



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

August 29, 2017 Government Records Council Meeting

Luis Rodriguez

Complainant

v.

Kean University

Custodian of Record

Complaint No. 2016-129

At the August 29, 2017 public meeting, the Government Records Council (“Council”) considered the August 22, 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 Custodian complied with the Council’s July 25, 2017 Interim Order because the Custodian timely forwarded to the Complainant in unredacted form an e-mail dated February 9, 2016, between Geri Benedetto and Audrey Kelly regarding the subject “FW: OPRA #16-15,” in compliance with said Order.
2. Although the Custodian denied the Complainant access to the relevant record, which the Council subsequently determined via an *in camera* examination should have been disclosed, the Custodian did disclose the record in compliance with the Council’s July 25, 2017 Interim Order. Moreover, the evidence of record does not indicate that the Custodian’s actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian’s actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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



Final Decision Rendered by the
Government Records Council
On The 29th Day of August, 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: August 31, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
August 29, 2017 Council Meeting**

**Luis Rodriguez¹
Complainant**

GRC Complaint No. 2016-129

v.

**Kean University²
Custodial Agency**

Records Relevant to Complaint: “On Feb. 8, 2016, I sent an email to Geri Benedetto, Kean’s Chief Counsel and others. The subject line of the email was ‘OPRA #16-15.’ I asked Ms. Benedetto to forward that email to each and every member of the Board of Trustees. I seek a copy of any correspondence Ms. Benedetto had with a member of the Board of Trustees, Dawood Farahi, and/or Audrey Kelly about the content of the email and my request to have it forwarded to the BOT.”

Custodian of Record: Laura Barkley Haelig

Request Received by Custodian: March 7, 2016

Response Made by Custodian: March 16, 2016 and March 29, 2016

GRC Complaint Received: April 25, 2016

Background

July 25, 2017 Council Meeting:

At its 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, found that:

1. The Custodian complied with the Council’s May 23, 2017 Interim Order because the Custodian in a timely manner forwarded to the GRC nine (9) copies of the record ordered by the Council for an *in camera* examination, a document index, and a legal certification in compliance with the Council’s Interim Order.
2. **The *in camera* examination reveals that the Custodian has not lawfully denied access to the record responsive to the Complainant’s request because the record constitutes neither ACD material nor attorney-client privileged material exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. Therefore, the Custodian shall,**

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Jennifer McGruther.

within five (5) business days from receipt of the Council’s Interim Order, disclose to the Complainant in unredacted form the record responsive to the request; to wit, an e-mail dated February 9, 2016, between Geri Benedetto and Audrey Kelly regarding the subject “FW: OPRA #16-15.”

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

Procedural History:

On July 27, 2017, the Council distributed its July 25, 2017 Interim Order to all parties. On August 3, 2017, the Custodian disclosed to the Complainant in unredacted form an e-mail dated February 9, 2016, between Geri Benedetto and Audrey Kelly regarding the subject “FW: OPRA #16-15,” in compliance with the Council’s Interim Order.

Analysis

Compliance

On July 25, 2017, the Council ordered the above-referenced compliance. On July 27, 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. Therefore, compliance was due on or before August 3, 2017. On August 3, 2017, the Custodian forwarded to the Complainant in unredacted form an e-mail dated February 9, 2016, between Geri Benedetto and Audrey Kelly regarding the subject “FW: OPRA #16-15,” in compliance with the Council’s July 25, 2017 Interim Order.³

Therefore, the Custodian complied with the Council’s July 25, 2017 Interim Order because the Custodian timely forwarded to the Complainant in unredacted form an e-mail dated February 9, 2016, between Geri Benedetto and Audrey Kelly regarding the subject “FW: OPRA #16-15,” in compliance with said Order.

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).

³ The Custodian provided the GRC with a copy of the transmittal which included a copy of the record that she e-mailed to the Complainant.

