



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

January 26, 2021 Government Records Council Meeting

Patrick Duff
Complainant

Complaint No. 2017-246

v.

Stockton University
Custodian of Record

At the January 26, 2021 public meeting, the Government Records Council (“Council”) considered the January 19, 2021 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. Ms. Bailey complied with the Council’s December 15, 2020 Interim Order because she responded in the prescribed time frame providing records and simultaneously provided certified confirmation of compliance to the Executive Director.
2. Although the Custodian improperly redacted a portion of the records responsive to the Complainant’s November 30, 2017 OPRA request, the Custodian lawfully redacted most of the total production. 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 26th Day of January 2021

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: January 28, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
January 26, 2021 Council Meeting**

**Patrick Duff¹
Complainant**

GRC Complaint No. 2017-246

v.

**Stockton University²
Custodial Agency**

Records Relevant to Complaint:³ “All communication between Stockton University [“Stockton”] employees and the [New Jersey Department of Environmental Protection (“NJDEP”)] 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 Chester⁴
Request Received by Custodian: November 30, 2017
Response Made by Custodian: December 19, 2017
GRC Complaint Received: December 27, 2017

Background

December 15, 2020 Council Meeting:

At its December 15, 2020 public meeting, the Council considered the December 8, 2020 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 amended findings and recommendations. The Council, therefore, found that:

1. The current Custodian complied with the Council’s November 12, 2019 Interim Order because he responded in the extended time frame providing the GRC with nine (9) redacted and unredacted copies of the requested e-mails for *in camera* review. The current Custodian also simultaneously provided certified confirmation of compliance to the Executive Director.

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 current Custodian of Record is Brian Kowalski.

2. **On the basis of the Council's determination in this matter, the current Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order. Further, the current Custodian shall simultaneously deliver⁵ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁶ to the Executive Director.⁷**
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 December 16, 2020, the Council distributed its Interim Order to all parties. On December 22, 2020, Ellen Bailey responded to the Council's Interim Order on the current Custodian's behalf, providing a certification. Ms. Bailey certified that on December 22, 2020, she provided the Complainant with a copy of the e-mail body subject to disclosure in accordance with the Council's Interim Order. Ms. Bailey also provided a certified confirmation of compliance to the Executive Director.

Analysis

Compliance

At its December 15, 2020 meeting, the Council ordered the current Custodian to comply with the Council's determination based upon the *in camera* examination findings. The Council also ordered the current Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Executive Director. On December 16, 2020, 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 December 23, 2020.

On December 22, 2020, the fourth (4th) business day after receipt of the Council's Order, Ms. Bailey responded on the current Custodian's behalf, certifying that the Complainant was provided records in accordance with the Order. Ms. Bailey also provided a certified confirmation of compliance to the Executive Director.

⁵ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

⁶ "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."

⁷ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

Therefore, Ms. Bailey complied with the Council’s December 15, 2020 Interim Order because she responded in the prescribed time frame providing records and simultaneously provided certified confirmation of compliance to the Executive Director.

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 improperly redacted a portion of the records responsive to the Complainant’s November 30, 2017 OPRA request, the Custodian lawfully redacted most of the total production. 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 Executive Director respectfully recommends the Council find that:

1. Ms. Bailey complied with the Council’s December 15, 2020 Interim Order because she responded in the prescribed time frame providing records and simultaneously provided certified confirmation of compliance to the Executive Director.
2. Although the Custodian improperly redacted a portion of the records responsive to the Complainant’s November 30, 2017 OPRA request, the Custodian lawfully redacted most of the total production. 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: Samuel A. Rosado
Staff Attorney

January 19, 2021



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

December 15, 2020 Government Records Council Meeting

Patrick Duff
Complainant

Complaint No. 2017-246

v.

Stockton University
Custodian of Record

At the December 15, 2020 public meeting, the Government Records Council (“Council”) considered the December 8, 2020 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 current Custodian complied with the Council’s November 12, 2019 Interim Order because he responded in the extended time frame providing the GRC with nine (9) redacted and unredacted copies of the requested e-mails for *in camera* review. The current Custodian also simultaneously provided certified confirmation of compliance to the Executive Director.
2. **On the basis of the Council’s determination in this matter, the current Custodian shall comply with the Council’s Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order. Further, the current Custodian shall simultaneously deliver¹ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,² to the Executive Director.³**
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 certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

² "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 Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

Interim Order Rendered by the
Government Records Council
On The 15th Day of December 2020

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: December 16, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
December 15, 2020 Council Meeting**

**Patrick Duff¹
Complainant**

GRC Complaint No. 2017-246

v.

