



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

FINAL DECISION

November 9, 2022 Government Records Council Meeting

Michael Esslie
Complainant

Complaint No. 2021-97

v.

Rowan University
Custodian of Record

At the November 9, 2022 public meeting, the Government Records Council (“Council”) considered the October 27, 2022 Supplemental 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 the Council dismiss this complaint because the Complainant withdrew it in writing via e-mail to the GRC on September 21, 2022. Thus, no further adjudication is required.

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 9th Day of November 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: November 15, 2022



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
November 9, 2022 Council Meeting**

**Michael Esslie¹
Complainant**

GRC Complaint No. 2021-97

v.

**Rowan University²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of: “the report referenced in the Email dated February 26, 2019 from Ashley Donlan to Joanne M. Connor which is indicated to have been, ‘...sent through to the EDA Yesterday.’ Identified in Subject of Email as: EDA Draft.”

Custodian of Record: Gina Marie Floyd³
Request Received by Custodian: March 12, 2021
Response Made by Custodian: April 15, 2021
GRC Complaint Received: May 10, 2021

Background

August 30, 2022 Council Meeting:

At its August 30, 2022 public meeting, the Council considered the August 23, 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, found that:

1. The Custodian’s failure to provide a completed Statement of Information to the GRC, despite more than one request, results in a violation of N.J.A.C. 5:105-2.4(a). Moreover, the Custodian’s failure to respond additionally obstructed the GRC in its efforts to “receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian . . .” N.J.S.A. 47:1A-7(b).
2. The GRC must conduct an *in camera* review of the redacted report to validate the Custodian’s contention that it contains information protected by OPRA’s competitive advantage exemption and confidential, trade secret, proprietary, commercial and

¹ No legal representation listed on record.

² Represented by Elyse G. Crawford, Esq., Assistant General Counsel (Glassboro, NJ).

³ The current Custodian of Record is Lorra Arsinoe Feld.

financial information exemption. See Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005) and N.J.S.A. 47:1A-1.1.

3. **The Custodian shall deliver⁴ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 2 above), nine (9) copies of the redacted records, a document or redaction index⁵, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,⁶ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On August 31, 2022, the Council distributed its Interim Order to all parties. On September 6, 2022, Elyse G. Crawford, Esq., Assistant General Counsel for Rowan University ("Rowan"), e-mailed the Government Records Council ("GRC"), stating that she believed the matter had been resolved and the Complainant withdrew same. On September 8, 2022, Ms. Crawford requested a ten (10) business day extension of time to respond to the Interim Order, with the intention of filing a request for reconsideration. Ms. Crawford stated that prior to submitting the Statement of Information, Rowan provided the Complainant with the requested record unredacted, and therefore the matter should be dismissed as moot. On September 8, 2022, the GRC granted an extension until September 23, 2022 to submit a request for reconsideration of the Council's Order.

On September 21, 2022, the Complainant e-mailed the GRC and Ms. Crawford, stating his desire to withdraw the complaint. The Complainant noted that the complaint would not have been necessary if Rowan did not summarily deny his request.

On September 22, 2022, the GRC received Rowan's request for reconsideration of the Council's Interim Order via U.S. mail.

Analysis

No analysis required.

⁴ 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.

⁵ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

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."

Conclusions and Recommendations

The Executive Director respectfully recommends the Council dismiss this complaint because the Complainant withdrew it in writing via e-mail to the GRC on September 21, 2022. Thus, no further adjudication is required.

Prepared By: Samuel A. Rosado
Staff Attorney

October 27, 2022



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PO Box 819
TRENTON, NJ 08625-0819

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

August 30, 2022 Government Records Council Meeting

Michael Esslie
Complainant

Complaint No. 2021-97

v.

Rowan University
Custodian of Record

At the August 30, 2022 public meeting, the Government Records Council (“Council”) considered the August 23, 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 Custodian’s failure to provide a completed Statement of Information to the GRC, despite more than one request, results in a violation of N.J.A.C. 5:105-2.4(a). Moreover, the Custodian’s failure to respond additionally obstructed the GRC in its efforts to “receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian . . .” N.J.S.A. 47:1A-7(b).
2. The GRC must conduct an *in camera* review of the redacted report to validate the Custodian’s contention that it contains information protected by OPRA’s competitive advantage exemption and confidential, trade secret, proprietary, commercial and financial information exemption. See Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005) and N.J.S.A. 47:1A-1.1.
3. **The Custodian shall deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 2 above), nine (9) copies of the redacted records, a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,³ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council’s Interim Order.**

¹ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives them by the deadline.

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

³ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

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

Interim Order Rendered by the
Government Records Council
On The 30th Day of August 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: August 31, 2022

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
August 30, 2022 Council Meeting**

**Michael Esslie¹
Complainant**

GRC Complaint No. 2021-97

v.

**Rowan University²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of: “the report referenced in the Email dated February 26, 2019 from Ashley Donlan to Joanne M. Connor which is indicated to have been, ‘...sent through to the EDA Yesterday.’ Identified in Subject of Email as: EDA Draft.”

Custodian of Record: Gina Marie Floyd
Request Received by Custodian: March 12, 2021
Response Made by Custodian: April 15, 2021
GRC Complaint Received: May 10, 2021

Background³

Request and Response:

On March 12, 2021, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On March 15, 2021, Elyse Crawford, Esq. responded in writing on behalf of the Custodian stating that a thirty (30) day extension was needed to process the request.⁴

On April 15, 2021, Ms. Crawford responded in writing on behalf of the Custodian providing a copy of the requested report containing redactions. Ms. Crawford stated that the redactions were made to protect proprietary and financial information of investors and future tenants.

