and is such investigation concluded?
3. Was any action taken with regard to any individual regarding allegations in the memorandum?
4. If so, what action was taken?

May 4, 2011

E-mail from the Custodian to the GRC, attaching a legal certification from Ms. Miller. Ms. Miller certifies that she is the Deputy Director of the Department of Law and Public Safety's Division of Consumer Affairs, primarily responsible for supervision and management of the Division's consumer protection functions. Ms. Miller also certifies that she received a copy of the record at issue in this Denial of Access Complaint on April 13, 2010. Ms. Miller further certifies that the record contained Mr. Jenkins's observations and views about the Complainant's motives and her perceived agenda to move the LGCCC out of the DCA. Ms. Miller also certified that Mr. Jenkins believed that the Complainant was attempting to quash his attempts to enforce the law and that Mr. Jenkins believed he was being harassed and threatened by the Complainant. Ms. Miller certifies that she provided a copy of this record to Acting Division Director, Sharon Joyce for her review and for any appropriate action. Ms. Miller also certifies that she is not aware of any investigation being opened or initiated regarding any of the allegations contained in the record. Lastly, Ms. Miller certifies that she is not aware of any action having been taken against any individual in connection with the allegations contained in the record.

Analysis

Whether the Custodian complied with the Council's October 26, 2010 Interim Order?

At its October 26, 2010 public meeting, the Council determined that because the Custodian has asserted that the requested record was lawfully denied because the record responsive contains advisory, consultative or deliberative (ACD) material, the Council must determine whether the legal conclusion asserted by the Custodian is properly applied to the record at issue pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005). Therefore, the GRC must conduct an *in camera* review of the requested record to determine the validity of the Custodian's assertion that the requested record was properly denied.

The Council therefore ordered the Custodian to deliver to the Council in a sealed envelope nine (9) copies of the requested unredacted document, a document or redaction index, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, that the document provided is the document requested by the Council for the *in camera* inspection. Such delivery was to be received by the GRC within five (5) business days from receipt of the Council's Interim Order or on November 8, 2010.

The Custodian legally certified that he received the Council's Interim Order on November 4, 2010. The Custodian provided the GRC with a legal certification, the unredacted record requested for the *in camera* inspection and a redaction index on November 10, 2010. Therefore, the Custodian timely complied with the Council's October 26, 2010 Interim Order.

Whether the Custodian unlawfully denied the Complainant access to the memorandum dated April 13, 2010 from Scott Jenkins to Cindy Miller?

OPRA excludes from the definition of a government record "inter-agency or intra-agency advisory, consultative or deliberative material." N.J.S.A. 47:1A-1.1. It is evident that this phrase is intended to exclude from the definition of a government record the types of documents that are the subject of the "deliberative process privilege."

In O'Shea v. West Milford Board of Education, GRC Complaint No. 2004-93 (April 2006), the Council stated that "neither the statute nor the courts have defined the terms... 'advisory, consultative, or deliberative' in the context of the public records law. The Council looks to an analogous concept, the deliberative process privilege, for guidance in the implementation of OPRA's ACD exemption. Both the ACD exemption and the deliberative process privilege enable a governmental entity to shield from disclosure material that is pre-decisional and deliberative in nature. Deliberative material contains opinions, recommendations, or advice about agency policies. In Re the Liquidation of Integrity Insurance Company, 165 N.J. 75, 88 (2000); In re Readoption With Amendments of Death Penalty Regulations, 182 N.J.149 (App. Div. 2004).

The deliberative process privilege is a doctrine that permits government agencies to withhold documents that reflect advisory opinions, recommendations and deliberations submitted as part of a process by which governmental decisions and policies are formulated.

NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150, 95 S. Ct. 1504, 1516, 44 L. Ed. 2d 29, 47 (1975). Specifically, the New Jersey Supreme Court has 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. Education Law Center v. NJ Department of Education, 198 N.J. 274, 966 A.2d 1054, 1069 (2009). This long-recognized privilege is rooted in the concept that the sovereign has an interest in protecting the integrity of its deliberations. The earliest federal case adopting the privilege is Kaiser Alum. & Chem. Corp. v. United States, 157 F. Supp. 939 (1958). The privilege and its rationale were subsequently adopted by the federal district courts and circuit courts of appeal. United States v. Farley, 11 F.3d 1385, 1389 (7th Cir.1993).

