



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

April 29, 2014 Government Records Council Meeting

Robert D. Yackel
Complainant

Complaint No.: 2013-227

v.

Township of Edison (Middlesex)
Custodian of Record

At the April 29, 2014 public meeting, the Government Records Council (“Council”) considered the April 22, 2014 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 February 25, 2014 Interim Order because she responded in the prescribed time frame submitting nine (9) copies of the requested record for an *in camera* review and simultaneously provided certified confirmation of compliance to the Executive Director.
2. The Custodian lawfully denied access to the requested record because same contains inter-agency or intra-agency advisory, consultative, or deliberative (“ACD”) material which is exempt from access under OPRA. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. The GRC declines to address whether the other exemptions asserted by the Custodian apply because the record is exempt as ACD material. Finally, because the Custodian complied with the Council’s February 25, 2014 Order and lawfully denied access to the responsive record, the Council should decline to analyze whether the Custodian knowingly and willfully violated OPRA 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 29th Day of April, 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: May 2, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
April 29, 2014 Council Meeting**

**Robert D. Yackel¹
Complainant**

GRC Complaint No. 2013-227

v.

**Township of Edison (Middlesex)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via facsimile or e-mail of correspondence from Mayor Antonio Ricigiliano to Councilman Alvero Gomez dated July 15, 2013, regarding the Council's public safety meeting.

Custodian of Record: Cheryl Russomano
Request Received by Custodian: July 27, 2013
Response Made by Custodian: July 31, 2013
GRC Complaint Received: August 2, 2013

Records Submitted for *In Camera* Examination: Correspondence from Mayor Ricigiliano to Councilman Gomez dated July 15, 2013 (1 page).

Background

February 25, 2014 Council Meeting:

At its February 25, 2014 public meeting, the Council considered the February 18, 2014 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. Pursuant to Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the responsive July 15, 2013 correspondence from Mayor Antonio Ricigiliano to Councilman Alvero Gomez to determine the validity of the Custodian's assertion that the record constitutes "inter-agency, intra agency advisory, consultative or deliberative" material and/or involves a grievance and collective bargaining negotiations which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

¹ No legal representation listed on record.

² Represented by Louis N. Rainone, Esq., of DeCotiis, Fitzpatrick & Cole, LLP (Teaneck, NJ).

2. **The Custodian must deliver³ to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see No. 1 above), a document or redaction index⁴, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,⁵ 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.**
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 February 26, 2014, The Council distributed its Interim Order to all parties on. On March 4, 2014, the Custodian responded to the Council's Interim Order. The Custodian certified that she is submitting nine (9) copies of the correspondence from Mayor Ricigliano to Councilman Gomez dated July 15, 2013 per the Council's Order. The GRC received the record on March 5, 2014.

Analysis

Compliance

At its February 25, 2014 meeting, the Council ordered the Custodian to submit nine (9) copies of the correspondence from Mayor Ricigliano to Councilman Gomez dated July 15, 2013, for an *in camera* review. The Council further required that the Custodian provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On February 26, 2014, 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 by close of business on March 5, 2014.

On March 4, 2014, the fourth (4th) business day after receipt of the Council's Order, the Custodian submitted certified confirmation of compliance to the GRC via e-mail. On March 5, 2014, the GRC received nine (9) copies of the requested record.

Therefore, the Custodian complied with the Council's February 25, 2014 Interim Order because she responded in the prescribed time frame submitting nine (9) copies of the requested record for an *in camera* review and simultaneously provided certified confirmation of compliance to the Executive Director.

³ 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.

⁴ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

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."

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. N.J.S.A. 47:1A-6.

OPRA provides that the definition of a government record “. . . shall not include . . . inter-agency or intra-agency advisory, consultative, or deliberative [(“ACD”)] material.” N.J.S.A. 47:1A-1.1.

The GRC conducted an *in camera* examination of the submitted record. In the SOI, the Custodian certified that the correspondence related to pending matters filed by IAFF Local 1197, of which the Complainant is President. The Custodian further certified that collective bargaining negotiations would likely include the issues raised in the correspondence and that same was set to begin 90 days prior to the end of the contract, or October 30, 2013 per Public Employees Relation Commission (“PERC”) statute. The review reveals that the correspondence addresses these pending matters and the collective bargaining implications of an action taken by the Township’s Public Safety Committee, of which Councilman Gomez is the Chair.

Based on the foregoing, the GRC is satisfied that the content of the correspondence fits within the ACD definition as the Mayor addresses current litigation and contract issues that are ongoing in the Township and deliberates on the implications of the Public Safety Committee’s actions.

Therefore, the Custodian lawfully denied access to the requested record because same contains ACD material which is exempt from access under OPRA. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. The GRC declines to address whether the other exemptions asserted by the Custodian apply because the record is exempt as ACD material. Finally, because the Custodian complied with the Council’s February 25, 2014 Order and lawfully denied access to the responsive record, the Council should decline to analyze whether the Custodian knowingly and willfully violated OPRA 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 February 25, 2014 Interim Order because she responded in the prescribed time frame submitting nine (9) copies of the requested record for an *in camera* review and simultaneously provided certified confirmation of compliance to the Executive Director.
2. The Custodian lawfully denied access to the requested record because same contains inter-agency or intra-agency advisory, consultative, or deliberative (“ACD”) material which is exempt from access under OPRA. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6.

