



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

September 30, 2014 Government Records Council Meeting

Luis Rodriguez
Complainant

v.

Kean University
Custodian of Record

Complaint No. 2013-323

At the September 30, 2014 public meeting, the Government Records Council (“Council”) considered the September 23, 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 failed to comply with the Council’s July 29, 2014 Interim Order because she neither provided certified confirmation of compliance to the Executive Director in accordance with N.J. Court Rule 1:4-4, nor produced the requested record to the Complainant within the allotted five (5) business days.
2. The Custodian unlawfully denied access to the requested record, and failed to fully comply with the Council’s July 29, 2014 Interim Order. However, the Custodian provided the requested record to the Complainant, and provided certified confirmation of compliance to the Executive Director. 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 30th Day of September, 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: October 3, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
September 30, 2014 Council Meeting**

**Luis Rodriguez¹
Complainant**

GRC Complaint No. 2013-323

v.

**Kean University²
Custodial Agency**

Records Relevant to Complaint: The Complainant requested an electronic copy, stating:

“On October 15, 2012, Mr. Tripodi wrote in an email to me on the issue of conflict of interest and recusal: ‘In addition to the foregoing, I have also consulted with the University’s representative at the Attorney General’s Office, who confirmed that I have no conflict of interest in investigating the Mutazz ethics matter and the other allegations you brought forward regarding Mr. Mutazz receiving preferential treatment from the Office of Human Resources involving the handling of disciplinary actions.’

I request a copy of the correspondence that Mr. Tripodi sent to the University’s representative at the AG’s office.

That document can be redacted to protect attorney-client privilege. The only text requested is that which will show that Mr. Tripodi requested such advise [sic] from the AG’s office, such as the date on which he requested sent the correspondence, the person to whom it was sent, anyone copied on the correspondence, and the subject line, if any, of the correspondence, and anyone copied in his correspondence.

Please note that the information I am requesting are ‘facts’ and thus not subject to attorney-client privilege.”

Custodian of Record: Laura Barkley-Haelig
Request Received by Custodian: October 21, 2013
Response Made by Custodian: October 30, 2013
GRC Complaint Received: November 6, 2013

¹ No legal representation listed on record.

² Represented by DAG Jennifer McGruther.

Background

July 29, 2014 Council Meeting:

At its July 29, 2014 public meeting, the Council considered the July 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, found that:

1. The Custodian must disclose all other portions of the requested correspondence to the Complainant (*i.e.* sender, recipients, date, time, subject, and closing salutations). To these portions of the requested correspondence, the Custodian has unlawfully denied access. *See Ray v. Freedom Acad. Charter Sch. (Camden)*, GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010).
2. **The Custodian shall comply with conclusion No. 1 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 Rules, R. 1:4-4,³ to the Executive Director.⁴**
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 July 30, 2014, the Council distributed its Interim Order to all parties. On Thursday, August 7, 2014, the Custodian responded to the Council's Interim Order, via email, certifying that she produced the requested records to the Complainant, with redactions.

Analysis

Compliance

At its July 29, 2014 meeting, the Council ordered the Custodian to disclose all other portions of the requested correspondence to the Complainant (*i.e.* sender, recipients, date, time, subject, and closing salutations). The Council further required the Custodian to submit certified confirmation of compliance, in accordance with R. 1:4-4, to the Executive Director. On July 30,

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.

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 August 6, 2014.

On August 7, 2014, the sixth (6th) business day after receipt of the Council's Order, the Custodian submitted certified confirmation of compliance to the GRC, via email. The Custodian did not request an extension of time to respond.

Therefore, the Custodian failed to comply with the Council's July 29, 2014 Interim Order because she neither provided certified confirmation of compliance to the Executive Director in accordance with N.J. Court Rule 1:4-4, nor produced the requested record to the Complainant within the allotted five (5) business days.

