



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**

**July 23, 2013 Government Records Council Meeting**

Phillip Molnar  
(on behalf of Express-Times)  
Complainant

Complaint No. 2012-04

v.

Warren County Community College  
Custodian of Record

At the July 23, 2013 public meeting, the Government Records Council (“Council”) considered the July 16 Findings and Recommendations of the Executive Director 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 Custodian has complied with the terms of the Council’s April 30, 2013 Interim Order because the Custodian has complied with the terms of the Order within the required five (5) business days.
2. The results of the *in camera* examination reveal that (1) only the executive session minutes for June 30, 2010, contain redactions referencing a building located at 445 Marshall Street; and (2) the redacted segment of said minutes contains privileged communications between a lawyer and client and is exempt from disclosure as attorney-client privileged information pursuant to N.J.S.A. 47:1A-1.1. *See also Keddie v. Rutgers*, 148 N.J. 36, 54 (1997).
3. Although the Custodian’s response was legally insufficient and violated N.J.S.A. 47:1A-5(g), and the Custodian’s demand that the Complainant complete an official request form is an impermissible limitation on access, the Custodian did comply with the terms of 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 actions do 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 23rd Day of July, 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: July 26, 2013**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director  
July 23, 2013 Council Meeting**

**Phillip Molnar**<sup>1</sup>  
(on behalf of Express-Times)

**GRC Complaint No. 2012-04**

v.

**Warren County Community College**<sup>2</sup>  
**Custodial Agency**

**Records Relevant to Complaint:** All Warren County Community College Board of Trustees executive session minutes from January 2010 to December 7, 2011.

**Custodian of Records:** Dennis Florentine  
**Request Received by Custodian:** December 7, 2011  
**Response Made by Custodian:** December 7, 2011  
**GRC Complaint Received:** January 5, 2012

**Records Submitted for *In Camera* Examination:** Executive session minutes for January 13, 2010, February 24, 2010, May 12, 2010, June 30, 2010, September 8, 2010, May 18, 2011, June 29, 2011 at 7:10 p.m., and September 7, 2011 at 6:35 p.m. and 8:45 p.m.

**Background**

**April 30, 2013 Council Meeting:**

At its 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, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian’s response was legally insufficient and violated N.J.S.A. 47:1A-5(g) and Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008) because the Custodian failed to respond in writing to each item contained in the Complainant’s OPRA request.
2. The Custodian’s demand that the Complainant complete an official request form is an impermissible limitation on access pursuant to Renna v. County of Union, 407 N.J. Super. 230 (App. Div. 2009) and Carter v. Franklin Fire District No. 1 (Somerset), GRC Complaint No. 2011-73 (Interim Order July 30, 2012) because the Complainant

---

<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Veronica Hallett, Esq., of Florio Perrucci Steinhardt & Fader, LLC (Phillipsburg, NJ).

submitted a letter request which clearly invoked OPRA and made clear the nature of the request.

3. The Custodian did not unlawfully deny access to the requested records based solely upon the sufficiency of the disclosed record's content. See Katinsky v. River Vale Township, GRC Complaint No. 2003-68 (November 2003). See also Kwanzaa v. Department of Corrections, GRC Complaint No. 2004-167 (March 2005), citing N.J.S.A. 47:1A-7(b).
4. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* examination of the unredacted executive session minutes for January 13, 2010, February 24, 2010, May 12, 2010, June 30, 2010, September 8, 2010, May 18, 2011, June 29, 2011 at 7:10 p.m., and September 7, 2011 at 6:35 p.m. and 8:45 p.m. to determine if any of the redacted portions of the minutes make reference to a building located at 445 Marshall Street in Phillipsburg, and if so, the validity of the Custodian's assertion that any attorney advice contained within said minutes, was properly redacted pursuant to N.J.S.A. 47:1A-1.1.
5. **The Custodian must deliver to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see paragraph 4 above), a document or redaction index, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, that the record provided is the record 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.**
6. 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.