The GRC declines to address whether the other exemptions asserted by the Custodian apply because the record is exempt as ACD material. Finally, because the Custodian complied with the Council's February 25, 2014 Order and lawfully denied access to the responsive record, the Council should decline to analyze whether the Custodian knowingly and willfully violated OPRA under the totality of the circumstances.

Prepared By: Frank F. Caruso
Senior Case Manager

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

April 22, 2014



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

INTERIM ORDER

February 25, 2014 Government Records Council Meeting

Robert D. Yackel
Complainant

Complaint No. 2013-227

v.

Township of Edison (Middlesex)
Custodian of Record

At the February 25, 2014 public meeting, the Government Records Council ("Council") considered the February 18, 2014 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. Pursuant to Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the responsive July 15, 2013 correspondence from Mayor Antonio Ricigiliano to Councilman Alvero Gomez to determine the validity of the Custodian's assertion that the record constitutes "inter-agency, intra agency advisory, consultative or deliberative" material and/or involves a grievance and collective bargaining negotiations which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
2. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see No. 1 above), a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,³ 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.**
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 25th Day of February, 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: February 26, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 25, 2014 Council Meeting**

**Robert D. Yackel¹
Complainant**

GRC Complaint No. 2013-227

v.

**Township of Edison (Middlesex)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via facsimile or e-mail of correspondence from Mayor Antonio Ricigiliano to Councilman Alvero Gomez dated July 15, 2013, regarding the Council's public safety meeting.

Custodian of Record: Cheryl Russomano
Request Received by Custodian: July 27, 2013
Response Made by Custodian: July 31, 2013
GRC Complaint Received: August 2, 2013

Background³

Request and Response:

On July 27, 2013, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On July 31, 2013, the Custodian responded in writing denying access to the requested record as "inter-agency, intra agency advisory, consultative or deliberative" ("ACD") material involving ongoing litigation. N.J.S.A. 47:1A-1.1.

Denial of Access Complaint:

On August 2, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant does not submit any argument disputing the denial of access.

¹ No legal representation listed on record.

² Represented by Louis N. Rainone, Esq., of DeCotiis, Fitzpatrick & Cole, LLP (Teaneck, NJ).

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.

Statement of Information:

On September 18, 2013, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that the subject matter of the responsive record was ongoing litigation grievances and Public Employees Relation Commission (“PERC”) matters with IAFF Local 1197. The Custodian contended that same is exempt from disclosure under OPRA as containing grievances and collective bargaining negotiations including documents and statements of strategy or negotiating positions.

The Custodian affirmed that the Complainant is the president of IAFF Local 1197, the union who is the collective bargaining representative for the Township of Edison’s (“Township”) paid firefighters. The Custodian certified that the IAFF Local 1197 is a party to an agreement that expired on December 31, 2013. The Custodian further certifies that there are three (3) matters currently pending before the PERC and the Appellate Division, of which two (2) relate to a grievance arbitration. The Custodian affirms that the last matter is an unfair labor practice charge for EMT services. Finally, the Custodian certifies that the record at issue is a communication involving these matters and other items that are the subject of collective bargaining negotiations.

The Custodian contends that the information was sent under advice of counsel, is confidential, and involves a grievance, collective bargaining negotiations and litigation. The Custodian further contends that the record is also an ACD communication between the Mayor and Council.

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.

OPRA provides that

“[t]he terms [of a government record] shall not include inter-agency or intra-agency advisory, consultative, or deliberative material . . . information generated by or on behalf of public employers or public employees in connection . . . with any grievance filed by or against an individual or in connection with collective negotiations, including documents and statements of strategy or negotiating position . . .”

N.J.S.A. 47:1A-1.1.

In Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the Council⁴ dismissing 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." Id. The Court also stated that:

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

Id. at 355.

Further, the Court stated that:

We hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC's obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7(f), which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.

Id.

Therefore, pursuant to Paff, 379 N.J. Super. at 346, the GRC must conduct an *in camera* review of the responsive July 15, 2013 correspondence from Mayor Ricigiliano to Councilman Gomez to determine the validity of the Custodian's assertion that the record constitutes ACD material and/or involves a grievance and collective bargaining negotiations which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

Knowing & Willful

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

⁴ Paff v. NJ Dep't of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Pursuant to Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the responsive July 15, 2013 correspondence from Mayor Antonio Ricigiliano to Councilman Alvero Gomez to determine the validity of the Custodian's assertion that the record constitutes "inter-agency, intra agency advisory, consultative or deliberative" material and/or involves a grievance and collective bargaining negotiations which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
2. **The Custodian must deliver⁵ to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see No. 1 above), a document or redaction index⁶, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,⁷ 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.**
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

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

February 18, 2014

⁵ 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.

⁶ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

⁷ "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."