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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

June 26, 2018 Government Records Council Meeting

Glenn Jones
Complainant
v.
Rutgers, The State University of NJ
Custodian of Record

Complaint No. 2015-202

At the June 26, 2018 public meeting, the Government Records Council ("Council") considered the May 15, 2018 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian complied with the Council's September 26, 2017 Interim Order, because he timely provided the redacted meeting minutes to the Complainant and certified confirmation of compliance to the Executive Director.

2. The original Custodian unlawfully redacted certain excerpts of the requested meeting minutes. N.J.S.A. 47:1A-6. However, the current Custodian complied with the Council's September 26, 2017 Interim Order by providing responsive records to the Complainant on September 28, 2017. Additionally, the evidence of record does not indicate the original Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the original Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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

Final Decision Rendered by the
Government Records Council
On The 26th Day of June, 2018

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: June 29, 2018

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Supplemental Findings and Recommendations of the Council Staff
June 26, 2018 Council Meeting

Glenn Jones[1] **GRC Complaint No. 2015-202**
Complainant

v.

Rutgers, The State University of New Jersey[2]
Custodial Agency

Records Relevant to Complaint: Copies of the following:

1. UMDNJ Board of Trustees Minutes – Public Session – August 2007-March 2008
2. UMDNJ Board of Trustees Minutes – Executive Session – August 2007-March 2008
3. UMDNJ Board of Trustees Minutes – Governance Sub-Committee Minutes – July 2007-March 2008

Custodian of Record: Casey Woods[3]
Request Received by Custodian: May 10, 2015
Response Made by Custodian: May 12, 2015; May 27, 2015; May 29, 2015; June 5, 2015
GRC Complaint Received: July 2, 2015

Background

September 26, 2017 Council Meeting:

At its September 26, 2017 public meeting, the Council considered the September 19, 2017 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. Although the Custodian initially failed to provide all of the requested records, he provided the Executive Director with nine (9) copies of the requested records along with a signed certification within the extended deadline. Therefore, the Custodian complied with the Council's January 31, 2017 Interim Order.

2. With certain exceptions noted within the above table, the Custodian lawfully denied access to the redacted portions of the executive meeting minutes as they contained

[1] No legal representation listed on record.
[2] Represented by Associate General Counsel Elizabeth Minott.
[3] The Records Custodian at the time of the OPRA request was Susan G. Glick; the Custodian who certified to the response to the Interim Order was Daniel E. Faltas, Esq. As of May 26, 2017, the Records Custodian is Casey Woods.

advisory, consultative, or deliberative material pursuant to N.J.S.A. 47:1A-1.1. *See* Educ. Law Ctr. v. N.J. Dep't of Educ., 198 N.J. 274 (2009) and In Re the Liquidation of Integrity Ins. Co., 165 N.J. 75, 88 (2000). Furthermore, the Custodian lawfully denied access to certain redacted sections of the executive meeting minutes under attorney-client privilege pursuant to N.J.S.A. 47:1A-1.1. See Tractenberg v. Twp. of W. Orange, 416 N.J. Super. 354, 376 (App. Div. 2010); In re Envtl. Ins. Declaratory Judgment Actions, 259 N.J. Super. 308, 313 (App. Div. 1992).

3. **The Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order and simultaneously provide certified conformation of compliance pursuant to N.J. Court Rule 1:4-4 to the GRC.[4]**

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

Procedural History:

On September 28, 2017, the Council distributed its Interim Order to all parties. That same day, the Custodian responded to the Council's Interim Order. The Custodian provided a certification stating that he provided responsive records to the Complainant in accordance with the Interim Order.

Analysis

Compliance

At its September 26, 2017 meeting, the Council ordered the Custodian to provide responsive records with redactions to the Complainant and to submit certified confirmation of compliance, in accordance with R. 1:4-4, to the Executive Director. On September 28, 2017 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 October 5, 2017.

On September 28, 2017, the Custodian responded to the Council's Order, certifying that the responsive records were provided to the Complainant on that date.

Therefore, the Custodian complied with the Council's September 26, 2017 Interim Order, because he timely provided the redacted meeting minutes to the Complainant and certified confirmation of compliance to the Executive Director.

[4] 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.

Knowing & Willful

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

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

In the matter before the Council, the original Custodian unlawfully redacted certain excerpts of the requested meeting minutes. N.J.S.A. 47:1A-6. However, the current Custodian complied with the Council's September 26, 2017 Interim Order by providing responsive records to the Complainant on September 28, 2017. Additionally, the evidence of record does not indicate the original Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the original Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. The Custodian complied with the Council's September 26, 2017 Interim Order, because he timely provided the redacted meeting minutes to the Complainant and certified confirmation of compliance to the Executive Director.

2. The original Custodian unlawfully redacted certain excerpts of the requested meeting minutes. N.J.S.A. 47:1A-6. However, the current Custodian complied with the Council's September 26, 2017 Interim Order by providing responsive records to the Complainant on September 28, 2017. Additionally, the evidence of record does not indicate the original Custodian's violation of OPRA had a positive element of

conscious wrongdoing or was intentional and deliberate. Therefore, the original Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: Samuel A. Rosado
Staff Attorney

May 15, 2018[5]

[5] This complaint was prepared for adjudication at the Council's May 22, 2018 meeting but could not be adjudicated due to lack of a quorum.

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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

INTERIM ORDER

September 26, 2017 Government Records Council Meeting

Glenn Jones
Complainant
v.
Rutgers, The State University of New Jersey
Custodian of Record

Complaint No. 2015-202

At the September 26, 2017 public meeting, the Government Records Council ("Council") considered the September 19, 2017 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. Although the Custodian initially failed to provide all of the requested records, he provided the Executive Director with nine (9) copies of the requested records along with a signed certification within the extended deadline. Therefore, the Custodian complied with the Council's January 31, 2017 Interim Order.

