



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

January 28, 2014 Government Records Council Meeting

Luis Rodriguez
Complainant

Complaint No. 2013-141

v.

Kean University
Custodian of Record

At the January 28, 2014 public meeting, the Government Records Council (“Council”) considered the January 21, 2014 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 complied with the Council’s November 19, 2013 Interim Order because she responded in the prescribed extended time frame providing records and simultaneously provided certified confirmation of compliance to the Executive Director.
2. The Custodian properly redacted material contained in the “Show Original” emails that consisted of “administrative or technical information regarding computer hardware, software and networks which, if disclosed, would jeopardize computer security.” N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. Thus, the Custodian complied with the Council’s November 19, 2013 Interim Order to disclose both the requested emails with the desired identifying information and the “Show Original” views of such emails “with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction.”
3. 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 28th Day of January, 2014

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 30, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
January 28, 2014 Council Meeting**

**Luis Rodriguez¹
Complainant**

GRC Complaint No. 2013-141

v.

**Kean University²
Custodial Agency**

Records Relevant to Complaint: “In March 2013, Jeffrey Toney sent an email from Faruque Chowdhury and Michael Tripodi asking them about [Complainant’s] reaction to Dr. Toney’s email sent me (*sic*) about a medical leave request. I would like a copy of that email showing the ‘To,’ ‘From,’ and ‘Date’ sent information typically found in an email sent via a Kean Google account . . . In addition, I would like a copy of the ‘Show Original’ view of the email . . . [Office of Computer and Information Systems (“OCIS”)] can explain how this is done.”

Custodian of Record: Laura Barkley-Haelig
Request Received by Custodian: April 26, 2013
Response Made by Custodian: May 7, 2013
GRC Complaint Received: May 16, 2013

Background

November 19, 2013 Council Meeting:

At its November 19, 2013 public meeting, the Council considered the November 12, 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 has not borne her burden of proving that she lawfully denied access based on OPRA’s exemptions for attorney-client privileged materials or personnel records, nor has she shown that access to the requested email should be denied because the Complainant was already in possession of the record. *See* N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-10; N.J.S.A. 2A:84A-20; RPC 1.6; Hewitt v. Longport Police Dep’t, GRC Complaint No. 2004-148 (March 2005); Mapp v. Borough of Roselle (Union), GRC Complaint No. 2009-334 (November 30, 2010); Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609, 618 (App. Div. 2008). Thus, the Custodian must disclose the responsive email, including the requested “To,”

¹ No legal representation listed on record.

² The Custodian is represented by Deputy Attorney General Jennifer McGrunther.

“From,” and date/time sent information typically found in emails sent using a University Google email account.

2. The Custodian has not borne her burden of proving that she lawfully denied the Complainant’s request for impermissibly requiring the Custodian to create a new record. See N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6; MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005); Gill v. Salem County, GRC Complaint No. 2005-185 (February 2006). The Complainant has made a valid OPRA request and asked that the record be produced in a particular format within the digital medium used by the University. See N.J.S.A. 47:1A-5(d). As such, the Complainant’s request is within the terms of OPRA, and the Custodian must disclose a copy of the requested email in the “Show Original” format. See Wolosky v. Borough of Mount Arlington, GRC Complaint No. 2010-194 (November 29, 2011).
3. **The Custodian shall comply with items number one (1) and two (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 1:4-4,³ to the Executive Director.⁴**
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, November 20, 2013, the Council distributed its Interim Order to all parties. On November 22, 2013, the Custodian was granted an extension of time to respond until December 4, 2013. On December 4, 2013, the Custodian was granted an additional extension of time to respond until December 10, 2013. On December 5, 2013, the Custodian was granted a final extension of time to respond until December 12, 2013.

On December 12, 2013, the Custodian responded to the Council’s Interim Order. The Custodian certifies that she provided the documents responsive to the Complainant’s request, with redactions made to the “Show Original” email message in accordance with N.J.S.A. 47:1A-1.1.

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 Satisfactory compliance requires that the Custodian deliver the record(s) 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.

Analysis

Compliance

At its November 19, 2013 meeting, the Council ordered the Custodian to “disclose the responsive email, including the requested ‘To,’ ‘From,’ and date/time sent information typically found in emails sent using a University Google email account” and “disclose a copy of the requested email in the ‘Show Original’ format” “within five (5) business days from receipt of the Council’s Interim Order . . . and simultaneously provide certified confirmation of compliance . . . to the Executive Director.” On November 20, 2013, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian’s response was due on November 27, 2013.

