State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

INTERIM ORDER

September 29, 2015 Government Records Council Meeting

Harry B. Scheeler, Jr.
Complainant
v.
NJ Office of the Attorney General
Custodian of Record

Complaint No. 2014-417

At the September 29, 2015 public meeting, the Government Records Council ("Council") considered the September 22, 2015 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 undisclosed records in order to determine the validity of the Custodian's assertions that the twenty-seven (27) pages of documents withheld are in fact exempt from disclosure based on OPRA's exemptions for attorney-client privilege; advisory, consultative, and deliberative materials; and draft documents pursuant to N.J.S.A. 47:1A-1.1 and Parave-Fogg v. Lower Alloways Creek Twp., GRC Complaint No. 2006-51.

2. **In Camera Order - The Custodian must deliver[1] to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see #1 above), a document or redaction index[2], as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 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 they arrive at the GRC office 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 29th Day of September, 2015

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: October 1, 2015

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Findings and Recommendations of the Executive Director
September 29, 2015 Council Meeting

Harry B. Scheeler, Jr.[1] **GRC Complaint No. 2014-417**
Complainant

v.

NJ Office of the Attorney General[2]
Custodial Agency

Records Relevant to Complaint: Copies of all e-mails sent or received by Trisha Smith and Elise Goldblat re: OPRA Request W90983 in the months of October & November 2014.

Custodian of Record: Bruce J. Solomon
Request Received by Custodian: November 18, 2014
Response Made by Custodian: November 26, 2014
GRC Complaint Received: December 5, 2014

Background[3]

Request and Response:

On November 17, 2014, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On November 26, 2014, the Custodian responded in writing, denying the request and stating that the records relied upon by the Division of Law ("DOL") in reaching its determinations are protected from access by the deliberative process privilege, pursuant to Education Law Center v. NJ Department of Education, 198 N.J. 274 (2009). The Custodian noted that he had reviewed 27 pages of e-mails between the various DOL Records Custodians regarding OPRA Request W90983. Further, he argued that legal research, legal memoranda, and internal e-mails are also exempt as attorney work product and as attorney-client privileged documents, pursuant to N.J.S.A. 47:1A-1.1, N.J.S.A. 1A-9(b), and Paff v. Division of Law, 412 N.J. Super. 140 (App. Div. 2010).

Denial of Access Complaint:

On December 4, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that following 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.

Custodian's denial, he telephoned the Custodian and inquired as to how the requested e-mails were privileged. The Complainant alleged that the Custodian replied, "[b]ecause the [previous] Custodian had asked how to respond to the request." The Complainant asserted that he told the Custodian that he wished to see "who the e-mails were sent to" (sic), more than the context of the e-mails. Further, the Complaint asserted that a prior GRC ruling, Mendes v. Freedom Academy Charter School, GRC Complaint No. 2009-184 (October 2010), supported his position. In Mendes, the GRC ordered the release of the "to," "from," "subject," "greeting" and "closing salutations," and "the electronic signature information" of privileged information.

The Complainant asserted that the Custodian, during the phone call, told the Complainant that he would look at the cited GRC ruling on December 1, 2014, when he returned to work. The Complainant alleged that he e-mailed the Custodian on December 3, 2014, but as of the filing of the complaint, the Complainant did not receive a response.

The Complainant requested that the GRC conduct an *in camera* review of the twenty-seven (27) pages of e-mails cited in the denial to determine if any are "legitimately privileged." The Complainant further stated that, regardless of the GRC's findings as to the context of the e-mails, he requested an order for the release of all other parts of the e-mails that are not privileged pursuant to Mendes. He further cited Ray v. Freedom Academy Charter School (Camden), GRC Complaint No. 2009-185 (Interim Order dated May 24, 2011), and Scheeler, Jr. v. MT Laurel (Burlington), GRC Complaint No. 2012-83 (Interim Order dated April 30, 2013), in support of his argument.

Statement of Information:

On December 29, 2014, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on November 18, 2014. The Custodian explained that Elise Goldblat, a Senior Deputy Attorney General, served as the Custodian of Records of the DOL until her retirement on October 31, 2014. Trisha Smith, an Attorney Assistant, who served as the Assistant Custodian of Records of the DOL until SDAG Goldblat's retirement, was named Acting Custodian of Records.

