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

May 18, 2021 Government Records Council Meeting

Luis Rodriguez
Complainant
v.
Kean University
Custodian of Record

Complaint No. 2015-290

At the May 18, 2021 public meeting, the Government Records Council ("Council") considered the May 11, 2021 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that Complainant's Counsel failed to comply with the Council's Interim Order because he did not submit an application for attorney's fees within the prescribed deadline. N.J.A.C. 5:105-2.13(b). Accordingly, the Council should dismiss this matter as no further analysis is necessary.

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 18th Day of May 2021

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: May 20, 2021

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Prevailing Party Attorney's Fees
Supplemental Findings and Recommendations of the Executive Director
May 18, 2021 Council Meeting

Luis Rodriguez[1]
Complainant

GRC Complaint No. 2015-290

v.

Kean University[2]
Custodial Agency

Records Relevant to Complaint: Electronic copy via e-mail of the "97th Day of Registration Term Comparison" report ("Report") for "13/FA to 15/FA" (as of April 8, 2015).

Custodian of Record: Laura Barkley Haelig
Request Received by Custodian: July 13, 2015
Response Made by Custodian: July 23, 2015
GRC Complaint Received: September 10, 2015

Background

January 26, 2021 Council Meeting:

At its January 26, 2021 public meeting, the Council considered the January 19, 2021 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian complied with the Council's July 25, 2017 Interim Order because she responded in the extended time frame disclosing the report "most current to, and preceding" the date of the Complainant's OPRA request. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.

2. Although the Custodian unlawfully denied access to the requested Report, she ultimately complied with the Council's July 25, 2017 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore,

[1] Represented by Walter M. Luers, Esq., of Cohn, Lifland, Pearlman, Herrmann & Knopf, LLP. (Saddle Brook, NJ). Mr. Luers entered his appearance on September 14, 2017.
[2] Represented by Deputy Attorney general Kerry Soranno. Previously represented by Deputy Attorney General Jennifer McGruther.

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

3. Pursuant to the Council's July 25, 2017 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Council required disclosure of either the exact Report, or a reasonable equivalent immediately preceding submission of the subject OPRA request. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Procedural History:

On January 27, 2021, the Council distributed its Interim Order to all parties. On February 25, 2021, Complainant's Counsel sought an additional twenty (20) business days to allow Kean University ("Kean") time to consider his fee demand. On March 3, 2021, the Government Records Council ("GRC") responded granting an extension through March 31, 2021.

On April 5, 2021, the GRC advised the parties that the fee agreement time frame expired. The GRC further advised that the Complainant's Counsel had twenty (20) business days, or until April 29, 2021, to submit a fee application.[3] The Complainant's Counsel did not submit a fee application within the appropriate time frame to do so.

Analysis

Compliance

At its January 26, 2021 meeting, the Council ordered the parties to "confer in an effort to decide the amount of reasonable attorney's fees" and notify the GRC of any fee agreement. Further, the Council ordered that, should the parties not reach an agreement, the Complainant's Counsel "shall submit a fee application . . . in accordance with N.J.A.C. 5:105-2.13." On January 27, 2020, the Council distributed its Interim Order to all parties, providing the parties twenty (20) business days to reach a fee agreement. Thus, the parties were required to notify the GRC of any agreement by February 25, 2021.

[3] The GRC notes that it received a "Read" receipt from the Complainant's Counsel on April 5, 2021 at 4:26 p.m.

On April 5, 2021, following the expiration of the extended time frame to reach a settlement, the GRC advised the parties that Complainant's Counsel had twenty (20) business days to submit a fee application in accordance with N.J.A.C. 5:105-2.13. As of April 29, 2021, the Council has received neither a fee agreement between the parties nor an application for an award of attorney's fees from the Complainant or Complainant's Counsel.

Therefore, Complainant's Counsel failed to comply with the Council's Interim Order because he did not submit an application for attorney's fees within the prescribed deadline. N.J.A.C. 5:105-2.13(b). Accordingly, the Council should dismiss this matter as no further analysis is necessary.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that Complainant's Counsel failed to comply with the Council's Interim Order because he did not submit an application for attorney's fees within the prescribed deadline. N.J.A.C. 5:105-2.13(b). Accordingly, the Council should dismiss this matter as no further analysis is necessary.

Prepared By: Frank F. Caruso
Executive Director

May 11, 2021

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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

January 26, 2021 Government Records Council Meeting

Luis F. Rodriguez
Complainant
v.
Kean University
Custodian of Record

Complaint No. 2015-290

At the January 26, 2021 public meeting, the Government Records Council ("Council") considered the January 19, 2021 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian complied with the Council's July 25, 2017 Interim Order because she responded in the extended time frame disclosing the report "most current to, and preceding" the date of the Complainant's OPRA request. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.

2. Although the Custodian unlawfully denied access to the requested Report, she ultimately complied with the Council's July 25, 2017 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

3. Pursuant to the Council's July 25, 2017 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Council required disclosure of either the exact Report, or a reasonable equivalent immediately preceding submission of the subject OPRA request. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties**

cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.

Interim Order Rendered by the
Government Records Council
On The 26th Day of January 2021

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: January 27, 2021

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Supplemental Findings and Recommendations of the Executive Director
January 26, 2021 Council Meeting

Luis Rodriguez[1] **GRC Complaint No. 2015-290**
Complainant

v.

Kean University[2]
Custodial Agency

Records Relevant to Complaint: Electronic copy via e-mail of the "97th Day of Registration Term Comparison" report ("Report") for "13/FA to 15/FA" (as of April 8, 2015).

Custodian of Record: Laura Barkley Haelig
Request Received by Custodian: July 13, 2015
Response Made by Custodian: July 23, 2015
GRC Complaint Received: September 10, 2015

Background

November 10, 2020 Council Meeting:

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

1. The Custodian's Counsel has failed to establish in her request for reconsideration of the Council's July 25, 2017 Interim Order that either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. Counsel has failed to establish that the complaint should be reconsidered based on a mistake or extraordinary circumstances. Counsel has also failed to show that the Council acted arbitrarily, capriciously or unreasonably Specifically, Counsel failed to prove that the Council made a mistake in ordering disclosure or that extraordinary circumstances existed here warranting a different finding. Thus, Counsel's request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast

[1] Represented by Walter M. Luers, Esq., of Cohn, Lifland, Pearlman, Herrmann & Knopf, LLP. (Saddle Brook, NJ). Mr. Luers entered his appearance on September 14, 2017.
[2] Represented by Deputy Attorney general Kerry Soranno. Previously represented by Deputy Attorney General Jennifer McGruther.

Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

2. While the Council's July 25, 2017 Interim Order remains in effect, the Council should amend conclusion No. 2 to provide additional clarity on how to comply with same. In the instance that the Custodian determines that a special service charge is required in order to produce and disclose the requested Report, she shall calculate and produce it to the Complainant. N.J.S.A. 47:1A-5(d). Further, should the Custodian be unable to provide an exact Report reflecting the data as of April 8, 2015, she shall obtain a provide the report most current to, and preceding, that date.