**Stockton University²
Custodial Agency**

Records Relevant to Complaint:³ “All communication between Stockton University [“Stockton”] employees and the [New Jersey Department of Environmental Protection (“NJDEP”)] 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 Chester⁴
Request Received by Custodian: November 30, 2017
Response Made by Custodian: December 19, 2017
GRC Complaint Received: December 27, 2017

Records Submitted for *In Camera* Examination: Ninety-six (96) e-mail chains redacted under OPRA’s exemption to remove advisory, consultative, or deliberative material, as well as pedagogical, scholarly, and/or academic research. N.J.S.A. 47:1A-1.1.

Background

November 12, 2019 Council Meeting:

At its November 12, 2019 public meeting, the Council considered the October 30, 2019 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 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 current Custodian of Record is Brian Kowalski.

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 deliver⁵ 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 index⁶, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,⁷ 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 November 14, 2019, the Council distributed its Interim Order to all parties. On November 18, 2019, the Custodian's Counsel requested an extension of time to respond. The Complainant objected to the extension since the matter was nearly two (2) years old. The GRC granted Counsel's request that same day, extending the time frame for five (5) additional days until November 29, 2019.

On November 29, 2019, the current Custodian responded to the Council's Interim Order, providing nine (9) redacted and unredacted copies of the requested e-mail correspondence. The current Custodian also provided a document index indicating the basis for the redactions, as well as a certified confirmation of compliance to the Executive Director.

Analysis

Compliance

At its November 12, 2019 meeting, the Council ordered the Custodian to submit nine (9) redacted and unredacted copies of the requested e-mail correspondence within five (5) business days from receipt of the Council's Interim Order. The Council also ordered the Custodian to provide a document index and simultaneously provide certified confirmation of compliance to the Executive Director. On November 14, 2019, the Council distributed its Interim Order to all parties,

⁵ 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.

⁶ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

⁷ "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."

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 November 21, 2019.

On November 18, 2019, the second (2nd) business day after receipt of the Council's Order, the Custodian's Council requested a five (5) business day extension of time to respond to the Council's Order. That same day the GRC granted the request, moving the response deadline to November 29, 2019. On November 29, 2019, the current Custodian responded to the Council's interim order, providing nine (9) redacted and unredacted copies of the requested e-mails for *in camera* review, as well as a certified confirmation of compliance to the Executive Director.

Therefore, the current Custodian complied with the Council's November 12, 2019 Interim Order because he responded in the extended time frame providing the GRC with nine (9) redacted and unredacted copies of the requested e-mails for *in camera* review. The current Custodian also simultaneously provided certified confirmation of compliance to the Executive Director.

Unlawful Denial of Access

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

Advisory, Consultative, or Deliberative ("ACD") Material

OPRA provides that the definition of a government record "shall not include . . . [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 Ctr., 198 N.J. at 285 (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.

The Council has also repeatedly held that draft records of a public agency fall within the deliberative process privilege. In Dalesky v. Borough of Raritan (Somerset), GRC Complaint No. 2008-61 (November 2009), the Council, in upholding the custodian's denial as lawful, determined that the requested study of the local police department 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 in draft form and had not yet been reviewed by the municipal engineer. The Council, looking to relevant case law, concluded that the requested letter was exempt from disclosure under OPRA as ACD material. See also Libertarians for Transparent Gov't v. Gov't Records Council, 453 N.J. Super. 83 (App. Div. 2018); Ciesla v. N.J. Dep't of Health and Senior Serv., GRC Complaint No. 2010-38 (May 2011), aff'd Ciesla v. N.J. Dep't of Health and Senior Serv., 429 N.J. Super. 127 (App. Div. 2012) (holding that a draft staff report was exempt from disclosure as ACD material)).

