



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 22, 2018 Government Records Council Meeting

Luis F. Rodriguez  
Complainant

Complaint No. 2016-159

v.

Kean University  
Custodian of Record

At the May 22, 2018 public meeting, the Government Records Council (“Council”) considered the May 15, 2018 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 February 27, and April 24, 2018 Interim Orders because she responded in the extended time frame supplying nine (9) copies of the unredacted Form attachment at issue here for an *in camera* review. The Custodian also simultaneously provided certified confirmation of compliance to the Council Staff inclusive of the required responses.
2. **The *In Camera* Examination set forth above reveals the Custodian has lawfully denied access to the Form attachment pursuant to N.J.S.A. 47:1A-6.**
3. Although the Custodian’s September 22, 2015 response was insufficient, she lawfully denied access to the responsive Form attachment. N.J.S.A. 47:1A-1.1; 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.

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 22<sup>nd</sup> Day of May, 2018

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: May 25, 2018**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Council Staff  
May 22, 2018 Council Meeting**

**Luis F. Rodriguez<sup>1</sup>  
Complainant**

**GRC Complaint No. 2016-159**

v.

**Kean University<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copy via e-mail of the bid waiver form (“Form”) and any “accompanying documents” for the “Resolution Authorizing the Waiver of Public Advertising and Bidding for Professional Services Performed by Ting Xu” (“Resolution”) passed at the June 2015 Board of Trustees meeting.

**Custodian of Record:** Laure Barkley-Haelig

**Request Received by Custodian:** September 11, 2015; May 12, 2016

**Response Made by Custodian:** September 22, 2015; May 23, 2016

**GRC Complaint Received:** June 6, 2016

**Records Submitted for *In Camera* Examination:** Draft contract between Kean University (“Kean”) and Ting Xu (11 pages).

**Background**

**April 24, 2018 Council Meeting:**

At its April 24, 2018 public meeting, the Council considered the April 17, 2018 Supplemental Findings and Recommendations of the Council Staff 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 has failed to establish in her request for reconsideration of the Council’s February 27, 2018 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. The Custodian failed to establish that the complaint should be reconsidered based on “new evidence” or a change in circumstances. The Custodian has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Specifically, the “evidence” submitted by the

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Deputy Attorney General Beth N. Shore. Previously represented by Deputy Attorney General Jennifer McGruther.

Custodian did not constitute “new evidence” because it could have been provided during the pendency of the complaint. Further, the subsequent disclosure of a contract to the Complainant did not change circumstances: it is still unclear whether the Custodian unlawfully denied access to the Form attachment(s) at issue here. Thus, the Custodian’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. The Council’s February 27, 2018 Interim Order remains in effect. As part of her certified confirmation of compliance, the Custodian shall include an explanation as to whether the contract was the only document accompanying the Form. The Custodian must also certify to the date the negotiations period ended, if applicable.

### Procedural History:

On April 25, 2018, The Council distributed its Interim Order to all parties. On May 1, 2018, the Custodian sought an extension of time to comply with the Council’s Order. On May 2, 2018, the Government Records Council (“GRC”) granted an extension until May 9, 2018.

On May 9, 2018, the Custodian responded to the Council’s Interim Order. Therein, the Custodian certified that she was providing nine (9) “true and correct” copies of the responsive Form attachment to the GRC. The Custodian certified that the contract provided for the *in camera* review was the only record attached to the Form. The Custodian maintained that the contract was exempt from disclosure as a draft document pursuant to N.J.S.A. 47:1A-1.1. See also Libertarians for Transparent Gov’t v. Gov’t Records Council, 2018 N.J. Super. LEXIS 14 (App. Div. 2018). Additionally, the Custodian affirmed that she did not have direct knowledge of what date negotiations ended, but that the contract was “effectuated” on July 23, 2015.

### Analysis

#### Compliance

At its February 27, 2018 meeting, the Council ordered the Custodian to provide nine (9) copies of the Form attachment at issue here for an *in camera* review and a document index “**within five (5) business days from receipt of the Council’s Interim Order . . . and simultaneously provide certified confirmation of compliance . . . to the Council Staff.**” Thereafter, the Custodian sought reconsideration, which the Council denied in its April 24, 2018 Interim Order. As part of that decision, the Council stated that the February 27, 2018 Interim Order remained in effect. The Council further ordered the Custodian to provide as part of her certified confirmation of compliance an explanation regarding the existence of additional Form attachments and the timing of contract negotiations. On April 25, 2018, 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 May 2, 2018.