Procedural History:

On November 12, 2020, the Council distributed its Interim Order to all parties. On November 18, 2020, Custodian's Counsel e-mailed the Government Records Council ("GRC") seeking a ten (10)-day extension of time to respond the Council's Order. On November 19, 2020, granted the request, extending the time for response to December 4, 2020. On December 3, 2020, Custodian's Counsel e-mailed the GRC seeking another extension of time to respond due to extraordinary circumstances. On December 7, 2020, the GRC granted the request and required a response by December 18, 2020.

On December 18, 2020, the Custodian responded to the Council's Interim Order. The Custodian certified that Kean University ("Kean") conducted an inquiry into the ability to disclose the exact Report sought and concluded that none existed. The Custodian affirmed that the most recent report available was the "92nd Day Registration Term Comparison Report" for "12/FA to 15/FA," which was generated on July 6, 2015. The Custodian certified that she disclosed this report without redactions to Complainant's Counsel via e-mail.

Analysis

Compliance

At its November 10, 2020 meeting, the Council rejected previous Custodian Counsel's request for reconsideration and reinstated the July 25, 2017 Interim Order. However, the Council clarified the Order to allow the Custodian to 1) develop a special service charge to produce the exact responsive Report; or 2) provide the report "most current to, and preceding" the date of the OPRA request. Further, the Council ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Executive Director. On November 12, 2020, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on November 19, 2020.

On December 18, 2020, the final business day of the second (2nd) extended time frame, the Custodian responded to the Council's Order. Therein, the Custodian certified that she could not produce the exact Report sought but was able to disclose a comparable report that came into

existence on July 6, 2015. Thus, the evidence of record supports that the Custodian complied with the Council's July 25, 2017 Interim Order, as clarified by the Council in its November 10, 2020 Order.

Therefore, the Custodian complied with the Council's July 25, 2017 Interim Order because she responded in the extended time frame disclosing the report "most current to, and preceding" the date of the Complainant's OPRA request. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.

Knowing & Willful

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

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

In the matter before the Council, although the Custodian unlawfully denied access to the requested Report, she ultimately complied with the Council's July 25, 2017 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prevailing Party Attorney's Fees

OPRA provides that:

> A person who is denied access to a government record by the custodian of the record, at the option of the requestor, may: institute a proceeding to challenge the

> custodian's decision by filing an action in Superior Court . . .; or in lieu of filing an action in Superior Court, file a complaint with the Government Records Council . . . A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.
>
> [N.J.S.A. 47:1A-6.]

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Court held that a complainant is a "prevailing party" if he achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct. Id. at 432. Additionally, the Court held that attorney's fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. Id.

Additionally, the New Jersey Supreme Court has ruled on the issue of "prevailing party" attorney's fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the Supreme Court discussed the catalyst theory, "which posits that a plaintiff is a 'prevailing party' if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." Mason, 196 N.J. at 71, (quoting Buckhannon Bd. & Care Home v. West Virginia Dep't of Health & Human Res., 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court stated that the phrase "prevailing party" is a legal term of art that refers to a "party in whose favor a judgment is rendered." (quoting Black's Law Dictionary 1145 (7th ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because "[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties . . ." Id. at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863. Further, the Supreme Court expressed concern that the catalyst theory would spawn extra litigation over attorney's fees. Id. at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

However, the Court noted in Mason, that Buckhannon is binding only when counsel fee provisions under federal statutes are at issue. 196 N.J. at 72, citing Teeters, 387 N.J. Super. at 429; see, *e.g.*, Baer v. Klagholz, 346 N.J. Super. 79 (App. Div. 2001) (applying Buckhannon to the federal Individuals with Disabilities Education Act), certif. denied, 174 N.J. 193 (2002). "But in interpreting New Jersey law, we look to state law precedent and the specific state statute before us. When appropriate, we depart from the reasoning of federal cases that interpret comparable federal statutes." 196 N.J. at 73 (citations omitted).

The Mason Court accepted the application of the catalyst theory within the context of OPRA, stating that:

> OPRA itself contains broader language on attorney's fees than the former RTKL did. OPRA provides that "[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." N.J.S.A. 47:1A-6. Under the prior RTKL, "[a] plaintiff in whose favor such an order [requiring access to public records] issues . . . may be awarded a reasonable attorney's fee not to exceed $500.00." N.J.S.A. 47:1A-4 (repealed 2002). The Legislature's revisions therefore: (1) mandate, rather than permit, an award of attorney's fees to a prevailing party; and

(2) eliminate the $500 cap on fees and permit a reasonable, and quite likely higher, fee award. Those changes expand counsel fee awards under OPRA.

[Mason at 73-76 (2008).]

The Court in Mason, further held that:

[R]equestors are entitled to attorney's fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) "a factual causal nexus between plaintiff's litigation and the relief ultimately achieved"; and (2) "that the relief ultimately secured by plaintiffs had a basis in law." Singer v. State, 95 N.J. 487, 495, *cert denied* (1984).

[Id. at 76.]

In the matter before the Council, the Complainant contended that the Custodian unlawfully denied access to the requested Report on the basis that no record existed. As it became clear that a threshold issue here involved creating a report by querying a database was at issue, the Council initially abeyed the complaint to await the Supreme Court's decision in Paff v. Galloway, 229 N.J. 340 (2017). Following the Court's decision, the Council held that the Custodian's denial was unlawful and that she was required to disclose the Report. Rodriguez, GRC 2015-290 (Interim Order dated July 25, 2017). Custodian's Counsel subsequently filed a request for reconsideration arguing that additional exemptions applied to the Report. The Council rejected the request for reconsideration but added clarity to its prior Order. On December 18, 2020, the Custodian complied with the July 25, 2017 Order, as clarified, by disclosing the report "most current to, and preceding" the date of the Complainant's OPRA request. Thus, the evidence of record supports that this complaint brought about a change in the Custodian's conduct, which resulted in the Complainant being a prevailing party.

Therefore, pursuant to the Council's July 25, 2017 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters, 387 N.J. Super. 432. Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. 51. Specifically, the Council required disclosure of either the exact Report, or a reasonable equivalent immediately preceding submission of the subject OPRA request. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's July 25, 2017 Interim Order because she responded in the extended time frame disclosing the report "most current to, and preceding" the date of the Complainant's OPRA request. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.

