



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

May 28, 2013 Government Records Council Meeting

Harry B. Scheeler, Jr.
Complainant

Complaint No. 2012-83

v.

Township of Mt. Laurel (Burlington)
Custodian of Record

At the May 28, 2013 public meeting, the Government Records Council (“Council”) considered the May 21, 2013 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:

1. The Custodian timely complied with the Council’s April 30, 2013 Interim Order by submitting certified confirmation of compliance that she provided the responsive records with redactions and a redaction index to the Complainant on May 6, 2013.
2. The Custodian unlawfully denied access to portions of the responsive e-mails. N.J.S.A. 47:1A-6. However, the Custodian timely complied with the Council’s April 30, 2013 Interim Order. 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 unlawful denial of access did 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 28th Day of May, 2013

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: June 5, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
May 28, 2013 Council Meeting**

**Harry B. Scheeler, Jr.¹
Complainant**

GRC Complaint No. 2012-83

v.

**Township of Mt. Laurel (Burlington)²
Custodian of Records**

Records Relevant to Complaint: Electronic copies via e-mail of any and all e-mails between any member of the Council and Mayor, Township of Mt. Laurel (“Township”) Solicitor, Ms. Lisa Tilton (“Ms. Tilton”), and Township Manager from May 2011 to December 2011 referencing Ms. Tilton and her application for employment as Township Clerk.³

Request Made: March 12, 2012

Response Made: March 16, 2012

GRC Complaint Filed: April 2, 2012⁴

Background

April 30, 2013 Council Meeting:

At its April 30, 2013 public meeting, the Council considered the April 23, 2013 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 unlawfully denied access to portions of the responsive 23 pages of records responsive to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. Thus, the Custodian must disclose the responsive e-mails with appropriate redactions for information exempt under Executive Order No. 26 (McGreevey, 2002). *See Mendes v. Freedom Academy Charter School (Camden)*, GRC Complaint No. 2009-184 (Interim Order dated August 24, 2010) and *Ray v. Freedom Academy Charter School (Camden)*, GRC Complaint No. 2009-185 (Interim Order dated May 24, 2011).

¹ No legal representation listed on record.

² Meredith Tomczyk, Custodian of Records. Represented by Timothy M. Prime, Esq., of Timothy M. Prime, LLC (Mt. Laurel, NJ).

³ The Complainant requested additional records that are not at issue in the instant complaint.

⁴ The GRC received the Denial of Access Complaint on said date.

2. **The Custodian shall comply with item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁵ to the Executive Director.⁶**
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 May 1, 2013, the Council distributed its Interim Order to all parties. On May 7, 2013, the Custodian responded to the Council's Interim Order. The Custodian certified that pursuant to the Council's Order, she forwarded the responsive records with redactions and a redaction index to the Complainant via e-mail on May 6, 2013. The Custodian certifies that she had to send two (2) separate e-mails to the Complainant because of the size of the electronic file.

Analysis

Compliance

At its April 30, 2013 meeting, the Council ordered the Custodian to:

"...disclose the responsive e-mails with appropriate redactions for information exempt under Executive Order No. 26 (McGreevey, 2002) ... within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director." (Footnotes omitted.)

On May 1, 2013, the Council disseminated its Order to the parties. On May 7, 2013, the Custodian submitted certified confirmation of compliance in which she certified that she provided the responsive records with redactions and a redaction index to the Complainant via e-mail on May 6, 2013. Therefore, the Custodian timely complied with the Council's April 30, 2013 Interim Order by submitting certified confirmation of compliance that she provided the responsive records with redactions and a redaction index to the Complainant on May 6, 2013.

⁵ "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."

⁶ Satisfactory compliance requires that the Custodian deliver the records 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.

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:

“... If 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 (Berg); 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).

The Custodian unlawfully denied access to portions of the responsive e-mails. N.J.S.A. 47:1A-6. However, the Custodian timely complied with the Council’s April 30, 2013 Interim Order. 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 unlawful denial of access did 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. The Custodian timely complied with the Council’s April 30, 2013 Interim Order by submitting certified confirmation of compliance that she provided the responsive records with redactions and a redaction index to the Complainant on May 6, 2013.

