



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

April 25, 2017 Government Records Council Meeting

Thomas R. Ashley, Esq.
(o/b/o Ralph Benjamin Cotto)
Complainant

Complaint No. 2015-337

v.

Union County Prosecutor's Office
Custodian of Record

At the April 25, 2017 public meeting, the Government Records Council ("Council") considered the April 18, 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 Custodian complied with the Council's March 28, 2017 Interim Order because he responded in the prescribed time frame by providing nine (9) unredacted copies of the three (3) e-mails for an *in camera* review and simultaneously providing certified confirmation of compliance to the Executive Director.
2. **The *In Camera* Examination set forth above reveals the Custodian has lawfully denied access pursuant to N.J.S.A. 47:1A-6 to the three responsive (3) e-mails because they are exempt as criminal investigatory records.**
3. Although the Custodian performed an insufficient search to locate records responsive to the subject OPRA request, he lawfully denied access to the three (3) e-mails subsequently located after the filing of this complaint. N.J.S.A. 47:1A-6. 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.
4. The Complainant has not achieved the desired result because the complaint did not bring about a change, voluntary or otherwise, in the custodian's conduct. Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, no 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 Custodian lawfully denied access to the three (3) responsive e-mails as criminal investigatory records. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. Therefore, the Complainant is not 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.

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 25th Day of April, 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: April 27, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
April 25, 2017 Council Meeting**

**Thomas R. Ashley, Esq.
(On Behalf of Ralph Benjamin Cotto)¹
Complainant**

GRC Complaint No. 2015-337

v.

**Union County Prosecutor's Office²
Custodial Agency**

Records Relevant to Complaint: Copies of all documents, possessed by the Union County Prosecutor's Office ("UCPO"), which mention Mr. Cotto.

Custodian of Record: Mark Spivey
Request Received by Custodian: August 12, 2015
Response Made by Custodian: August 24, 2015
GRC Complaint Received: November 1, 2015

Records Submitted for *In Camera* Examination: Three (3) e-mails between Scott M. Peterson, Assistant Prosecutor, and an investigator from the New York County District Attorney's Office.

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 Custodian's initial failure to locate the three (3) e-mails responsive to the Complainant's OPRA request constitutes an insufficient search pursuant to Schneble v. NJ Dep't of Env'tl. Prot., GRC Complaint 2007-220 (April 2008). *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2015-147 (Interim Order dated July 26, 2016).
2. The GRC must conduct an *in camera* review of the three (3) e-mails responsive to the Complainant's OPRA request to validate the Custodian's assertion that the records were exempt from disclosure as "inter-agency or intra-agency advisory, consultative,

¹ No legal representation listed on record.

² Represented by Brian P. Trelease, Esq. (Elizabeth, NJ).

or deliberative” material and/or under the criminal investigatory exemption. *See Paff v. NJ Dep’t of Labor, Bd. of Review*, 379 N.J. Super. 346 (App. Div. 2005); N.J.S.A. 47:1A-1.1.

3. **The Custodian must deliver³ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 2 above), a document or redaction index⁴, 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.**
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.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian’s compliance with the Council’s Interim Order.

Procedural History:

On March 30, 2017, the Council distributed its Interim Order to all parties on. On April 6, 2017, the Custodian responded to the Council’s Interim Order. The Custodian provided nine (9) copies of all three (3) e-mails to the GRC, along with certified confirmation of compliance. The Custodian certified that the three (3) e-mails contained a conversation between Chief Christopher Ryan, New York County District Attorney’s Office, and Assistant Prosecutor Scott M. Peterson regarding discovery in State v. Cotto, Indictment No. 11-10-00998, and a concurrent case in New York State. The Custodian also certified that he denied access to two (2) of the three (3) e-mails under the exemption for “inter-agency or intra-agency advisory, consultative, or deliberative” (“ACD”) material. N.J.S.A. 47:1A-1.1.

Analysis

Compliance

At its March 28, 2017 meeting, the Council ordered the Custodian to provide to the GRC nine (9) unredacted copies of the three (3) e-mails and to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On March 30, 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 April 6, 2017.

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.

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."

On April 6, 2017, the fifth (5th) business day after receipt of the Council's Order, the Custodian provided to the GRC nine (9) unredacted copies of the e-mails in question and simultaneously provided certified confirmation of compliance to the Executive Director.

Therefore, the Custodian complied with the Council's March 28, 2017 Interim Order because he responded in the prescribed time frame by providing nine (9) unredacted copies of the three (3) e-mails for an *in camera* review and simultaneously providing certified confirmation of compliance to the Executive Director.