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 (Berg); 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 denied the Complainant access to the relevant record, which the Council subsequently determined via an *in camera* examination should have been disclosed, the Custodian did disclose the record in compliance with the Council's July 25, 2017 Interim Order. Moreover, the evidence of record does not indicate that the Custodian's actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian's actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's July 25, 2017 Interim Order because the Custodian timely forwarded to the Complainant in unredacted form an e-mail dated February 9, 2016, between Geri Benedetto and Audrey Kelly regarding the subject "FW: OPRA #16-15," in compliance with said Order.
2. Although the Custodian denied the Complainant access to the relevant record, which the Council subsequently determined via an *in camera* examination should have been disclosed, the Custodian did disclose the record in compliance with the Council's July 25, 2017 Interim Order. Moreover, the evidence of record does not indicate that the Custodian's actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian's actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: John E. Stewart

August 22, 2017



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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CHRIS CHRISTIE
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KIM GUADAGNO
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INTERIM ORDER

July 25, 2017 Government Records Council Meeting

Luis Rodriguez
Complainant

Complaint No. 2016-129

v.

Kean University
Custodian of Record

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 Custodian complied with the Council’s May 23, 2017 Interim Order because the Custodian in a timely manner forwarded to the GRC nine (9) copies of the record ordered by the Council for an *in camera* examination, a document index, and a legal certification in compliance with the Council’s Interim Order.
2. **The *in camera* examination reveals that the Custodian has not lawfully denied access to the record responsive to the Complainant’s request because the record constitutes neither ACD material nor attorney-client privileged material exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. Therefore, the Custodian shall, within five (5) business days from receipt of the Council’s Interim Order, disclose to the Complainant in unredacted form the record responsive to the request; to wit, an e-mail dated February 9, 2016, between Geri Benedetto and Audrey Kelly regarding the subject “FW: OPRA #16-15.”**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.



Interim Order Rendered by the
Government Records Council
On The 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

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Luis Rodriguez¹
Complainant**

GRC Complaint No. 2016-129

v.

**Kean University²
Custodial Agency**

Records Relevant to Complaint: “On Feb. 8, 2016, I sent an email to Geri Benedetto, Kean’s Chief Counsel and others. The subject line of the email was ‘OPRA #16-15.’ I asked Ms. Benedetto to forward that email to each and every member of the Board of Trustees. I seek a copy of any correspondence Ms. Benedetto had with a member of the Board of Trustees, Dawood Farahi, and/or Audrey Kelly about the content of the email and my request to have it forwarded to the BOT.”

Custodian of Record: Laura Barkley Haelig

Request Received by Custodian: March 7, 2016

Responses Made by Custodian: March 16, 2016 and March 29, 2016

GRC Complaint Received: April 25, 2016

Record Submitted for *In Camera* Examination: One (1) e-mail dated February 9, 2016, between Geri Benedetto and Audrey Kelly regarding the subject “FW: OPRA #16-15” and containing one attachment: the Complainant’s February 8, 2016 e-mail to Geri Benedetto containing the subject line “OPRA #16-15.”³

Background

May 23, 2017 Council Meeting:

At its May 23, 2017 public meeting, the Government Records Council (“Council”) considered the May 16, 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 GRC must conduct an *in camera* review of the responsive records to validate the Custodian’s assertion that said records are exempt from disclosure as intra-agency

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Jennifer McGruther.

³ This is the only record responsive to the request. The Custodian did not make this fact clear in the March 29, 2016 response to the Complainant’s OPRA request; she merely referenced “[t]he specific government records sought.”

advisory, consultative, or deliberative material and attorney-client privileged material. See Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005) and N.J.S.A. 47:1A-1.1.

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

Procedural History:

On May 24, 2017, the Council distributed its May 23, 2017 Interim Order to all parties. On May 30, 2017, the Custodian requested an extension of time until June 13, 2017, to respond to the Council's Interim Order. On May 31, 2017, the GRC granted the Custodian's request for the extension of time. On June 13, 2017, the Custodian's Council delivered to the GRC nine (9) copies of the record ordered by the Council for an *in camera* examination, a document index, and a legal certification prepared by the Custodian.