2. With certain exceptions noted within the above table, the Custodian lawfully denied access to the redacted portions of the executive meeting minutes as they contained advisory, consultative, or deliberative material pursuant to N.J.S.A. 47:1A-1.1. *See* Educ. Law Ctr. v. NJ Dep't of Educ., 198 N.J. 274 (2009) and In Re the Liquidation of Integrity Ins. Co., 165 N.J. 75, 88 (2000). Furthermore, the Custodian lawfully denied access to certain redacted sections of the executive meeting minutes under attorney-client privilege pursuant to N.J.S.A. 47:1A-1.1. *See* Tractenberg v. Twp. of W. Orange, 416 N.J. Super. 354, 376 (App. Div. 2010); In re Envtl. Ins. Declaratory Judgment Actions, 259 N.J. Super. 308, 313 (App. Div. 1992).

3. **The Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order and simultaneously provide certified conformation of compliance pursuant to N.J. Court Rule 1:4-4 to the GRC.**[1]

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

4. The 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 September, 2017

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: September 28, 2017

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

***In Camera* Findings and Recommendations of the Executive Director**
September 26, 2017 Council Meeting

Glenn Jones[1] **GRC Complaint No. 2015-202**
Complainant

v.

Rutgers, the State University of New Jersey[2]
Custodial Agency

Records Relevant to Complaint: Copies of the following:

1. UMDNJ Board of Trustees Minutes – Public Session – August 2007-March 2008
2. UMDNJ Board of Trustees Minutes – Executive Session – August 2007-March 2008
3. UMDNJ Board of Trustees Minutes – Governance Sub-Committee Minutes – July 2007-March 2008

Custodian of Record: Casey Woods[3]
Request Received by Custodian: May 10, 2015
Response Made by Custodian: May 12, 2015; May 27, 2015; May 29, 2015; June 5, 2015
GRC Complaint Received: July 2, 2015

Records Submitted for *In Camera* Examination: Unredacted copies of Executive Session meeting minutes from September 2007 thru February 2008, which were redacted because they contained advisory, consultative, or deliberative ("ACD") material and/or attorney-client privileged communications.

Background

January 31, 2017 Council Meeting:

At its January 31, 2017 public meeting, the Council considered the January 24, 2017 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

[1] No legal representation listed on record.
[2] Represented by Associate General Counsel Elizabeth Minott.
[3] The Records Custodian at the time of the OPRA request was Susan G. Glick; the Custodian who certified to the response to the Interim Order was Daniel E. Faltas, Esq. As of May 26, 2017, the Records Custodian is Casey Woods.

1. The Council orders the Custodian to disclose the originally approved public minutes for the September 18, 2007 meeting requested by the Complainant, as the Custodian certified that she is in possession of the record and "stands ready" to produce same.

2. **The Custodian shall comply with item #1 above within five (5) business days from receipt of the Council's Interim Order with any appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**

3. The GRC must conduct an *in camera* review of the undisclosed records in order to validate the Custodian's assertions that the documents withheld are, in fact, exempt from disclosure based on OPRA's exemptions for attorney-client privileged and ACD material, pursuant to N.J.S.A. 47:1A-1.1.

4. **The Custodian must deliver to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see #3 above), 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 records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order**.

5. The Custodian has borne her burden of proof that she lawfully denied access to the requested Governance Sub-Committee minutes, because she certified that neither her office nor Ms. Pastva's located records responsive to the request, and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. N.J.S.A. 47:1A- 6; Pusterhofer, GRC 2005-49.

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

Procedural History:

On February 2, 2017, the Council distributed its Interim Order to all parties. The Custodian responded to the Council's Interim Order on February 14, 2017, delivering to the GRC nine unredacted copies of the September 18, 2007 Executive Session minutes and certification stating that the Complainant was provided with a copy of the originally approved public meeting minutes for September 18, 2007.

Analysis

Compliance

At its January 31, 2017 meeting, the Council ordered the Custodian to deliver to the GRC nine (9) copies of the records without redactions for an *in camera* inspection. The Council also

ordered the Custodian to deliver the originally approved public minutes for September 18, 2007, and submit certified confirmation of compliance to the Executive Director. On February 2, 2017, 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 February 9, 2017.

On February 14, 2017, the Custodian delivered nine (9) copies of the Executive Session minutes for September 18, 2007, a document index, and a legal certification with respect to paragraph (1) of the Interim Order. On May 3, 2017, the GRC notified the Custodian that her response was incomplete, as the Interim Order sought unredacted copies of Executive Session minutes for meetings held from September 2007 through February 2008. The GRC granted the Custodian five (5) business days to address the issue.

On May 9, 2017, the Custodian responded in writing, providing nine (9) copies of the requested Executive Session minutes in unredacted form, nine (9) copies of the document index, and a certification to the Executive Director.

Although the Custodian initially failed to provide all of the requested records, he provided the Executive Director with nine (9) copies of the requested records along with a signed certification within the extended deadline. Therefore, the Custodian complied with the Council's January 31, 2017 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.

Advisory, Consultative, or Deliberative Material

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 BOE, GRC Complaint No. 2004-93 (April 2006), the Council stated that:

> [N]either 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 Ins. Co., 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 (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 the decision-making process *and* its disclosure would reveal deliberations that occurred during that process. Educ. Law Ctr. v. NJ Dep't of Educ., 198 N.J. 274 (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 federal district courts and circuit courts of appeal subsequently adopted the privilege and its rationale. United States v. Farley, 11 F.3d 1385, 1389 (7th Cir. 1993).

The Court discussed the deliberative process privilege at length in Integrity, 165 N.J. at 84-88. The issue was 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 McClain v. Coll. Hosp., 99 N.J. 346 (1985). Id. 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.
>
> [Id. at 84-85 (citations omitted).]

The Court also set out procedural guidelines based upon those discussed in McClain:

> The 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.
>
> [Integrity, 165 N.J. at 88 (*citing* McClain, 99 N.J. at 361-62).]

Attorney-Client Privileged Communications

OPRA provides that a "government record" shall not include "any record within the attorney-client privilege." N.J.S.A. 47:1A-1.1. 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 [and] the circumstances indicating the intention of secrecy must appear." Id. at 220-21.

In the context of public entities, the attorney-client privilege extends to communications between the public body, the attorney retained to represent it, necessary intermediaries and agents through whom communications are conveyed, and co-litigants who have employed a lawyer to act for them in a common interest. *See* Tractenberg v. Twp. of W. Orange, 416 N.J. Super. 354, 376 (App. Div. 2010); In re Envtl. Ins. Declaratory Judgment Actions, 259 N.J. Super. 308, 313 (App. Div. 1992).