Unlawful Denial of Access

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

Criminal investigatory records are exempt from disclosure. N.J.S.A. 47:1A-1.1. A criminal investigatory record is defined as "a record which is not required by law to be made, maintained or kept on file that is held by a law enforcement agency which pertains to any criminal investigation or related civil enforcement proceeding" Id.

The status of records purported to fall under the criminal investigatory records exemption pursuant to N.J.S.A. 47:1A-1.1 was examined by the GRC in Janeczko v. NJ Dep't of Law and Pub. Safety, Div. of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004). In Janeczko, the Council found that under OPRA, "criminal investigatory records include records involving all manner of crimes, resolved or unresolved, and includes information that is part and parcel of an investigation, confirmed and unconfirmed." *See also* Solloway v. Bergen Cnty. Prosecutor's Office, GRC Complaint No. 2011-39 (January 2013); Reitzler v. Egg Harbor Police Dep't (Atlantic), GRC Complaint No. 2011-85 (January 2013); Hwang v. Bergen Cnty. Prosecutor's Office, GRC Complaint No. 2011-348 (January 2013). Moreover, the Council has previously found that investigative reports were exempt as criminal investigatory records. *See* Crook v. Atlantic Cnty. Prosecutor's Office, GRC Complaint No. 2010-92 (March 2011).

The GRC conducted an *in camera* examination on the submitted e-mails. Upon review, the GRC is satisfied that the e-mails meet the two-prong test to qualify as criminal investigatory records. N.J.S.A. 47:1A-1.1. The *in camera* review confirms that the e-mails were part of the Cotto criminal investigation. Specifically, and as noted in both the SOI and certification of compliance, it is clear that the records refer to a question on discovery in Cotto. Further, there is no evidence in the record to indicate that the e-mails in question were required to be made, maintained, or kept on file by law.

Accordingly, the Custodian lawfully denied access to the responsive e-mails because they constitute criminal investigatory records pertaining to Cotto, Indictment No. 11-10-00998. N.J.S.A. 47:1A-6; Janeczko, GRC 2002-79 and 2002-80. Further, because the responsive e-mails

are exempt under the criminal investigatory exemption, the GRC declines to address the applicability of the ACD material exemption here.

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)).

Although the Custodian performed an insufficient search to locate records responsive to the subject OPRA request, he lawfully denied access to the three (3) e-mails subsequently located after the filing of this complaint. N.J.S.A. 47:1A-6. 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, but also over 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.

Here, the Complainant filed this complaint (on behalf of a client) stating that access to the subject OPRA request was denied. It should be noted that the Complainant did not provide any arguments as to why he believed the Custodian's denial of access was lawful. In the SOI, the Custodian certified that, after receiving this complaint, he located three (3) e-mails he previously did not know existed. The Custodian also argued that the e-mails were exempt under the criminal investigatory exemption and as ACD material. N.J.S.A. 47:1A-1.1. The Council subsequently found a technical violation (insufficient search) and ordered the e-mails be provided to it for an *in camera* review.

The *in camera* review has revealed that the Custodian lawfully denied access to the three (3) e-mails. Notwithstanding the Custodian's technical violation, the Complainant is not a prevailing party and is therefore not entitled to an award of reasonable attorney's fees. *See Paff v. Twp. of Teaneck (Bergen)*, GRC Complaint No. 2010-09 (February 2012)(holding that the complainant was not entitled to attorney's fees because the *in camera* review revealed that the custodian lawfully denied access to redactions contained in minutes).

Therefore, the Complainant has not achieved the desired result because the complaint did not bring about a change, voluntary or otherwise, in the Custodian's conduct. Teeters, 387 N.J. Super. 432. Additionally, no 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 Custodian lawfully denied access to the three (3) responsive e-mails as criminal investigatory records. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. Therefore, the Complainant is not 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.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's March 28, 2017 Interim Order because he responded in the prescribed time frame by providing nine (9) unredacted copies of the

three (3) e-mails for an *in camera* review and simultaneously providing certified confirmation of compliance to the Executive Director.