#### Compliance:

On May 8, 2013, the Custodian responded to the Council's Interim Order. The Custodian delivered nine (9) copies of the requested unredacted records, a document index, and a certification. The Custodian certifies that he received the Council's April 30, 2013 Interim Order on May 2, 2013. The Custodian further certifies that the records submitted are true and exact copies of the records ordered by the Council for the *in camera* examination

#### Analysis

## **Compliance**

On April 30, 2013, the Council ordered the Custodian to deliver to the Council within five (5) business days from receipt of the Council's Order nine (9) copies of the requested unredacted records, a document or redaction index, and a legal certification that the record provided is the record requested by the Council for the *in camera* inspection. On May 8, 2013, within the required five (5) business days, the Custodian delivered to the Executive Director the requested unredacted records, a document or redaction index, and a legal certification as required by the terms of the Council's Order.

Accordingly, the Custodian has complied with the terms of the Council's April 30, 2013 Interim Order because the Custodian has complied with the terms of the Order within the required five (5) business days.

## **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.

The GRC conducted an *in camera* examination on the submitted executive session minutes for January 13, 2010, February 24, 2010, May 12, 2010, June 30, 2010, September 8, 2010, May 18, 2011, June 29, 2011 at 7:10 p.m., and September 7, 2011 at 6:35 p.m. and 8:45 p.m. to determine if any of the redacted portions of the minutes make reference to a building located at 445 Marshall Street in Phillipsburg, and if so, the validity of the Custodian's assertion that any attorney advice contained within said minutes was properly redacted pursuant to N.J.S.A. 47:1A-1.1. Of the nine (9) records submitted, only one (1) record, the executive session minutes for June 30, 2010, contain redactions which pertained to a building located at 445 Marshall Street. Accordingly, only the June 30, 2010 executive session minutes require further analysis.

The Custodian redacted two and one-half sentences from the June 30, 2010 executive session minutes. This was the only content redacted from the record. The Custodian certified the content was redacted pursuant to N.J.S.A. 47:1A-1.1 as attorney-client privileged information. There is no dispute between the parties regarding the validity of a lawyer-client relationship.

OPRA excludes from the definition of a government record any record within the attorney client privilege. N.J.S.A. 47:1A-1.1. In New Jersey, protecting confidentiality within the attorney-client relationship has long been recognized by the courts. *See, e.g. Matter of Grand Jury Subpoenas*, 241 N.J. Super. 18 (App. Div. 1989). In general, the attorney-client privilege renders as confidential communications between a lawyer and a client made in the course of that professional relationship. *See N.J.S.A. 2A: 84A-20* and *Fellerman v. Bradley*, 99 N.J. 493, 498-99 (1985). Rule 504 (1) of the New Jersey Rules of Evidence provides that communications between a lawyer and client, "in the course of that relationship and in professional confidence,

are privileged....” Such communications as discussion of litigation strategy, evaluation of liability, potential monetary exposure and settlement recommendations are considered privileged. The Press of Atlantic City v. Ocean County Joint Insurance Fund, 337 N.J. Super. 480, 487 (Law Div. 2000). Also confidential are mental impressions, legal conclusions, and opinions or theories of attorneys. In Re Environmental Ins. Actions, 259 N.J. Super. 308, 317 (App. Div. 1992).

The attorney-client privilege "recognizes that sound legal advice or advocacy serves public ends and that the confidentiality of communications between client and attorney constitutes an indispensable ingredient of our legal system." Matter of Grand Jury Subpoenas, 241 N.J. Super. 18, 27-8 (App.Div.1989). The attorney-client privilege protects communications between a lawyer and the client made in the course of that professional relationship, and particularly protects information which, if disclosed, would jeopardize the legal position of the client. N.J.S.A. 2A:84A-20; RPC 1.6. The New Jersey Supreme Court has observed that RPC 1.6 “expands the scope of protected information to include all information relating to the representation, regardless of the source or whether the client has requested it be kept confidential or whether disclosure of the information would be embarrassing or detrimental to the client.” In re Advisory Opinion No. 544 of N.J. Sup. Court, 103 N.J. 399, 406 (1986).