On May 1, 2018, the fourth (4<sup>th</sup>) business day after receipt of the Council's Order, the Custodian sought an extension of time until May 9, 2018 to respond, which the GRC granted. On May 9, 2018, the last day of the extended time frame, the Custodian submitted to the GRC nine (9) copies of the requested record for an *in camera* review. The Custodian also simultaneously provided certified confirmation of compliance to the Council Staff inclusive of the required responses.

Therefore, the Custodian complied with the Council's February 27, and April 24, 2018 Interim Orders because she responded in the extended time frame supplying nine (9) copies of the unredacted Form attachment at issue here for an *in camera* review. The Custodian also simultaneously provided certified confirmation of compliance to the Council Staff inclusive of the required responses.

### **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.

OPRA provides that the definition of a government record "shall not include . . . inter-agency or intra-agency advisory, consultative, or deliberative [("ACD")] material." 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 Center v. N.J. Dep't of Educ., 198 N.J. 274, 285 (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.

Additionally, the courts and GRC have long held that draft documents are exempt under the ACD exemption. See Ciesla v. N.J. Dep't of Health & Senior Serv., 429 N.J. Super. 127 (App. Div. 2012) (affirming Ciesla v. N.J. Dep't of Health and Senior Serv., GRC Complaint No. 2010-38 (May 2011) (holding that a draft staff report was exempt from disclosure as ACD material). The Council has also repeatedly held that draft records of a public agency fall within the deliberative process privilege. For example, in Dalesky v. Borough of Raritan (Somerset), GRC Complaint No. 2008-61 (November 2009), the Council 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 that had not yet been reviewed by the municipal engineer. The Council, relying on precedential case law, concluded that the requested letter was exempt from disclosure under OPRA as ACD material. See also Anonymous v. Ocean City Historic Pres. Comm'n (Cape May), GRC Complaint No. 2015-2 (June 2015) (holding that a draft historic district map was exempt from disclosure under the ACD exemption).

In the instant matter, the GRC conducted an *in camera* examination on the submitted Form attachment and has confirmed that it was a draft record not subject to disclosure at the time of the Complainant's OPRA requests. Among the evidence substantiating this determination is that each of the contract's eleven (11) pages contains a "Draft" stamp. Further, the contract does not contain a date on which it was entered into and is not signed or dated by any party. Finally, the Custodian's certified statement that the contract was not completed until approximately month or more after the Board of Trustee's meeting at which the Form was addressed gives further credence to the position that the attachment was a draft document.

Accordingly, the Custodian lawfully denied access to the Form attachment because it was a draft document and thus exempt under OPRA. N.J.S.A. 47:1A-1.1; Ciesla, 429 N.J. Super. 127. The Custodian has thus borne her burden of proof that she lawfully denied access to the record. N.J.S.A. 47:1A-6.

### **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's September 22, 2015 response was insufficient, she lawfully denied access to the responsive Form attachment. N.J.S.A. 47:1A-1.1; 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.

### **Conclusions and Recommendations**

The Council Staff respectfully recommends the Council find that:

1. The Custodian complied with the Council's February 27, and April 24, 2018 Interim Orders because she responded in the extended time frame supplying nine (9) copies of the unredacted Form attachment at issue here for an *in camera* review. The Custodian also simultaneously provided certified confirmation of compliance to the Council Staff inclusive of the required responses.
2. **The *In Camera* Examination set forth above reveals the Custodian has lawfully denied access to the Form attachment pursuant to N.J.S.A. 47:1A-6.**
3. Although the Custodian's September 22, 2015 response was insufficient, she lawfully denied access to the responsive Form attachment. N.J.S.A. 47:1A-1.1; 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.

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

May 15, 2018



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**

**April 24, 2018 Government Records Council Meeting**

Luis Rodriguez  
Complainant

Complaint No. 2016-159

v.