The GRC conducted an *in camera* examination on the submitted records, consisting of executive session meeting minutes from September 2007 through February 2008. The results of the examination are set forth in the following table:

Record/ Redaction Number	**Record Name/Date**	**Description of Redaction**	**Custodian's Explanation/ Citation for Redactions**	**Findings of the *In Camera* Examination[4]**

[4] **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.

1/2	University of Medicine and Dentistry of New Jersey ("UMDNJ") Board of Trustees Executive Session Minutes – September 18, 2007 (3 pgs.).	Page 1: Under the heading, "Report of the Legal Committee": second half of the first paragraph.	Contains inter-agency or intra-agency advisory, consultative, or deliberative material. N.J.S.A. 47:1A-1.1.	The partial sentence is exempt as it contains advisory material regarding a budget recommendation. N.J.S.A. 47:1A-1.1.
1/2		Page 1: Under the heading, "Report of the Legal Committee": second half of the second paragraph.	Contains inter-agency or intra-agency advisory, consultative, or deliberative material. N.J.S.A. 47:1A-1.1.	The partial sentence is exempt as it contains advisory material regarding a budget recommendation. N.J.S.A. 47:1A-1.1.
1/3		Pages 1-2: Under the heading, "Report of the Legal Committee": starting with the 13th word in the third paragraph through the end of the paragraph.	Contains inter-agency or intra-agency advisory, consultative, or deliberative material. N.J.S.A. 47:1A-1.1.	The paragraph excerpt is exempt as it contains ACD material pertaining to reports on claims adjudication. N.J.S.A. 47:1A-1.1.
1/4		Page 2: Under the heading, "Appropriations Act/Cooper Hospital": third, fourth, and fifth paragraphs.	Contains inter-agency or intra-agency advisory, consultative, or deliberative material. N.J.S.A. 47:1A-1.1.	The paragraphs are exempt as they contain ACD material summarizing advisory opinions from outside counsel. N.J.S.A. 47:1A-1.1.
1/5		Page 2: Under the heading, "Appropriations Act/Cooper Hospital": starting	Contains inter-agency or intra-agency advisory, consultative, or	The excerpt is exempt as it contains ACD material on responding to

		with the sixth word in the eighth paragraph.	deliberative material. N.J.S.A. 47:1A-1.1.	inquiries from the NJ Legislature. N.J.S.A. 47:1A-1.1.
1/6		Page 3: First paragraph; starting with the fourth word of the second sentence through the end of the sentence.	Any record within the attorney-client privilege. N.J.S.A. 47:1A-1.1.	The excerpt is exempt as it contains attorney-client privileged communications pertaining to decisions made based on the advice of counsel. N.J.S.A. 47:1A-1.1.
1/7		Page 3: First paragraph: starting with the fifth word of the third sentence through the end of the sentence.	Any record within the attorney-client privilege. N.J.S.A. 47:1A-1.1.	The excerpt is exempt as it contains attorney-client privileged communications pertaining to opinions from outside counsel. N.J.S.A. 47:1A-1.1.
1/8		Page 3: Second paragraph: starting with the fourth word of the first sentence through the end of the sentence.	Contains inter-agency or intra-agency advisory, consultative, or deliberative material. N.J.S.A. 47:1A-1.1.	The excerpt is exempt as it contains ACD material regarding opinions on funding allocations. N.J.S.A. 47:1A-1.1.
1/9		Page 3: Second paragraph: starting with the fourth word of the second sentence through the end of the sentence.	Contains inter-agency or intra-agency advisory, consultative, or deliberative material. N.J.S.A. 47:1A-1.1.	The excerpt is exempt as it contains ACD material regarding opinions on funding allocations. N.J.S.A. 47:1A-1.1.
1/10		Page 3: Third paragraph; second half of the first	Contains inter-agency or intra-agency	The excerpt is exempt as it contains ACD

		sentence through the second sentence.	advisory, consultative, or deliberative material. N.J.S.A. 47:1A-1.1.	material on responding to inquiries from the NJ legislature and whether to seek advice from counsel. N.J.S.A. 47:1A-1.1.
1/11		Page 3: Fourth paragraph; starting with the fifth word of the second sentence.	Any record within the attorney-client privilege. N.J.S.A. 47:1A-1.1.	The excerpt is exempt as it contains attorney-client privileged communications pertaining to opinions from outside counsel. N.J.S.A. 47:1A-1.1.
1/12		Page 3: Fifth paragraph: starting with the fifth word of the first sentence through the end of the paragraph.	Contains inter-agency or intra-agency advisory, consultative, or deliberative material. N.J.S.A. 47:1A-1.1.	The excerpt is exempt as it contains ACD material regarding school policy. N.J.S.A. 47:1A-1.1.
2/1	UMDNJ Board of Trustees Executive Session Minutes – October 16, 2007 (3 pgs.)	Page 1-2: Under heading "Cooper Hospital": starting with the ninth word in the paragraph through the end of the paragraph.	Contains inter-agency or intra-agency advisory, consultative, or deliberative material. N.J.S.A. 47:1A-1.1.	The excerpt is exempt as it contains ACD material regarding the school funding. N.J.S.A. 47:1A-1.1.
2/2		Page 2: Under the heading "Performance Evaluation: Michael R. Clarke, Esq.": starting with the seventh word in the paragraph through the end of the	Contains inter-agency or intra-agency advisory, consultative, or deliberative material. N.J.S.A. 47:1A-1.1.	The excerpt is exempt as it contains ACD material pertaining to an employee's performance evaluations and agency