2. **The *In Camera* Examination set forth above reveals the Custodian has lawfully denied access pursuant to N.J.S.A. 47:1A-6 to the three responsive (3) e-mails because they are exempt as criminal investigatory records.**
3. Although the Custodian performed an insufficient search to locate records responsive to the subject OPRA request, he lawfully denied access to the three (3) e-mails subsequently located after the filing of this complaint. N.J.S.A. 47:1A-6. 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.
4. The Complainant has not achieved the desired result because the complaint did not bring about a change, voluntary or otherwise, in the custodian's conduct. Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, no 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 Custodian lawfully denied access to the three (3) responsive e-mails as criminal investigatory records. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. Therefore, the Complainant is not 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.

Prepared By: Frank F. Caruso
Communications Specialist

April 18, 2017



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

INTERIM ORDER

March 28, 2017 Government Records Council Meeting

Thomas R. Ashley, Esq.
(o/b/o Ralph Benjamin Cotto)
Complainant

Complaint No. 2015-337

v.

Union County Prosecutor's Office
Custodian of Record

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 Custodian's initial failure to locate the three (3) e-mails responsive to the Complainant's OPRA request constitutes an insufficient search pursuant to Schneble v. NJ Dep't of Env'tl. Prot., GRC Complaint 2007-220 (April 2008). *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2015-147 (Interim Order dated July 26, 2016).
2. The GRC must conduct an *in camera* review of the three (3) e-mails responsive to the Complainant's OPRA request to validate the Custodian's assertion that the records were exempt from disclosure as "inter-agency or intra-agency advisory, consultative, or deliberative" material and/or under the criminal investigatory exemption. *See* Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005); N.J.S.A. 47:1A-1.1.
3. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 2 above), a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,³ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**

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

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

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

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

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**

**Thomas R. Ashley, Esq.
(On Behalf of Ralph Benjamin Cotto)¹
Complainant**

GRC Complaint No. 2015-337

v.

**Union County Prosecutor's Office²
Custodial Agency**

Records Relevant to Complaint: Copies of all documents, possessed by the Union County Prosecutor's Office ("UCPO"), which mention Mr. Cotto.

Custodian of Record: Mark Spivey
Request Received by Custodian: August 12, 2015
Response Made by Custodian: August 24, 2015
GRC Complaint Received: November 1, 2015

Background³

Request and Response:

On August 12, 2015, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On August 24, 2015, the Custodian responded by seeking clarification of the subject OPRA request.⁴ On the same day, Chris G. Alevras, on behalf of Mr. Cotto, responded to the Custodian, stating that Mr. Cotto sought any records maintained in his file that related to any non-New Jersey prosecutorial agency in California, New York, or any other location. Again, on the same day, the Custodian responded via e-mail, advising that he actually needed clarification in the form of specific records (*i.e.*, criminal complaints, indictments, *etc.*). The Custodian noted that he was unsure whether the UCPO would be able to identify records from a file that was shared with other law enforcement agencies in specific states unless Mr. Cotto were able to identify specific records.

¹ No legal representation listed on record.

² Represented by Brian P. Trelease, Esq. (Elizabeth, NJ).

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.

⁴ The record is unclear whether the Custodian initially responded in writing or orally.

Thomas R. Ashley, Esq. (On Behalf of Ralph Benjamin Cotto) v. Union County Prosecutor's Office, 2015-337 – Findings and Recommendations of the Executive Director

On September 17, 2015, Mr. Alevras e-mailed the Custodian, apologizing for the delay and noting that the Custodian's August 24, 2015 e-mail went "straight to TRASH." Mr. Alevras stated that Mr. Cotto sought the following:

1. Communications received by UCPO, issued and sent by any New York law enforcement agency;
2. Any communications received by UCPO, issued and sent by any New York prosecutorial agency; and
3. Any communications sent by the UCPO, addressed to any New York law enforcement/prosecutorial agency.

On September 25, 2015, the Custodian responded to Mr. Alevras via e-mail, asking for Mr. Cotto's full name and date of birth to further aid in his search for responsive records. The Custodian also asked whether the correspondence sought related to a single case or multiple files. On the same day, Mr. Alevras provided Mr. Cotto's full name and date of birth and also advised that any responsive correspondence related only to Indictment No. 11-10-00998. Mr. Alevras also noted that the responsive records likely fell within the time period of January 1, 2011, to present.

On October 23, 2015, the Custodian responded to Mr. Alevras in writing, denying the Complainant's OPRA request on the basis that the UCPO could not locate any responsive records. The Custodian noted that, to the extent that records did exist, same would have been exempt from disclosure as "inter-agency or intra-agency advisory, consultative, or deliberative" ("ACD") material. N.J.S.A. 47:1A-1.1.