Analysis

Compliance

On May 23, 2017, the Council ordered the above-referenced compliance. On May 24, 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. On May 30, 2017, within the initial period of time for compliance, the Custodian requested and was granted an extension of time until June 13, 2017, to comply with the Council's Order. On June 13, 2017, the Custodian forwarded to the GRC nine (9) copies of the record ordered by the Council for an *in camera* examination, a document index, and a legal certification in compliance with the Council's Interim Order.

Therefore, the Custodian complied with the Council's May 23, 2017 Interim Order because the Custodian in a timely manner forwarded to the GRC nine (9) copies of the record ordered by the Council for an *in camera* examination, a document index, and a legal certification in compliance with the Council's Interim Order.

Unlawful Denial of Access

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise

exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful. N.J.S.A. 47:1A-6.

The Custodian asserted two reasons for denying the Complainant access to the requested record: (1) that the requested record constituted inter-agency or intra-agency advisory, consultative, or deliberative (“ACD”) material and (2) that the record was within the attorney-client privilege. The Custodian stated that the records were exempt from access pursuant to N.J.S.A. 47:1A-1.1.

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

In O’Shea v. West Milford BOE, GRC Complaint No. 2004-93 (April 2006), the Council stated that:

[N]either the statute nor the courts have defined the terms ... “advisory, consultative, or deliberative” in the context of the public records law. The Council looks to an analogous concept, the deliberative process privilege, for guidance in the implementation of OPRA’s ACD exemption. Both the ACD exemption and the deliberative process privilege enable a governmental entity to shield from disclosure material that is pre-decisional and deliberative in nature. Deliberative material contains opinions, recommendations, or advice about agency policies. In Re the Liquidation of Integrity Ins. Co., 165 N.J. 75, 88 (2000); In re Readoption With Amendments of Death Penalty Regulations, 182 N.J.149 (App. Div. 2004).⁴

The deliberative process privilege is a doctrine that permits government agencies to withhold documents that reflect advisory opinions, recommendations, and deliberations submitted as part of a process by which governmental decisions and policies are formulated. NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975). Specifically, the New Jersey Supreme Court has ruled that a record that contains or involves factual components is entitled to deliberative-process protection under the exemption in OPRA when it was used in the decision-making process *and* its disclosure would reveal deliberations that occurred during that process. Educ. Law Ctr. v. NJ Dep’t of Educ., 198 N.J. 274 (2009). This long-recognized privilege is rooted in the concept that the sovereign has an interest in protecting the integrity of its deliberations. The earliest federal case adopting the privilege is Kaiser Alum. & Chem. Corp. v. United States, 157 F. Supp. 939 (1958). The privilege and its rationale were subsequently adopted by the federal district courts and circuit courts of appeal. United States v. Farley, 11 F.3d 1385, 1389 (7th Cir.1993).

The deliberative process privilege was discussed at length in Integrity. There, the Court addressed the question of whether the Commissioner of Insurance, acting in the capacity of

⁴ Affirmed on appeal. See O’Shea v. West Milford Board of Education, 391 N.J. Super. 534, 538 (App. Div. 2007), certif. denied, 192 N.J. 292 (2007).

liquidator of a regulated entity, could protect certain records from disclosure which she claimed contained opinions, recommendations, or advice regarding agency policy. Id. at 81. The Court adopted a qualified deliberative process privilege based upon the holding of McClain v. Coll. Hosp., 99 N.J. 346 (1985). Integrity, 165 N.J. at 88. In doing so, the Court noted that:

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

Id. at 84-85 (citations omitted).

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

The initial burden falls on the state agency to show that the documents it seeks to shield are pre-decisional and deliberative in nature (containing opinions, recommendations, or advice about agency policies). Once the deliberative nature of the documents is established, there is a presumption against disclosure. The burden then falls on the party seeking discovery to show that his or her compelling or substantial need for the materials overrides the government's interest in non-disclosure. Among the considerations are the importance of the evidence to the movant, its availability from other sources, and the effect of disclosure on frank and independent discussion of contemplated government policies.