Timeliness

On November 22, 2013, the second (2nd) business day after receipt of the Council’s Order, the Custodian requested an extension of time to respond until December 4, 2013. On December 4, 2013, the Custodian was granted an additional extension of time to respond until December 10, 2013. On December 5, 2013, the Custodian was granted a final extension of time to respond until December 12, 2013. On December 12, 2013, the Custodian provided certified confirmation of compliance that he was providing the email message requested by the Complainant with the requisite identifying information and a redacted copy of the requested “Show Original” version of email message. The Custodian also provided a detailed document index describing the information redacted and the legal basis for doing so.

Therefore, the Custodian complied with the Council’s November 19, 2013 Interim Order because she responded in the prescribed extended time frame providing records and simultaneously provided certified confirmation of compliance to the Executive Director.

Lawfulness of Redactions Made to “Show Original” Emails

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. For example, OPRA states that “administrative or technical information regarding computer hardware, software and networks which, if disclosed, would jeopardize computer security” is not considered a government record subject to disclosure. N.J.S.A. 47:1A-1.1. 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.

Here, the Custodian certified that the “Show Original” views of the requested email messages were redacted based on OPRA’s exemption from disclosure of administrative or technical information that would jeopardize computer security. N.J.S.A. 47:1A-1.1. The Custodian provided a certification from the Managing Assistant Director of the Office of Computer and Information Services at Kean University. He certified, in relevant part, that:

3. The “Show Original” view is defined as the message identification of a particular email. It provides the route and confirmation of where the email message was along the way to its recipient(s).
4. The “Show Original” view may show such information as the originating address. Originating address is the internet address of the email composer. This would provide the client internet address of the sender.
5. Additionally, the “Show Original” view may provide email server information which would contain server names along with internet addresses of servers that route email traffic. The disclosure of this technical information would jeopardize computer security.

Certification of William Hood (December 12, 2013).

Similarly, the redaction index submitted by the Custodian states that the redacted information consists of the “[o]riginating address of the email composer” and “[e]mail server information.” The redacted “Show Original” emails provided to the GRC appear to comport with these certifications. Thus, the Custodian has borne her burden of showing that she properly redacted the “Show Original” emails that the Council ordered disclosed.

Therefore, the Custodian properly redacted material contained in the “Show Original” emails that consisted of “administrative or technical information regarding computer hardware, software and networks which, if disclosed, would jeopardize computer security.” N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. Thus, the Custodian complied with the Council’s November 19, 2013 Interim Order to disclose both the requested emails with the desired identifying information and the “Show Original” views of such emails “with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction.”

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 that “[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 the Council to determine that a custodian “knowingly and willfully” violated OPRA: the custodian’s actions must have been much more than negligent conduct; the custodian must have had some knowledge that his actions were wrongful; the

custodian's actions must have had a positive element of conscious wrongdoing; the custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden; and the custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. *See Alston v. City of Camden*, 168 N.J. 170, 185 (2001); *Fielder v. Stonack*, 141 N.J. 101, 124 (1995); *Berg v. Reaction Motors Div.*, 37 N.J. 396, 414 (1962); *ECES v. Salmon*, 295 N.J. Super. 86, 107 (App. Div. 1996).

Although the Custodian did not initially meet her burden of proving that she lawfully denied access to the requested records, she subsequently provided the Complainant with the records responsive to his request and made appropriate redactions for material exempt from disclosure under OPRA. 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 complied with the Council's November 19, 2013 Interim Order because she responded in the prescribed extended time frame providing records and simultaneously provided certified confirmation of compliance to the Executive Director.
2. The Custodian properly redacted material contained in the "Show Original" emails that consisted of "administrative or technical information regarding computer hardware, software and networks which, if disclosed, would jeopardize computer security." N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. Thus, the Custodian complied with the Council's November 19, 2013 Interim Order to disclose both the requested emails with the desired identifying information and the "Show Original" views of such emails "with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction."
3. 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: Robert T. Sharkey, Esq.
Staff Attorney