2. Although the Custodian unlawfully denied access to the requested Report, she ultimately complied with the Council's July 25, 2017 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

3. Pursuant to the Council's July 25, 2017 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the Council required disclosure of either the exact Report, or a reasonable equivalent immediately preceding submission of the subject OPRA request. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. 432, and Mason, 196 N.J. 51. **Based on this determination, the parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid to Complainant within twenty (20) business days. The parties shall promptly notify the GRC in writing if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, Complainant's Counsel shall submit a fee application to the Council in accordance with N.J.A.C. 5:105-2.13.**

Prepared By: Frank F. Caruso
Executive Director

January 19, 2021

State of New Jersey
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LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

November 10, 2020 Government Records Council Meeting

Luis Rodriguez
Complainant
v.
Kean University
Custodian of Record

Complaint No. 2015-290

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

1. The Custodian's Counsel has failed to establish in her request for reconsideration of the Council's July 25, 2017 Interim Order that either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. Counsel has failed to establish that the complaint should be reconsidered based on a mistake or extraordinary circumstances. Counsel has also failed to show that the Council acted arbitrarily, capriciously or unreasonably Specifically, Counsel failed to prove that the Council made a mistake in ordering disclosure or that extraordinary circumstances existed here warranting a different finding. Thus, Counsel's request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

2. While the Council's July 25, 2017 Interim Order remains in effect, the Council should amend conclusion No. 2 to provide additional clarity on how to comply with same as follows: in the instance that the Custodian determines that a special service charge is required in order to produce and disclose the requested Report, she shall calculate and produce it to the Complainant. N.J.S.A. 47:1A-5(d). Further, should the Custodian be unable to provide an exact Report reflecting the data as of April 8, 2015, she shall obtain and provide the report most current to, and preceding, that date.

Interim Order Rendered by the
Government Records Council
On The 10th Day of November 2020

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: November 12, 2020

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Reconsideration
Supplemental Findings and Recommendations of the Council Staff
November 10, 2020 Council Meeting

Luis Rodriguez[1] **GRC Complaint No. 2015-290**
Complainant

v.

Kean University[2]
Custodial Agency

Records Relevant to Complaint: Electronic copy via e-mail of the "97th Day of Registration Term Comparison" report ("Report") for "13/FA to 15/FA" (as of April 8, 2015).

Custodian of Record: Laura Barkley Haelig
Request Received by Custodian: July 13, 2015
Response Made by Custodian: July 23, 2015
GRC Complaint Received: September 10, 2015

Background

July 25, 2017 Council Meeting:

At its July 25, 2017 public meeting, the Council considered the July 18, 2017 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Council should lift the abeyance order and proceed with the adjudication of the complaint. The Council will address whether the Custodian was required to update the responsive Report to the Complainant's specifications with information contained in a database.

2. The Custodian unlawfully denied access to the Complainant's OPRA request seeking the requested Report with updates. N.J.S.A. 47:1A-6. Specifically, the Custodian was required to query a database and extract the responsive data: such an action does not amount to creating a new record. Zahler v. Ocean Cnty. Coll., GRC Complaint No. 2013-266 (Interim Order dated July 29, 2014). *See also* Paff v. Galloway Twp., 2017 N.J. LEXIS 680 (2017). Further, the Custodian did not bear her burden of proving that

[1] Represented by Walter M. Luers, Esq. of the law Offices of Walter M. Luers, LLC. (Clinton, NJ). Mr. Luers entered his appearance on September 14, 2017.
[2] Represented by Deputy Attorney General Jennifer McGruther.

the requested Report, inclusive of enrollment data, was a draft record not subject to disclosure under the inter-agency or intra-agency advisory, consultative, or deliberative material exemption. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. Thus, the Custodian must disclose the responsive Report with updated data for "13/FA to 15/FA" to the Complainant.

3. **The Custodian shall comply with conclusion No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,[3] to the Executive Director.[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 July 27, 2017, the Council distributed its Interim Order to all parties. On August 7, 2017, on behalf of the Custodian, Meaghan Lenahan requested additional time to until August 15, 2017 to comply with the Council's Order. On the same day, the Government Records Council ("GRC") granted the extension request. On August 10, 2017, Custodian's Counsel sought an additional two (2) week extension to determine how to address the Council's Order. On August 11, 2017, the GRC responded granting an extension until August 25, 2017. On August 22, 2017, the Vice President Geri Benedetto e-mailed the GRC advising that based on an emergent issue, Kean was seeking additional time to respond to the Order. On August 25, 2017, the GRC granted one (1) final extension until September 1, 2017 based solely on the circumstances arising from the emergent issue.

On September 1, 2017, Custodian's Counsel filed a request for reconsideration of the Council's July 25, 2017 Interim Order based on a mistake and extraordinary circumstances and attaching legal certifications from Joseph Marinello, Director of Kean Office of Computer and Information Systems ("OCIS"), and Marsha McCarthy, Acting Associate President of the Division of Enrollment Management. Counsel contended that the Council previously abeyed this decision in anticipation of a decision in Paff v. Galloway Twp., 227 N.J. 24 (2016). Counsel stated that there, the New Jersey Supreme Court overturned the Appellate Division's decision but remanded for additional arguments against disclosure. Counsel contended that here, the Council did not follow the Court's procedure by providing Kean the opportunity to argue 1) whether it could create the record; or 2) whether any exemptions applied. Counsel argued that the GRC instead assumed the record was not exempt and could be produced by "a few simple commands."

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

[4] 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.

Counsel first argued that the Report could not be accurately recreated for the time frame requested. Counsel contended that the requested Report has not been generated and no existing reports could be "updated." See Marinello Cert.; McCarthy Cert. at ⁋ 3. Counsel argued that versions of the Report were periodically run for enrollment analysis, and the data constantly evolved: various versions of the Report represented a snapshot in time. McCarthy Cert. ⁋ 4-7. Counsel further argued that the evolving data issue complicated Kean's ability to generate the exact Report sought, if it were even possible to do so. Counsel averred that doing so would take OCIS several hours in tandem with an employee from Enrollment. Counsel also contended that the Vice President of Enrollment would have to review the finished Report. Marinello Cert. ⁋ 5-7. Counsel thus contended that the Report would take more than the "two or three minutes" discussed in Paff. Further, Counsel contended that even if Kean could produce the requested Report, it would likely not be accurate to April 8, 2015 based on evolving data. Marinello Cert. ⁋ 4, 8; McCarthy Cert. ⁋ 11, 13-14.

Counsel further argued that even if the Report could be created, it was exempt from disclosure under the "inter-agency or intra-agency advisory, consultative, or deliberative [("ACD")] material" exemption. N.J.S.A. 47:1A-1.1. Counsel averred that Kean utilizes their reports to "inform [its] strategic planning for marketing and other purposes." Counsel also averred that the report is used to determine areas of strength and weakness in order to allocate Kean's resources. McCarthy Cert. ⁋ 5-7. Counsel also asserted that Kean does not "generally share the information within," except to select members of the Kean Leadership Committee to better inform their deliberations on strategic decisions. McCarthy Cert. ⁋ 15-16, 18. Counsel thus argued that the report was exempt as ACD material in accordance with OPRA and all relevant case law. N.J.S.A. 47:1A-1.1; Educ. Law Ctr. v. N.J. Dep't of Educ., 198 N.J. 274 284 (2009) (citing In re Liquidation of Integrity Ins. Co., 165 N.J. 75 (2000)).