		section.		organization changes. N.J.S.A. 47:1A-1.1.
2/3		Page 2: Under the heading "Board Structure: Board of Concerned Citizens": Starting in the middle of the first paragraph through the end of the paragraph.	Contains inter-agency or intra-agency advisory, consultative, or deliberative material. N.J.S.A. 47:1A-1.1.	The excerpt is exempt as it contains ACD material pertaining to a board's structural organization. N.J.S.A. 47:1A-1.1.
2/4		Page 2: Under the heading "Report of the Legal Committee": Entire paragraph.	Contains inter-agency or intra-agency advisory, consultative, or deliberative material. N.J.S.A. 47:1A-1.1.	The excerpt is not ACD material as it states a board's final decision will be approved in Public Session. **Therefore, the Custodian unlawfully denied access to this excerpt and must disclose same.**
2/5		Page 2: Under the heading "Other Business": Entire paragraph.	Contains inter-agency or intra-agency advisory, consultative, or deliberative material. N.J.S.A. 47:1A-1.1.	The excerpt is exempt as it contains ACD material regarding guidelines, and university accounting methods. N.J.S.A. 47:1A-1.1.
3/1	UMDNJ Board of Trustees Executive Session Minutes – November 20, 2007 (6 pgs.)	Page 1-2: Under the heading "Ethics and Compliance Ad Hoc Committee Report, provided by Mr. Del Tufo": latter half of the first sentence, then the entirety of the first 6 bullet points.	Contains inter-agency or intra-agency advisory, consultative, or deliberative material. N.J.S.A. 47:1A-1.1.	The excerpt is exempt as it contains ACD material pertaining to employee contracts, compensation, and qualifications, as well as the potential make-up of the ad hoc

				committee, except for the latter half the first sentence. N.J.S.A.47:1A-1.1. **For that portion of the excerpt, the Custodian unlawfully denied access and must disclose same.**
3/2		Page 2: Second sentence of the seventh bullet point through the eighth bullet point.	Contains inter-agency or intra-agency advisory, consultative, or deliberative material. N.J.S.A. 47:1A-1.1.material.	The excerpt is exempt as it contains ACD material pertaining to performance and reformation of the ad hoc committee. N.J.S.A. 47:1A-1.1.
3/3		Page 2-4: Second sentence of the ninth bullet point through the tenth bullet point, ending at the middle of page 4.	Contains inter-agency or intra-agency advisory, consultative, or deliberative material. N.J.S.A. 47:1A-1.1.	The excerpt is exempt as it contains ACD material pertaining to performance and reformation of the ad hoc committee. N.J.S.A. 47:1A-1.1.
3/4		Page 4: Below the line, "Judge Stern excused himself . . .": entire first paragraph, and entire second paragraph after the first nine (9) words.	Contains inter-agency or intra-agency advisory, consultative, or deliberative material. N.J.S.A. 47:1A-1.1.	The excerpt is exempt as it contains ACD material pertaining to continued discussions on reformation suggestions for the ad hoc committee. N.J.S.A. 47:1A-1.1.

3/5		Page 4: Under the heading, "Personnel Actions, provided by Dr. Owen": both paragraphs in their entirety.	Contains inter-agency or intra-agency advisory, consultative, or deliberative material. N.J.S.A. 47:1A-1.1.	The excerpt is exempt as it contains ACD material pertaining continued discussions on reformation suggestions for the ad hoc committee. N.J.S.A. 47:1A-1.1.
		Page 5: Under the heading, "University Physicians Association (UPA) Update, proved by Dr. Owen": all seven (7) bullet points and the first sentence thereafter following the first seven (7) words.	Contains inter-agency or intra-agency advisory, consultative, or deliberative material. N.J.S.A. 47:1A-1.1.	The excerpt is exempt as it contains ACD material pertaining to the structure and organization of the UPA. N.J.S.A. 47:1A-1.1.
3/6		Page 6: Second half of the first paragraph after the word "proposal," through the next three (3) paragraphs. Then the second sentence of the last paragraph.	Contains inter-agency or intra-agency advisory, consultative, or deliberative material. N.J.S.A. 47:1A-1.1.	The excerpt is exempt as it contains ACD material regarding the use of funds from State appropriations. N.J.S.A. 47:1A-1.1.
3/7		Page 6: Below the line "Discussion of Claims": both paragraphs in their entirety.	Contains inter-agency or intra-agency advisory, consultative, or deliberative material. N.J.S.A. 47:1A-1.1.	The excerpt is exempt as it contains ACD material pertaining to reports on claims adjudication. N.J.S.A. 47:1A-1.1.
4/1	UMDNJ Board of Trustees Executive	Page 1: First paragraph under the heading, "Minutes" starting with the	Contains inter-agency or intra-agency advisory,	The excerpt is exempt as it contains ACD material

	Session Minutes – December 13, 2007 (3 pgs.).	thirteenth word to the end of the paragraph.	consultative, or deliberative material. N.J.S.A. 47:1A-1.1.	pertaining to university operations policy. N.J.S.A. 47:1A-1.1.
4/2		Page 1-2: Four bullet points, then the remaining paragraphs after "Dr. Owen stated" to before "WHEREUPON . . ." begins.	Contains inter-agency or intra-agency advisory, consultative, or deliberative material. N.J.S.A. 47:1A-1.1.	The excerpt is exempt as it contains advisory and consultative material pertaining to university policy operations. N.J.S.A.47:1A-1.1.
4/3		Page 3: Entire paragraph beginning after the first six (6) words.	Contains inter-agency or intra-agency advisory, consultative, or deliberative material. N.J.S.A. 47:1A-1.1.	The redacted portion of the first sentence does not contain ACD material as it only refers to an announcement. **Therefore the Custodian unlawfully denied access to this portion of the excerpt and must disclose same.** The remainder of the excerpt is exempt as containing advisory material on the selection of personnel. N.J.S.A. 47:1A-1.1.
5/1	UMDNJ Board of Trustees Executive Session Minutes –	Page 1-2: Last three paragraphs of the page, then the first paragraph of the second page starting in the middle of the	Contains inter-agency or intra-agency advisory, consultative, or deliberative	The paragraphs are exempt as they contain advisory material from the legal committee. N.J.S.A. 47:1A-

