



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

February 25, 2014 Government Records Council Meeting

Anthony Russomano
Complainant

Complaint No. 2013-74

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 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 this complaint should be dismissed because the Complainant (via Counsel) withdrew same in an e-mail on January 27, 2014. Therefore, no further adjudication is required.

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 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**

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

**Anthony Russomano¹
Complainant**

GRC Complaint No. 2013-74

v.

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

Records Relevant to Complaint: Copies of the Mayor's appointments and schedule from January 1, 2010 through January 15, 2013, listed on the Mayor's computer and her secretary's computer.

Custodian of Record: Michelle Kasperski³

Request Received by Custodian: January 14, 2013

Response Made by Custodian: January 24, 2013

GRC Complaint Received: March 4, 2013

Background

December 20, 2013 Council Meeting:

At its December 20, 2013 public meeting, the Council considered the December 10, 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. In accordance with Smith v. NJ Dep't of Corrections, GRC Complaint No. 2005-84 (Interim Order dated April 25, 2007), the GRC must conduct an *in camera* review of the responsive records to determine the validity of the Custodian's assertion that the appointments and schedules from January 1, 2010 to January 15, 2013, contain ACD material or are exempt under executive privilege. See Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005); N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9(a); Executive Order No. 26 (Gov. McGreevey, 2002). If the records are available in Microsoft Outlook® or a similar electronic calendar, the GRC requests that the responsive schedules be provided in a monthly format.

¹ Represented by Thomas C. Jardim, Esq., of Jardim, Meisner & Susser, P.C. (Florham Park, NJ).

² Represented by Karl Kemm, Esq., of Hoagland, Longo, Moran, Dunst & Doukas, LLP (New Brunswick, NJ).

³ Ms. Kasperski was designated to respond to this complaint as the custodian of record because of a recusal issue with the actual Custodian.

2. **The Custodian must deliver⁴ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 1 above), a document or redaction index,⁵ as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,⁶ that the records provided are the records 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.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On December 23, 2013, the Council distributed its Interim Order to all parties. On December 27, 2013, the Custodian's Counsel requested an extension until January 3, 2014 to respond to the Council's Order, which the GRC granted. On January 27, 2014, the Complainant's Counsel e-mailed the GRC withdrawing this complaint on behalf of the Complainant.

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that this complaint should be dismissed because the Complainant (via Counsel) withdrew same in an e-mail on January 27, 2014. Therefore, no further adjudication is required.

Prepared By: Frank F. Caruso
Senior Case Manager

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

February 18, 2014

⁴ 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.

⁵ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

⁶ "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."



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CHRIS CHRISTIE
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KIM GUADAGNO
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RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

December 20, 2013 Government Records Council Meeting

Anthony Russomano
Complainant

Complaint No. 2013-74

v.

Township of Edison (Middlesex)
Custodian of Record

At the December 20, 2013 public meeting, the Government Records Council ("Council") considered the December 10, 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. In accordance with Smith v. NJ Dep't of Corrections, GRC Complaint No. 2005-84 (Interim Order dated April 25, 2007), the GRC must conduct an *in camera* review of the responsive records to determine the validity of the Custodian's assertion that the appointments and schedules from January 1, 2010 to January 15, 2013, contain ACD material or are exempt under executive privilege. See Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005); N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9(a); Executive Order No. 26 (Gov. McGreevey, 2002). If the records are available in Microsoft Outlook® or a similar electronic calendar, the GRC requests that the responsive schedules be provided in a monthly format.
2. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 1 above), a document or redaction index,² as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,³ that the records provided are the records 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."

4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 20th Day of December, 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: December 23, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
December 20, 2013 Council Meeting**

**Anthony Russomano¹
Complainant**

GRC Complaint No. 2013-74

v.

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

Records Relevant to Complaint: Copies of the Mayor's appointments and schedule from January 1, 2010 through January 15, 2013, listed on the Mayor's computer and her secretary's computer.

Custodian of Record: Michelle Kasperski³
Request Received by Custodian: January 14, 2013
Response Made by Custodian: January 24, 2013
GRC Complaint Received: March 4, 2013

Background⁴

Request and Response:

On January 14, 2013, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On January 24, 2013, the Custodian responded in writing attaching a response from Custodian's Counsel advising that the responsive records are exempt from disclosure as "inter-agency or intra-agency advisory, consultative or deliberative" ("ACD") material and the records implicate executive privilege. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9(a); Executive Order No. 26 (Gov. McGreevey, 2002)("EO 26"); North Jersey Newspapers Co. v. Passaic Cnty. Bd. of Freeholders, 127 N.J. 9, 16-18 (1992); Gannett NJ Partners, LP v. Cnty. of Middlesex, 379 N.J. Super. 205, 217-218 (App. Div. 2005)(holding in part that County Counsel's appointment book was exempt from disclosure under).

¹ Represented by Thomas C. Jardim, Esq., of Jardim, Meisner & Susser, P.C. (Florham Park, NJ).

² Represented by Karl Kemm, Esq., of Hoagland, Longo, Moran, Dunst & Doukas, LLP (New Brunswick, NJ).

³ Ms. Kasperski was designated to respond to this complaint as the custodian of record because of a recusal issue with the actual Custodian.