Counsel next contended that the Report was also exempt under the "trade secret and proprietary commercial or financial information" exemption. N.J.S.A. 47:1A-1.1; Commc'n Workers of America, AFL-CIO v. Treasurer of N.J., 417 N.J. Super. 341, 356 (App. Div. 2010). Counsel argued that the information in the reports was not intended for wide dissemination; Kean treats it as confidential. Counsel argued that the reports are marked "draft" and "confidential" and only shared with select Kean officials. McCarthy Cert. ⁋ 15-16, 18. Counsel also argued that individuals receiving reports understand its confidential nature based on the markings. Counsel contended that the information in these reports meet the definition of "trade secret," as described in CWA, 417 N.J. Super. at 361. Counsel asserted that the information was invaluable to Kean, gave them an economic advantage in the higher education market, and was used to make marketing and strategic decisions. McCarthy Cert. ⁋5-8, 15-18.

Finally, Counsel contended that the Report was exempt under the "advantage to bidders and competitors" exemption. N.J.S.A. 47:1A-1.1. Counsel asserted that disclosure would give Kean's competitors the ability to exploit the report's information for gain. Counsel asserted that the competitors would be able to identify weaknesses within recruitment cycles and build strategies "detrimental to Kean." McCarthy Cert. 5-8, 17-18. Counsel noted that fully-vetted data was published in a publicly-available report. McCarthy Cert. ⁋ 9-12. Counsel averred that the Complainant could obtain the information sought from that report, as opposed to receiving the Report at issue here.

Counsel thus requested that the GRC: 1) reconsider its Interim Order requiring Kean to disclose the requested report; and 2) determine that Kean did not violate OPRA "by not creating the requested record.

Analysis

Reconsideration

Pursuant to N.J.A.C. 5:105-2.10, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. Requests must be in writing, delivered to the Council and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. N.J.A.C. 5:105-2.10(a) – (e).

In the matter before the Council, Custodian's Counsel filed the request for reconsideration of the Council's July 25, 2017 Interim Order on September 1, 2017, the final day of the third extension from the issuance of the Council's Order.

Applicable case law holds that:

> "A party should not seek reconsideration merely based upon dissatisfaction with a decision." D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D'Atria, . . . 242 N.J. Super. at 401. "Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement." Ibid.
>
> [In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).]

OPRA provides that the definition of a government record "shall not include . . . [ACD] material." N.J.S.A. 47:1A-1.1. When the exception is invoked, a governmental entity may "withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated." Educ. Law Ctr. v. N.J. Dep't of Educ., 198 N.J. 274, 286 (2009) (citing NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975)). The New Jersey Supreme Court has also ruled that a record that contains or involves factual components is entitled to deliberative-process protection under the exemption in

OPRA when it was used in decision-making process and its disclosure would reveal deliberations that occurred during that process. Educ. Law Ctr., 198 N.J. 274.

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

More recently, in Hopkins v. Monmouth Cnty. Bd. of Taxation, *et al*, GRC Complaint No. 2014-01, *et seq.* (June 2018), the Council adopted an Initial Decision from the Office of Administrative Law that addresses a database of tax information known as "Computer Assisted Mass Appraisal" ("CAMA") data. Therein, among other arguments, the custodian asserted that the requested data may contain information nondisclosable under the ACD exemption. The custodians argued that the ACD exemption applied to the responsive CAMA data because it was never finalized and some of the data ultimately made up the MOD-IV program. In reaching the conclusion that the ACD exemption did not apply to CAMA data, the Administrative Law Judge noted that:

> There was no testimony that CAMA data was used in the formulation of policy. CAMA data is facts about properties. The CAMA documents do not contain opinions, recommendations, or advice about agency policy as expressed in [In re Liquidation of Integrity Ins. Co., 165 N.J. 75, 84-85 (2000)]. There was no testimony that the CAMA data contained opinions, recommendations, or [advice]. The CAMA data contains facts . . . Some of the CAMA data, the Mod-4, and SR1A data, is on the [I]nternet.
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> [Id. at 16.]
>
> Further, OPRA provides that:
>
> A government record shall not include . . . trade secrets and proprietary commercial or financial information obtained from any source. For the purposes of this paragraph, trade secrets shall include data processing software obtained by a public body under a licensing agreement which prohibits its disclosure (emphasis added).
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> [N.J.S.A. 47:1A-1.1.]

In Newark Morning Star Ledger Co. v. N.J. Sports & Exposition Auth., 423 N.J. Super. 140, 168 (App. Div. 2011), the Appellate Division elaborated on defining trade secret and proprietary information and its application to OPRA's proprietary and trade secret exemption:

> Relying on the Court's guidance set forth in Lamorte Burns & Co. v. Walters, 167 N.J. 285, 299-301, 770 A.2d 1158 (2001), we considered "the key elements" to determine when commercial financial information was proprietary. [Commc'ns Workers of America v. Rousseau, 417 N.J. Super. 341, 356, 9 A.3d 1064 (App. Div. 2010)]. Lamorte suggested we must analyze "the relationship of the parties at the time of disclosure[,] . . . the intended use of the information[,]" and "the expectations of the parties." Ibid. (citing Lamorte, *supra*, 167 N.J. at 299-300, 770 A.2d 1158). "[U]nder OPRA, if the document contains commercial or proprietary information it is not considered a government record and not subject to disclosure." Id. at 358, 9 A.3d 1064. We concluded the investment agreements sought by the plaintiffs were proprietary as their content was not intended for wide dissemination, the "[d]efendants' expectation of confidentiality [was] manifest" and the agreements delineated the specific terms and specific persons who may review the information. Id. at 359, 9 A.3d 1064. Further,
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> > [e]ach agreement contains specific information about the capitalization of the partnership, its commencement and termination date, and other information pertinent to the operational fortunes of the partnership. Finally, each agreement is a complex document. Each reflects years of experience and expertise by trained legal and financial professionals. Id. at 359-60, 9 A.3d 1064.
>
> In analyzing whether information qualifies as "trade-secrets," a term not defined by OPRA, Id. at 360, 9 A.3d 1064, we considered the Court's prior reliance on Comment b of the Restatement of Torts § 757 (1939). Id. at 361, 9 A.3d 1064 (citing Hammock v. Hoffmann-LaRoche, 142 N.J. 356, 384, 662 A.2d 546 (1995)). The comment provides: "'[a] trade secret may consist of any . . . compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.'" Ibid. (quoting Restatement of Torts § 757 cmt. b (1939)). Other considerations include the extent to which the information is known outside of the owner's business, the extent to which it is known by employees of the owner, the measures taken to guard the secrecy of the information, the value of the information to the owner and competitors, the effort expended to develop the information, and the ease or difficulty by which the information can be duplicated. Ibid. (citing Hoffmann-LaRoche, 142 N.J. at 384, 662 A.2d 546).
>
> "'Trade secrets are a peculiar kind of property. Their only value consists in their being kept private. If they are disclosed or revealed, they are destroyed.'" Trump's Castle Assocs. v. Tallone, 275 N.J. Super. 159, 163, 645 A.2d 1207 (App. Div. 1994) (quoting In re Iowa Freedom of Info. Council, 724 F.2d 658, 662 (8th Cir. 1983)).

[Newark Morning Ledger, 423 N.J. Super. at 169.]

