INTERIM ORDER

November 12, 2019 Government Records Council Meeting

Patrick Duff Complainant
v.
Stockton University Custodian of Record

Complaint No. 2017-246

At the November 12, 2019 public meeting, the Government Records Council (“Council”) considered the October 30, 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 GRC must conduct an in camera review of the redacted e-mails to determine the validity of the Custodian’s assertion that the redactions are valid under OPRA’s exemptions for inter-agency or intra-agency advisory, consultative, or deliberative material, scholarly and/or academic research, and privacy. N.J.S.A. 47:1A-1.1. See Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).

2. The Custodian shall deliver to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 1 above), nine (9) copies of the redacted records, a document or redaction index, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 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.

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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.”

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Interim Order Rendered by the
Government Records Council
On The 12th Day of November 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: November 14, 2019
Patrick Duff\(^1\)  
Complainant

v.

Stockton University\(^2\)  
Custodial Agency

Records Relevant to Complaint:\(^3\) “All communication between Stockton University [\(\text{\textquotedblleft Stockton\textquotedblright}\)] employees and the [New Jersey Department of Environmental Protection (\(\text{\textquotedblleft NJDEP\textquotedblright}\))] regarding the research project on 753 Walnut St. and it’s [sic] connection to MLK Jr, such as emails, letters, faxes and requests made of the research team by any and all NJDEP officials. I am also seeking all interpersonal communications by Stockton employees regarding the study, such as but not limited to, Paul Schopp, Michelle McDonald, John O’Hare, Briana Cardinale, Kimberly Bylone and any other employee or student who worked on the publicly funded study.”

Custodian of Record: Thomas Chester  
Request Received by Custodian: November 30, 2017  
Response Made by Custodian: December 19, 2017  
GRC Complaint Received: December 27, 2017

Background\(^4\)

Request and Response:

On November 30, 2017, the Complainant submitted an Open Public Records Act (\(\text{\textquotedblleft OPRA\textquotedblright}\)) request to the Custodian seeking the above-mentioned records. On December 1, 2017, the Custodian responded in writing acknowledging receipt of the request and the initial deadline of December 11, 2017.

On December 11, 2017, the Custodian responded to the Complainant, stating that an extension of time to until December 20, 2017 was needed to fulfill the request. That same day, the

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\(^1\) No legal representation listed on record.  
\(^2\) Represented by Deputy Attorney General Laurie Fichera.  
\(^3\) The Complainant sought other 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 Executive Director the submissions necessary and relevant for the adjudication of this complaint.

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Complainant responded to the Custodian, clarifying his request. The Complainant stated that he was seeking:

[E]mails, letters, memos and faxes between the dates of 8-1-2017 and 12-11-2017, of all the aforementioned named individuals and unnamed individuals from Stockton University, to and from themselves, as well as to and from any State NJDEP official, as well as any communications they had with any City of Camden Official as well as Cooper’s Ferry Partnership regarding the publicly funded research project that Stockton was hired to undertake.

On December 12, 2017, the Complainant e-mailed the Custodian to requesting a status update, stating that he believed the response was due that day. On December 13, 2017, the Custodian responded to the Complainant, stating that an extension notice was sent on December 11 but was delivered to the incorrect e-mail address. The Custodian attached the December 11 correspondence and maintained that Stockton would respond on December 20, 2017.

On December 13, 2017, the Complainant sent an e-mail addressed to Stockton in general, stating that the extension was unreasonable. The Complainant asserted that a search for e-mail records should not take a long time considering they are not archived or stored in a warehouse. The Complainant stated that he should received a response that day or else he would file a Denial of Access Complaint.

On December 19, 2017, Cynthia Frazier, on behalf of the Custodian, responded to the Complainant in writing, providing responsive records attached to two (2) separate e-mails. That same day, the Complainant responded to the Custodian, objecting to the redactions made to the responsive e-mails. The Complainant added that he would be filing a Denial of Access Complaint as a result. The Complainant then sent an additional e-mail inquiring as to why content within e-mails dated between August 20, 2016 and October 31, 2016 could be privileged information. The Complainant also asked why all communications from Sharron Musher were redacted, even though she was a Stockton employee. The Complainant again stated that the e-mails should be provided to him unredacted or else he would file a complaint.

On December 20, 2017, the Custodian responded to the Complainant, stating that Stockton provided him with all responsive records to his request. The Custodian added that the redactions were made under OPRA’s exemption for inter-agency or intra-agency advisory, consultative, or deliberative (“ACD”) material; or under the exemption for research records of higher education institutions. N.J.S.A. 47:1A-1.1.

Denial of Access Complaint:

On December 27, 2017, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that he was provided with many heavily redacted records in response to his OPRA request. The Complainant asserted that he asked the Custodian to provide the records unredacted but was refused. The Complainant added that some of the provided e-mails were redacted completely, rendering them impossible to understand.
Statement of Information:

On February 6, 2018, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on November 30, 2017. The Custodian certified that he requested the Chief Information Officer at Stockton to execute a search of the University’s e-mail server based upon the identified names in the request. The Custodian certified that the results of the search were reviewed, redacted, and combined into a single Bates stamped document. The Custodian also certified that he asked the named individuals if there was any correspondence that may be missing from the search results and was told by all that they communicated solely via e-mail. The Custodian certified that he responded in writing via Ms. Frazier on December 19, 2017, providing 869 pages of e-mails containing redactions.