Kean University  
Custodian of Record

At the April 24, 2018 public meeting, the Government Records Council (“Council”) considered the April 17, 2018 Supplemental Findings and Recommendations of the Council Staff 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 has failed to establish in her request for reconsideration of the Council’s February 27, 2018 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. The Custodian failed to establish that the complaint should be reconsidered based on “new evidence” or a change in circumstances. The Custodian has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Specifically, the “evidence” submitted by the Custodian did not constitute “new evidence” because it could have been provided during the pendency of the complaint. Further, the subsequent disclosure of a contract to the Complainant did not change circumstances: it is still unclear whether the Custodian unlawfully denied access to the Form attachment(s) at issue here. Thus, the Custodian’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. The Council’s February 27, 2018 Interim Order remains in effect. As part of her certified confirmation of compliance, the Custodian shall include an explanation as to whether the contract was the only document accompanying the Form. The Custodian must also certify to the date the negotiations period ended, if applicable.





Interim Order Rendered by the  
Government Records Council  
On The 24<sup>th</sup> Day of April, 2018

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: April 25, 2018**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

*Reconsideration*  
**Supplemental Findings and Recommendations of the Council Staff  
April 24, 2018 Council Meeting**

**Luis F. Rodriguez<sup>1</sup>**  
**Complainant**

**GRC Complaint No. 2016-159**

v.

**Kean University<sup>2</sup>**  
**Custodial Agency**

**Records Relevant to Complaint:** Electronic copy via e-mail of the bid waiver form (“Form”) and any “accompanying documents” for the “Resolution Authorizing the Waiver of Public Advertising and Bidding for Professional Services Performed by Ting Xu” (“Resolution”) passed at the June 2015 Board of Trustees meeting.

**Custodian of Record:** Laure Barkley-Haelig

**Request Received by Custodian:** September 11, 2015; May 12, 2016

**Response Made by Custodian:** September 22, 2015; May 23, 2016

**GRC Complaint Received:** June 6, 2016

**Background**

**February 27, 2018 Council Meeting:**

At its February 27, 2018 public meeting, the Council considered the February 20, 2018 Findings and Recommendations of the Council Staff 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 September 22, 2015 response was insufficient because she failed to respond in writing to each request item contained in the request individually. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008); Graumann v. Newfield Police Dep’t (Gloucester), GRC Complaint No. 2014-314 (May 2015).
2. The GRC must conduct an *in camera* review of the responsive Form attachment to determine the validity of the Custodian’s assertion that the record was exempt under OPRA as “inter-agency, intra-agency advisory, consultative or deliberative” material.

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Deputy Attorney General Jennifer McGruther.

N.J.S.A. 47:1A-1.1. See Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).

3. **The Custodian must deliver<sup>3</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see conclusion No. 2 above), a document or redaction index<sup>4</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,<sup>5</sup> that the record provided is the record 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.

#### Procedural History:

On March 1, 2018, the Council distributed its Interim Order to all parties. On March 8, 2018, Custodian's Counsel requested additional time to respond to the Council's Order. On March 13, 2018, the Government Records Council ("GRC") granted Custodian Counsel's request for an extension until March, 16, 2018.

On March 16, 2018, the Custodian filed a request for reconsideration of the Council's February 27, 2018 Interim Order based on a "new evidence"<sup>6</sup> and a change in circumstances. Therein, the Custodian argued that the Council should reconsider this complaint because the Complainant has a final version of the contract ordered for an *in camera* review.

The Custodian certified that after her July 28, 2016 submission of the Statement of Information ("SOI"), the Complainant submitted a new OPRA request seeking access to the finalized copy of the contract. The Custodian affirmed that on August 19, 2016, the Complainant filed a denial of access complaint with the GRC.<sup>7</sup> The Custodian affirmed that she provided him access to the contract (11 pages) on August 24, 2016.

The Custodian contended her August 24, 2016 disclosure of the finalized contract represented "new evidence" that could not have been provided at the time of the SOI. The Custodian also contended that the Complainant's receipt of the contract sufficiently changed the circumstances in this complaint and warranted a reconsideration and dismissal. Further, the Custodian asserted that this complaint was rendered moot by the fact that the Complainant obtained the "factual element" of the record he sought here. See Mason v. City of Hoboken, 2008

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<sup>3</sup> 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.

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

<sup>5</sup> "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."

<sup>6</sup> "New evidence," as noted on the GRC's "Request for Reconsideration" form, means evidence that could not have been provided prior to the Council's decision because the evidence did not exist at that time.

<sup>7</sup> Rodriguez v. Kean Univ., GRC Complaint No. 2016-236 (March 2016).

N.J. Super. Unpub. LEXIS 1660, 7 (App. Div. 2008); L.R. v. Camden Bd. of Educ. Custodian, 2012 N.J. Super. Unpub LEXIS 1140, 6-7 (App Div. 2012).