OPRA also exempts access to "information which, if disclosed, would give an advantage to competitors or bidders . . ." N.J.S.A. 47:1A-1.1.

In this matter, Custodian's Counsel sought reconsideration of the Council's July 25, 2017 Interim Order based on a mistake and extraordinary circumstances. Principally, Counsel took issue with the Council issuing its Interim Order without following the Paff Court by allowing Kean to argue: 1) whether it could create the record; or 2) whether any exemptions applied. Counsel argued that the GRC instead assumed the record was not exempt and could be produced by "a few simple commands." In arguing that the Council should reconsider its Interim Order, Counsel expanded Kean's arguments against disclosure based on the enumerated issues above. The GRC will briefly address each below.

The GRC rejects Counsel's first argument that Paff, 227 N.J. 24 narrowly required the disclosure of electronic information that could be produced within "two or three minutes." The Paff Court, as well as those decisions cited in the Interim Order, do not support that the amount of time it takes to collate and produce electronic information affects that information's status as a "government record." See *e.g.* Zahler, GRC 2013-266. In fact, OPRA allows an agency to charge a special service charge should an OPRA request require "a substantial amount of manipulation or programming of information technology." N.J.S.A. 47:1A-5(d). Thus, contrary to Counsel's narrow view of Paff, OPRA supports the disclosure of records even in instances where gathering them requires a substantial amount of technological solutions. Further, there was not a question as to Kean's ability to create a report, given that the Complainant was already in possession of an example of same.

The GRC also rejects that Counsel's argument that: 1) Kean should have been given a second opportunity to expand its bases for denying access; and 2) that those additional exemptions apply to the requested electronic information prospectively contained in the requested Report. Regarding the first point, the defendants' only argument in Paff, 227 N.J. 24 and before the lower courts was that they were not required to create a "government record." While the Custodian here argued this position, she also asserted that the requested Report was exempt as a draft document under the ACD exemption. The Council addressed this assertion as part of its Interim Order and determined it was unfounded. Thus, the GRC was not obligated to allow Kean to submit an updated reply arguing additional reasons for denying access.

Notwithstanding, the GRC is not persuaded that the expanded bases for denial apply to the Report sought by the Complainant. Initially, there is no evidence in the record to prove that Kean relied on the enrollment data sought as part of a specific decision-making process. See Hopkins, 2014-01. Further, it cannot be said that the enrollment information falls within the trade secret and proprietary exemption. There is no evidence in the record to suggest that the data passes the test described in NJSEA, 423 N.J. Super. at 169. Also, Counsel provided no colorable argument that disclosure of basic enrollment information would provide an advantage to other institutions of higher learning; thus, the competitors and bidders exemption is not applicable here either. Further

taking away from the asserted exemptions is the fact that Kean posts a significant amount of the requested data on its own website.[5]

As the moving party, the Custodian's Counsel was required to establish either of the necessary criteria set forth above: either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. See Cummings, 295 N.J. Super. at 384. Counsel failed to establish that the complaint should be reconsidered based on a mistake or extraordinary circumstances. Counsel has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. See D'Atria, 242 N.J. Super. at 401. Specifically, Counsel failed to prove that the Council made a mistake in ordering disclosure or that extraordinary circumstances existed here warranting a different finding. Thus, Counsel's request for reconsideration should be denied. Cummings, 295 N.J. Super. at 384; D'Atria, 242 N.J. Super. at 401; Comcast, 2003 N.J. PUC at 5-6.

Notwithstanding the forgoing, Custodian's Counsel has provided some additional information on the process required to produce a Report. Armed with this information, the GRC believes it necessary to clarify the Interim Order to ensure the Custodian's compliance with it. Such a clarification will be of benefit to the parties in attempting to fulfill the subject OPRA request to the greatest extent possible.

Accordingly, while the Council's July 25, 2017 Interim Order remains in effect, the Council should amend conclusion No. 2 to provide additional clarity on how to comply with same as follows: in the instance that the Custodian determines that a special service charge is required in order to produce and disclose the requested Report, she shall calculate and produce it to the Complainant. N.J.S.A. 47:1A-5(d). Further, should the Custodian be unable to provide an exact Report reflecting the data as of April 8, 2015, she shall obtain and provide the report most current to, and preceding, that date.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian's Counsel has failed to establish in her request for reconsideration of the Council's July 25, 2017 Interim Order that either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. Counsel has failed to establish that the complaint should be reconsidered based on a mistake or extraordinary circumstances. Counsel has also failed to show that the Council acted arbitrarily, capriciously or unreasonably Specifically, Counsel failed to prove that the Council made a mistake in ordering disclosure or that extraordinary circumstances existed here warranting a different finding. Thus, Counsel's request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria,

[5] http://ir.kean.edu/irhome/IRHome.asp (last accessed October 23, 2020). The GRC notes that the website currently includes enrollment data from Fall 2015 through Fall 2019. In previous times that the GRC accessed this site, the data went as far back as Fall 2013.

242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

2. While the Council's July 25, 2017 Interim Order remains in effect, the Council should amend conclusion No. 2 to provide additional clarity on how to comply with same as follows: in the instance that the Custodian determines that a special service charge is required in order to produce and disclose the requested Report, she shall calculate and produce it to the Complainant. N.J.S.A. 47:1A-5(d). Further, should the Custodian be unable to provide an exact Report reflecting the data as of April 8, 2015, she shall obtain and provide the report most current to, and preceding, that date.

Prepared By: Frank F. Caruso
Executive Director

October 27, 2020

State of New Jersey
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

INTERIM ORDER

July 25, 2017 Government Records Council Meeting

Luis Rodriguez
Complainant
v.
Kean University
Custodian of Record

Complaint No. 2015-290

At the July 25, 2017 public meeting, the Government Records Council ("Council") considered the July 18, 2017 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Council should lift the abeyance order and proceed with the adjudication of the complaint. The Council will address whether the Custodian was required to update the responsive Report to the Complainant's specifications with information contained in a database.

2. The Custodian unlawfully denied access to the Complainant's OPRA request seeking the requested Report with updates. N.J.S.A. 47:1A-6. Specifically, the Custodian was required to query a database and extract the responsive data: such an action does not amount to creating a new record. Zahler v. Ocean Cnty. Coll., GRC Complaint No. 2013-266 (Interim Order dated July 29, 2014). *See also* Paff v. Galloway Twp., 2017 N.J. LEXIS 680 (2017). Further, the Custodian did not bear her burden of proving that the requested Report, inclusive of enrollment data, was a draft record not subject to disclosure under the interagency or intra-agency advisory, consultative, or deliberative material exemption. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. Thus, the Custodian must disclose the responsive Report with updated data for "13/FA to 15/FA" to the Complainant.

3. **The Custodian shall comply with conclusion No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,[1] to the Executive Director.[2]**

[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

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 25th Day of July, 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: July 27, 2017

record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Supplemental Findings and Recommendations of the Executive Director
July 25, 2017 Council Meeting

Luis Rodriguez[1] **GRC Complaint No. 2015-290**
Complainant

v.