Denial of Access Complaint:

On May 10, 2021, the Complainant filed a Denial of Access Complaint with the

¹ No legal representation listed on record.

² No legal representation listed on record.

³ 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.

⁴ The Complainant did not include in the Denial of Access Complaint a copy of this correspondence from the Custodian.

Government Records Council (“GRC”). The Complainant asserted that the report he received was substantially redacted and questioned how some of the redactions would constitute proprietary or financial information given the surrounding context. The Complainant also contended that some redactions appeared to be information that was publicly known or available due to its subject as a state-approved and funded project.

The Complainant also contended that Rowan University’s (“Rowan”) reliance on a third-party counsel to review the requested report to ensure that information contained in the report remained confidential was improper. The Complainant asserted that Rowan, and not a third party, is obligated to redact government records. The Complainant also argued that if Rowan wanted to protect this information on the basis that it received same in a confidential manner, then Rowan should produce a statement or affirmation from the outside parties stating that the redacted information was not publicized.

Statement of Information:

On May 18, 2021, the GRC requested a Statement of Information (“SOI”) from the Custodian. After receiving no response within the allotted five (5) business days, the GRC sent a “No Defense” letter to the Custodian on June 8, 2021, requesting a completed SOI within three (3) business days of receipt. The GRC noted that the Custodian’s failure to submit an SOI could lead to an adjudication based solely on the Complainant’s submission. N.J.A.C. 5:105-2.4(f). To date, the Custodian has not responded.

Analysis

Failure to Submit SOI

OPRA also provides that “Custodians shall submit a completed and signed statement of information (SOI) form to the Council and the complainant simultaneously that details the custodians' position for each complaint filed with the Council[.]” N.J.A.C. 5:105-2.4(a).

OPRA further provides that:

Custodians shall submit a completed and signed SOI for each complaint to the Council's staff and the complainant not later than five business days from the date of receipt of the SOI form from the Council's staff . . . Failure to comply with this time period may result in the complaint being adjudicated based solely on the submissions of the complainant.

[N.J.A.C. 5:105-2.4(f).]

Finally, OPRA provides that “[a] custodian’s failure to submit a completed and signed SOI . . . may result in the Council’s issuing a decision in favor of the complainant.” N.J.A.C. 5:105-2.4(g). In Alterman, Esq. v. Sussex Cnty. Sheriff’s Office, GRC Complaint No. 2013-353 (September 2014), the custodian failed to provide a completed SOI to the GRC within the allotted deadline. Thus, the Council noted the custodian’s failure to adhere to N.J.A.C. 5:105-2.4(a). See

also Kovacs v. Irvington Police Dep't (Essex), GRC Complaint No. 2014-196 (January 2015); Howell v. Twp. of Greenwich (Warren), GRC Complaint No. 2015-249 (November 2016).

In the instant matter, the Custodian did not comply with the GRC's initial request for an SOI dated May 18, 2021. After the expiration of the five (5) business day deadline, the GRC again attempted to obtain a completed SOI from the Custodian with a "No Defense" letter and requesting the completed SOI within three (3) business days of receipt. This transmission included a copy of the original SOI letter providing detailed instructions on how to properly submit an SOI. However, the GRC never received a response.

Accordingly, the Custodian's failure to provide a completed SOI to the GRC, despite more than one request, results in a violation of N.J.A.C. 5:105-2.4(a). Moreover, the Custodian's failure to respond additionally obstructed the GRC in its efforts to "receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian . . ." N.J.S.A. 47:1A-7(b).

Unlawful Denial of Access

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

In Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the Council⁵ that accepted the custodian's legal conclusion for the denial of access without further review. The Appellate Division noted that "OPRA contemplates the GRC's meaningful review of the basis for an agency's decision to withhold government records When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers." Id. The Court stated that:

[OPRA] also contemplates the GRC's *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the 'Open Public Meetings Act,' N.J.S.A. 10:4-6 to -21, it also provides that the GRC 'may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.' N.J.S.A. 47:1A-7(f). This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.

[Id. at 355.]

Further, the Court found that:

⁵ Paff v. N.J. Dep't of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

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 responded to the Complainant on April 15, 2021, providing a copy of the requested report with redactions. The Custodian stated that the redactions were made to protect trade secrets and proprietary information and/or information that would provide an unfair advantage to bidders. See N.J.S.A. 47:1A-1.1.

Upon review of the evidence of record in the instant complaint, the GRC cannot determine whether the Custodian properly denied access to the redacted information. Although the disclosed report was included in the Denial of Access Complaint, the GRC cannot independently determine the validity of those redactions. For these reasons, a “meaningful review” is necessary to determine whether the redactions contained in the report fall within the asserted exemption. Paff, 379 N.J. Super. at 355.

Accordingly, the GRC must conduct an *in camera* review of the redacted report to validate the Custodian’s contention that it contains information protected by OPRA’s competitive advantage exemption and confidential, trade secret, proprietary, commercial and financial information exemption. See Paff, 379 N.J. Super. at 346 and 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.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian’s failure to provide a completed Statement of Information to the GRC, despite more than one request, results in a violation of N.J.A.C. 5:105-2.4(a). Moreover, the Custodian’s failure to respond additionally obstructed the GRC in its efforts to “receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian . . .” N.J.S.A. 47:1A-7(b).
2. The GRC must conduct an *in camera* review of the redacted report to validate the Custodian’s contention that it contains information protected by OPRA’s competitive

advantage exemption and confidential, trade secret, proprietary, commercial and financial information exemption. See Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005) and N.J.S.A. 47:1A-1.1.

3. **The Custodian shall deliver⁶ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 2 above), nine (9) copies of the redacted records, a document or redaction index⁷, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,⁸ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Samuel A. Rosado
Staff Attorney

August 23, 2022

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."