Finally, the Custodian reasserted that the contract at issue here, by its very nature, was a draft document exempt from disclosure under the “inter-agency, intra-agency advisory, consultative or deliberative” (“ACD”) material exemption. N.J.S.A. 47:1A-1.1; Ciesla v. N.J. Dep’t of Health & Senior Servs., 429 N.J. Super. 127, 140 (App. Div. 2012). The Custodian asserted that the draft contract was subject to change and remained confidential throughout the negotiation period. Lynch v. Clymer, 282 N.J. Super. 301, 305 (App. Div. 1995). The Custodian thus contended that she properly denied access to the draft contract and this complaint should be dismissed.

On March 18, 2018, the Complainant submitted objections to the request for reconsideration. The Complainant asserted that in any instance where bid waiver materials were disclosed to him, the accompanying documents always contained a “note of explanation.” The Complainant argued that Kean University (“Kean”) never certified to whether additional documents accompanying the draft contract existed. The Complainant argued that the Custodian’s certification only addressed the draft nature of the contract, and not the existence of any additional accompanying documents. The Complainant contended that the Custodian has thus insinuated that the Board of Trustees were only given a draft contract and no other explanatory material as to who the company was and why a bid waiver was needed.

The Complainant noted that if both the Custodian and Counsel were to certify that the draft contract was the only attachment, then he would withdraw his complaint. The Complainant asserted that absent a dual-certification, the request for reconsideration should be denied.

### **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, the Custodian filed the request for reconsideration of the Council’s February 27, 2018 Interim Order on March 16, 2018, the final day of the extended deadline to do so.

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).

In the instant matter, the Custodian submitted information she deemed to be “new evidence” and a change in circumstances. In support, the Custodian certified to the events of an OPRA request that became the subject of Rodriguez v. Kean Univ., GRC Complaint No. 2016-236 (March 2018). There, the Complainant submitted an OPRA request on July 28, 2016 for the “contract” described in the SOI relevant to this complaint and filed on the same day. After Kean extended the time frame, the Complainant filed GRC No. 2016-236 arguing timeliness issues. Thereafter, on August 24, 2016, the Custodian disclosed a copy of the contract to the Complainant.

The Custodian now argues that the forgoing amounted to “new evidence” that she could not have provided at the time of the SOI. The GRC is compelled to recommend rejection of the request for reconsideration on these grounds. “New evidence” as defined for the reconsideration process is that which did not exist prior to a Council decision. Here, that decision occurred nearly a year and half after the Complainant’s OPRA request, the filing of GRC No. 2016-236, and disclosure of the contract. Each action also occurred within a reasonably short time period after the Custodian filed the SOI here. Further, the Complainant cited to this case at the time of his July 28, 2016 OPRA request. However, Kean never sought to amend the record here until after the Council’s February 27, 2018 Order. For these reasons, it is clear that the July 28, 2016 OPRA request and disclosed contract does not represent “new evidence.”

Further, the GRC recommends that the Council reject that a change in circumstances occurred. Even though the Custodian ultimately disclosed a contract to the Complainant, this does not cure the GRC’s reasons for requiring an *in camera* review. Specifically, the Custodian’s reiterated description of the contract has not “end[ed] the inquiry.” Ciesla, 429 N.J. Super. at 141. Further, the issue of whether the contract was truly a draft at that time has not been settled. Additionally, it is still unclear whether the attachment truly was comprised solely of a contract, “draft” or otherwise. Thus, the question of whether the Custodian unlawfully denied access to the Form attachment(s) remains.

As the moving party, the Custodian 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. The Custodian failed to establish that the

complaint should be reconsidered based on “new evidence” or a change in circumstances. The Custodian has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. *See D’Atria, 242 N.J. Super.* at 401. Specifically, the “evidence” submitted by the Custodian did not constitute “new evidence” because it could have been provided during the pendency of the complaint. Further, the subsequent disclosure of a contract to the Complainant did not change circumstances: it is still unclear whether the Custodian unlawfully denied access to the Form attachment(s) at issue here. Thus, the Custodian’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.

Accordingly, the Council’s February 27, 2018 Interim Order remains in effect. The Council should also request that the Custodian include as part of her certified confirmation of compliance an explanation as to whether the contract was the only document accompanying the Form. The Custodian must also certify to the date the negotiations period ended, if applicable.