	January 15, 2008 (3 pgs.)	first sentence.	material. N.J.S.A. 47:1A-1.1.	1.1.
5/2		Page 2: Under the heading "Robert Wood Johnson Medical School (Camden Campus) Update, provided by Dr. Owen": last sentence of the main paragraph starting after the first three (3) words.	Contains inter-agency or intra-agency advisory, consultative, or deliberative material. N.J.S.A. 47:1A-1.1.	The partial sentence is exempt as containing advisory material regarding a proposed agreement between the University and Cooper Hospital. N.J.S.A. 47:1A-1.1.
5/3		Page 2-3: Under the heading "New Jersey Department of Corrections Update, provided by Mr. Kosseff": the second and third bullet points, and the second half of the second sentence within the fifth bullet point. Additionally, the last sentence starting with the fifth (5^{th}) word.	Contains inter-agency or intra-agency advisory, consultative, or deliberative material. N.J.S.A. 47:1A-1.1.	The excerpt is exempt as it contains ACD material pertaining to healthcare operations for inmates. N.J.S.A. 47:1A-1.1.
6/1	UMDNJ Board of Trustees Executive Session Minutes – February 19, 2008 (3 pgs.)	Page 1-2: Under the heading "Report to the Board on the UMDNJ-Office of Ethics and Compliance, by Mr. Kaplan": Second paragraph through the end of the section on page 2.	Contains inter-agency or intra-agency advisory, consultative, or deliberative material. N.J.S.A. 47:1A-1.1. Also contains attorney-client privileged communications	The excerpt is exempt as containing attorney-client privileged communications between the Board and counsel regarding the structure of the Office of Ethics and Compliance. N.J.S.A.47:1A-1.1.

			. N.J.S.A. 47:1A-1.1.	The excerpt also contains ACD material by and amongst members of the Board and Counsel regarding potential reforms to the Office of Ethics and Compliance. N.J.S.A. 47:1A-1.1.
6/2		Page 2-3: Under the heading "University Physicians Association (UPA) Update, by Dr. Owen": Beginning with the fifth word of the second sentence through the end of the section.	Contains inter-agency or intra-agency advisory, consultative, or deliberative material. N.J.S.A. 47:1A-1.1.	The excerpt is exempt as it contains consultative and deliberative material regard the relationship between the University and the UPA. N.J.S.A. 47:1A-1.1.
6/3		Page 3: Under the heading "Legal Committee, by Mr. Hoffman": First two (2) paragraphs below the line "Discussion on Claims." Then third paragraph after the first six (6) words.	Contains inter-agency or intra-agency advisory, consultative, or deliberative material. N.J.S.A. 47:1A-1.1.	The excerpt is exempt as it contains ACD material pertaining to reports on settlement negotiations. N.J.S.A. 47:1A-1.1.
6/4		Page 3: Under the heading "Correctional Physical Health Care, by Mr. Kosseff": starting after the fifteenth word in the first sentence to the end of the paragraph. Then after the seventh word of the second paragraph to	Contains inter-agency or intra-agency advisory, consultative, or deliberative material. N.J.S.A. 47:1A-1.1.	The excerpt is exempt as it contains advisory and consultative material regarding healthcare operations for inmates. N.J.S.A. 47:1A-1.1.

		the end.		

With certain exceptions noted within the above table, the Custodian lawfully denied access to the redacted portions of the executive meeting minutes as they contained ACD material pursuant to N.J.S.A. 47:1A-1.1. *See* Educ. Law Ctr. v. NJ Dep't of Educ., 198 N.J. 274 (2009) and Integrity, 165 N.J. at 84-88. Furthermore, the Custodian lawfully denied access to certain redacted sections of the executive meeting minutes under attorney-client privilege pursuant to N.J.S.A. 47:1A-1.1. *See* Tractenberg, 416 N.J. Super. at 376 and In re Envtl. Ins., 259 N.J. Super. at 313.

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. Although the Custodian initially failed to provide all of the requested records, he provided the Executive Director with nine (9) copies of the requested records along with a signed certification within the extended deadline. Therefore, the Custodian complied with the Council's January 31, 2017 Interim Order.

2. With certain exceptions noted within the above table, the Custodian lawfully denied access to the redacted portions of the executive meeting minutes as they contained advisory, consultative, or deliberative material pursuant to N.J.S.A. 47:1A-1.1. *See* Educ. Law Ctr. v. NJ Dep't of Educ., 198 N.J. 274 (2009) and In Re the Liquidation of Integrity Ins. Co., 165 N.J. 75, 88 (2000). Furthermore, the Custodian lawfully denied access to certain redacted sections of the executive meeting minutes under attorney-client privilege pursuant to N.J.S.A. 47:1A-1.1. *See* Tractenberg v. Twp. of W. Orange, 416 N.J. Super. 354, 376 (App. Div. 2010); In re Envtl. Ins. Declaratory Judgment Actions, 259 N.J. Super. 308, 313 (App. Div. 1992).

3. **The Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order and simultaneously provide certified conformation of compliance pursuant to N.J. Court Rule 1:4-4 to the GRC.**[5]

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

4. The 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: Samuel A. Rosado
Staff Attorney

September 19, 2017

State of New Jersey
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Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

INTERIM ORDER

January 31, 2017 Government Records Council Meeting

Glenn Jones
Complainant
v.
Rutgers, The State University of NJ
Custodian of Record

Complaint No. 2015-202

At the January 31, 2017 public meeting, the Government Records Council ("Council") considered the January 24, 2017 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 Council orders the Custodian to disclose the originally approved public minutes for the September 18, 2007 meeting requested by the Complainant, as the Custodian certified that she is in possession of the record and "stands ready" to produce same.

2. **The Custodian shall comply with item #1 above within five (5) business days from receipt of the Council's Interim Order with any appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,[1] to the Executive Director.[2]**

3. The GRC must conduct an *in camera* review of the undisclosed records in order to validate the Custodian's assertions that the documents withheld are, in fact, exempt from disclosure based on OPRA's exemptions for attorney-client privileged and ACD material, pursuant to N.J.S.A. 47:1A-1.1.

4. **The Custodian must deliver[3] to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see #3 above), a document or redaction**

[1] "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."
[2] 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.
[3] The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

index[4], as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,[5] that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.

5. The Custodian has borne her burden of proof that she lawfully denied access to the requested Governance Sub-Committee minutes, because she certified that neither her office nor Ms. Pastva's located records responsive to the request, and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. N.J.S.A. 47:1A- 6; Pusterhofer, GRC 2005-49.

6. 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 31st Day of January, 2017

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: February 2, 2017

[4] The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.
[5] "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Findings and Recommendations of the Executive Director
January 31, 2017 Council Meeting

Glenn Jones[1] **GRC Complaint No. 2015-202**
Complainant

v.