Approved By: Dawn R. SanFilippo, Esq.
Senior Counsel

January 21, 2014



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
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TRENTON, NJ 08625-0819

CHRIS CHRISTIE
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INTERIM ORDER

November 19, 2013 Government Records Council Meeting

Luis Rodriguez
Complainant
v.
Kean University
Custodian of Record

Complaint No. 2013-141

At the November 19, 2013 public meeting, the Government Records Council (“Council”) considered the November 12, 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 has not borne her burden of proving that she lawfully denied access based on OPRA’s exemptions for attorney-client privileged materials or personnel records, nor has she shown that access to the requested email should be denied because the Complainant was already in possession of the record. *See N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-10; N.J.S.A. 2A:84A-20; RPC 1.6; Hewitt v. Longport Police Dep’t*, GRC Complaint No. 2004-148 (March 2005); *Mapp v. Borough of Roselle (Union)*, GRC Complaint No. 2009-334 (November 30, 2010); *Bart v. City of Paterson Hous. Auth.*, 403 *N.J. Super.* 609, 618 (App. Div. 2008). Thus, the Custodian must disclose the responsive email, including the requested “To,” “From,” and date/time sent information typically found in emails sent using a University Google email account.
2. The Custodian has not borne her burden of proving that she lawfully denied the Complainant’s request for impermissibly requiring the Custodian to create a new record. *See N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6; MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control*, 375 *N.J. Super.* 534, 546 (App. Div. 2005); *Gill v. Salem County*, GRC Complaint No. 2005-185 (February 2006). The Complainant has made a valid OPRA request and asked that the record be produced in a particular format within the digital medium used by the University. *See N.J.S.A. 47:1A-5(d)*. As such, the Complainant’s request is within the terms of OPRA, and the Custodian must disclose a copy of the requested email in the “Show Original” format. *See Wolosky v. Borough of Mount Arlington*, GRC Complaint No. 2010-194 (November 29, 2011).
3. **The Custodian shall comply with items number one (1) and two (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

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 19th Day of November, 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: November 20, 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 record(s) 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.

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 19, 2013 Council Meeting**

**Luis Rodriguez¹
Complainant**

GRC Complaint No. 2013-141

v.

**Kean University²
Custodial Agency**

Records Relevant to Complaint: “In March 2013, Jeffrey Toney sent an email from Faruque Chowdhury and Michael Tripodi asking them about [Complainant’s] reaction to Dr. Toney’s email sent me (*sic*) about a medical leave request. I would like a copy of that email showing the ‘To,’ ‘From,’ and ‘Date’ sent information typically found in an email sent via a Kean Google account . . . In addition, I would like a copy of the ‘Show Original’ view of the email . . . [Office of Computer and Information Systems (“OCIS”)] can explain how this is done.”

Custodian of Record: Laura Barkley-Haelig
Request Received by Custodian: April 26, 2013
Response Made by Custodian: May 7, 2013
GRC Complaint Received: May 16, 2013

Background³

Request and Response:

On April 26, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On May 7, 2013, seven (7) business days after receipt of the request, the Custodian responded in writing denying the Complainant’s request based on OPRA’s exemptions for personnel records and attorney-client privileged materials. See N.J.S.A. 47:1A-10; N.J.S.A. 47:1A-1.1.

Denial of Access Complaint:

On May 16, 2013, the Complainant filed a Denial of Access Complaint with the GRC. The Complainant states that OPRA’s exemption of personnel records from disclosure includes an

¹ No legal representation listed on record.

² The Custodian is represented by Deputy Attorney General Jennifer McGrunther.

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.

exception for “a person in interest.” The Complainant argues that he is the subject of the requested email and, therefore, the personnel records exemption does not apply.

The Complainant additionally states that, “Dr. Toney used the text of this email as part of my performance evaluation,” and that this text was part of materials appended to that evaluation. The Complainant asserts that any applicable attorney-client privilege has thus been waived.

The Complainant further argues that the text of the email chain, as contained in the addendum to his performance evaluation, does not provide enough information to determine “with a reasonable degree of certainty that it was sent and on which date it was sent.” The Complainant states that this is why he has requested a “Show Original” view of the emails.

Statement of Information:

On June 6, 2013, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that she received the Complainant’s OPRA request on April 26, 2013 and denied access on May 7, 2013. The Custodian further certifies that the Complainant’s request was forwarded to Kean University’s (“University”) In-House Counsel on April 26, 2013.