### **Conclusions and Recommendations**

The Council Staff respectfully recommends the Council find that:

1. The Custodian has failed to establish in her request for reconsideration of the Council’s February 27, 2018 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. The Custodian failed to establish that the complaint should be reconsidered based on “new evidence” or a change in circumstances. The Custodian has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Specifically, the “evidence” submitted by the Custodian did not constitute “new evidence” because it could have been provided during the pendency of the complaint. Further, the subsequent disclosure of a contract to the Complainant did not change circumstances: it is still unclear whether the Custodian unlawfully denied access to the Form attachment(s) at issue here. Thus, the Custodian’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. The Council’s February 27, 2018 Interim Order remains in effect. As part of her certified confirmation of compliance, the Custodian shall include an explanation as to whether the contract was the only document accompanying the Form. The Custodian must also certify to the date the negotiations period ended, if applicable.

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

April 17, 2018



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
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PHILIP D. MURPHY  
Governor

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

INTERIM ORDER

February 27, 2018 Government Records Council Meeting

Luis F. Rodriguez  
Complainant

Complaint No. 2016-159

v.

Kean University  
Custodian of Record

At the February 27, 2018 public meeting, the Government Records Council ("Council") considered the February 20, 2018 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 September 22, 2015 response was insufficient because she failed to respond in writing to each request item contained in the request individually. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008); Graumann v. Newfield Police Dep't (Gloucester), GRC Complaint No. 2014-314 (May 2015).
2. The GRC must conduct an *in camera* review of the responsive Form attachment to determine the validity of the Custodian's assertion that the record was exempt under OPRA as "inter-agency, intra-agency advisory, consultative or deliberative" material. N.J.S.A. 47:1A-1.1. See Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).
3. **The Custodian must deliver<sup>1</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see conclusion No. 2 above), a document or redaction index<sup>2</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,<sup>3</sup> that the record provided is the record 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.**

<sup>1</sup> 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.

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

<sup>3</sup> "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.

Interim Order Rendered by the  
Government Records Council  
On The 27<sup>th</sup> Day of February, 2018

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: March 1, 2018**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff  
February 27, 2018 Council Meeting**

**Luis F. Rodriguez<sup>1</sup>  
Complainant**

**GRC Complaint No. 2016-159**

v.

**Kean University<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copy via e-mail of the bid waiver form (“Form”) and any “accompanying documents” for the “Resolution Authorizing the Waiver of Public Advertising and Bidding for Professional Services Performed by Ting Xu” (“Resolution”) passed at the June 2015 Board of Trustees meeting.

**Custodian of Record:** Laure Barkley-Haelig

**Request Received by Custodian:** September 11, 2015; May 12, 2016

**Response Made by Custodian:** September 22, 2015; May 23, 2016

**GRC Complaint Received:** June 6, 2016

**Background<sup>3</sup>**

**Request and Response:**

On September 11, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On September 22, 2015, the Custodian responded in writing disclosing the responsive Form, but did not address the portion of the request seeking “accompanying documents.”

On May 11, 2016, the Complainant resubmitted his OPRA request. On May 13, 2016, the Complainant e-mailed the Custodian advising that she failed to disclose all responsive records earlier. The Complainant thus stated that he would not withdraw the resubmitted OPRA request. On May 23, 2016, the Custodian responded in writing denying access to the “accompanying documents” under the “inter-agency, intra-agency advisory, consultative or deliberative” (“ACD”) material exemption. N.J.S.A. 47:1A-1.1.

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Deputy Attorney General Jennifer McGruther.

<sup>3</sup> 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 June 6, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant averred that after the Custodian initially disclosed the Form, he did not realize that she never addressed the attachments portion of his OPRA request. The Complainant stated that upon realizing the omission in May 2016, he resubmitted his OPRA request and was denied access.

The Complainant first contended that either the Custodian or another Kean University (“Kean”) employee violated OPRA in September 2015 by failing to provide the requested Form attachments. The Complainant argued that at the least, the Custodian (or other employee) failed to provide a specific lawful basis for denying access to the attachments.