Here, the redactions in the June 30, 2010 executive session minutes do not constitute direct communications between a lawyer and a client. However, they do contain a summary of advice between a lawyer and client (the Warren County Community College Board of Trustees) prepared by one of the clients (the Board Secretary). Although, the redacted material is a summary, it may still be privileged if it sufficiently reveals specific communications between the lawyer and client. Further, there is nothing in the evidence of record to indicate that third parties were known to be present when the advice was rendered, which would have destroyed any confidentiality. Accordingly, the Council has determined, after reviewing the record *in camera*, that the redacted segment of said minutes contain attorney-client communications.

The Council next turns to the issue of whether the attorney-client communications are exempt from disclosure because they are attorney-client privileged.

The evidence of record reveals that the 445 Marshall Street transaction is a closed matter. The Complainant asserted that the College’s need for confidentiality of attorney-client privileged information was moot after the building was purchased; therefore, the redactions were improper. Conversely, the Custodian certified that the purchase of the building did not render the attorney-client privilege moot because the privilege extends beyond the termination of the attorney-client relationship, as well as beyond the completion of the transaction.

The Supreme Court in Keddie v. Rutgers, 148 N.J. 36, 54 (1997), considered attorney-client communications in pending versus closed matters, and made the following observations:

Obviously, the need for confidentiality is greater in pending matters than in closed cases. Even in closed cases, however, attorney work-product and documents containing legal strategies may be entitled to protection from disclosure.

Similarly, some confidential information may be shielded from public disclosure based on the protection afforded by the attorney-client privilege.

Id. at 54.

The record submitted for *in camera* examination did not contain attorney work-product and/or documents containing legal strategies. As such, the Council must consider whether the advice summarized in the minutes reveals specific communications between the lawyer and client, and therefore requires shielding from public disclosure.

The *in camera* examination of the redacted segment of the June 30, 2010 executive session minutes reveals that such segment did contain privileged communications between a lawyer and client and is therefore exempt from disclosure as attorney-client privileged information pursuant to N.J.S.A. 47:1A-1.1.

Accordingly, the results of the *in camera* examination reveal that (1) only the executive session minutes for June 30, 2010, contain redactions referencing a building located at 445 Marshall Street; and (2) the redacted segment of said minutes contains privileged communications between a lawyer and client and is exempt from disclosure as attorney-client privileged information pursuant to N.J.S.A. 47:1A-1.1. *See also* Keddie, *supra*.

### **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 “... [i]f 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)).

Here, although the Custodian's response was legally insufficient and violated N.J.S.A. 47:1A-5(g), and the Custodian's demand that the Complainant complete an official request form is an impermissible limitation on access, the Custodian did comply with the terms of 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 actions do 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 has complied with the terms of the Council's April 30, 2013 Interim Order because the Custodian has complied with the terms of the Order within the required five (5) business days.
2. The results of the *in camera* examination reveal that (1) only the executive session minutes for June 30, 2010, contain redactions referencing a building located at 445 Marshall Street; and (2) the redacted segment of said minutes contains privileged communications between a lawyer and client and is exempt from disclosure as attorney-client privileged information pursuant to N.J.S.A. 47:1A-1.1. *See also Keddie v. Rutgers*, 148 N.J. 36, 54 (1997).
3. Although the Custodian's response was legally insufficient and violated N.J.S.A. 47:1A-5(g), and the Custodian's demand that the Complainant complete an official request form is an impermissible limitation on access, the Custodian did comply with the terms of 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 actions do 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: John E. Stewart, Esq.

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

July 16, 2013