



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

January 25, 2022 Government Records Council Meeting

Chaya- Bracha Karen Walkenfeld
Complainant
v.
Rutgers University
Custodian of Record

Complaint No. 2021-26

At the January 25, 2022, public meeting, the Government Records Council (“Council”) considered the January 18, 2022, 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 GRC must conduct an *in camera* review of the 175 pages of redacted e-mails responsive to the Complainant’s OPRA request to validate the Custodian’s assertion that the records were exempt from disclosure under the “inter-agency or intra-agency advisory, consultative, or deliberative material” exemption. See Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005); N.J.S.A. 47:1A-1.1.
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.
4. The Council defers analysis of whether the Complainant is a prevailing party 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 25th Day of January 2022

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 26, 2022

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 25, 2022 Council Meeting**

**Chaya-Bracha Karen Walkenfeld¹
Complainant**

GRC Complaint No. 2021-26

v.

**Rutgers University²
Custodial Agency**

Records Relevant to Complaint:

June 17, 2020 OPRA request: Copies of e-mails to/from William O'Brien, Anna Enobong, Salvador B. Mena, and Christopher Molloy regarding the "Muslims4peace Annual Interfaith project Mohammad Conference on February 9, 2020" between August 2019 and February 15, 2020.³

June 23, 2020 OPRA request: Copies of e-mails to/from Matthew Gulsby containing the keywords "Muslims4Peace," "MuslimsforPeace," "Prophet Muhammad Conference;" and "Muslims4Peace Conference" from February 2020 through April 2020.⁴

Custodian of Record: Jewell Battle

Request Received by Custodian: June 17, 2020; June 23, 2020

Response Made by Custodian: August 25, 2020; September 21, 2020⁵

GRC Complaint Received: January 22, 2021

Background⁶

Request and Response:

On June 17, 2020, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On the same day, the Custodian responded in writing confirming receipt of the Complainant's OPRA request. The Complainant

¹ Represented by David Abrams, Esq. (New York, NY).

² Represented by Elizabeth Minott, Esq. (New Brunswick, NJ).

³ The Complainant sought additional records that are not at issue in this complaint.

⁴ The Complainant sought additional records that are not at issue in this complaint.

⁵ While the responses appear to be well beyond the statutorily mandated time frame, the GRC will not address timeliness here due N.J.S.A. 47:1A-5(i) and the concurrent COVID-19 health emergency and because the Complainant did not raise the issue as part of this complaint.

⁶ 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.

responded noting that “project” should be replaced with “Prophet” and that the search should include the keywords “Muslims4Peace,” “MuslimsforPeace,” “Prophet Muhammad Conference;” and “Muslims4Peace Conference.” On June 18, 2020, the Custodian responded confirming receipt of the clarification and noting that a search will be conducted based on the keywords provided. On August 25, 2020, the Custodian responded in writing disclosing multiple e-mails with redactions for privacy interest and “inter-agency or intra-agency advisory, consultative, or deliberative [“ACD”] material.” N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-1.1; Serrano v. South Brunswick Twp., 358 N.J. Super. 352, 368 (App. Div. 2003); Ciesla v. N.J. Dep’t of Health and Senior Serv., 429 N.J. Super. 127 (App. Div. 2012).

On June 23, 2020, the Complainant submitted an OPRA request to the Custodian seeking the above-mentioned records. On September 21, 2020, the Custodian responded in writing disclosing multiple e-mails with redactions for privacy information and ACD material. N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-1.1; Serrano, 358 N.J. Super. 352; Ciesla, 429 N.J. Super. 127.

Denial of Access Complaint:

On January 22, 2021, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the records she received were so heavily redacted that it was impossible for her to determine whether the redactions were lawful. The Custodian also noted that she submitted similar requests to other universities seeking similar records and received them with only privacy redactions.

Statement of Information:

On February 23, 2021, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA requests on June 17, 2020 and June 23, 2020 respectively. The Custodian certified that her search included relying on Rutgers University’s Office of Information Technology to search for and provide responsive e-mails. The Custodian affirmed that she reviewed and redacted the responsive e-mails prior to disclosure. The Custodian certified that she responded in writing on August 25, 2020 and September 21, 2020 disclosing 175 pages of e-mails and providing a specific lawful basis for the redactions contained therein.

The Custodian argued that she lawfully denied access to those redacted portions of the responsive records under the ACD exemption. N.J.S.A. 47:1A-1.1; Ciesla, 429 N.J. Super. 127. The Custodian contended that this is particularly true of information including “strategic planning and security discussions.” The Custodian also contended that the Complainant’s claim that she was unable to determine whether the exemption applied is in error because OPRA did not require an agency to share potentially exempt material with a requestor prior to asserting said exemption. The Custodian argued that such an action would “defeat the purpose of redacting records . . . and would compromise the privacy and security of the University.”

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 Council⁷ 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:

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 Custodian disclosed 175 pages of e-mails with redactions under the ACD exemption. The Complainant argued in the Denial of Access Complaint that she could not determine whether the redacted material could reasonably fall within the cited exemption. The Complainant also noted that other universities disclosed similar records with only privacy

⁷ Paff v. N.J. Dep’t of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

information redacted. The Custodian argued in the SOI that the redactions were proper under the ACD exemption. N.J.S.A. 47:1A-1.1. The Custodian also argued that no public agency was required to “share” exempt material with a requestor prior to redacting same.

Upon review of the submissions, a “meaningful review” is necessary to determine whether the denied e-mail chains fall within the asserted exemptions. Whether other universities disclosed similar e-mail records without asserting the ACD exemption is not dispositive here; the GRC can only determine whether the redactions made in this complaint were lawful. Further, the GRC has routinely reviewed e-mails *in camera* in complaints with facts like the present complaint. See *e.g. Pouliot v. N.J. Dep’t of Educ.*, GRC Complaint No. 2015-281 (Interim Order dated January 31, 2017). Thus, the GRC must review same to determine the full applicability of the cited exemptions.

Therefore, the GRC must conduct an *in camera* review of the 175 pages of redacted e-mails responsive to the Complainant’s OPRA request to validate the Custodian’s assertion that the records were exempt from disclosure under the ACD material exemption. See *Paff*, 379 N.J. Super. at 346; N.J.S.A. 47:1A-1.1.

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.

Prevailing Party Attorney’s Fees

The Council defers analysis of whether the Complainant is a prevailing party 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 175 pages of redacted e-mails responsive to the Complainant’s OPRA request to validate the Custodian’s assertion that the records were exempt from disclosure under the “inter-agency or intra-agency advisory, consultative, or deliberative material” exemption. See *Paff v. N.J. Dep’t of Labor, Bd. of Review*, 379 N.J. Super. 346 (App. Div. 2005); N.J.S.A. 47:1A-1.1.
2. **The Custodian shall deliver⁸ 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 index⁹, as well as a legal**

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⁹ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,¹⁰ 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.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Executive Director

January 18, 2022

¹⁰ "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."