2. The Custodian unlawfully denied access to portions of the responsive e-mails. N.J.S.A. 47:1A-6. However, the Custodian timely complied with the Council's April 30, 2013 Interim Order. 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 unlawful denial of access did 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: Frank F. Caruso
Senior Case Manager

Approved By: Brandon D. Minde, Esq.
Executive Director

May 21, 2013



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
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CHRIS CHRISTIE
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KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

April 30, 2013 Government Records Council Meeting

Harry B. Scheeler, Jr.
Complainant

Complaint No. 2012-83

v.

Township of Mt. Laurel (Burlington)
Custodian of Record

At the April 30, 2013 public meeting, the Government Records Council ("Council") considered the April 23, 2013 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 unlawfully denied access to portions of the responsive 23 pages of records responsive to the Complainant's OPRA request. N.J.S.A. 47:1A-6. Thus, the Custodian must disclose the responsive e-mails with appropriate redactions for information exempt under Executive Order No. 26 (McGreevey, 2002). See Mendes v. Freedom Academy Charter School (Camden), GRC Complaint No. 2009-184 (Interim Order dated August 24, 2010) and Ray v. Freedom Academy Charter School (Camden), GRC Complaint No. 2009-185 (Interim Order dated May 24, 2011).
2. **The Custodian shall comply with item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹ to the Executive Director.²**
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.

Interim Order Rendered by the
Government Records Council
On The 30th Day of April, 2013

¹ "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."

² Satisfactory compliance requires that the Custodian deliver the records 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.



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: May 1, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 30, 2013 Council Meeting**

**Harry B. Scheeler, Jr.¹
Complainant**

GRC Complaint No. 2012-83

v.

**Township of Mt. Laurel (Burlington)²
Custodian of Records**

Records Relevant to Complaint: Electronic copies via e-mail of any and all e-mails between any member of the Council and Mayor, Township of Mt. Laurel (“Township”) Solicitor, Ms. Lisa Tilton (“Ms. Tilton”), and Township Manager from May 2011 to December 2011 referencing Ms. Tilton and her application for employment as Township Clerk.³

Request Made: March 12, 2012

Response Made: March 16, 2012

GRC Complaint Filed: April 2, 2012⁴

Background⁵

Request and Response:

On March 12, 2012, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian. On March 16, 2012, the Custodian’s Counsel responded in writing on behalf of the Custodian denying access to the responsive records pursuant to N.J.S.A. 47:1A-10. On March 19, 2012, the Complainant responded disputing Counsel’s asserted exemption.

Counsel responded in writing on March 19, 2012 stating that three (3) e-mails exist and are attached:

1. E-mail from Ms. Tilton to Counsel dated June 10, 2011, to schedule an interview.
2. E-mail from Ms. Tilton to Counsel dated July 19, 2011, requesting reconsideration of the decision to not hire her.

¹ No legal representation listed on record.

² Meredith Tomczyk, Custodian of Records. Represented by Timothy M. Prime, Esq., of Timothy M. Prime, LLC (Mt. Laurel, NJ).

³ The Complainant requested additional records that are not at issue in the instant complaint.

⁴ The GRC received the Denial of Access Complaint on said date.

⁵ 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.

3. E-mail from Counsel to Ms. Tilton dated July 25, 2011, providing a response to her reconsideration e-mail.

On March 20, 2012, the Complainant responded asserting that he believed the Township was withholding e-mails because he obtained e-mails through OPRA requests to other municipalities and further is in possession of an e-mail between Counsel and Ms. Tilton that the Township did not provide. On March 21, 2011, the Custodian responded advising the Complainant that she was working with the Township IT consultant regarding the e-mail archiving process prior to her employment; thus, additional time to respond would be necessary.

On March 22, 2012, the Custodian responded stating that all responsive e-mails are exempt from disclosure pursuant to Executive Order No. 26 (McGreevey, 2002) (“EO 26”). The Complainant responded on the same day disputing that the records are exempt in their entirety and that only exempt portions of the e-mails should be redacted. The Complainant noted that he would initiate a complaint unless the e-mails were disclosed by day’s end.

Denial of Access Complaint:

On April 2, 2012, the Complainant filed his Denial of Access Complaint with the Government Records Council (“GRC”) arguing that the Custodian unlawfully denied access to the responsive e-mails pursuant to the attorney-client privilege exemption.⁶ The Complainant contends that, at the very least, the records should be redacted, disclosing non-exempt information such as “To, From, Date, and Subject” line. The Complainant further disputes that the attorney-client privilege exemption applies to the e-mails because the Township is not engaged in any litigation with Ms. Tilton.