Scholarly and/or Academic Research

OPRA exempts access to:

Pedagogical, scholarly and/or academic research records and/or the specific details of any research project conducted under the auspices of a public higher education institution in New Jersey, including, but not limited to research, development information, testing procedures, or information regarding test participants, related to the development or testing of any pharmaceutical or pharmaceutical delivery system, 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.]

In Stevens v. Rutgers Univ., GRC Complaint No. 2016-249 (June 2018), the complainant sought records concerning a World Trade Center project conducted by the Environmental and Occupational Health Sciences Institute ("Institute"). The custodian denied access under the academic research exemption. In considering whether the exemption applied, the Council stated that:

In order for the academic research exemption to apply, the request must seek "pedagogical, scholarly, or academic research" conducted "under the auspices of a public higher education institution in New Jersey . . ." N.J.S.A. 47:1A-1.1. Thus, the GRC must establish whether the information sought consisted of research conducted by an individual under the auspices of a public higher education institution in New Jersey.

[Id. at 3.]

Cell Phone Numbers

The GRC has long held that telephone numbers may be redacted from records subject to disclosure. In Smith v. N.J. Dep't of Corr., GRC Complaint No. 2004-163 (June 2005), the Council considered whether the custodian unlawfully denied access to telephone numbers on the cellular telephone bills of certain agency personnel. In finding that the Custodian did not unlawfully deny access, the Council concluded:

The Custodian should not release the itemized telephone numbers contained in the cellular telephone billing records [because] . . . the need for confidentiality and the privacy issues implicated weigh heavier than the public's interest in access [and] the impracticality of OPRA's requirement that prior to allowing access . . . custodians must redact from a record any information which discloses the unlisted telephone numbers of any person pursuant to N.J.S.A. 47:1A-5(a).

[Id.]

When privacy interests are at issue, the GRC employs the common law balancing test established by the New Jersey Supreme Court in Doe v. Poritz, 142 N.J. 1 (1995). The New Jersey Supreme Court has explained that OPRA's safeguard against disclosure of personal information is substantive and requires "a balancing test that weighs both the public's strong interest in disclosure with the need to safeguard from public access personal information that would violate a reasonable expectation of privacy." Burnett v. Cnty. of Bergen, 198 N.J. 408, 422-23, 427 (2009).

When "balanc[ing] OPRA's interests in privacy and access," courts consider the following factors:

(1) the type of record requested; (2) the information it does or might contain; (3) the potential for harm in any subsequent nonconsensual disclosure; (4) the injury from disclosure to the relationship in which the record was generated; (5) the adequacy of safeguards to prevent unauthorized disclosure; (6) the degree of need for access; and (7) whether there is an express statutory mandate, articulated public policy, or other recognized public interest militating toward access.

[Id. at 427 (quoting Doe, 142 N.J. at 88).]

However, in Smith, GRC 2004-163, the Council did not find it necessary to conduct the common law balancing test for access to telephone numbers because it found that "[a] balanced consideration of the privacy interests of citizens and the public interest in disclosure of the records in question by the GRC directly mirrors that performed by the New Jersey Supreme Court in [N. Jersey Newspapers Co. v. Passaic Cnty. Bd. of Chosen Freeholders, 127 N.J. 9 (1992)]."

Subsequently, upon reviewing the balancing test in N. Jersey, the Council stated:

In conducting its balanced consideration on the side of the need for confidentiality, the Court found three problems with unrestricted access to the telephone numbers.

Id. at 16-17. The Court identified one problem as the implication of privacy interests since access to the telephone numbers called is the disclosure not only of the record of the public official's calls but, inferentially, the identity of those who have called the official. The second problem the Court identified with the disclosure of the identity of such callers was that it may directly conflict with an express legislative policy or need of government . . . [t]he third problem identified by the Court was those times when a government official will have to make a telephone call that has an arguable claim of confidentiality . . .

[Id.]

Although the Council concluded in Smith that the telephone numbers should be redacted from the requested records based upon the outcome of the court's balancing test in N. Jersey, it went on to note that:

[E]ven if a balanced consideration of the privacy issues and need for confidentiality with the public's need for the telephone numbers called came out on the side for disclosure, there is the practical problem with OPRA's mandate that prior to allowing access to any government record, the custodian must redact from that record any information which discloses the unlisted phone numbers of any person. N.J.S.A. 47:1A-5(a). It is not likely that any custodian could comply with this OPRA provision by making such redactions with accurate precision when there is a realistic chance that the custodian may miss just one unlisted telephone number.