The Custodian states that the requested records fall within OPRA’s exemptions for attorney-client privileged materials and personnel records. *See* N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-10. The Custodian also states that the Complainant suggested that she contact the University’s OCIS to learn how to create one of the requested documents. The Custodian asserts that OPRA “does not require a public agency to create documents, to respond to requests for information, or to conduct institutional research on behalf of the requestor.”

The Custodian notes that the requested record was inadvertently produced in a chain of messages, and that the Complainant has the record in his possession as he provided a dated copy of it with his Denial of Access Complaint. The Custodian contends that the request is therefore moot and that there was no unlawful denial of access. *See* L.R. & O/B/O J.R. v. Camden Bd. of Educ., 2012 N.J. Super. Unpub. LEXIS 1140, *6-7 (App. Div. May 23, 2012).

Analysis⁴

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.

⁴ 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.

Validity of the General Email Request

The Custodian asserts that the requested email is exempt from access because OPRA excludes from disclosure “any record within the attorney-client privilege.” N.J.S.A. 47:1A-1.1. 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. *See* 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 Op. No. 544 of N.J. Sup. Court, 103 N.J. 399, 406 (1986).

Here, although one of the email’s recipients was the University’s In-House Counsel, there is nothing to indicate that the communication relates to that representation or was made in the course of that professional relationship. *See* N.J.S.A. 2A:84A-20; RPC 1.6; In re Advisory Op. No. 544, 103 N.J. at 406. Rather, the requested email was sent to multiple parties and appears to be an off-the-cuff remark. Thus, there is no evidence that the attorney-client privilege is applicable.

The Custodian also contends that the email should not be disclosed because it is a personnel record exempt from disclosure under OPRA. *See* N.J.S.A. 47:1A-10. OPRA, however, provides specific exceptions to that rule, stating: “[P]ersonnel . . . records of any individual shall be accessible . . . when authorized by an individual in interest.” N.J.S.A. 47:1A-10. The GRC has stated that “N.J.S.A. 47:1A-10 is a codified version of Executive Order 11 (1974) and [it] has been applied and understood that [the] only individuals who have access to personnel and pension records are specific public officials and the person who is the subject of the personnel file. An ‘individual in interest’ is to mean the person who is the subject of the personnel file” Hewitt v. Longport Police Dep’t, GRC Complaint No. 2004-148 (March 2005); Mapp v. Borough of Roselle (Union), GRC Complaint No. 2009-334 (November 30, 2010).

Here, the Complainant states that the requested email was attached to a performance review prepared by one of his superiors. It also appears, based upon the Complainant’s initial response to the email, that he saw a portion of it prior to its inclusion in any personnel document. Regardless, the Complainant is a person in interest seeking a personnel document that is likely part of his own personnel file. *See* N.J.S.A. 47:1A-10; Hewitt, GRC 2004-148; Mapp, GRC 2009-334.

As an alternative to the above arguments, the Custodian also asserts that she lawfully denied the Complainant’s request because he is already in possession of the email. In Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609, 618 (App. Div. 2008), the Appellate Division addressed such the issue:

It is undisputed that [the complainant] at all times had within his possession a copy of the cover letter at issue; indeed, he attached a copy to the complaint he

filed with the [GRC]. He could not have been denied access to the document, however, if he already had the document he sought.

Id. (citing Bent v. Twp. of Stafford Police Dep't, 381 N.J. Super. 30, 34, 38 (App. Div. 2005)).

Here, the Complainant included a copy of the requested email with a chain of emails he submitted with his Denial of Access Complaint. This copy, however, does not contain all of “the ‘To,’ ‘From,’ and ‘Date’ sent information typically found in an email sent via a Kean Google account” that the Complainant seeks. While the Complainant appears to have the majority of the requested record, it is disputed that he had it within his possession at all times. *See* Bart, 403 N.J. Super. at 618. The Complainant thus did not have the document sought when he filed his complaint. *See id.*

Therefore, the Custodian has not borne her burden of proving that she lawfully denied access based on OPRA’s exemptions for attorney-client privileged materials or personnel records, nor has she shown that access to the requested email should be denied because the Complainant was already in possession of the record. *See* N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-10; N.J.S.A. 2A:84A-20; RPC 1.6; Hewitt, GRC 2004-148; Mapp, GRC 2009-334; Bart, 403 N.J. Super. at 618. Thus, the Custodian must disclose the responsive email, including the requested “To,” “From,” and date/time sent information typically found in emails sent using a University Google email account..