⁴ 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.

Denial of Access Complaint:

On March 4, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant disputes the Custodian’s denial of access based on the ACD exemption, executive privilege and privacy interests.

The Complainant contends that even assuming that factual information could be deliberative in some way, the ACD privilege does not apply to a calendar or appointment book. Educ. Law Ctr. v. NJ Dep’t of Educ., 198 N.J. 274 (2009). The Complainant argues that it is unlikely that any information such as a date book or calendar could be part of a decision-making process or would reveal deliberations of an issue.

The Complainant further contends that he is not aware of any decisions of the State or GRC that extend executive privilege to municipalities. Finally, the Complainant asserts that even if the privacy exemption applies to certain portions of the date book and calendars, any other information not implicating privacy interest must be disclosed. Smith v. NJ Dep’t of Corrections, GRC Complaint No. 2005-84 (Interim Order dated November 15, 2006).

The Complainant argues that the Custodian unlawfully denied access to the responsive records and violated OPRA. The Complainant asserts that, as an alternative, the Custodian should provide him redacted copies of the responsive records.

Statement of Information:

On April 9, 2013, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that she received the Complainant’s OPRA request on January 14, 2013. The Custodian certifies that the request was forwarded to Custodian’s Counsel, who responded denying access to the responsive records as ACD material and based on implications of executive privilege.⁵

Analysis⁶

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 a “... public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy ...”

⁵ The GRC notes that the Custodian also certified that the current Mayor’s Administration has never submitted a destruction of records form for these records. The Custodian further certified that no search was conducted.

⁶ 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.

N.J.S.A. 47:1A-1. OPRA further provides that “[g]overnment record’ or ‘record’ means any paper, written or printed book ... information stored or maintained electronically ... [t]he terms shall not include [ACD] material.” N.J.S.A. 47:1A-1.1. OPRA provides that “[t]he provisions of [OPRA] shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to ... Executive Order of the Governor ...” N.J.S.A. 47:1A-9(a).

EO 26 provides that:

In addition to those records of the Office of the Governor that are exempted by the provisions of [OPRA], the following records ... shall not be subject to public inspection, copying or examination ... *Any record* made, maintained, kept on file or received by the Office of the Governor in the course of its official business which *is subject to an executive privilege* or grant of confidentiality established or recognized by the Constitution of this State, statute, court rules or judicial case law. All portions of records, including electronic communications, that contain advisory, consultative or deliberative information or other records protected by a recognized privilege.

Id. at 2(a)-(b)(emphasis added).

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 Council⁷ 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

⁷ Paff v. NJ Dep’t of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

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.

Moreover, in Smith, GRC 2005-84, the Council was tasked with a similar issue of determining whether "... the agenda or schedule of ... Commissioner Devon Brown ..." was exempt under the executive privilege and ACD exemptions. The Council held that it was necessary to conduct an *in camera* review of the schedules, reasoning that:

[I]t implicates privacy interests of persons who meet with public officials. However, the general appearances of the Commissioner (which might be otherwise publicized) is not likely exempt from public access in the same manner in which the telephone numbers or the identity of persons with whom the Commissioner might have met.

Id. at 7.

Here, the Complainant disputed that any privilege or exemption applied to the schedules. The Complainant further argued that nothing in the schedules could be part of a decision-making process or would reveal deliberations of an issue. Finally, the Complainant argued that there is no precedent extending executive privilege to the municipal level. In the SOI, the Complainant relied on Counsel's response to the OPRA request, which asserted that the records were exempt under the ACD and executive privilege exemption. The facts here fall squarely within those facts presented in Smith; thus, an *in camera* review is necessary to determine whether every entry in the responsive schedules is subject to any of the exemptions or whether same even apply to the records.

Therefore, in accordance with Smith, the GRC must conduct an *in camera* review of the responsive records to determine the validity of the Custodian's assertion that the appointments and schedules from January 1, 2010 to January 15, 2013, contain ACD material or are exempt under executive privilege. *See Paff*, 379 N.J. Super. at 346; N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9(a); EO 26. If the records are available in Microsoft Outlook® or a similar electronic calendar, the GRC requests that the responsive schedules be provided in a monthly format.

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.

Prevailing Party Attorney's Fees

The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. In accordance with Smith v. NJ Dep't of Corrections, GRC Complaint No. 2005-84 (Interim Order dated April 25, 2007), the GRC must conduct an *in camera* review of the responsive records to determine the validity of the Custodian's assertion that the appointments and schedules from January 1, 2010 to January 15, 2013, contain ACD material or are exempt under executive privilege. *See Paff v. NJ Dep't of Labor, Bd. of Review*, 379 N.J. Super. 346 (App. Div. 2005); N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9(a); Executive Order No. 26 (Gov. McGreevey, 2002). If the records are available in Microsoft Outlook® or a similar electronic calendar, the GRC requests that the responsive schedules be provided in a monthly format.
2. **The Custodian must deliver⁸ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 1 above), a document or redaction index,⁹ as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,¹⁰ that the records provided are the records 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.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Senior Case Manager

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

December 10, 2013

⁸ 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.

⁹ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

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