Denial of Access Complaint:

On November 1, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant provided no arguments as to why he believed the Custodian's denial of access was unlawful.

Statement of Information:⁵

On April 28, 2016, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on August 12, 2015. The Custodian affirmed that, following a series of communications in which he attempted to obtain clarification of the subject OPRA request, he responded in writing on October 23, 2015, denying access to the request. The Custodian certified that he advised the Complainant that no records existed and that, even if records were to exist, they would be exempt as ACD. However, the Custodian certified that, subsequent to the filing of this complaint, he located three (3) responsive e-mails. The Custodian further certified that he denied access to those records under the ACD and the criminal investigatory exemptions. N.J.S.A. 47:1A-1.1.

⁵ The complaint was referred to mediation on December 9, 2015. Following the parties' unsuccessful efforts to mediate the matter, the complaint was referred back to the GRC for adjudication on April 19, 2016. Thomas R. Ashley, Esq. (On Behalf of Ralph Benjamin Cotto) v. Union County Prosecutor's Office, 2015-337 – Findings and Recommendations of the Executive Director

The Custodian affirmed that he initially performed a manual page-by-page search of the case file in State v. Cotto, Indictment No. 11-10-00998, and was unable to locate responsive records. The Custodian affirmed that, following the filing of this complaint, he and Scott M. Peterson, the assistant prosecutor handling Cotto, agreed to search their e-mail accounts to determine if any records existed outside the physical file. The Custodian affirmed that Assistant Prosecutor Peterson located the three (3) e-mails between himself and the New York County District Attorney's Office within his account. The Custodian certified that the first e-mail was an inquiry by the investigator about whether the UCPO pursued a certain investigative avenue. The Custodian certified that the second e-mail was Assistant Prosecutor Peterson's response, informing the investigator that an answer could be found in the discovery in Cotto. The Custodian certified that the third e-mail contained a single word: "Thanks." The Custodian certified that he did not locate any additional correspondence responsive to the subject OPRA request.

The Custodian first contended that the responsive e-mails were exempt as ACD material. N.J.S.A. 47:1A-1.1; McGee v. Twp. of East Amwell, 416 N.J. Super. 602, 618-619 (App. Div. 2010) (*citing* Educ. Law Ctr. v. NJ Dep't of Educ., 198 N.J. 274, 285 (2009)). The Custodian argued that the e-mails at issue meet the two-prong ACD test: 1) the information sought was part of the process leading to the formulation of an agency's decision, and 2) the material reflected deliberative aspects of the process. McGee, 416 N.J. Super. at 620. The Custodian argued that the records consisted of correspondence between UCPO and the New York County District Attorney's Office regarding the formulation of an investigation plan related to the ongoing criminal investigation of Mr. Cotto. Specifically, the Custodian certified that the e-mails contained discussion of whether the agencies reached a particular decision on the investigation process. The Custodian argued that disclosure of the e-mails would defeat the express purpose of the ACD exemption.

Additionally, the Custodian argued that the e-mails were exempt as criminal investigatory records. The Custodian asserted that the responsive e-mails also meet the two-prong criminal investigatory test: 1) the records were not required by law to be made, maintained, or kept on file by a law enforcement agency, and 2) the records pertain to a criminal investigation or related civil enforcement proceeding. O'Shea v. Twp. of West Milford, 410 N.J. Super. 371, 381-382 (App. Div. 2009). The Custodian affirmed that there is no law compelling UCPO to maintain an e-mail. Further, the Custodian certified that the e-mails clearly relate to the criminal investigation in Cotto. The Custodian thus argued that the e-mails clearly fall within the definition of a criminal investigatory record exempt from disclosure under OPRA.

Analysis

Insufficient Search

A custodian is obligated to search for and find identifiable government records listed in an OPRA request. Donato v. Twp. of Union, GRC Complaint No. 2005-182 (February 2007); May v. Twp. of Edison (Middlesex), GRC Complaint No. 2007-165 (October 2007); Schneble v. NJ Dep't of Env'tl. Prot., GRC Complaint 2007-220 (April 2008). Further, "it is among a custodian's duties to perform a complete search for the requested records before responding to an

OPRA request as doing so will help ensure that the Custodian's response is accurate and has an appropriate basis in law." Weiner v. Cnty. of Essex, GRC Complaint No. 2013-220 (March 2014) at 3.