Validity of the “Show Original” Email Request

OPRA provides that:

[a] custodian shall permit access to a government record and provide a copy thereof in the medium requested if the public agency maintains the record in that medium. If the public agency does not maintain the record in the medium requested, the custodian shall either convert the record to the medium requested or provide a copy in some other meaningful medium.

N.J.S.A. 47:1A-5(d).

OPRA, however, neither obligates a records custodian to create a document in response to a request nor forces government officials to identify and siphon useful information. *See* MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005); Gill v. Salem County, GRC Complaint No. 2005-185 (February 2006) (finding request for list of all employees paid by county invalid because fulfilling request required creation of new document based on existing data).

In Wolosky v. Borough of Mount Arlington, GRC Complaint No. 2010-194 (November 29, 2011), the complainant sought check registry data converted from “.pdf” to one of several digital formats. The GRC, noting that OPRA does not define “medium,” interpreted “Microsoft Word, Excel, Access . . . or the current software used . . . that is readable as a .txt file[.]” as the requested media. Id. The GRC reiterated that “[t]he plain language of OPRA provides that a

custodian must provide a record in the medium requested.” The GRC ultimately found an unlawful denial of access because, even though the Custodian had converted the record from “.pdf” to a Microsoft Word document, the resulting file was “merely an unusable stream of data . . . not responsive to the [c]omplainant’s request.” Id.

Here, the Complainant asked for the desired email in “the ‘Show Original’ view.” As in Wolosky, he requested a digital record that exists in one medium (the email format evident in the printouts submitted with the Denial of Access Complaint) be converted into another (the “Show Original” view) prior to disclosure. The GRC treated the request in Wolosky as being plainly within the terms of OPRA, and there is nothing in the record to indicate that this request should instead be treated as either overly broad or as requiring the Custodian to create a new document. *See* MAG, 375 N.J. Super. at 546; Wolosky, GRC 2010-194; Gill, 2005-185.

Therefore, the Custodian has not borne her burden of proving that she lawfully denied the Complainant’s request for impermissibly requiring the Custodian to create a new record. *See* N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6; MAG, 375 N.J. Super. at 546; Gill, 2005-185. The Complainant has made a valid OPRA request and asked that the record be produced in a particular format within the digital medium used by the University. *See* N.J.S.A. 47:1A-5(d). As such, the Complainant’s request is within the terms of OPRA, and the Custodian must disclose a copy of the requested email in the “Show Original” format. *See* Wolosky, GRC 2010-194.

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 has not borne her burden of proving that she lawfully denied access based on OPRA’s exemptions for attorney-client privileged materials or personnel records, nor has she shown that access to the requested email should be denied because the Complainant was already in possession of the record. *See* N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-10; N.J.S.A. 2A:84A-20; RPC 1.6; Hewitt v. Longport Police Dep’t, GRC Complaint No. 2004-148 (March 2005); Mapp v. Borough of Roselle (Union), GRC Complaint No. 2009-334 (November 30, 2010); Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609, 618 (App. Div. 2008). Thus, the Custodian must disclose the responsive email, including the requested “To,” “From,” and date/time sent information typically found in emails sent using a University Google email account.
2. The Custodian has not borne her burden of proving that she lawfully denied the Complainant’s request for impermissibly requiring the Custodian to create a new record. *See* N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6; MAG Entm’t, LLC v. Div. of

Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005); Gill v. Salem County, GRC Complaint No. 2005-185 (February 2006). The Complainant has made a valid OPRA request and asked that the record be produced in a particular format within the digital medium used by the University. See N.J.S.A. 47:1A-5(d). As such, the Complainant's request is within the terms of OPRA, and the Custodian must disclose a copy of the requested email in the "Show Original" format. See Wolosky v. Borough of Mount Arlington, GRC Complaint No. 2010-194 (November 29, 2011).

3. **The Custodian shall comply with items number one (1) and two (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**
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: Robert T. Sharkey, Esq.
Staff Attorney

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

November 12, 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 record(s) 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.