The deliberative process privilege was discussed at length in In Re Liquidation of Integrity Insurance Co., 165 N.J. 75 (2000). There, the court addressed the question of whether the Commissioner of Insurance, acting in the capacity of Liquidator of a regulated entity, could protect certain records from disclosure which she claimed contained opinions, recommendations or advice regarding agency policy. *Id.* at 81. The court adopted a qualified deliberative process privilege based upon the holding of McClain v. College Hospital, 99 N.J. 346 (1985), Liquidation of Integrity, *supra*, 165 N.J. at 88. In doing so, the court noted that:

“[a] document must meet two requirements for the deliberative process privilege to apply. First, it must have been generated before the adoption of an agency's policy or decision. In other words, it must be pre-decisional. ... Second, the document must be deliberative in nature, containing opinions, recommendations, or advice about agency policies. ... Purely factual material that does not reflect deliberative processes is not protected. ... Once the government demonstrates that the subject materials meet those threshold requirements, the privilege comes into play. In such circumstances, the government's interest in candor is the "preponderating policy" and, prior to considering specific questions of application, the balance is said to have been struck in favor of non-disclosure.” (Citations omitted.) *Id.* at 84-85.

The court further set out procedural guidelines based upon those discussed in McClain:

“[t]he initial burden falls on the state agency to show that the documents it seeks to shield are pre-decisional and deliberative in nature (containing opinions, recommendations, or advice about agency policies). Once the deliberative nature of the documents is established, there is a presumption against disclosure. The burden then falls on the party seeking discovery to show that his or her compelling or substantial need for the materials overrides the government's interest in non-disclosure. Among the considerations are the importance of the evidence to the movant, its availability from other sources, and the effect of disclosure on frank and independent discussion of contemplated government policies.” In Re Liquidation of Integrity, *supra*, 165 N.J. at 88, *citing McClain*, *supra*, 99 N.J. at 361-62.

In In Re Liquidation of Integrity, *supra*, 165 N.J. at 84-5, the judiciary set forth the legal standard for applying the deliberative process privilege as follows:

- (1) The initial burden falls on the government agency to establish that matters are both *pre-decisional* and *deliberative*.
 - a. Pre-decisional means that the records were generated before an agency adopted or reached its decision or policy.
 - b. Deliberative means that the record contains opinions, recommendations, or advice about agency policies or decisions.
 - i. Deliberative materials do not include purely factual materials.
 - ii. Where factual information is contained in a record that is deliberative, such information must be produced so long as the factual material can be separated from its deliberative context.
 - c. The exemption covers recommendations, draft documents, proposals, suggestions, and other subjective documents *which reflect the personal opinions of the writer rather than the policy of the agency*.
 - d. Documents which are protected by the privilege are those which *would inaccurately reflect or prematurely disclose the views of the agency, suggesting as agency position that which is only a personal position*.
 - e. To test whether disclosure of a document is likely to adversely affect the purposes of the privilege, courts ask themselves *whether the document is so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communications within the agency*.
- (2) Please note that if an *in camera* inspection were conducted by the courts, the process would include the following:

Once it has been determined that a record is deliberative, there is a presumption against disclosure and the party seeking the document has the burden of establishing his or her compelling or substantial need for the record.

- a. That burden can be met by a showing of:
 - i. the importance of the information to the requesting party,
 - ii. its availability from other sources **and**
 - iii. the effect of disclosure on frank and independent discussion of contemplated government policies.

The Custodian asserts that he lawfully denied the Complainant access to the requested record because the opinion and facts contained in the memorandum were so inextricably

intertwined that he denied the record responsive in its entirety. The Custodian also asserts that the requested memorandum contains ACD material which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

The Custodian also certifies that Mr. Jenkins wrote a memorandum to his supervisor, Ms. Miller on April 13, 2010. The Custodian certifies that Mr. Jenkins discussed a number of concerns and issues within the workplace, including the chain of command, the interrelationship between LGCCC and the Office of Consumer Protection, the processing of applications and the conduct of investigations. The Custodian also certifies that the record responsive contained opinions, recommendations, and advice about agency policies and practices. Furthermore, the Custodian certifies that Mr. Jenkins used plain talk and frank uninhibited expression to communicate to Ms. Miller as part of a process to examine existing policies and procedures in the Office of Consumer Protections. The Custodian also certifies that pursuant to Education Law Center v. NJ Department of Education, 198 N.J. 274 (2009), it is the full and frank discussion of ideas in order to develop new policies and examine existing policies that is the hallmark of the deliberative process privilege.