Through counsel, the Custodian asserted that the requested correspondence mainly consisted of discussions by and between Stockton faculty members and Stockton research personnel regarding the progress of their scholarly work during the identified time period. The Custodian argued that the redactions were made to protect ACD material in relation to said work, citing Educ. Law Ctr. v. N.J. Dep’t of Educ., 198 N.J. 274, 285 (2009). See N.J.S.A. 47:1A-1.1.

The Custodian contended that the e-mails contained deliberations and drafts created by the researchers regarding their methodology, evaluations of artifacts and evidence, and preliminary findings. The Custodian contended that these researchers and faculty consulted and deliberated amongst each other over a twelve (12) month period to develop a final report for NJDEP. The Custodian argued that such findings are explicitly exempt in accordance with Ciesla v. N.J. Dep’t of Health and Senior Servs., 429 N.J. Super. 127 (App. Div. 2012) and Libertarians for Transparent Gov’t v. Gov’t Records Council, 453 N.J. Super. 83 (App. Div.), certif. denied, 233 N.J. 484 (2018).

The Custodian argued that the requested records constitute ACD material because they pre-date Stockton’s submission of its final report to NJDEP on December 18, 2017. The Custodian also asserted that the correspondence contained draft research material and preliminary findings and was subject to revision throughout the process. The Custodian therefore asserted that the correspondence satisfied the requirements to qualify as ACD material and were exempt from disclosure.

Additionally, the Custodian argued that some of the responsive e-mails were by and between Stockton research personnel and the project’s sponsors at NJDEP. The Custodian asserted that the correspondence between the parties pertained to the scope of the project, preliminary findings, and determinations on what was expected to be included in the final report.

The Custodian contended that such e-mails were redacted based upon OPRA’s exemption of “pedagogical, scholarly and/or academic research records and/or the specific details of any research project except that a custodian may not deny inspection of a government record or part thereof that gives the name, title, expenditures, source and amounts of funding and date when the final project summary of any research will be available.” N.J.S.A. 47:1A-1.1. The Custodian asserted that the correspondence contained the work product of Stockton personnel with the goal of producing a research report, consisting of evaluations of historical evidence and scholarly conclusions.
The Custodian argued that as a public institution of higher education, Stockton’s research on behalf of NJDEP would fall under this exemption. The Custodian cited Rosenbaum v. Rutgers Univ., GRC Complaint No. 2002-91 (January 2004), where research was exempted under OPRA when “conducted under the auspices of a public higher education institution in New Jersey.”

Lastly, the Custodian contended that redactions were made to some of the responsive e-mails to protect the cell phone numbers of Stockton employees and home address of individuals contacted by Stockton employees during the research project. The Custodian asserted that under N.J.S.A. 47:1A-1, “a public an obligation to safeguard from public access a citizen’s personal information with which it has been entrusted when disclosed thereof would violate the citizen’s reasonable expectation of privacy.” The Custodian contended that he appropriately balanced the Complainant’s need for redacted information with the potential harm if such information were released, citing Paff v. Warren Cnty. Office of the Prosecutor, GRC Complaint No. 2007-167 (December 2008).

The Custodian asserted that he properly sought an extension to time to respond to the request due to the large volume of documents to review. Therefore, the Custodian asserted that the delay in response did not constitute a knowing and willful denial of access.

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.

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 Council 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.

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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.

In the instant matter, the Custodian asserted that the redacted e-mails contain ACD material, academic and/or scholarly research, and/or personal information and are therefore not subject to access under OPRA. N.J.S.A. 47:1A-1.1. As part of the SOI, the Custodian stated that the content of the e-mails pertained to a research project being conducted on behalf of NJDEP.

Notwithstanding the Custodian’s descriptions, a “meaningful review” is necessary to determine whether the redacted e-mails fell within the stated exemptions. The GRC must therefore review same in order to determine the full applicability of exemptions. Such an action is not uncommon, as the GRC will routinely perform an in camera review in similar circumstances. See Pouliot v. N.J. Dep’t of Educ., GRC Complaint No. 2015-281 (Interim Order dated January 31, 2017).

Therefore, the GRC must conduct an in camera review of the redacted e-mails to determine the validity of the Custodian’s assertion that the redactions are valid under OPRA’s exemptions for ACD material, scholarly and/or academic research, and privacy. 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 Executive Director respectfully recommends the Council find that:

1. The GRC must conduct an in camera review of the redacted e-mails to determine the validity of the Custodian’s assertion that the redactions are valid under OPRA’s exemptions for inter-agency or intra-agency advisory, consultative, or deliberative material, scholarly and/or academic research, and privacy. N.J.S.A. 47:1A-1.1. See Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).
2. The Custodian shall deliver\(^6\) to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 1 above), nine (9) copies of the redacted records, a document or redaction index\(^7\), 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.

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: Samuel A. Rosado
Staff Attorney

October 30, 2019

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\(^6\) 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.

\(^7\) 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.”