[Id.]

Personal Communications

The Council is permitted to raise additional defenses regarding the disclosure of records pursuant to Paff v. Twp. of Plainsboro, No. A-2122-05T2, 2007 N.J. Super. Unpub. LEXIS 2135 (App. Div.), certif. denied, 193 N.J. 292 (2007).⁸ In Paff, the complainant challenged the Council's authority to uphold a denial of access for reasons never raised by the custodian. Slip op. at 3. Specifically, the Council did not uphold the basis for the redactions cited by the custodian. Ibid. The Council, on its own initiative, determined that the Open Public Meetings Act prohibited the disclosure of the redacted portions to the requested executive session minutes. Slip op. at 2-3. The Council affirmed the custodian's denial to portions of the executive session minutes but for reasons other than those cited by the custodian. Id. The complainant argued that the Council did not have the authority to do anything other than determine whether the custodian's cited basis for denial was lawful. Id. at 3-4. The Court held that:

The GRC has an independent obligation to "render a decision as to whether the record which is the subject of the complaint is a government record which must be made available for public access pursuant to' OPRA . . . The GRC is not limited to assessing the correctness of the reasons given for the custodian's initial determination; it is charged with determining if the initial decision was correct."

⁸ On appeal from Paff v. Township of Plainsboro, GRC Complaint No. 2005-29 (March 2006).

[Id. at 4.]

The Court further stated that:

Aside from the clear statutory mandate to decide if OPRA requires disclosure, the authority of a reviewing agency to affirm on reasons not advanced by the reviewed agency is well established. Cf. Bryant v. City of Atl. City, 309 N.J. Super. 596, 629-30 (App. Div. 1998) (citing Isko v. Planning Bd. of Livingston, 51 N.J. 162, 175 (1968) (lower court decision may be affirmed for reasons other than those given below)); Dwyer v. Erie Inv. Co., 138 N.J. Super. 93, 98 (App. Div. 1975) (judgments must be affirmed even if lower court gives wrong reason), certif. denied, 70 N.J. 142 (1976); Bauer v. 141-149 Cedar Lane Holding Co., 42 N.J. Super. 110, 121 (App. Div. 1956) (question for reviewing court is propriety of action reviewed, not the reason for the action), aff'd, 24 N.J. 139 (1957).

[Id. at 4-5.]

On reconsideration of Lewen v. Robbinsville Pub. School, Dist., GRC Complaint No. 2008-211 (February 2011), the Council reversed its decision ordering disclosure of an e-mail between public employees discussing personal (non-governmental) matters. Following an *in camera* examination and analysis of other states' rulings with similar OPRA statutes, the Council found disclosure would not be in the public interest. Id. (citing Howell Educ. Ass'n MEA/NEA v. Howell Bd. of Educ., 789 N.W.2d 495 (2010), Schill v. Wis. Rapids Sch. Dist., 786 N.W.2d 177 (Wis. 2010), Denver Publ. Co. v. Bd. of Cnty. Comm'rs of Arapahoe Cnty., 121 P.3d 190 (Colo. 2005), State of Florida v. City of Clearwater, 863 S. 2d 149 (Fla. 2003), and Tiberino v. Spokane Cnty. Prosecutor, 13 P.3d 1104 (Wash. 2000)).⁹

In Lewin, the Council noted that the purpose of OPRA is “to maximize public knowledge about public affairs in order to ensure an informed citizenry.” In reconsidering its Interim Order, the GRC reflected that its “*in camera* review of the e-mail in question revealed that the contents of the e-mail constituted a personal communication between friends and as such, the contents of the e-mail in question contribute nothing to the public’s knowledge about public affairs.” [emphasis in original]. Finally, as “the e-mail in question constituted a personal communication, it was not ‘made, maintained or kept on file . . . in the course of official business’ and is therefore not disclosable under OPRA. N.J.S.A. 47:1A-1.1.” Id. (citing Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010)).