Kean University[2]
Custodial Agency

Records Relevant to Complaint: Electronic copy via e-mail of the "97th Day of Registration Term Comparison" report ("Report") for "13/FA to 15/FA" (as of April 8, 2015).

Custodian of Record: Laura Barkley Haelig
Request Received by Custodian: July 13, 2015
Response Made by Custodian: July 23, 2015
GRC Complaint Received: September 10, 2015

Background

March 28, 2017 Council Meeting:

At its March 28, 2017 public meeting, the Council considered the March 21, 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. The issue of whether the Custodian was required to update the Report to the Complainant's specifications and provide same should be held in abeyance until the Supreme Court has ruled in Paff v. Galloway Twp., 444 N.J. Super. 495 (App. Div. 2016)(*cert. granted* 227 N.J. 24 (2016)). Such an action will benefit all parties and give the GRC an adequate opportunity to apply the Supreme Court's decision to this complaint.

2. 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 removal of the standing abeyance and full adjudication of this complaint.

[1] No legal representation listed on record.
[2] Represented by Deputy Attorney General Jennifer McGruther.

Procedural History:

On March 30, 2017, the Council distributed its Interim Order to all parties. On June 21, 2017, the Supreme Court decided Paff v. Galloway Twp., 2017 N.J. LEXIS 680 (2017).

Analysis

Abeyance of Complaint

At its March 28, 2017 meeting, the Council held the instant complaint in abeyance, pending the outcome of Paff. There, the Court accepted plaintiff's appeal from the Appellate Division's decision that the defendant municipality was not required to coalesce basic information into an e-mail log and disclose same. The Appellate Court had reached its conclusion by determining that such an action was akin to creating a record, which OPRA did not require (notwithstanding that the e-mail log would have taken a few key strokes to create). The Supreme Court reversed and remanded, holding that basic e-mail information stored electronically is a "government record" under OPRA, unless an exemption applies to that information. The Court reasoned that:

> A document is nothing more than a compilation of information -- discrete facts and data. By OPRA's language, information in electronic form, even if part of a larger document, is itself a government record. Thus, electronically stored information extracted from an email is not the creation of a new record or new information; it is a government record.
>
> . . . .
>
> With respect to electronically stored information by a municipality or other public entity, we reject the Appellate Division's statement that "OPRA only allows requests for records, not requests for information." Paff, 444 N.J. Super. at 503, (*quoting* Bent, 381 N.J. Super. at 37). That position cannot be squared with OPRA's plain language or its objectives in dealing with electronically stored information.
>
> Id. at 24, 28.

Accordingly, the Council should lift the abeyance order and proceed with the adjudication of the complaint. The Council will address whether the Custodian was required to update the responsive Report to the Complainant's specifications with information contained in a database.

Unlawful Denial of Access

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request

"with certain exceptions." N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

In Fang v. Dep't of Transp., GRC Complaint No. 2006-93 (May 2007), the complainant sought disciplinary action records and specified the particular information that the records might contain. The custodian certified that no records existed that contained a compilation of the information specified by the complainant in the request. The Council, relying upon the Court's decision in MAG, 375 N.J. Super. 534, held that "[b]ecause OPRA does not require custodians to research files to discern which records may be responsive to a request or compile records which do not otherwise exist, the Custodian has met his burden of proof that access to these records was not unlawfully denied pursuant to N.J.S.A. 47:1A-6. *See* [MAG]." Id. at 11.

Conversely, in Zahler v. Ocean Cnty. Coll., GRC Complaint No. 2013-266 (Interim Order dated July 29, 2014), the Council addressed the custodian's argument that she was not required to create a record in order to satisfy an OPRA request for database information pursuant to Morgano v. Essex Cnty. Prosecutor's Office, GRC Complaint No. 2007-156 (Interim Order dated February 27, 2008). Therein, the complainant sought access to a list of adjuncts to include certain information. The custodian produced a list that did not include all information sought; however, the evidence of record indicated that she could have produced a fully responsive record. Specifically, evidence existed to support that all information the complainant sought existed within a few different databases.

The Council first noted that the definition of a "government record" included "information stored or maintained electronically." N.J.S.A. 47:1A-1.1. The Council then distinguished the facts of Morgano and held that the custodian unlawfully denied access to the responsive list containing all elements identified in the subject OPRA request. The Council reasoned that:

> The Morgano decision refers to compiling certain disclosable information from a paper record and listing or creating another paper record responsive to a request. However, in terms of certain electronic filing systems, *general querying of information cannot be viewed as equal to creating a new paper record*. While information stored electronically may include additional pieces of information/fields, many programs have the capability to extract requested information/fields for disclosure . . . Further, querying electronic file systems for responsive information is not unlike searching an e-mail account for e-mails responsive to an OPRA request.

Id. at 12 (emphasis added).

Moreover, the Council has repeatedly held that draft records of a public agency fall within the deliberative process privilege. In Dalesky v. Borough of Raritan (Somerset), GRC Complaint No. 2008-61 (November 2009), the Council, in upholding the custodian's denial as lawful, determined that the requested record was a draft document and that draft documents in their entirety are ACD material pursuant to N.J.S.A. 47:1A-1.1. Subsequently, in Shea v. Village of Ridgewood (Bergen), GRC Complaint No. 2010-79 (February 2011), the custodian certified

that a requested letter was a draft document that the Municipal Engineer had not yet reviewed. The Council, looking to relevant case law, concluded that the requested letter was exempt from disclosure under OPRA as ACD material. *See also* Ciesla v. NJ Dep't of Health and Senior Serv., GRC Complaint No. 2010-38 (May 2011)(*aff'd* Ciesla v. NJ Dept. of Health & Senior Serv., 429 N.J. Super. 127 (App. Div. 2012) (holding that a draft staff report was exempt from disclosure as ACD material).

In the matter currently before the Council, the Complainant sought access to an updated version of the Report previously provided to S&P. The Report appeared to be derived from enrollment information contained in a database. Kean denied the OPRA request, stating that they had no obligation to create the requested report. After the Complainant filed the complaint, the Custodian argued in the SOI that OPRA did not require her to create a record matching a time frame of the Complainant's choosing. Further, the Custodian argued that the information sought, to the extent that it was included in a report provided to the Faculty Senate, was exempt under the ACD exemption as a draft record.

The GRC first addresses whether the Custodian was obligated to collate information from a database to provide the responsive Report to the Complainant. The GRC finds that the instant complaint more closely fits on the square with Zahler, GRC 2013-266. The Court's decision in Paff, 2017 N.J. LEXIS 680, although decided after the pendency of this complaint, is also instructive. Specifically, the Complainant identified a specific type of record, the Report (previously created for S&P), which was comprised of enrollment information in a database, likely by utilizing a few simple commands. As was the case in Zahler, the Custodian was not required to create a record; rather, she was required to extract the enrollment data from a database and update the Report. A similar type of compilation was also contemplated in Paff.