Conversely, the Complainant asserts that the Custodian's denial was unlawful because the requested record is not an inter-agency memorandum because it was written to a supervisor and individuals in other agencies. Furthermore, the Complainant asserts that the requested record might contain erroneous information concerning her both personally and professionally and thus should not be considered privileged.

The GRC conducted an *in camera* examination on the submitted record pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005). The results of this examination are set forth in the following table:

| Record or Redaction Number | Record Name/Date | Description of Record or Redaction | Custodian's Explanation/ Citation for Non-disclosure or Redactions | Findings of the <i>In Camera</i> Examination⁷ |
|-----------------------------------|-----------------------------|---|---|---|
| 1 | Memo from Scott T. Jenkins, | Access to this record was denied in its | This record is exempt from disclosure as | Withhold the record in its entirety, because although it does not contain |

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.

| | | | | |
|--|--|-----------|---|--|
| | Chief of Investigation to Cindy K. Miller, Bureau Chief, dated April 13, 2010 regarding Marilou Halvorsen. | entirety. | advisory, consultative or deliberative materials pursuant to <u>N.J.S.A. 47:1A-1.1.</u> | recommendations, opinions, or advice about agencies policies or decisions, since the record is a factual account of a conversation between Mr. Jenkins and the Complainant written to Mr. Jenkins's supervisor, Mr. Jenkins stated in the record that he believed he was being harassed and threatened by the Complainant. Thus the record responsive is not disclosable pursuant to Executive Order 26 (McGreevey), <u>N.J.S.A. 47:1A-9.a.</u> and <u>N.J.S.A. 4A:7-1 et seq.</u> |
|--|--|-----------|---|--|

The GRC's *in camera* examination of the requested memorandum from Scott Jenkins to Cindy Miller dated April 13, 2010 regarding the Complainant revealed that the memorandum did not contain recommendations, opinions, or advice about agency policies or decisions. However, upon review of said record, the evidence of record indicates that Mr. Jenkins makes an explicit claim "for the record" that he was being harassed and threatened by the Complainant. Thus, the requested record is exempt from disclosure pursuant to Executive Order 26 (McGreevey 2002) as a record of complaint under the New Jersey State Policy Prohibiting Discrimination in the Workplace (*N.J.A.C. 4A:7-3.1 et seq.*).

In addition, in the certification from Ms. Miller to the GRC dated May 4, 2011, Ms. Miller certifies that Mr. Jenkins stated in the responsive record that the Complainant was attempting to quash his attempts to enforce the law and that Mr. Jenkins believed he was being harassed and threatened by the Complainant.

OPRA provides, "[t]he provisions of this act...shall not abrogate any exemption of a public record or government record from public access... made pursuant to Executive Order of the Governor." N.J.S.A. 47:1A-9.a.

Additionally, Paragraph 4 of Executive Order 26 (McGreevey 2002) provides in relevant part as follows:

"The following records shall not be considered to be government records subject to public access pursuant to [OPRA] ...: Records of complaints and investigations undertaken pursuant to the Model Procedures for Internal Complaints Alleging Discrimination, Harassment or Hostile Environments in accordance with the State Policy Prohibiting

Discrimination, Harassment and Hostile Environments in the Workplace adopted by Executive Order No. 106 (Whitman 1999), whether open, closed or inactive.”⁸

The State Policy Prohibiting Discrimination in the Work Place states:

“Supervisors shall make every effort to maintain a work environment that is free from any form of prohibited discrimination/harassment. Supervisors shall immediately refer allegations of prohibited discrimination/harassment to the State agency’s Equal Employment Opportunity/Affirmative Action Office, or any other individual designated by the State agency to receive complaints of workplace discrimination/harassment...” *N.J.A.C. 4A:7-3.1 (e)*

Therefore, because Mr. Jenkins made an explicit claim “for the record” that he felt threatened or harassed by the Complainant, the record responsive is exempt from disclosure pursuant to Executive Order 26 (McGreevey 2002) as a record of complaint under the New Jersey State Policy Prohibiting Discrimination in the Workplace (*N.J.A.C. 4A:7-3.1 et seq.*) and N.J.S.A. 47:1A-9.a.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian has complied with the Council’s October 26, 2010 Interim Order by providing the Council with all records set forth in Paragraph two (2) of the Order within five (5) business days of receiving the Council’s Order.
2. The GRC’s *in camera* examination of the requested memorandum from Scott Jenkins to Cindy Miller dated April 13, 2010 regarding the Complainant revealed that the memorandum did not contain recommendations, opinions, or advice about agencies policies or decisions and as such is not exempt from disclosure as adversary, consultative or deliberative material pursuant to N.J.S.A. 47A:1.1 as asserted by Custodian. However, the requested record should have been denied as a record of complaint under the New Jersey State Policy Prohibiting Discrimination in the Workplace (*N.J.A.C. 4A:7-3.1 et seq.*) pursuant to Executive Order 26 (McGreevey 2002) and N.J.S.A. 47:1A-9.a.