Rutgers, The State University of New Jersey[2]
Custodial Agency

Records Relevant to Complaint: Copies of the following:

1. UMDNJ Board of Trustees Minutes – Public Session – August 2007-March 2008
2. UMDNJ Board of Trustees Minutes – Executive Session – August 2007-March 2008
3. UMDNJ Board of Trustees Minutes – Governance Sub-Committee Minutes – July 2007-March 2008

Custodian of Record: Susan G. Glick
Request Received by Custodian: May 10, 2015
Response Made by Custodian: May 12, 2015; May 27, 2015; May 29, 2015; June 5, 2015
GRC Complaint Received: July 2, 2015

Background[3]

Request and Response:

On May 10, 2015, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. The Custodian's Counsel responded on May 12, 2015, seeking an extension of time to respond until May 29, 2015. On May 26, 2015, the Complainant wrote to the Custodian, seeking a status update. On May 27, 2015, the Custodian's Counsel replied and forwarded her May 12, 2015 e-mail seeking an extension. The Complainant replied that same day, thanking the Custodian's Counsel for her response and noting that for some reason, he never received the earlier May 12, 2015 e-mail.

On May 29, 2015, the Custodian's Counsel wrote to the Complainant and advised that her office was still awaiting responsive documents from the Office of the Secretary and processing additional responsive documents. She requested a second extension, until June 5,

[1] No legal representation listed on record.
[2] Represented by Rutgers Compliance Associate Elizabeth V. Gilligan, Esq.
[3] The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

2015. On June 5, 2015, Ms. Gilligan responded to the Complainant in writing, attaching a letter regarding the request, the responsive records located, and a document titled "Guide to OPRA."

The Custodian's Counsel's letter stated that, in response to item 1, she was attaching the following six (6) items: Board of Trustee Public Meeting Minutes for September 2007, October 2007, November 2007, December 2007, January 2008, and February 2008.

With respect to Item 2, Ms. Gilligan's letter stated that she was attaching the following seven (7) items, with redactions: Board of Trustees Executive Session Meeting Minutes for August 2007, September 2007, October 2007, November 2007, December 2007, January 2008, and February 2008.

Ms. Gilligan asserted the University's belief that they were not obligated to release these documents but was doing so as a "courtesy." She further noted that various portions of the attached documents were redacted, pursuant to N.J.S.A. 47:1A-1.1, which exempts inter-agency or intra-agency advisory, consultative, or deliberative ("ACD") materials. See also Ciesla v. N.J. Dept. of Health & Senior Servs., 429 N.J. Super. 127, 137 (App. Div. 2012); Education Law Center v. N.J. Dept. of Educ., 198 N.J. 274, 285-86 (2009); Gannett N.J. Partners, L.P. v. County of Middlesex, 379 N.J. Super. 205, 218 (App. Div. 2005).

With respect to Item 3, Ms. Gilligan denied this portion of the request, stating that the Office of the Secretary of the University conducted a search and found no existing responsive documents for the requested time period.

The Complainant replied on June 8, 2015, stating that not all of the documents were forwarded. He stated that instead of the September 2007 redacted Executive Session Minutes, Ms. Gilligan supplied a document labeled "September 18, 2007 Board of Trustee Minutes," which indicated a revision "to State on October 17, 2007." He clarified that he had requested "original and revised copies" of Board Meeting Minutes from September 18, 2007, if a board meeting took place, and additionally a copy of the September 18, 2007 Executive Session Minutes. The Complainant noted that the October 16, 2007 Executive Session Minutes made reference to the September 18, 2007 Executive Session Minutes, so he "assume[d] those documents do exist."

The Complainant further noted that the October 16, 2007 Executive Session Minutes referenced a scheduled Governance, Ethics Committee meeting prior to the next October 2007 Board meeting. He argued that the response that no responsive documents exist would "appear to be unjustified." He further objected to the "overly broad nature" of the redactions and urged Ms. Gilligan to "reconsider [her] approach."

On June 16, 2015, Ms. Gilligan responded to the Complainant, advising that she was out of the office the previous week and that her office was reviewing his e-mail and taking his comments under advisement. She stated, "I expect we'll get back to you within the next week or so."

On June 24, 2015, the Complainant wrote to Ms. Gilligan, seeking a response as to whether any additional documents would be produced in response to his OPRA request. He advised that if additional documents or an explanation were not provided by the end of the week, he would file a complaint with the Government Records Council ("GRC"). On June 25, 2015, Ms. Gilligan replied, reiterating that her office was reviewing his request and taking his comments "very seriously." She stated that her office was contacting various parties to obtain any missing documents. She wrote that her office appreciated his patience and "respectfully ask[s] for a bit more." Ms. Gilligan also noted that she would be away from the office from Monday to Wednesday of the next week but that the e-mail inbox would be monitored by the Records Custodian Susan Glick.

Denial of Access Complaint:

On June 29, 2015, the Complainant submitted a Denial of Access Complaint to the GRC. The Complainant asserted that his request was partially denied. With respect to item 1, the Complainant alleged that Rutgers had failed to produce "the official original September 18, 2007 Board of Trustees minutes" previously available on the "UMDNJ.edu" website, prior to the Rutgers/UMDNJ merger. The Complainant alleged that Rutgers had modified the September 18, 2007 BOT minutes to indicate a revision made on October 17, 2007. The Complainant alleged, however, that as of July 2012, this "modification" was not contained on the document available on the public website. The Complainant additionally stated that the above-mentioned revision would have occurred on October 16, 2007, as confirmed by the minutes from the BOT public session of that day, and not October 17, 2007.

The Complainant further alleged, with respect to item 1, that Rutgers "failed to produce" the September 18, 2007 Executive Session Minutes and the original unredacted September 18, 2007 BOT-Public Session minutes. The Complainant additionally contended that "sometime after July 2012," the September 18, 2007 Public Session minutes were modified to include a resolution (regarding a $4 million transfer) because of an "alleged conclu[sion]" from UMDNJ in the September 18, 2007 public session. The Complainant asserted that, in reality, the unproduced September 18, 2007 Executive Session minutes show that the Board acknowledged its previous determination that they had actually decided not to transfer the $4 million to RWJ Medical School Camden-Cooper Hospital, in part based on advice received from a new employee, the Complainant. The Complainant stated that while UMDNJ did subsequently decide to transfer the funds, this was done after the September 18, 2007 meeting.