In Lebbing v. Borough of Highland Park (Middlesex), GRC Complaint No. 2009-251 (February 2011), the Council held that the custodian denied access as a result of an initially inadequate search pursuant to complainant's OPRA request and failed to bear the burden of proving due diligence in searching for the records. Specifically, the complainant submitted two (2) OPRA requests, one year apart, for the same records. The custodian conducted a search one year after the initial search and located the records in the same area, within an office that she admitted having searched a year earlier. *See also* Weiner v. Cnty. of Essex, GRC Complaint No. 2013-52 (September 24, 2013)

Finally, in Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2015-147 (Interim Order dated July 26, 2016), the complainant filed a denial of access complaint after he received a record responsive to the request at issue there but in response to a separate OPRA request. The custodian certified in the SOI that he had only previously checked the paper file containing the responsive records but insinuated that he had not searched his computer. The Council determined that the custodian's search was insufficient, reasoning that "his failure to locate this easily identifiable record raises a question of whether he performed a search of his computer prior to disclosing records initially to the Complainant." Id. at 5.

Here, the Custodian certified in the SOI that he initially performed a page-by-page review of the Cotto indictment file and determined that no records existed. The Custodian also certified that, after the filing of this complaint, he and Assistant Prosecutor Peterson performed a search of their e-mail accounts and ultimately located the three (3) records now at issue. Although decided during the pendency of this complaint, the Council's decision in Verry, GRC 2015-147 is instructive. Similar to the facts in Verry, GRC 2015-147, the evidence supports that the Custodian initially reviewed the physical file only. However, neither he nor Assistant Prosecutor Peterson performed a search of their e-mail accounts until after this complaint was filed. It should be noted that the custodian's insufficient search in Verry, GRC 2015-147, came to light prior to the complaint filing. However, the principle of Verry holds true here: the Custodian failed "to perform a complete search for the requested records before responding to an OPRA request." Thus, the evidence clearly supports that the Custodian conducted an insufficient search prior to disclosing responsive records to the Complainant.

Accordingly, the Custodian's initial failure to locate the three (3) e-mails responsive to the Complainant's OPRA request constitutes an insufficient search pursuant to Schneble, GRC 2007-220. *See also* Verry, GRC 2015-147.

Unlawful Denial of Access

In Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the Council⁶ that accepted the custodian's legal

⁶ Paff v. NJ Dep't of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

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conclusion for the denial of access without further review. The Appellate Division noted that “OPRA contemplates the GRC’s meaningful review of the basis for an agency’s decision to withhold government records When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers.” Id. The Court stated that:

[OPRA] also contemplates the GRC’s *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the ‘Open Public Meetings Act,’ N.J.S.A. 10:4-6 to -21, it also provides that the GRC ‘may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.’ N.J.S.A. 47:1A-7(f). This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.

Id. at 355.

Further, the Court found that:

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

Id.

Here, the Custodian denied access to three (3) e-mails. In the SOI, the Custodian certified to the content of each e-mail and argued that they were exempt from disclosure under the ACD and criminal investigatory exemptions. N.J.S.A. 47:1A-1.1; N.J.S.A. 2A:84A-20; N.J.R.E. 504. The description provided by the Custodian gives the GRC pause to determine whether he lawfully denied access to the records under those two (2) exemptions. Specifically, the description of each e-mail raises questions as to the full applicability of the exemptions cited. For this reason, the GRC believes the most prudent course of action here is to perform an *in camera* review of the three (3) e-mails.

Therefore, the GRC must conduct an *in camera* review of the three (3) e-mails responsive to the Complainant’s OPRA request to validate the Custodian’s assertion that the records were exempt from disclosure as ACD material and/or under the criminal investigatory exemption. *See Paff*, 379 N.J. Super. at 346; N.J.S.A. 47:1A-1.1.

Knowing & Willful

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

Prevailing Party Attorney's Fees

The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian's initial failure to locate the three (3) e-mails responsive to the Complainant's OPRA request constitutes an insufficient search pursuant to Schneble v. NJ Dep't of Env'tl. Prot., GRC Complaint 2007-220 (April 2008). *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2015-147 (Interim Order dated July 26, 2016).
2. The GRC must conduct an *in camera* review of the three (3) e-mails responsive to the Complainant's OPRA request to validate the Custodian's assertion that the records were exempt from disclosure as "inter-agency or intra-agency advisory, consultative, or deliberative" material and/or under the criminal investigatory exemption. *See* Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005); N.J.S.A. 47:1A-1.1.
3. **The Custodian must deliver⁷ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 2 above), a document or redaction index⁸, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,⁹ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

⁷ 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.

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

⁹ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

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5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

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