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 (*id.*; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

The Custodian unlawfully denied access to the requested record, and failed to fully comply with the Council's July 29, 2014 Interim Order. However, the Custodian provided the requested record to the Complainant, and provided certified confirmation of compliance to the Executive Director. 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 failed to comply with the Council's July 29, 2014 Interim Order because she neither provided certified confirmation of compliance to the Executive Director in accordance with N.J. Court Rule 1:4-4, nor produced the requested record to the Complainant within the allotted five (5) business days.
2. The Custodian unlawfully denied access to the requested record, and failed to fully comply with the Council's July 29, 2014 Interim Order. However, the Custodian provided the requested record to the Complainant, and provided certified confirmation of compliance to the Executive Director. 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: Samuel A. Rosado, Esq.
Staff Attorney

Approved By: Dawn R. SanFilippo, Esq.
Acting Executive Director

September 23, 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

July 29, 2014 Government Records Council Meeting

Luis Rodriguez
Complainant
v.
Kean University
Custodian of Record

Complaint No. 2013-323

At the July 29, 2014 public meeting, the Government Records Council ("Council") considered the July 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 must disclose all other portions of the requested correspondence to the Complainant (*i.e.* sender, recipients, date, time, subject, and closing salutations). To these portions of the requested correspondence, the Custodian has unlawfully denied access. See Ray v. Freedom Acad. Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010).
2. **The Custodian shall comply with conclusion No. 1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹ to the Executive Director.²**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

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.

Interim Order Rendered by the
Government Records Council
On The 29th Day of July, 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: July 30, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 29, 2014 Council Meeting**

**Luis Rodriguez¹
Complainant**

GRC Complaint No. 2013-323

v.

**Kean University²
Custodial Agency**

Records Relevant to Complaint: The Complainant requested an electronic copy, stating:

“On October 15, 2012, Mr. Tripodi wrote in an email to me on the issue of conflict of interest and recusal: ‘In addition to the foregoing, I have also consulted with the University’s representative at the Attorney General’s Office, who confirmed that I have no conflict of interest in investigating the Mutazz ethics matter and the other allegations you brought forward regarding Mr. Mutazz receiving preferential treatment from the Office of Human Resources involving the handling of disciplinary actions.’

I request a copy of the correspondence that Mr. Tripodi sent to the University’s representative at the AG’s office.

That document can be redacted to protect attorney-client privilege. The only text requested is that which will show that Mr. Tripodi requested such advise [sic] from the AG’s office, such as the date on which he requested sent the correspondence, the person to whom it was sent, anyone copied on the correspondence, and the subject line, if any, of the correspondence, and anyone copied in his correspondence.

Please note that the information I am requesting are ‘facts’ and thus not subject to attorney-client privilege.”

Custodian of Record: Laura Barkley-Haelig
Request Received by Custodian: October 21, 2013
Response Made by Custodian: October 30, 2013
GRC Complaint Received: November 6, 2013

¹ No legal representation listed on record.

² Represented by DAG Jennifer McGruther.

Background³

Request and Response:

On October 21, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On October 30, 2013, seven (7) business days later, the Custodian responded, in writing, denying the request as exempt under attorney-client privilege pursuant to N.J.S.A. 47:1A-1.1.

Denial of Access Complaint:

On November 6, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant contended that requested documents that contain factual information or information that does not clearly fall within attorney-client privilege should be released in redacted form.

Statement of Information:

On November 18, 2013, the Custodian filed a Statement of Information (“SOI”). The Custodian stated that attorney-client privilege protects the “communications between a lawyer and a client in the course of that relationship and in professional confidence.” See N.J.S.A. 2A:84A-20(1); N.J.R.E. 504; Paff v. Div. of Law, 412 N.J. Super. 140, 150 (App. Div. 2010). Additionally, the Custodian stated that this attorney-client relationship exists between the Attorney General’s Office and the State agencies it represents. See Comm. to Recall Menendez v. Wells, 204 N.J. 79, 97 (2012); Paff, 412 N.J. Super. at 151.

The Custodian contended that the Complainant’s request for correspondence sent to Kean University’s (“University”) representative at the Attorney General’s Office seeking legal advice on an employee ethics investigation “go[es] to the heart of the attorney-client privilege” and is not a “government record.”

Moreover, the Custodian asserted that the Complainant, in a prior request, sought the same documents. Rodriguez v. Kean Univ., GRC Complaint No. 2013-68 (October 2013). In Rodriguez, the Council found that the Complainant’s request constituted legal advice rendered by retained counsel, and therefore was exempt from disclosure as attorney-client privileged material. Id.