Statement of Information:

On April 27, 2012, the Custodian filed her Statement of Information (“SOI”), certifying that she received the Complainant’s OPRA request on March 12, 2012. The Custodian certifies that she responded on March 22, 2012, advising that all responsive e-mails were exempt from disclosure pursuant to EO 26. The Custodian certifies that 23 pages of e-mails were not disclosed to the Complainant.

Counsel submitted a letter brief arguing that at the time the Custodian denied access to the e-mails pursuant to EO 26, he was unaware that EO 26 exempted:

“... resumes, applications for employment or other information concerning job applicants while a recruitment search is ongoing. The resumes of successful candidates shall be disclosed once the successful candidate is hired. The resumes of unsuccessful candidates may be disclosed after the search has been concluded and the position has been filled, but only where the unsuccessful candidate has consented to such disclosure.” *Id.*

⁶ The GRC notes that the Custodian never asserted that any of the records were exempt under the attorney-client privilege exemption. The Custodian only argued that the records are exempt pursuant to EO 26.

Counsel asserts that the responsive e-mails include names and other information concerning other candidates for the Clerk's position who were not hired and who have not consented to the disclosure of such information. Counsel thus argues that EO 26 applies and access to the records should be denied. Counsel finally notes that the Township does not and has not asserted that any records are exempt as attorney-client privileged material.

Analysis⁷

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.

EO 26 provides that the following is exempt from disclosure under OPRA:

"... resumes, applications for employment or other information concerning job applicants while a recruitment search is ongoing. The resumes of successful candidates shall be disclosed once the successful candidate is hired. The resumes of unsuccessful candidates may be disclosed after the search has been concluded and the position has been filled, but only where the unsuccessful candidate has consented to such disclosure." *Id.*

The GRC has previously determined that even if an e-mail is exempt, certain portions of the e-mail that are not exempt should be disclosed pursuant to a custodian's duty to redact records pursuant to N.J.S.A. 47:1A-5.g. *Mendes v. Freedom Academy Charter School (Camden)*, GRC Complaint No. 2009-184 (Interim Order dated August 24, 2010)(holding that the custodian must disclose "(1) To: (2) cc: (3) From: (4) Subject, and (5) Closing salutations and electronic signature information.). *See also Ray v. Freedom Academy Charter School (Camden)*, GRC Complaint No. 2009-185 (Interim Order dated May 24, 2011).

Here, the Complainant filed this complaint disputing the Custodian's denial of access to responsive e-mails arguing that at the very least, the Custodian should disclose the responsive e-mails with redactions where necessary.

In the SOI, the Custodian certified that she denied access to 23 pages of e-mails pursuant to EO 26. Counsel submitted a letter brief arguing that EO 26 applied because the e-mails contained names and other information concerning candidates who were not hired and have not consented to the disclosure of information relating to the Township Clerk's position. However, the e-mails likely contain the pertinent header information found in every e-mail and may additionally contain portions of the e-mail body that are not subject to redaction. Therefore, the

⁷ There may be other OPRA issues in this matter; however, the Council's analysis is based solely on the claims made in the Complainant's Denial of Access Complaint.

records should have been disclosed with the proper redactions for the exempt information pursuant to EO 26.

Therefore, the Custodian unlawfully denied access to portions of the responsive 23 pages of records responsive to the Complainant's OPRA request. N.J.S.A. 47:1A-6. Thus, the Custodian must disclose the responsive e-mails with appropriate redactions for information exempt under EO 26. See Mendes, *supra*, and Ray, *supra*.

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 unlawfully denied access to portions of the responsive 23 pages of records responsive to the Complainant's OPRA request. N.J.S.A. 47:1A-6. Thus, the Custodian must disclose the responsive e-mails with appropriate redactions for information exempt under Executive Order No. 26 (McGreevey, 2002). See Mendes v. Freedom Academy Charter School (Camden), GRC Complaint No. 2009-184 (Interim Order dated August 24, 2010) and Ray v. Freedom Academy Charter School (Camden), GRC Complaint No. 2009-185 (Interim Order dated May 24, 2011).
2. **The Custodian shall comply with item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁸ to the Executive Director.⁹**
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
Senior Case Manager

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⁹ Satisfactory compliance requires that the Custodian deliver the records 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.

Approved By: Brandon D. Minde, Esq.
Executive Director

April 23, 2013