Prepared By: Harlynn A. Lack, Esq.
Case Manager

Approved By: Catherine Starghill, Esq.

⁸ *N.J.A.C. 4A:7-3.1*, Policy Prohibiting Discrimination, Harassment or Hostile Work Environments in the Workplace; Complaint Procedure, and Appeals, was renamed Policy Prohibiting Discrimination in the Workplace; Complaint Procedure, and Appeals, by R.2007 d.244, effective August 20, 2007. See: 39 *N.J.R.* 1340(a), 39 *N.J.R.* 3499(a).

Executive Director

June 21, 2011



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
PO BOX 819
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INTERIM ORDER

October 26, 2010 Government Records Council Meeting

Marilou Halvorsen
Complainant

Complaint No. 2010-114

v.

New Jersey Department of Law & Public Safety,
Division of Consumer Affairs
Custodian of Record

At the October 26, 2010 public meeting, the Government Records Council ("Council") considered the September 13, 2010 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. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the requested record (memorandum dated April 13, 2010 from Mr. Scott Jenkins to Ms. Cindy Miller) to determine the validity of the Custodian's assertion that the record contains advisory, consultative or deliberative material which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
2. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted document (see #1 above), a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4³, that the document provided is the document 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* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

² The document or redaction index should identify the document 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."

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

Interim Order Rendered by the
Government Records Council
On The 26th Day of October, 2010

Robin Berg Tabakin, Chair
Government Records Council

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

Charles A. Richman, Secretary
Government Records Council

Decision Distribution Date: October 28, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
October 26, 2010 Council Meeting**

**Marilou Halvorsen¹
Complainant**

GRC Complaint No. 2010-114

v.

**New Jersey Department of Law and Public Safety,
Division of Consumer Affairs²
Custodian of Records**

Records Relevant to Complaint: A written copy of an e-mail memorandum titled “Incident Commissioner Halvorsen” written by Chief Inspector Scott Jenkins, sent in early April to Cindy Miller, Thomas Hower, Governor’s Authorities Unit and other individuals.

Request Made: May 10, 2010

Response Made: May 17, 2010

Custodian: Bruce J. Solomon

GRC Complaint Filed: June 1, 2010³

Background

May 10, 2010

Complainant’s Open Public Records Act (“OPRA”) request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

May 17, 2010

Custodian’s response to the OPRA request. The Custodian responds in writing to the Complainant’s OPRA request on the fifth (5th) business day following receipt of such request. The Custodian states that access to the requested record, a memorandum dated April 13, 2010, is denied because the memorandum was written by a subordinate to his supervisor and includes inter/intra-agency advisory, consultative or deliberative (ACD) material. The Custodian asserts that the facts and opinions contained in the memorandum are inextricably intertwined.

¹ Represented by Michael Borneo, Esq., of Rispoli, Borneo, & Suthard, P.C. (Elizabeth, NJ).

² Represented by DAG Steven N. Flanzman on behalf of the New Jersey Attorney General.

³ The GRC received the Denial of Access Complaint on said date.

May 24, 2010

E-mail from the Custodian to the Complainant. The Custodian informs the Complainant as to how she can appeal the Agency's decision denying access to the requested records.

June 1, 2010

Denial of Access Complaint filed with the Government Records Council ("GRC") with the following attachments:

- Complainant's OPRA request dated May 10, 2010
- Letter from the Custodian to the Complainant dated May 17, 2010
- Letter from the Custodian to the Complainant dated May 24, 2010

The Complainant states that in late April she asked Cindy Miller and Thomas Hower for a copy of the requested record. The Complainant states that she was told to submit an OPRA request. The Complainant argues that the requested record is not an inter-agency memorandum because this memorandum was written to a supervisor and individuals in other agencies. The Complainant asserts that this memorandum might contain erroneous information concerning her both personally and professionally and thus should not be considered privileged information.