Additional Submissions:

On January 11, 2014, the Complainant sent a letter to the GRC in response to the Custodian’s SOI. The Complainant argued that the request in the current matter differed from the one adjudicated in Rodriguez, GRC No. 2013-68. The Complainant asserted that a blanket claim of attorney-client privilege does not allow the Custodian to deny access to the record in its

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.

entirety. Diaz v. City of Perth Amboy, GRC Complaint No. 2007-53 (January 2008). The Complainant also contended that he sought only the factual elements contained in the requested document, not information subject to attorney-client privilege. The Complainant argued that pursuant to Diaz, such factual information is still subject to disclosure, so long as the privileged material is redacted. Id.

The Complainant, however, also cited Meakem v. Borough of Pompton Lakes, GRC Complaint No. 2003-66 (March 2004), for the proposition that a custodian may lawfully deny access to an entire record where privileged portions are intertwined with the balance of a document.

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 exempts access to “any record within the attorney-client privilege.” N.J.S.A. 47:1A-1.1. Further, “[t]he provisions of [OPRA] shall not abrogate or erode any . . . grant of confidentiality . . . recognized by . . . court rule.” N.J.S.A. 47:1A-9(b). As such, OPRA does not allow for the disclosure of attorney work product, consisting of “the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.” Rule 4:10-2(c).

In the context of public entities, these privileges extend to communications between the public body, the attorney retained to represent it, necessary intermediaries and agents through whom communications are conveyed, and co-litigants who have employed a lawyer to act for them in a common interest. *See* Tractenberg v. Twp. Of W. Orange, 416 N.J. Super. 354, 376 (App. Div. 2010); In re Env'tl. Ins. Declaratory Judgment Actions, 259 N.J. Super. 308, 313 (App. Div. 1992); In re Grand Jury Subpoenas, 241 N.J. Super. 18, 30 (App. Div. 1989). At the same time, the attorney-client and work product privileges do not apply to automatically and completely insulate all attorney correspondence from disclosure. *See* Hunterdon Cnty. P.B.A. Local 188 v. Twp. of Franklin, 286 N.J. Super. 389, 394 (“[attorney-client privilege] ordinarily does not apply to lawyers’ bills for services to a public entity”).

In Rodriguez, the Complainant sought “any and all written correspondence memorializing that conversation [between the University’s In-House Counsel and its representative at the Attorney General’s Office] (such as emails, letters or memoranda).” GRC No. 2013-68. The Council found that the request constituted “written legal advice rendered to a public entity by retained counsel.” Id. (*citing* Payton v. N.J. Tpk. Auth., 148 N.J. 524, 550-551 (1997); Paff, 412 N.J. Super. at 156; Grand Jury Subpoenas, 241 N.J. Super. at 28). Therefore, the Council concluded that such correspondence was exempt from disclosure as attorney-client

privileged material. Id. (citing N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6; Paff, 412 N.J. Super. at 156; Meakem, GRC No. 2003-66).

In the current matter, the Complainant requested the same correspondence as in Rodriguez, but sought only factual text not exempt as attorney-client privileged material. GRC No. 2013-68. As set forth in Rodriguez, discussions between the University's In-House Counsel and its representative at the Attorney General's office pertaining to legal advice in an employee ethics investigation are exempt from disclosure as attorney-client privileged material. See id.; N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9(b); Rule 4:10-2(c). Thus, the Custodian lawfully denied access to those discussions within the requested record. N.J.S.A. 47:1A-6.

The GRC however, has required custodians to disclose non-privileged content within records. See Diaz, GRC No. 2003-53 (“[A] custodian may redact [attorney or consultant bills or invoices] to remove any information protected by attorney-client privilege”). Consistent with N.J.S.A. 47:1A-5(g), a custodian must redact any portion of a government record that the Custodian asserts is not subject to disclosure, and must permit access to the remainder of the record.

Therefore, the Custodian must disclose all other portions of the requested correspondence to the Complainant (*i.e.* sender, recipients, date, time, subject, and closing salutations). To these portions of the requested correspondence, the Custodian has unlawfully denied access. See Ray v. Freedom Acad. Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010).

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 must disclose all other portions of the requested correspondence to the Complainant (*i.e.* sender, recipients, date, time, subject, and closing salutations). To these portions of the requested correspondence, the Custodian has unlawfully denied access. See Ray v. Freedom Acad. Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010).
2. **The Custodian shall comply with conclusion No. 1 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 1:4-4,⁴ to the Executive Director.⁵

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: Samuel A. Rosado, Esq.
Staff Attorney

Approved By: Dawn R. SanFilippo, Esq.
Acting Executive Director

July 22, 2014

⁴ "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."

⁵ 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.