The Complainant also alleged that the September 18, 2007 Public Session minutes and many of the other Public Session minutes and Executive Session minutes have been "modified" to omit the attendance of then-General Counsel Lester Aron. The Complainant stated he was "unaware of any privilege that would sanction changing public records to hide a person's attendance at a meeting." He argued that Rutgers should be "compelled" to produce the original unmodified public records, not the "modified false copies" submitted in response to his OPRA request.

With respect to item 2, the Executive Session minutes, the Complainant reiterated that he sought "only . . . the information topics outlined in Item 1 above." He further stated that "matters

truly related to personnel issues or legal claims in the Executive Session minutes are not being sought." The Complainant stated Rutgers had "refused" to provide "even a redacted version" of the Executive Session minutes. The Complainant additionally argued that under OPRA, all matters in Executive Session must be made public when the matters are no longer confidential. He argued that the documents requested are from 2007-2008 and concern UMDNJ, which has "ceased to exist as an entity." He disputed Rutgers' claim that the deliberative privilege is "eternal," arguing that this deliberative privilege does not "extend to the exclusion of the speaker's name or the topic that was discussed in Executive Session." He further disputed the "reliance on the attorney-client privilege" as he claimed that the record produced did not indicate "that any one spoke as an attorney providing legal counsel."

With respect to item 3, the Complainant disputed Rutgers' response that no responsive records existed. He argued that the October and November 2007 Board of Trustee Public Session minutes indicated that the Governance Subcommittee meeting was scheduled and had minutes approved during this time period. He asserted that this evidenced that responsive documents do exist and that Rutgers should made to produce all responsive documents.

Statement of Information:

On August 14, 2015, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on May 10, 2015. The Custodian certified that she responded in writing on June 5, 2015.

The Custodian listed the records responsive to the Complainant's OPRA request as follows:

- February 2008 Board of Trustees Public Meeting Minutes (9 pages)
- January 2008 Board of Trustees Public Meeting Minutes (14 pages)
- December 2007 Board of Trustees Public Meeting Minutes (2 pages)
- November 2007 Board of Trustees Public Meeting Minutes (6 pages)
- October 2007 Board of Trustees Public Meeting Minutes (6 pages)
- September 2007 Board of Trustee Public Meeting Minutes (8 pages)
- February 2008 Board of Trustees Executive Session Meeting Minutes (3 pages, with redactions)
- January 2008 Board of Trustees Executive Session Meeting Minutes (3 pages, with redactions)
- December 2007 Board of Trustees Executive Session Meeting Minutes (3 pages, with redactions)
- November 2007 Board of Trustees Executive Session Meeting Minutes (6 pages, with redactions)
- October 2007 Board of Trustees Executive Session Meeting Minutes (3 pages, with redactions)
- September 2007 Board of Trustees Executive Session Meeting Minutes (3 pages, with redactions).

The Custodian certified that the University disclosed all of the above-mentioned record to the Complainant. She certified that her office undertook a "diligent search" to obtain the requested records. She averred that she and her staff contacted the Office of the Secretary of the University, where the requested records are stored.

She certified that Kimberlee Pastva, the Interim Secretary of the University, conducted a search for the records among the UMDNJ archives housed in her office. The Custodian averred that Ms. Pastva produced the requested documents, with the exception of the third part of the request – "UMDNJ Governance Subcommittee meeting Minutes July 1, 2007 – March 1, 2008." The Custodian stated that although it was the University's position that such minutes would not be required to be released under OPRA, Ms. Pastva still conducted a search and stated that no responsive documents were found.

The Custodian additionally certified that, apart from Ms. Pastva's efforts, the Records Custodian also contacted Robert Vietrogoski, of the Special Collections, History of Medicine section within the George F. Smith Library of the Health Sciences. She averred that Mr. Vietrogoski was unable to produce documents responsive to part three of the request, certifying that it was "concluded that documents responsive to the third part of this request do not exist."

The Custodian noted that the Complainant asserted that the University failed to "produce a superseded version of the September 18, 2007 public session minutes." She argued that the Complainant's request did not explicitly seek superseded minutes, and that once the Complainant explained that he sought such minutes, the University researched the issue and confirmed the existence of the superseded minutes. The Custodian averred that she thereafter obtained a copy of the superseded minutes and "stands ready to produce same."

The Custodian argued that, because the Complainant's request did not explicitly seek superseded minutes, she was under no obligation to conduct research to determine whether superseded documents exist and therefore satisfied its obligations under OPRA. As to the Complainant's assertion that the public session minutes of the September 18, 2007 meeting and "many of the other Public Session Minutes and Executive Session minutes" have been modified to omit the presence of General Counsel Lester Aron, the Custodian stated that the University has located and "stands ready" to produce the superseded September 18, 2007 minutes and previously disclosed minutes, the content of which "speak for themselves."

The Custodian stated that if the Complainant specifically identified other minutes that he contends were modified, the University would conduct a search to determine whether superseded versions existed. However, the Custodian argued that the University's position is that if such material existed, it may be considered advisory, consultative, or deliberative material ("ACD") that is expressly excluded from the definition of government records under N.J.S.A. 47:1A-1.1.

With respect to the Complainant's assertion that the public session minutes of October and November 2007 meetings indicated that "Governance subcommittee meeting were scheduled" and "minutes [were] approved during this time period," the Custodian argued that the excerpts cited by the Complainant actually make no reference to the existence of minutes from the October 9, 2007 meeting of the Governance and Ethics committee or of any other meeting of

that subcommittee. The Custodian argued that while the excerpts make reference to the approval of executive session minutes, they "make no reference whatsoever to approval of any minutes of the Governance subcommittee."

The Custodian also argued that while the University's initial denial was due to not locating any responsive documents, the request is also subject to denial on the ground that the requested minutes are not government records pursuant to N.J.S.A. 47:1A-1.1. The Custodian asserted that a board subcommittee's function is to consult and deliberate over matters within its purview and then recommend courses of action to the institution's governing body. The Custodian thereafter argued that such subcommittees are therefore purely advisory and consultative bodies with no lawful authority to act on behalf a public agency. The Custodian then suggested that even if such minutes were to exist, they would constitute ACD material expressly excluded from OPRA's definition of government records.

