INTERIM ORDER

July 30, 2019 Government Records Council Meeting

Gavin C. Rozzi
Complainant
v.
Township of Lacey (Ocean)
Custodian of Record

At the July 30, 2019 public meeting, the Government Records Council (“Council”) considered the July 23, 2019 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’s response to the Complainant’s June 6, 2017 OPRA request was legally insufficient because she failed to cite a specific lawful basis for the redactions made to the responsive correspondence. Therefore, the Custodian violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and Paff v. Borough of Lavallette, GRC Complaint No. 2007-209 (Interim Order dated June 25, 2008).


3. The Custodian shall deliver1 to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 2 above), nine (9) copies of the redacted records, a document or redaction index2, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 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.

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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 the GRC physically receives them by the deadline.

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

3 “I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.”
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

Interim Order Rendered by the
Government Records Council
On The 30th Day of July 2019

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 1, 2019
Gavin C. Rozzi
Complainant

v.

Township of Lacey (Ocean)
Custodial Agency

Records Relevant to Complaint:
1) “Copies of any correspondence between Malcolm’s attorneys and Lacey Township attorneys regarding his Zoning Board litigation and/or the Zoning Letter of Approval.”

2) “Copies of all email correspondence sent to Community Development Director Chris Reid regarding “Malcolm” sent from June 1st, 2016 to June 6th, 2017. Please search subject and body.”

Custodian of Record: Veronica Laureigh
Request Received by Custodian: June 6, 2017
Response Made by Custodian: June 9, 2017
GRC Complaint Received: August 7, 2017

Background

Request and Response:

On June 6, 2017, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On June 9, 2017, Lisa Monbleau (“Ms. Monbleau”) on behalf of the Custodian responded in writing, providing responsive records with some documents containing redactions. On August 2, 2017, the Complainant responded to the Ms. Monbleau, stating that the response did not include a lawful basis for the redactions made in accordance with OPRA, N.J.S.A. 47:1A-6. The Complainant requested that he be provided with a lawful basis for the redactions so that he would be able to independently determine whether they were valid.

1 No legal representation listed on record.
2 Represented by Lauren Staiger, Esq. (Toms River, NJ).
3 The Complainant requested additional records that are not at issue in this matter.
4 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 Council Staff the submissions necessary and relevant for the adjudication of this complaint.
Denial of Access Complaint:

On August 7, 2017, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian failed to provide the lawful basis for the redactions made to the responsive records as required under OPRA. N.J.S.A. 47:1A-6; see also Paff v. Borough of Lavallette (Ocean), GRC Complaint No. 2007-209. The Complainant also asserted that the Custodian did not respond to his August 2, 2017 correspondence noting the omission. The Complainant contended that because no lawful basis was provided, each redaction was arbitrary, capricious, and unreasonable.

The Complainant added that after notifying the Custodian that lawful reasons had not been provided, a second, identical OPRA request was submitted by a third party to the Custodian. The Complainant asserted that the Custodian provided the same response, yet still failed to provide a lawful basis for the redactions. The Complainant contended that this second omission is evidence of the Custodian’s willful noncompliance.

The Complainant requested that the GRC order the Custodian to disclose the redacted portions of the records upon the completion of an in camera review, or in the alternative order the Custodian to provide a lawful basis for the redactions pursuant to N.J.S.A. 47:1A-5(g). The Complainant also requested that the GRC find that the Custodian knowingly and willfully violated OPRA, as well as any other relief deemed equitable and just.

Statement of Information:

On August 22, 2017, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on June 6, 2017. The Custodian certified that her search included sending the request to Community Development and IT to locate responsive e-mails. The Custodian also certified that the request was sent to the Township Attorney and Joint Insurance Fund Attorney for additional letters and correspondence. The Custodian certified that she responded in writing on June 9, 2017, providing responsive records, with certain e-mails containing redactions.

The Custodian argued that in accordance with the review conducted by the Township Attorney, the responsive correspondence was redacted in accordance with N.J.R.E. 408, which protects statements made pertaining to settlement negotiations in litigation.

Analysis

Insufficient Response

OPRA requires that, when providing access to redacted records, a custodian shall provide a specific lawful basis for redactions. In Paff v. Borough of Lavallette, GRC Complaint No. 2007-209 (Interim Order dated June 25, 2008), the custodian responded in a timely manner providing redacted records to the complainant; however, the custodian failed to provide a specific legal basis for said redactions. The Council held that “[t]he Custodian’s response was legally insufficient under OPRA because he failed to provide a written response setting forth a detailed and lawful
basis for each redaction . . . .” Id. at 4. See also Schwarz v. N.J. Dep’t of Human Serv., GRC Complaint No. 2004-60 (February 2005) (setting forth the proposition that specific citations to the law that allows a denial of access are required at the time of the denial); Renna v. Union Cnty. Improvement Auth., GRC Complaint No. 2008-86 (May 2010) (noting that N.J.S.A. 47:1A-5(g) requires a custodian of record to indicate the specific basis for noncompliance).

Here, the Custodian timely responded to the Complainant’s June 6, 2017 OPRA request. However, while the Custodian provided correspondence, she failed to cite a specific lawful basis for the redactions contained therein. It was not until she submitted her SOI on August 7, 2017 that provided the basis for the redactions.

Accordingly, the Custodian’s response to the Complainant’s June 6, 2017 OPRA request was legally insufficient because she failed to cite a specific lawful basis for the redactions made to the responsive correspondence. Therefore, the Custodian violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and Paff, GRC 2007-209.

**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. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the Council5 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.

[Id. at 355.]

Further, the Court found that:

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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.]

In the instant matter, the Custodian asserted that the redacted portions of correspondence referenced settlement negotiations and are therefore not subject to access under N.J.R.E. 408 and N.J.S.A. 47:1A-9(b). As part of the SOI, the Custodian provided general descriptions of the redacted sections.

Notwithstanding the Custodian’s description, a “meaningful review” is necessary to determine whether all redacted portions of the provided correspondence reference settlement negotiations. The GRC must therefore review same in order to determine the full applicability of exemption.

Therefore, the GRC must conduct an *in camera* review of the redacted correspondence to determine the validity of the Custodian’s assertion that the redactions are valid under N.J.R.E. 408 and N.J.S.A. 47:1A-9(b). 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 response to the Complainant’s June 6, 2017 OPRA request was legally insufficient because she failed to cite a specific lawful basis for the redactions made to the responsive correspondence. Therefore, the Custodian violated OPRA pursuant to N.J.S.A. 47:1A-5(g) and Paff v. Borough of Lavallette, GRC Complaint No. 2007-209 (Interim Order dated June 25, 2008).

3. The Custodian shall deliver⁶ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 2 above), nine (9) copies of the redacted records, a document or redaction index⁷, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,⁸ that the records provided are the records requested by the Council for the in camera inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council’s Interim Order.

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

Prepared By: Samuel A. Rosado
Staff Attorney

July 23, 2019

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⁷ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.
⁸ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."