INTERIM ORDER

September 24, 2019 Government Records Council Meeting

Krzysztof Golas
Complainant
v.
Essex County Department of Corrections
Custodian of Record

Complaint No. 2018-12

At the September 24, 2019 public meeting, the Government Records Council (“Council”) considered the September 17, 2019 Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The GRC must conduct an in camera review of the responsive e-mails withheld from disclosure to determine the validity of the Custodian’s assertion that the record was exempt under OPRA as “inter-agency or intra-agency advisory, consultative, or deliberative material.” 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), 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 Executive Director 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.”

New Jersey is an Equal Opportunity Employer • Printed on Recycled paper and Recyclable
Interim Order Rendered by the
Government Records Council
On The 24th Day of September 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: September 26, 2019
STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Findings and Recommendations of the Executive Director
September 24, 2019 Council Meeting

Krzysztof Golas¹
Complainant

v.

Essex County Department of Corrections²
Custodial Agency

Records Relevant to Complaint: Electronic copies via e-mail of e-mails between the County of Essex (“County”) and the County Department of Corrections (“ECDOC”) related to Symbol PC2077R and Symbol PC2077U from September 1, 2017 through December 31, 2017.³

Custodian of Record: Valentina Smoot Palchetti
Request Received by Custodian: January 10, 2018
Response Made by Custodian: January 17, 2018
GRC Complaint Received: January 25, 2018

Background⁴

Request and Response:

On January 10, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On January 17, 2018, the Custodian responded in writing denying access to responsive e-mails between the County and ECDOC under the “inter-agency or intra-agency advisory, consultative, or deliberative [(“ACD”)] material” exemption. On the same day, the Complainant disputed the denial, arguing that the e-mails in question were “PROCEDURAL and relate directly to the processing of a publicly available civil service promotion list.” (Emphasis in original). The Complainant noted that the Custodian’s failure to disclosure the e-mails would result in a Denial of Access Complaint filing.

On January 18, 2018, the Custodian responded to the Complainant advising that the responsive e-mails were between two (2) County employees and were “intra-agency” in nature.

¹ No legal representation listed on record.
² Represented by Courtney Gaccione, Esq. (Newark, NJ).
³ The Complainant requested additional records not at issue in this complaint.
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.

Krzysztof Golas v. Essex County Department of Corrections, 2018-12 – Findings and Recommendations of the Executive Director
Denial of Access Complaint:

On January 25, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that the e-mails responsive to his OPRA request were not exempt from disclosure under OPRA. The Complainant reiterated his reasons for this position as reflected in earlier correspondence with the Custodian.

Statement of Information:

On February 8, 2018, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant’s OPRA request on January 10, 2018. The Custodian certified that her search included Human Resources and ECDOC locating responsive faxes and e-mails among their records. The Custodian affirmed that the search revealed five (5) pages of e-mails and a two (2) page fax. The Custodian certified that she responded in writing on January 17, 2018 disclosing the fax and denying access to the e-mails.

The Custodian stated that OPRA contained an exemption for ACD material. The Custodian argued that the ACD exemption applied to the responsive e-mails because they contained discussions regarding the promotional lists. The Custodian noted that following the Complainant’s dispute over her denial, she met with Counsel regarding the e-mails. The Custodian asserted that the same conclusion resulted, and she maintained the denial accordingly. The Custodian also certified that no additional records existed.

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

---

5 Paff v. NJ Dep’t of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).
Krzysztof Golas v. Essex County Department of Corrections, 2018-12 – Findings and Recommendations of the Executive Director
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:

We hold only that the GRC has and should exercise its discretion to conduct in camera review when necessary to resolution of the appeal . . . There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of in camera review by the GRC. The GRC’s obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7(f), which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.

[Id.]

Here, the Complainant sought correspondence between the County and ECDOC, for which the Custodian denied access to five (5) pages of e-mails under the ACD exemption. Prior to, and as part of, the Denial of Access Complaint, the Complainant alleged that the e-mails were “procedural” and thus subject to disclosure. In the SOI, the Custodian argued that she properly denied access to the records under the ACD exemption because they were between employees of the County and ECDOC regarding the promotional list.

Given the vagueness with which the Custodian described the withheld e-mails, a “meaningful review” is necessary to determine same reasonably fell within the ACD exemption. The GRC must thus review same in order to determine the full applicability of ACD exemption. Such an action is not uncommon, as the GRC will routinely perform an in camera review in similar circumstances. See e.g. 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 responsive e-mails withheld from disclosure to determine the validity of the Custodian’s assertion that the record was exempt under OPRA as ACD material. N.J.S.A. 47:1A-1.1. See Paff, 379 N.J. Super, at 346.

Knowing & Willful

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

The Executive Director respectfully recommends the Council find that:

1. The GRC must conduct an in camera review of the responsive e-mails withheld from disclosure to determine the validity of the Custodian’s assertion that the record was exempt under OPRA as “inter-agency or intra-agency advisory, consultative, or deliberative material.” 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), 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 Executive Director 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: Frank F. Caruso
Executive Director

September 17, 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.”

Krzysztof Golas v. Essex County Department of Corrections, 2018-12 – Findings and Recommendations of the Executive Director