



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

October 29, 2013 Government Records Council Meeting

Luis Rodriguez
Complainant
v.
Kean University
Custodian of Record

Complaint No. 2013-68

At the October 29, 2013 public meeting, the Government Records Council (“Council”) considered the October 22, 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 the Complainant is seeking records of the consultations between the University’s In-House Counsel and the University’s representative at the Attorney General’s Office regarding the In-House Counsel’s potential conflict of interest in investigating an ethics complaint, and the emails responsive to this request constitute written legal advice rendered to a public entity by retained counsel. *See* Payton v. N.J. Tpk. Auth., 148 N.J. 524, 550-51 (1997); Paff v. Div. of Law, 442 N.J. Super. 140, 156 (App. Div. 2010); In re Grand Jury Subpoena Duces Tecum served by Sussex Cnty., 241 N.J. Super. 18, 28 (App. Div. 1989). Thus, the Custodian lawfully denied access to these communications as they are shielded from disclosure based on OPRA’s exemption for attorney-client privileged materials. *See* N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6; Paff v. Div. of Law, 442 N.J. Super. 140, 156 (App. Div. 2010); Meakem v. Borough of Pompton Lakes, GRC Complaint No. 2003-66 (March 2004).

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 October, 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 1, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
October 29, 2013 Council Meeting**

**Luis Rodriguez¹
Complainant**

GRC Complaint No. 2013-68

v.

**Kean University²
Custodial Agency**

Records Relevant to Complaint: The Complainant's request stated: "On October 15, 2012, Michael Tripodi wrote in an email to me: '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 am requesting any and all written correspondence memorializing that conversation (such as emails, letters or memoranda)."

Custodian of Record: Laura Barkley-Haelig
Request Received by Custodian: February 19, 2013
Response Made by Custodian: February 28, 2013
GRC Complaint Received: March 1, 2013

Background³

Request and Response:

On February 19, 2013, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On February 28, 2013, seven (7) business days later, the Custodian responded in writing denying the request as being within the attorney-client privilege pursuant to N.J.S.A. 47:1A-1.1.

Denial of Access Complaints:

On March 1, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserts that the Custodian did not provide any other basis for the denial aside from the statutory grounds and, therefore, he cannot

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Jennifer McGruther.

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.

challenge the particulars of the Custodian's decision. Citing Diaz v. City of Perth Amboy, GRC Complaint No. 2007-53 (February 2008), the Complainant further asserts that a claim of attorney-client privilege does not permit the Custodian to deny access to the entire requested record. The Complainant contends that requested documents that contain factual information or information that does not clearly fall within attorney-client privilege should be released in a redacted form. The Complainant, however, also cites to 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.

Statement of Information:

On April 1, 2013, the Custodian filed a Statement of Information ("SOI") certifying that she received the Complainant's OPRA request on February 19, 2013 and responded in writing on February 28, 2013. The Custodian certifies that the Complainant's request was forwarded to Mr. Tripodi, Kean University's (the "University") In-House Counsel, who identified email communications responsive to the OPRA request. The Custodian further certifies that Mr. Tripodi determined that the email communications were exempt pursuant to the attorney-client privilege.

The Custodian states 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*, 442 N.J. Super. 140, 150 (App. Div. 2010). The Custodian additionally states that this covered attorney-client relationship exists between the Attorney General's Office and the State agencies it represents. *See Comm. to Recall Menedez v. Wells*, 204 N.J. 79, 97 (2012); *Paff*, 412 N.J. Super. at 151.

The Custodian contends that the request for "all written correspondence" between the University's General Counsel and the Attorney General's Office regarding legal advice about an employee ethics investigation goes "to the heart of the attorney-client privilege and [the communications] are excluded from OPRA's definition of government record." *See N.J.S.A. 2A:84A-20(1)* (quotations omitted).

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. OPRA states that a government record shall not include "any record within attorney-client privilege." N.J.S.A. 47:1A-1.1. 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.

In In re Grand Jury Subpoena Duces Tecum served by Sussex Cnty., 241 N.J. Super. 18 (App. Div. 1989), the Court considered the situation of a law firm retained by a County Board of Freeholders and held that “the [attorney-client] privilege is fully applicable to communications between a public body and an attorney retained to represent it.” Id. at 28. Further, in Payton v. N.J. Tpk. Auth., 148 N.J. 524 (1997), the Court held that a unit of State government is a “client” for the purposes of attorney-client privilege and, consequently, any legal advice rendered by retained counsel is shielded from disclosure. See id. at 550-51.

The Court in Paff, interpreting OPRA, held that advice letters from the Division of Law are records within the attorney-client privilege and are thus exempt from disclosure. See Paff, 412 N.J. Super. at 156. Similarly, in Meakem the GRC examined a request for a letter from a borough administrator seeking a legal opinion from the borough zoning board’s attorney. See Meakem, GRC No. 2003-66. The nature of the letter was not disclosed, except for a certification in the SOI that the document asked for “a legal interpretation.” See id. The GRC found the denial of access lawful based on OPRA’s exemption for attorney-client privileged materials. See id.

Here, the Complainant made a request seeking “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).” On its face, such a request is overly broad. See MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30 (App. Div. 2005). The Custodian certified in her SOI, however, that responsive emails exist and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. As the Custodian identified a record responsive to the Complainant’s request, despite its broad nature, the GRC will determine whether such a record must be disclosed under OPRA. See Wargacki v. Cnty. of Bergen, 2011-198 (December 2012).

The Complainant is seeking any record of the University’s In-House Counsel’s consultations with the University’s representative at the Attorney General’s Office regarding the In-House Counsel’s potential conflict of interest in investigating an ethics complaint, and the emails responsive to this request constitute written legal advice rendered to a public entity by retained counsel. See Payton, 148 N.J. at 550-51; Paff, 412 N.J. Super. at 156; Sussex Cnty., 241 N.J. Super. at 28. Thus, the Custodian lawfully denied access to these communications as they are shielded from disclosure based on OPRA’s exemption for attorney-client privileged materials. See 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.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Complainant is seeking records of the consultations between the University’s In-House Counsel and the University’s representative at the Attorney General’s Office regarding the In-House Counsel’s potential conflict of interest in investigating an ethics complaint, and the emails responsive to this request constitute written legal advice rendered to a public entity by retained counsel. See Payton v. N.J. Tpk. Auth., 148 N.J. 524, 550-51 (1997); Paff v. Div. of Law, 442 N.J. Super. 140, 156 (App. Div. 2010); In re Grand Jury Subpoena Duces Tecum served by Sussex Cnty.,

241 N.J. Super. 18. 28 (App. Div. 1989). Thus, the Custodian lawfully denied access to these communications as they are shielded from disclosure based on OPRA's exemption for attorney-client privileged materials. *See* N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6; Paff v. Div. of Law, 442 N.J. Super. 140, 156 (App. Div. 2010); Meakem v. Borough of Pompton Lakes, GRC Complaint No. 2003-66 (March 2004).

Prepared By: Robert T. Sharkey
Staff Attorney

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

October 22, 2013