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

OPRA also excludes from the definition of a government record any record within the attorney client privilege. N.J.S.A. 47:1A-1.1. In New Jersey, protecting confidentiality within the attorney-client relationship has long been recognized by the courts. *See, e.g. Matter of Grand Jury Subpoenas*, 241 N.J. Super. 18 (App. Div. 1989). In general, the attorney-client privilege renders as confidential communications between a lawyer and a client made in the course of that professional relationship. *See N.J.S.A.* 2A: 84A-20 and Fellerman v. Bradley, 99 N.J. 493, 498-99 (1985). Rule 504 (1) of the New Jersey Rules of Evidence provides that communications between a lawyer and client, “in the course of that relationship and in professional confidence, are privileged” Such communications as discussion of litigation strategy, evaluation of liability, potential monetary exposure, and settlement recommendations are considered privileged. The Press of Atlantic City v. Ocean County Joint Insurance Fund, 337 N.J. Super. 480, 487 (Law Div. 2000). Also confidential are mental impressions, legal conclusions, and opinions or theories of attorneys. In Re Environmental Ins. Actions, 259 N.J. Super. 308, 317

(App. Div. 1992).

The attorney-client privilege "recognizes that sound legal advice or advocacy serves public ends and that the confidentiality of communications between client and attorney constitutes an indispensable ingredient of our legal system." Matter of Grand Jury Subpoenas, 241 N.J. Super. 18, 27-8 (App.Div.1989). The attorney-client privilege protects communications between a lawyer and the client made in the course of that professional relationship and particularly protects information which, if disclosed, would jeopardize the legal position of the client. N.J.S.A. 2A:84A-20; RPC 1.6. Moreover, "[t]he privilege extends to communications between a public body and the attorney retained to represent it." Matter of Grand Jury, *supra*, at 28. The New Jersey Supreme Court has observed that RPC 1.6 "expands the scope of protected information to include all information relating to the representation, regardless of the source or whether the client has requested it be kept confidential or whether disclosure of the information would be embarrassing or detrimental to the client." In re Advisory Opinion No. 544 of N.J. Sup. Court, 103 N.J. 399, 406 (1986).

Redaction of otherwise public documents is appropriate where protection of privileged or confidential subject matter is a concern. South Jersey Publishing Co., Inc. v. N. J. Expressway Authority, 124 N.J. 478, 488-9 (1991). Moreover, whether the matter contained in the requested documents pertains to pending or closed cases is important, because the need for confidentiality is greater in pending matters. Keddie v. Rutgers, State University, 148 N.J. 36, 54 (1997). Nevertheless, "[e]ven in closed cases . . . attorney work-product and documents containing legal strategies may be entitled to protection from disclosure." Id.

The GRC conducted an *in camera* examination of the submitted record. The record is described above under the subheading "Record Submitted for *In Camera* Examination." The total content of the e-mail consists of three (3) letters of the alphabet.

The Custodian's first argument is that the Complainant was denied access to the record because it constitutes ACD material, exempt from access under N.J.S.A. 47:1A-1.1. Although the record may have been generated before the adoption of the agency's policy or decision, if any, the three letters which constitute the entire content of the e-mail certainly do not contain opinions, recommendations, or advice about agency policies. Accordingly, the record is not exempt from access as ACD material pursuant to N.J.S.A. 47:1A-1.1.

The Custodian also asserted, however, that the Complainant requested communications between the University's Board of Trustees and the Board's counsel; therefore, his request was denied because it seeks attorney-client privileged material pursuant to N.J.S.A. 47:1A-1.1. First of all, if Ms. Benedetto was acting in the capacity of the Board's attorney at the time she generated the record, such fact is unclear from the evidence of record.⁵ Not every communication between two members of an organization, when one member happens to be an attorney, is an attorney-client communication. However, even if there was a present attorney-client relationship between the sender, Ms. Benedetto, and the recipient, Audrey Kelly, the content of the e-mail does not appear to have been made in contemplation of professional confidence. Further, the

⁵ According to the Custodian's certification of compliance, Ms. Benedetto also serves as an Associate Vice President of the University.

communication does not present an opinion on law, legal services, or assistance in a legal proceeding. Moreover, it is not the type of information which, if disclosed, would jeopardize the legal position of a client.⁶ As such, the responsive record is not exempt from access as attorney-client privileged material pursuant to N.J.S.A. 47:1A-1.1.