The Custodian additionally attached, as Exhibit A and Exhibit B, certifications from herself and Ms. Pastva. In the Custodian's certification, she reiterated that her office conducted a "diligent search" for the requested subcommittee minutes and found no documents. She certified that she therefore does "not believe they exist."

Ms. Pastva's certification also concerned the governance subcommittee minutes. She averred that she conducted a "diligent search" within her department, which holds all legacy UMDNJ records of governance, and found no responsive documents. She certified that she therefore "[does] not believe they exist."

Additional Submissions:

On August 26, 2015, the Complainant wrote to the GRC, in response to the Custodian's SOI. He noted that although the University acknowledged the existence of September 18, 2007 Executive Session Minutes, those minutes were not disclosed to the Complainant as part of the SOI response. He argued that the University's "continued" failure to produce the document was a violation of OPRA.

He also noted the Custodian's statement that they possessed the original/superseded September 18, 2007 BOT Public Session Minutes but did not produce them because the original minutes were not specifically requested. The Complainant argued that in his June 8, 2015 e-mail response to the University's initial June 5, 2015 disclosure, he requested "If there was a Board meeting on September 18, 2007, I would like a copy of those minutes, (original and revised copies) as this was part of my original request." He argued that the University's "continued" failure to produce these original minutes was a violation of OPRA. He stated that OPRA required documents be produced, "not that the government agency 'stands ready to produce' them."

He also argued that the University had "ignored" an obligation to make Executive Session matters public when the reason for the privilege no longer exists. He reiterated that his request sought matters in Executive Session related to Cooper Hospital and the transfer of funds from UMDNJ to Cooper. He argued that the University's redactions were unlawful, as the

September 18, 2007 Public Session minutes indicated that the Board had approved a resolution transferring funds from UMDNJ to Cooper in Executive Session.

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.

Item 1: Public Session Minutes

The Custodian certified that in response to item 1 of the request, the University produced six (6) responsive records, consisting of Public Meeting Minutes from September 2007 to February 2008. The Complainant disputed the September 18, 2007 Public Session minutes he received, arguing that they were "modified" and did not reflect the previous "official original" minutes available on the UMDNJ website. In her SOI, the Custodian argued that, while the Complainant's request did not "explicitly seek superseded minutes," she thereafter obtained a copy of the original public minutes and stood "ready to produce" the records.

The Council therefore orders the Custodian to disclose the originally approved public minutes for the September 18, 2007 meeting requested by the Complainant, as the Custodian certified that she is in possession of the record and "stands ready" to produce same.

Item 2: Executive Session Minutes

In Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the GRC, which 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.
>
> Paff, 379 N.J. Super. at 354.

The court also stated that:

> The statute . . . 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 10:4-21, 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 stated that:

> We hold only that GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal…There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC's obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7(f), which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.

Id.

Here, the Custodian has argued that the responsive Executive Session minutes provided to the Complainant were redacted pursuant to N.J.S.A. 47:1A-1.1, as inter-agency or intra-agency advisory, consultative, or deliberative ("ACD") material and attorney-client privileged material. Without inspecting the withheld records, and in light of the Custodian's burden to prove a lawful denial of access, the GRC cannot conduct the "meaningful review of the basis for an agency's decision to withhold government records" contemplated under OPRA. Id. at 354.

Therefore, the GRC must conduct an *in camera* review of the undisclosed records in order to validate the Custodian's assertions that the documents withheld are, in fact, exempt from disclosure based on OPRA's exemptions for attorney-client privileged and ACD material, pursuant to N.J.S.A. 47:1A-1.1.

Item 3: Governance Sub-Committee Minutes

The Council has previously found that, in light of a custodian's certification that no records responsive to the request exist, and where no evidence exists in the record to refute the custodian's certification, no unlawful denial of access occurred. See Pusterhofer, GRC 2005-49 (July 2005). Here, the Custodian certified in her SOI, and included an additional certification from Interim Secretary Ms. Pastva, that her office conducted a diligent search for the requested subcommittee minutes and located no responsive records. Ms. Pastva additionally certified to her belief that such records do not exist.

With respect to the Complainant's assertion that the public session minutes of October and November 2007 meetings indicated that "Governance subcommittee meeting [*sic*] were scheduled" and "minutes [were] approved during this time period," the Custodian argued that the

excerpts cited by the Complainant actually made no reference to the existence of minutes from the October 9, 2007 meeting of the Governance and Ethics committee or of any other meeting of that subcommittee. The Complainant provided no additional evidence to counteract the Custodian's certification.

Therefore, the Custodian has borne her burden of proof that she lawfully denied access to the requested Governance Sub-Committee minutes, because she certified that neither her office nor Ms. Pastva's located records responsive to the request, and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. N.J.S.A. 47:1A- 6; Pusterhofer, GRC 2005-49.

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 Council orders the Custodian to disclose the originally approved public minutes for the September 18, 2007 meeting requested by the Complainant, as the Custodian certified that she is in possession of the record and "stands ready" to produce same.

2. **The Custodian shall comply with item #1 above within five (5) business days from receipt of the Council's Interim Order with any appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,[4] to the Executive Director.[5]**

3. The GRC must conduct an *in camera* review of the undisclosed records in order to validate the Custodian's assertions that the documents withheld are, in fact, exempt from disclosure based on OPRA's exemptions for attorney-client privileged and ACD material, pursuant to N.J.S.A. 47:1A-1.1.

4. **The Custodian must deliver[6] to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see #3 above), a document or redaction**

[4] "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."

[5] 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.

[6] The *in camera* records 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.

index[7], as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,[8] that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.

5. The Custodian has borne her burden of proof that she lawfully denied access to the requested Governance Sub-Committee minutes, because she certified that neither her office nor Ms. Pastva's located records responsive to the request, and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. N.J.S.A. 47:1A- 6; Pusterhofer, GRC 2005-49.

6. 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: Husna Kazmir
Staff Attorney

January 24, 2017

[7] The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.
[8] "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."