The Complainant also disputed the Custodian’s denial of access under the ACD exemption. The Complainant noted that the ACD exemption is valid, but asserted that it only applied to whole documents in very limited instances. The Complainant also argued that the ACD exemption does not apply to factual elements of a record. The Complainant stated that the Superior Court’s decision in Rampolla v. Hatikvah Int’l Acad. Charter Sch., Docket No. MID-L-4441-13 (September 16, 2015) addressed the two-prong test for determining whether a record fell within the ACD exemption. Slip op. at 10. Further, the Complainant stated that in its analysis, the Rampolla court cited to Corr. Medical Servs., Inc. v. Dep’t of Corr., 426 N.J. Super. 106 (App. Div. 2012), which found there to be a “profound distinction” between policy decisions and administrative decisions. Id. at 122.

The Complainant contended that the Custodian unlawfully relied on the ACD exemption because the requested attachments related to an administrative decision to provide Ting Xu a bid waiver. The Complainant noted that the Board of Trustees already established a bid waiver policy when the Resolution was presented to them. Further, the Complainant asserted that item No. 7 on the Form (“Brief Explanation for the Waiver Request”) supports his contention that the Resolution action was “administrative in nature.” The Complainant argued that it seems unlikely that the Board of Trustees would base a policy decision on a “[b]rief [e]xplanation.” The Complainant also incorporated an excerpt from a final report made by the Office of the Comptroller’s (“Comptroller”) investigation into Kean’s purchasing of a lavish conference table through the bid waiver process.<sup>4</sup> The Complainant asserted that the Comptroller’s discussion of Kean’s bid waiver process further supported that decisions made on these types of resolutions were administrative, and not policy, decisions.

### Statement of Information:

On July 28, 2016, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s initial OPRA request on September 11, 2015 and responded disclosing the bid waiver form on September 22, 2015. The Custodian affirmed that she received the Complainant’s “duplicate” OPRA request on May 12, 2016. The Custodian certified that upon review of the Complainant’s September 11, 2015 OPRA request and Kean’s response, it was determined that her failure to address “accompanying documents” was an oversight. The

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<sup>4</sup> [http://www.nj.gov/comptroller/news/docs/kean\\_final\\_report.pdf](http://www.nj.gov/comptroller/news/docs/kean_final_report.pdf). (accessed on February 2, 2018).

Custodian certified that she obtained the attachment from the “Office of Record” and reviewed it, determining that same was exempt as ACD material. The Custodian certified that she responded in writing on May 23, 2016 denying access to the attachment as ACD material under N.J.S.A. 47:1A-1.1.

The Custodian averred that the State College Contracts Law authorizes Kean’s Board of Trustees to make, negotiate, or award a contract for professional services by resolution without public advertising. N.J.S.A. 18A:64-56(a)(1), (15). The Custodian certified that the Form at issue here fell within this process, and the Board of Trustees received it and the attachment to negotiate a contract with Ting Xu. The Custodian asserted that the attachment, which is at issue here, was a draft contract containing proposed terms. The Custodian argued that the Board of Trustees review the draft contract in order to decide how to proceed with respect to negotiations. The Custodian thus contended that the attachment was subject to the ACD exemption because it was pre-decisional and contained recommended contract terms (*citing* N.J.S.A. 47:1A-1.1; Educ. Law Ctr. v. N.J. Dep’t of Educ., 198 N.J. 274, 284 (2009)). The Custodian also noted that negotiations are considered confidential as well. N.J.S.A. 47:1A-9(b); Lynch v. Clymer, 282 N.J. Super. 301, 305 (App. Div. 1995)(holding that the State was entitled to negotiate with the Internal Revenue Service in private).

The Custodian further argued that prevailing case law supports that draft documents are exempt from access under the ACD exemption. Ciesla v. N.J. Dep’t of Health & Senior Servs., 429 N.J. Super. 127, 140 (App. Div. 2012). The Custodian contended that the Ciesla Court held that OPRA “creates an unqualified exemption for deliberative materials.” Id. at 141. The Custodian contended that the contract contained draft terms which were the subject of continued negotiations.