Next, the GRC briefly addresses whether the Report or any information therein was exempt as ACD material because it was in draft form. There is no evidence in the record to prove that the Report or any of the enrollment numbers therein were somehow in draft form. Further, the Custodian did not provide any explanation or additional documentation to prove that raw enrollment numbers compiled into the Report were somehow draft in nature. For those reasons, the GRC is not persuaded that the Custodian could lawfully deny access to an updated version of the Report.

Accordingly, the Custodian unlawfully denied access to the Complainant's OPRA request seeking the requested Report with updates. N.J.S.A. 47:1A-6. Specifically, the Custodian was required to query a database and extract the responsive data: such an action does not amount to creating a new record. Zahler, GRC 2013-266. *See also* Paff, 2017 N.J. LEXIS 680. Further, the Custodian did not bear her burden of proving that the requested Report, inclusive of enrollment data, was a draft record not subject to disclosure under the ACD exemption. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. Thus, the Custodian must disclose the responsive Report with updated data for "13/FA to 15/FA" to the Complainant.

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 should lift the abeyance order and proceed with the adjudication of the complaint. The Council will address whether the Custodian was required to update the responsive Report to the Complainant's specifications with information contained in a database.

2. The Custodian unlawfully denied access to the Complainant's OPRA request seeking the requested Report with updates. N.J.S.A. 47:1A-6. Specifically, the Custodian was required to query a database and extract the responsive data: such an action does not amount to creating a new record. Zahler v. Ocean Cnty. Coll., GRC Complaint No. 2013-266 (Interim Order dated July 29, 2014). *See also* Paff v. Galloway Twp., 2017 N.J. LEXIS 680 (2017). Further, the Custodian did not bear her burden of proving that the requested Report, inclusive of enrollment data, was a draft record not subject to disclosure under the interagency or intra-agency advisory, consultative, or deliberative material exemption. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. Thus, the Custodian must disclose the responsive Report with updated data for "13/FA to 15/FA" to the Complainant.

3. **The Custodian shall comply with conclusion No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,[3] to the Executive Director.[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.

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

July 18, 2017

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

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

State of New Jersey
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

INTERIM ORDER

March 28, 2017 Government Records Council Meeting

Luis Rodriguez
Complainant
v.
Kean University
Custodian of Record

Complaint No. 2015-290

At the March 28, 2017 public meeting, the Government Records Council ("Council") considered the March 21, 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 issue of whether the Custodian was required to update the Report to the Complainant's specifications and provide same should be held in abeyance until the Supreme Court has ruled in Paff v. Galloway Twp., 444 N.J. Super. 495 (App. Div. 2016)(*cert. granted* 227 N.J. 24 (2016)). Such an action will benefit all parties and give the GRC an adequate opportunity to apply the Supreme Court's decision to this complaint.

2. 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 removal of the standing abeyance and full adjudication of this complaint.

Interim Order Rendered by the
Government Records Council
On The 28th Day of March, 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: March 30, 2017

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Findings and Recommendations of the Executive Director
March 28, 2017 Council Meeting

Luis Rodriguez[1] **GRC Complaint No. 2015-290**
Complainant

v.

Kean University[2]
Custodial Agency

Records Relevant to Complaint: Electronic copy via e-mail of the "97th Day of Registration Term Comparison" report ("Report") for "13/FA to 15/FA" (as of April 8, 2015).

Custodian of Record: Laura Barkley Haelig
Request Received by Custodian: July 13, 2015
Response Made by Custodian: July 23, 2015
GRC Complaint Received: September 10, 2015

Background[3]

Request and Response:

On July 11, 2015, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. The Complainant included a snapshot of a similar record and stated that Kean University ("Kean") previously created one for Standard and Poor's ("S&P") for "11/FA" through "14/FA." On July 23, 2015, the Custodian responded in writing, advising that an extension until August 6, 2015, would be necessary in order to process the OPRA request. On August 6, 2015, the last day of the extended time frame, the Custodian responded in writing, advising the Complainant that no responsive records exist.

On August 7, 2015, the Complainant e-mailed the Custodian, advising that he wished to amend his OPRA request. The Complainant, however, reiterated that he was seeking a copy of the "97th Day of Registration Term Comparison for Terms 13/FA to 15/FA." The Complainant then sent a second e-mail, copying Custodian's Counsel, asking the Custodian to clarify why she could not produce the Report. The Complainant asked if he worded his request incorrectly and sought guidance if so. The Complainant also included a link to the American Civil Liberties Union's amicus brief on disclosure of electronic data submitted in Paff v. Galloway Twp., 444

[1] No legal representation listed on record.
[2] Represented by Deputy Attorney General Jennifer McGruther.
[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.

N.J. Super. 495 (App. Div. 2016), stating that the Custodian may be persuaded to disclose the Report after reviewing it.[4] The Complainant requested that Custodian's Counsel "exercise [her] role" by requiring the Custodian to respond quickly. The Complainant also requested that, should Custodian's Counsel deem him correct, she "exercise [her] role" by alerting the Custodian to the Complainant's "correctness of [his] interpretation" and advising her to disclose the Report. Alternatively, the Complainant requested that Custodian's Counsel "exercise [her] ethical obligation" by affirming in writing that the Custodian would not follow her legal advice.

On August 8, 2015, the Complainant e-mailed the Custodian to suggest that a 2010 presentation from the "NJ Geospatial Forum Open Public Records Task Force" ("GFTF"), a group affiliated with the New Jersey Office of Information Technology, confirms that Kean should provide him the Report.[5] On August 20, 2015, Meaghan Lenahan e-mailed the Complainant on behalf of the Custodian, advising that the Complainant did not revise his original OPRA request. Ms. Lenahan stated that the Complainant could resubmit a revised or clarified OPRA request if he so chose; however, the subject OPRA request would remain closed until Kean received the new request. On August 20, 2015, the Complainant e-mailed Ms. Lenahan, asking her to confirm whether Kean stood by their response that no records existed.

Denial of Access Complaint:

On September 10, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that the Custodian unlawfully denied him access to the Report and requested that the GRC determine whether the Custodian's Counsel played an active role in said denial.

The Complainant stated that he previously requested an enrollment document distributed to the Faculty Senate in October 2013. The Complainant stated that he received a similar copy of the record he sought but for a different time frame. The Complainant contended that the Custodian should have provided the Report, as requested, if updated information for the time period he identified existed. The Complainant contended that the amicus arguments presented by the New Jersey League of Municipalities in Paff, 444 N.J. Super. 495, do not apply here because Kean was not required to do research; the Custodian simply had to replicate the process that produced the original report with a minor tweak.

The Complainant also contended that Kean as a whole violated OPRA by failing to cooperate with his requests to help revise the request. Mason v. City of Hoboken, 196 N.J. 51, 78 (2008). The Complainant asserted that the Custodian never advised him of a special service charge and never allowed him to negotiate a charge. The Complainant argued that the Custodian

[4] In Paff, 444 N.J. Super. at 495, the Appellate Division reversed the trial court, holding that a custodian is not required to "create" an electronic e-mail log, "even if the information sought to be included in the new government record is stored or maintained electronically in other government records" and could be created easily. Id. at 505. The Court reached its decision during the pendency of this complaint.