Accordingly, the *in camera* examination reveals that the Custodian has not lawfully denied access to the record responsive to the Complainant's request because the record constitutes neither ACD material nor attorney-client privileged material exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. Therefore, the Custodian shall, within five (5) business days from receipt of the Council's Interim Order, disclose to the Complainant in unredacted form the record responsive to the request; to wit, an e-mail dated February 9, 2016, between Geri Benedetto and Audrey Kelly regarding the subject "FW: OPRA #16-15."

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 Custodian complied with the Council's May 23, 2017 Interim Order because the Custodian in a timely manner forwarded to the GRC nine (9) copies of the record ordered by the Council for an *in camera* examination, a document index, and a legal certification in compliance with the Council's Interim Order.
2. **The *in camera* examination reveals that the Custodian has not lawfully denied access to the record responsive to the Complainant's request because the record constitutes neither ACD material nor attorney-client privileged material exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. Therefore, the Custodian shall, within five (5) business days from receipt of the Council's Interim Order, disclose to the Complainant in unredacted form the record responsive to the request; to wit, an e-mail dated February 9, 2016, between Geri Benedetto and Audrey Kelly regarding the subject "FW: OPRA #16-15."**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

⁶ The GRC recognizes that not only the content of an e-mail, but also the attachments, would be subject to the attorney-client privilege. Here, however, the attachment to the responsive record is the Complainant's Feb. 8, 2016 e-mail to Geri Benedetto asking that the e-mail be shared with certain individuals, and it appears that the content of the responsive record serves only that purpose.

Prepared By: John E. Stewart

July 18, 2017



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INTERIM ORDER

May 23, 2017 Government Records Council Meeting

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v.

Kean University
Custodian of Record

At the May 23, 2017 public meeting, the Government Records Council ("Council") considered the May 16, 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 GRC must conduct an *in camera* review of the responsive records to validate the Custodian's assertion that said records are exempt from disclosure as intra-agency advisory, consultative, or deliberative material and attorney-client privileged material. See Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005) and N.J.S.A. 47:1A-1.1.
2. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the records responsive to the request, a document or redaction index listing each of the responsive records², 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.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

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."



Interim Order Rendered by the
Government Records Council
On The 23rd Day of May, 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: May 24, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
May 23, 2017 Council Meeting**

**Luis Rodriguez¹
Complainant**

GRC Complaint No. 2016-129

v.

**Kean University²
Custodial Agency**

Records Relevant to Complaint: “On Feb. 8, 2016, I sent an email to Geri Benedetto, Kean’s Chief Counsel and others. The subject line of the email was ‘OPRA #16-15.’ I asked Ms. Benedetto to forward that email to each and every member of the Board of Trustees. I seek a copy of any correspondence Ms. Benedetto had with a member of the Board of Trustees, Dawood Farahi, and/or Audrey Kelly about the content of the email and my request to have it forwarded to the BOT.”

Custodian of Record: Laura Barkley Haelig

Request Received by Custodian: March 7, 2016

Response Made by Custodian: March 16, 2016 and March 29, 2016

GRC Complaint Received: April 25, 2016

Background³

Request and Response:

On March 7, 2016, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On March 16, 2016, the seventh (7th) business day following receipt of said request, the Custodian responded in writing, informing the Complainant that she would need an extension of time until March 30, 2016, in order to address the Complainant’s request. On March 29, 2016, the Custodian responded in writing, informing the Complainant that the requested records were exempt from access under N.J.S.A. 47:1A-1.1 because the records constituted inter-agency or intra-agency advisory, consultative, or deliberative (“ACD”) material and were records within the attorney-client privilege.

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.

Denial of Access Complaint:

On April 25, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that he provided the request to the Custodian on March 7, 2016, and that the Custodian responded to the request on March 29, 2016, informing him that the requested records were exempt from access pursuant to N.J.S.A. 47:1A-1.1 because the records constituted ACD material and were attorney-client privileged.