The Custodian explained that Request W90983 was filed by the Complainant on October 10, 2014. In that request he sought, "a copy of ALL lawsuits filed against the Office of the Governor for vi[o]lating the Open Public Records Act from 1-19-10 until 10-10-14. Please also provide all answers to these lawsuits." In addition, the Complainant requested "a copy of all Denial of Access Complaints filed with the Government Records Council against the Office of the Governor from 1-19-10 until 10-10-14…" The Custodian reported that Ms. Smith replied in writing to that request on November 17, 2014. Ms. Smith's response stated, "[a]ttached is the list in response to OPRA Request # W90983, filed with the Division of Law, as modified pursuant to our discussion on November 14, 2014." In addition, the Custodian said the attached list was "compiled from matters that we have been able to access through the Division of Law's (DOL) Case Management System (CMS) that are identified as OPRA cases filed against the Office of the Governor and opened in the CMS between 1-19-10 and 10-10-14 in which the DOL is providing and/or provided legal representation. Additional known matters were included on the list that were not reflected in our CMS."

The Custodian certified that, with regard to this OPRA request, Acting Custodian Smith conducted e-mail searches of both her and SDAG Goldblat's e-mails to each other in October and November 2014, seeking e-mails regarding Request W90983. Acting Custodian Smith certified that she found 27 pages of e-mails responsive to this request. The Custodian certified that because this request sought access to records of the Department of Law and Public Safety, Acting Custodian Smith forwarded them to the Custodian for his review, as he is Custodian of the DOL. The Custodian reviewed the material and met with Acting Custodian Smith to respond on behalf of the DOL.

The Custodian argued that the records responsive to the request were protected from access by the deliberative process privilege and noted that legal research, legal memoranda, and internal e-mails are also exempt as attorney work product and as attorney-client privileged documents, pursuant to Paff v. Division of Law, 412 N.J. Super. 140 (App. Div. 2010); N.J.S.A. 47:1A-1.1; and N.J.S.A. 47:1A-9(b). The Custodian certified that he found that the documents created or relied upon by DOL's custodians were used to provide advice and counsel to the DOL and were used in deliberation and consultation with the DOL. As such, they were excluded from access under OPRA, pursuant to attorney-client, attorney work product, and deliberative process privileges. Further, the Custodian averred that upon review of the requested documents, he concluded that the documents were pre-decisional and contained inter/intra-agency advisory, consultative, or deliberative ("ACD") materials. The Custodian also concluded that the facts and opinions contained in the documents were so "inextricably intertwined" that he could not "reasonably redact" material but instead had to withhold access to the records in their entirety. Katon v. NJ Dep't of Law and Public Safety, Office of the Attorney General, GRC Complaint No. 2012-267 (July 2013), Education Law Center v. New Jersey Department of Education, 198 N.J. 274 (2009), In re Liquidation of Integrity Ins. Co., 165 N.J. 75, 83 (2000), and Paff v. Division of Law, 412 N.J. Super. 140 (App. Div. 2010).

The Custodian certified that the Attorney General and the DOL rely upon the advice, counsel, and deliberations provided by the Deputy Attorney General serving as Departmental and DOL Custodians of Records. He noted that Assistant and Deputy Attorneys General also provide the Attorney General and the DOL with legal advice regarding OPRA matters and that documents they produce consist of attorney work product. The Custodian argued that, as the responsive documents were pre-decisional and constituted attorney-client privileged records, the Complainant was rightfully denied 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 GRC in which the GRC dismissed the complaint by accepting the custodian's legal conclusion for the denial of access without further review. The court stated 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.
>
> Paff, 379 N.J. Super. at 354.

The court also stated that:

> The statute…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 10:4-21, 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 stated that:

> We hold only that 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 has made several arguments, grounded in OPRA and other relevant cases, as to why the twenty-seven (27) pages of e-mails responsive to the request need not be disclosed. Without inspecting the withheld records, and in light of the Custodian's burden to prove a lawful denial of access, the GRC cannot conduct the "meaningful review of the basis for an agency's decision to withhold government records" contemplated under OPRA. Id. at 354.

Therefore, the GRC must conduct an *in camera* review of the undisclosed records in order to determine the validity of the Custodian's assertions that the twenty-seven (27) pages of documents withheld are in fact exempt from disclosure based on OPRA's exemptions for attorney-client privilege; advisory, consultative and deliberative materials, and draft documents pursuant to N.J.S.A. 47:1A-1.1 and Parave-Fogg.

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 undisclosed records in order to determine the validity of the Custodian's assertions that the twenty-seven (27) pages of documents withheld are in fact exempt from disclosure based on OPRA's exemptions for attorney-client privilege; advisory, consultative, and deliberative materials; and draft documents pursuant to N.J.S.A. 47:1A-1.1 and Parave-Fogg v. Lower Alloways Creek Twp., GRC Complaint No. 2006-51.

2. **In Camera Order - The Custodian must deliver[4] to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see #1 above), a document or redaction index[5], as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 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.**

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: Husna Kazmir
Staff Attorney

Reviewed By: Joseph D. Glover
Executive Director

September 22, 2015

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[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."