The Complainant does not agree to mediate this complaint.

June 8, 2010

Request for the Statement of Information ("SOI") sent to the Custodian.

June 18, 2010

Letter from GRC to the Custodian. The GRC sends a letter to the Custodian indicating that the GRC provided the Custodian with a request for a Statement of Information on June 8, 2010 and to date has not received a response. Further, the GRC states that if the Statement of Information is not submitted within three (3) business days, the GRC will adjudicate this complaint based solely on the information provided by the Complainant.

June 18, 2010

E-mail from Sharon Joyce, Acting Director of the Division of Consumer Affairs, to the GRC. Ms. Joyce requests an extension of time to submit the SOI.

June 18, 2010

E-mail from the GRC to Ms. Joyce. The GRC grants the Custodian a five (5) business day extension to submit the SOI.

June 25, 2010

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated May 10, 2010
- Letter from the Custodian to the Complainant dated May 17, 2010

The Custodian certifies that he contacted Ms. Joyce upon receipt of the OPRA request and conducted a search of the Division of Consumer Affairs' files in order to identify any record described by the Complainant. The Custodian certifies that he located a two (2) page memorandum from Scott T. Jenkins, Chief Inspector to Cindy Miller, Bureau Chief of the Division of Consumer Affairs (DCA) dated April 13, 2010. The Custodian also certifies that no records responsive to this request have been destroyed.

The Custodian certifies that N.J.S.A. 5:8-1, et seq., created the Legalized Games of Chance Control Commission (LGCCC) within the Division of Consumer Affairs in the Department of Law and Public Safety. The Custodian certifies that the Governor appoints the five (5) commissioners of the LGCCC. The Complainant is one of those commissioners and is currently the Chairperson of the LGCCC. Additionally, the Custodian certifies that Ms. Miller serves as Mr. Jenkins's supervisor.

The Custodian asserts that Mr. Jenkins wrote the subject memorandum to Ms. Miller on April 13, 2010 and therein discussed a number of concerns and issues in the workplace, including the chain of command, the interrelationship between LGCCC and the Office of Consumer Protection, processing of applications and the conduct of investigations. Furthermore, the Custodian asserts that this memorandum contains opinions, recommendations, and advice about agency policies and practices addressed to Ms. Miller. Additionally, the Custodian argues that that the memorandum was written by a subordinate to his supervisor and that the memorandum contained ACD material exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. Furthermore, the Custodian argues that the opinions and facts contained in the memorandum is so inextricably intertwined that it cannot be redacted.

Analysis

Whether the Custodian unlawfully denied access to the requested record?

OPRA provides that:

"...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*" (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

"... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ...The terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material." (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

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 the instant complaint, the Custodian responded to the Complainant’s OPRA request on the fifth (5th) business day following receipt of such request. The Custodian denied access to the responsive memorandum because it is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 and contains ACD material. The Complainant states because that the memorandum was sent to other individuals in different agencies so it is not an inter-agency memorandum.

In Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the Complainant appealed a final decision of the GRC⁴ in which the GRC dismissed the complaint by accepting the Custodian’s legal conclusion for the denial of access without further review. The court stated 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.”

The court also stated that:

“[t]he statute 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-7f. This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.”

Further, the court stated that:

⁴ Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005). Marilou Halvorsen v. NJ Department of Law & Public Safety, Division of Consumer Affairs, 2010-114 – Findings and Recommendations of the Executive Director

“[w]e 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-7f, which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.”

Therefore, pursuant to Paff, *supra*, the GRC must conduct an *in camera* review of the requested record (memorandum dated April 13, 2010 from Mr. Scott Jenkins to Ms. Cindy Miller) to determine the validity of the Custodian’s assertion that the record contains ACD material which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

Whether the Custodian’s failure to disclose the responsive memorandum rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

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. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the requested record (memorandum dated April 13, 2010 from Mr. Scott Jenkins to Ms. Cindy Miller) to determine the validity of the Custodian’s assertion that the record contains advisory, consultative or deliberative material which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
2. **The Custodian must deliver⁵ to the Council in a sealed envelope nine (9) copies of the requested unredacted document (see #1 above), a document or redaction index⁶, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4⁷, that the document provided is the document requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council’s Interim Order.**

⁵ The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

⁶ The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

⁷ "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. 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: Harlynn A. Lack, Esq.
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

September 13, 2010