The GRC conducted an *in camera* examination on the submitted records. The results of this examination are set forth in the following table. The GRC notes that the table identifies only those e-mail bodies where the GRC determined the asserted exemptions do not apply (in whole or in part) as well as those exempt for reasons not asserted by the Custodian. The GRC will not list

⁹ In Tiberino, the Court upheld nondisclosure of a former employee’s e-mails in a case where the employee had been terminated, in part owing to her use of e-mail for personal reasons. The Court said: “[T]he public has an interest in seeing that public employees are not spending their time on the public payroll pursuing personal matters. But it is the amount of time spent on personal matters, not the content of personal emails or phone calls or conversations, that is of public interest.” (emphasis added).

any e-mails to which it deems that the exemptions raised by the Custodian were properly applied to same:

Record or Redaction Number (Bates #s)	Record Name/Date	Description of Record or Redaction	Custodian's Explanation/ Citation for Non-disclosure or Redactions	Findings of the <i>In Camera</i> Examination¹⁰
106	11/30/17 – 3:50PM E-mail from Cynthia Frazier to Thomas Chester	Redacted communication regarding handling of OPRA request.	Exempt from disclosure pursuant to the deliberative process privilege, <u>N.J.S.A. 47:1A-1.1</u> .	The first sentence of the redacted paragraph did not contain ACD material. Therefore, the Custodian unlawfully redacted that portion of the e-mail and shall disclose same. The remainder of the redacted paragraph was properly withheld as ACD material. <u>N.J.S.A. 47:1A-1.1</u> .
569	10/26/17 – 8:50AM E-mail from Carisa Calabrese to Kelly Oquist	Communications between co-workers catching up on personal lives.	<u>N.J.S.A. 47:1A-1</u> protects citizen's reasonable expectation of privacy.	The bodies of the e-mail chain contain personal communications and are therefore not government records. <u>N.J.S.A.</u>

¹⁰ **Unless expressly identified for redaction, everything in the record shall be disclosed.** For purposes of identifying redactions, unless otherwise noted a paragraph/new paragraph begins whenever there is an indentation and/or a skipped space(s). The paragraphs are to be counted starting with the first whole paragraph in each record and continuing sequentially through the end of the record. If a record is subdivided with topic headings, renumbering of paragraphs will commence under each new topic heading. Sentences are to be counted in sequential order throughout each paragraph in each record. Each new paragraph will begin with a new sentence number. If only a portion of a sentence is to be redacted, the word in the sentence which the redaction follows or precedes, as the case may be, will be identified and set off in quotation marks. If there is any question as to the location and/or extent of the redaction, the GRC should be contacted for clarification before the record is redacted. The GRC recommends the redactor make a paper copy of the original record and manually "black out" the information on the copy with a dark colored marker, then provide a copy of the blacked-out record to the requester.

				47:1A-1. <u>See Lewen</u> , GRC 2008-211.
569, 562	10/26/17 – 8:39AM E-mail from Kelly Oquist to Carisa Calabrese	Communications between co-workers catching up on personal lives.	<u>N.J.S.A. 47:1A-1</u> protects citizen’s reasonable expectation of privacy.	The bodies of the e-mail chain contain personal communications and are therefore not government records. <u>N.J.S.A. 47:1A-1. See Lewen</u> , GRC 2008-211.
569, 562, 555	10/26/17 – 8:37AM E-mail from Carisa Calabrese to Kelly Oquist	Communications between co-workers catching up on personal lives.	<u>N.J.S.A. 47:1A-1</u> protects citizen’s reasonable expectation of privacy.	The bodies of the e-mail chain contain personal communications and are therefore not government records. <u>N.J.S.A. 47:1A-1. See Lewen</u> , GRC 2008-211.
570, 562, 555, 549	10/26/17 – 8:35AM E-mail from Kelly Oquist to Carisa Calabrese	Communications between co-workers catching up on personal lives.	<u>N.J.S.A. 47:1A-1</u> protects citizen’s reasonable expectation of privacy.	The bodies of the e-mail chain contain personal communications and are therefore not government records. <u>N.J.S.A. 47:1A-1. See Lewen</u> , GRC 2008-211.
570, 563, 555, 549, 543	10/26/17 – 8:32AM E-mail from Carisa Calabrese to Kelly Oquist	Communications between co-workers catching up on personal lives.	<u>N.J.S.A. 47:1A-1</u> protects citizen’s reasonable expectation of privacy.	The bodies of the e-mail chain contain personal communications and are therefore not government records. <u>N.J.S.A. 47:1A-1. See Lewen</u> , GRC 2008-211.
570, 563, 556 549, 543, 537	10/26/17 – 8:31AM E-mail from Kelly	Communications between co-workers catching	<u>N.J.S.A. 47:1A-1</u> protects citizen’s reasonable	The bodies of the e-mail chain contain personal