The Complainant argues that the Custodian misinterpreted the ACD and attorney-client privilege exemptions because she applied them to the entire document. The Complainant contends that the Custodian should have disclosed the requested records to him after redacting the ACD and attorney-client privileged material.

The Complainant asserts that the Custodian recently provided the Complainant with a communication between the Custodian and Felice Vazquez, wherein the Custodian redacted alleged ACD and attorney-client privileged material.⁴ For this reason, the Complainant states that the Custodian knowingly and willfully violated OPRA because the Custodian denied the Complainant the entire document rather than just redacting the alleged exempt material. At the very least, the Complainant asserts that the Custodian was obligated to disclose the dates and subjects of the responsive e-mail(s).

Statement of Information:

On May 26, 2016, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on March 7, 2016, and responded in writing on March 16, 2016, seeking an extension. The Custodian further certified that she responded in writing on March 29, 2016, providing a disposition.

The Custodian certified that the Complainant requested communications between the University’s Board of Trustees (“Board”) and the Board’s counsel. The Custodian argues that such communications are clearly attorney-client privileged and not subject to disclosure pursuant to N.J.S.A. 47:1A-1.1. The Custodian set forth the purposes of the attorney-client privilege (citations omitted).

The Custodian also argues that the requested records were lawfully denied as ACD material. The Custodian states that the deliberative process privilege shields documents or communications that are pre-decisional and deliberative. The Custodian states that, per the court’s decision in In Re the Liquidation of Integrity Ins. Co., 165 N.J. 75 (2000), a pre-decisional record “must have been generated before the adoption of an agency’s policy or decision.” Id. at 84. The Custodian also states that to be deliberative, the record must “contain opinions, recommendations, or advice about agency policies.” Id. at 84-85. The Custodian asserts that the requested records pertain to the substance of an ongoing deliberation among the Board. As such, the Custodian contends the requested records were lawfully denied. The Custodian states that no Vaughn index was required in this matter because to do so would break

⁴ The Complainant is referring to Rodriguez v. Kean University, GRC Complaint No. 2016-40 (Interim Order March 28, 2016).

the attorney-client privilege, and the request itself obviated the need for a Vaughn index because it defined the nature of the documents requested.⁵

Additional Submissions:

On June 15, 2016, the Complainant responded to the Custodian's SOI. The Complainant states that the Custodian misunderstands the necessity for providing a Vaughn index. The Complainant also reiterates his argument for disclosure of the non-exempt portions of the records that he previously set forth in the complaint.

Analysis

Unlawful Denial of Access

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

The Custodian did not identify any records that were responsive to the Complainant's request. Rather, the Custodian argued that the Complainant's request was lawfully denied because the records constituted ACD and attorney-client privileged material pursuant to N.J.S.A. 47:1A-1.1.

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 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.

⁵ Because no responsive records were listed in the SOI, the GRC contacted the Custodian's Counsel on April 21, 2017, to determine if the OPRA request identified the records with sufficient specificity such that responsive records were able to be located by the Custodian. On April 26, 2017, the Custodian's Counsel informed the GRC that the Custodian located responsive records; however, the Custodian denied access to the records.

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

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.

Accordingly, the GRC must conduct an *in camera* review of the responsive records to validate the Custodian's assertion that said records are exempt from disclosure as ACD and attorney-client privileged material. *See Paff*, 379 N.J. Super. 346 and 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.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The GRC must conduct an *in camera* review of the responsive records to validate the Custodian's assertion that said records are exempt from disclosure as intra-agency advisory, consultative, or deliberative material and attorney-client privileged material. *See Paff v. NJ Dep't of Labor, Bd. of Review*, 379 N.J. Super. 346 (App. Div. 2005) and N.J.S.A. 47:1A-1.1.
2. **The Custodian must deliver⁷ to the Council in a sealed envelope nine (9) copies of the records responsive to the request, a document or redaction index listing each of the responsive records⁸, 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.**

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."

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

Prepared By: John E. Stewart

May 16, 2017