[5] The presentation is no longer available through the link that the Complainant provided to the Custodian. However, a formal report, located at https://njgin.state.nj.us/oit/gis/NJ_NJGINExplorer/docs/OPRATaskForceFinalReport.pdf, reflects the presentation's topics. The 2010 report also contains what appears to be a question and answer session with an unidentified Government Records Council representative.

instead chose to respond in the fewest amount of text necessary and refused to answer his follow-up questions.

Finally, the Complainant asserted that, were Kean able to produce the Report from information stored in a database, the GRC should determine that the Custodian knowingly and willfully violated OPRA. The Complainant contended that he advised the Custodian of all relevant GRC case law on this issue, but she still failed to disclose the Report.

Statement of Information:

On October 13, 2015, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on July 13, 2015. The Custodian affirmed that she forwarded the request to Marsha McCarthy, Director of Enrollment Services, on July 23, 2015. The Custodian certified that, after obtaining an extension of time, Ms. McCarthy advised her office on July 29, 2015, that Enrolment Services did not maintain a standard record similar to the Report. The Custodian certified that Ms. McCarthy again confirmed this fact on August 6, 2015. The Custodian certified that she responded in writing on the same day, advising the Complainant that no record existed.

The Custodian affirmed that the Complainant submitted what he asserted to be a new OPRA request on August 7, 2015, which revised the subject OPRA request. The Custodian averred that, upon review of the request, she determined that it was the same as the subject OPRA request without any revisions. The Custodian certified that Ms. Lenahan responded to the Complainant on August 20, 2015, advising that the new request was the same as the subject request. The Custodian noted that Ms. Lenahan afforded the Complainant the opportunity to submit a new or revised OPRA request, but the Complainant never did so.

The Custodian contended that she did not unlawfully deny access to the Complainant's OPRA request because no records exist. *Citing* Mason v. City of Hoboken, 2008 N.J. Super. Unpub. LEXIS 1660 (App. Div. 2008). The Custodian contended that Kean was not required to create a record matching the time frames provided by the Complainant. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005). The Custodian further noted that, to the extent that the Complainant sought information contained in a report provided to the Faculty Senate, that report is a draft record that is not subject to disclosure. *See* Ciesla v. NJ Dep't of Health and Sr. Serv., *et al*, 429 N.J. Super. 127, 140 (App. Div. 2012).

Additional Submissions:

On October 19, 2015, the Complainant asserted that the Custodian failed to address the issue he raised in this complaint. The Complainant states that he previously provided the Custodian with a link to the GFTF presentation. The Complainant asserts that the presentation bolsters his argument that the Custodian must extract responsive information that is electronically maintained. The Complainant also directed the GRC back to the GFTF presentation to support his assertion that GRC case law requires disclose of the requested Report.

The Complainant further faulted Kean's argument that it did not have to disclose a non-standard record. The Complainant contended that whether or not the Report is standard is not relevant here. The Complainant asserted that the Custodian should have disclosed the Report (inclusive of an extra year) because Kean demonstrated that it could produce such a report for S&P. The Complainant noted that the composition of the report sent to S&P proves that the information was derived from a database. The Complainant also argued that Kean never stated that it stopped collecting data; therefore, any enrollment data inputted into the database after the Report was initially sent to S&P is disclosable.

The Complainant additionally faulted Kean's argument that an enrollment report was a draft document. The Complainant asserted that the Report clearly contains purely factual enrollment numbers. The Complainant asserted that In re the Liquidation of Integrity Ins. Co., 165 N.J. 75, 88 (2000), supports that factual information does not fall under the "inter-agency or intra-agency advisory, consultative, or deliberative" ("ACD") exemption. The Complainant stated that, contrary to the Custodian's assertion, University Senator Richard Katz confirmed in an e-mail that they received "the report" and were not advised that it was a draft.

Finally, the Complainant argued that the Custodian, and Kean more generally, appear to be conspiring to deny him and others access to enrollment information.[6]

Analysis

Abeyance of Complaint

The GRC begins by noting that the Administrative Procedures Act gives the GRC broad latitude to effectuate the purposes of OPRA. N.J.S.A. 52:14B-1 *et seq.* Regarding the Custodian's position that Kean was not required to create a record matching the Complainant's OPRA request, the Supreme Court granted certification on a similar issue. Paff v. Galloway Twp., 444 N.J. Super. 495 (*cert. granted* 227 N.J. 24 (2016)). There, the Supreme Court granted certification after the Appellate Division determined that a custodian was not required to create an e-mail log that "did not otherwise exist." Id. at 505. The Court reasoned that:

> OPRA does not require the creation of a new government record that does not yet exist at the time of a request, even if the information sought to be included in the new government record is stored or maintained electronically in other government records.

Id. at 506.

The GRC notes that it has issued a few decisions regarding a custodian's obligation to organize and collate data within a database. *See* Matthews v. City of Atlantic City (Atlantic), GRC Complaint No. 2008-123 (February 2009); Zahler v. Ocean Cnty. Coll., GRC Complaint No. 2013-266 (Interim Order dated July 29, 2014). However, the pending decision from the Supreme Court might affect the GRC's analysis on this issue going forward.

[6] The Complainant noted that Kean required its Senate to submit OPRA requests for enrollment information and continued to obtain extensions to those requests.

In the instant matter, the records responsive to the Complainant's OPRA request involve an apparent update to a Report previously provided to S&P through database information. Considering all the issues presented, as well as the prevailing question of disclosure currently being reviewed by the Supreme Court, the instant complaint should be held in abeyance pending a decision in Paff. Any decision to the contrary might lead to additional litigation and could entail unnecessary costs for all parties. Additionally, by holding the complaint in abeyance, the GRC will avoid unnecessary adjudication and conserve public resources. The GRC is thus satisfied that abeyance is the most acceptable course of action at this time for all parties involved. *See, e.g.*, Verry v. Franklin Fire District No. 1 (Somerset), GRC Complaint No. 2014-365 (Interim Order dated September 29, 2015); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2015-147 (Interim Order dated July 26, 2016).

Accordingly, the issue of whether the Custodian was required to update the Report to the Complainant's specifications and provide same should be held in abeyance until the Supreme Court has ruled in Paff.[7] Such an action will benefit all parties and give the GRC an adequate opportunity to apply the Supreme Court's decision to this complaint.

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 removal of the standing abeyance and full adjudication of this complaint.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The issue of whether the Custodian was required to update the Report to the Complainant's specifications and provide same should be held in abeyance until the Supreme Court has ruled in Paff v. Galloway Twp., 444 N.J. Super. 495 (App. Div. 2016)(*cert. granted* 227 N.J. 24 (2016)). Such an action will benefit all parties and give the GRC an adequate opportunity to apply the Supreme Court's decision to this complaint.

2. 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 removal of the standing abeyance and full adjudication of this complaint.

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

March 21, 2017

[7] The GRC notes that the Supreme Court was scheduled to hear oral argument in Paff on February 28, 2017.