#### Additional Submissions:

On August 10, 2016, the Complainant emailed the GRC arguing that the Custodian failed to provide any evidence explaining why she failed to provide the Form attachment in September 2015. The Complainant also objected to the Custodian’s use of the words “Office of Record,” suggesting that her failure to identify the exact office in possession of the attachment represented withholding evidence. The Complainant also argued that the term “Office of Record” could cause confusion in later complaint filings. The Complainant further argued that not identifying the specific office or individuals involved prevents the GRC and public from determining exact repeat OPRA violators. The Complainant requested that the GRC provide a statement on record regarding the Custodian’s practice of not identifying the individuals or offices assisting in OPRA request responses.<sup>5</sup>

### Analysis

#### Sufficiency of Response

OPRA provides that a custodian’s response, either granting or denying access, must be in

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<sup>5</sup> The Complainant also requested that the GRC “place [Kean] under administrative review for all OPRA requests.” The Complainant alleged that the Custodian “unintentionally” failed to provide records on several occasions. The GRC notes that its statutory duties under OPRA do not allow for it to individually monitor an agency’s day-to-day OPRA operations. N.J.S.A. 47:1A-7(b).

writing pursuant to N.J.S.A. 47:1A-5(g). Further, in Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008), the GRC held that “. . . [t]he Custodian’s response was legally insufficient because he failed to respond to each request item individually. Therefore, the Custodian has violated N.J.S.A. 47:1A-5(g).” In Graumann v. Newfield Police Dep’t (Gloucester), GRC Complaint No. 2014-314 (May 2015), the subject OPRA request sought multiple items in a single paragraph, as opposed to an enumerated list. In her response, the custodian only addressed a portion of the OPRA request. The Council determined that the custodian’s response was insufficient because it failed to address each request item individually. In reaching this conclusion, the Council reasoned that the custodian “completely failed to acknowledge or address the balance of the request.”

Here, the Custodian responded to the Complainant’s September 11, 2015 OPRA request on September 22, 2015 providing only the Form. The Custodian did not address the portion of the request seeking “accompanying documents” in any way. It was not until after the Complainant realized the issue and refiled the OPRA request on May 11, 2016 that the Custodian addressed that portion of the request. The facts here are directly on point with Graumann, GRC 2014-314. The Custodian only addressed part of the OPRA request, but failed to address each item requested. Thus, her response was insufficient.

Accordingly, the Custodian’s September 22, 2015 response was insufficient because she failed to respond in writing to each request item contained in the request individually. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and Paff, GRC 2007-272; Graumann, GRC 2014-314.

### **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 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 Council<sup>6</sup> 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

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<sup>6</sup> Paff v. NJ Dep’t of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

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 Complainant sought the Form attachment that the Custodian asserted was exempt as ACD material. The Complainant argued that the attachment was not subject to the exemption because the Board of Trustee’s action was administrative and not a policy decision. The Complainant also argued that the attachment was identified under the Resolution No. 7: “Brief Explanation for the Waiver Request.” The Complainant argued that the Board certainly would not have made a policy decision based on a “[b]rief [e]xplanation.” Conversely, the Custodian contended in the SOI that the attachment was a “draft” contract that the Board utilized to engage in contract negotiations with Ting Xu. The Custodian contended that the attachment was pre-decisional and contained recommended contract terms the Board could utilize during negotiations.

Notwithstanding the Custodian’s description of the attachment, the GRC must review same in order to determine the full applicability of ACD exemption. The GRC does not believe the Custodian’s SOI description of the attachment “ends the inquiry.” Ciesla, 429 N.J. Super. at 141. Specifically, the attachment’s significance as a policy-making tool is questionable given that it was memorialized as an attachment under the “Brief Explanation” Form item. Further, there is some confusion as to whether the attachment was a “draft” document. Based on the forgoing, the GRC believes it necessary to review the attachment *in camera* to verify whether the ACD exemption applies.

Therefore, the GRC must conduct an *in camera* review of the responsive Form attachment to determine the validity of the Custodian’s assertion that the record was exempt under OPRA as ACD material. N.J.S.A. 47:1A-1.1. See Paff, 379 N.J. Super. at 346.

### **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 Council Staff respectfully recommends the Council find that:

1. The Custodian's September 22, 2015 response was insufficient because she failed to respond in writing to each request item contained in the request individually. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008); Graumann v. Newfield Police Dep't (Gloucester), GRC Complaint No. 2014-314 (May 2015).
2. The GRC must conduct an *in camera* review of the responsive Form attachment to determine the validity of the Custodian's assertion that the record was exempt under OPRA as "inter-agency, intra-agency advisory, consultative or deliberative" material. N.J.S.A. 47:1A-1.1. See Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).
3. **The Custodian must deliver<sup>7</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see conclusion No. 2 above), a document or redaction index<sup>8</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,<sup>9</sup> that the record provided is the record 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.

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

February 20, 2018

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<sup>7</sup> 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.

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

<sup>9</sup> "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."