	Oquist to Carisa Calabrese	up on personal lives.	expectation of privacy.	communications and are therefore not government records. <u>N.J.S.A. 47:1A-1. See Lewen</u> , GRC 2008-211.
571, 563-564, 556, 550, 543, 537, 532	10/26/17 – 8:30AM E-mail from Carisa Calabrese to Kelly Oquist	Communications between co-workers catching up on personal lives.	<u>N.J.S.A. 47:1A-1</u> protects citizen’s reasonable expectation of privacy.	The bodies of the e-mail chain contain personal communications and are therefore not government records. <u>N.J.S.A. 47:1A-1. See Lewen</u> , GRC 2008-211.
571, 564, 556, 550, 544, 537, 532, 527	10/26/17 – 8:25AM E-mail from Kelly Oquist to Carisa Calabrese	Communications between co-workers catching up on personal lives.	<u>N.J.S.A. 47:1A-1</u> protects citizen’s reasonable expectation of privacy.	The bodies of the e-mail chain contain personal communications and are therefore not government records. <u>N.J.S.A. 47:1A-1. See Lewen</u> , GRC 2008-211.
576, 571, 564, 557, 550, 544, 538, 532, 527	10/26/17 – 8:22AM E-mail from Carisa Calabrese to Kelly Oquist	Communications between co-workers catching up on personal lives.	<u>N.J.S.A. 47:1A-1</u> protects citizen’s reasonable expectation of privacy.	The bodies of the e-mail chain contain personal communications and are therefore not government records. <u>N.J.S.A. 47:1A-1. See Lewen</u> , GRC 2008-211.
572, 564, 557, 551, 544, 538, 532, 527	10/26/17 – 8:19AM E-mail from Kelly Oquist to Carisa Calabrese	Communications between co-workers catching up on personal lives.	<u>N.J.S.A. 47:1A-1</u> protects citizen’s reasonable expectation of privacy.	The bodies of the e-mail chain contain personal communications and are therefore not government records. <u>N.J.S.A. 47:1A-1. See</u>

				Lewen, GRC 2008-211.
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As noted above, all e-mail bodies not addressed above were lawfully withheld under the OPRA’s ACD exemption, scholarly and/or academic research exemption. Further, the Custodian lawfully denied access to private cell phone numbers based on the GRC’s prior decisions favoring the privacy interests of the public. See Smith, GRC 2004-163.

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 current Custodian complied with the Council’s November 12, 2019 Interim Order because he responded in the extended time frame providing the GRC with nine (9) redacted and unredacted copies of the requested e-mails for *in camera* review. The current Custodian also simultaneously provided certified confirmation of compliance to the Executive Director.
2. **On the basis of the Council’s determination in this matter, the current Custodian shall comply with the Council’s Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order. Further, the current Custodian shall simultaneously deliver¹¹ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,¹² to the Executive Director.**¹³
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

December 8, 2020

¹¹ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

¹² "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."

¹³ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.



State of New Jersey
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

November 12, 2019 Government Records Council Meeting

Patrick Duff
Complainant

Complaint No. 2017-246

v.

Stockton University
Custodian of Record

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 deliver¹ 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 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.**
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 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."

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

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 12, 2019 Council Meeting**

**Patrick Duff¹
Complainant**

GRC Complaint No. 2017-246

v.

**Stockton University²
Custodial Agency**

Records Relevant to Complaint:³ “All communication between Stockton University [“Stockton”] employees and the [New Jersey Department of Environmental Protection (“NJDEP”)] 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

Background⁴

Request and Response:

On November 30, 2017, the Complainant submitted an Open Public Records Act (“OPRA”) 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

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.

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 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.

⁵ Paff v. N.J. 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.]

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 deliver⁶ 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 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.**
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

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."