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CHARLES A. RICHMAN  
Acting Commissioner

**FINAL DECISION**

**April 28, 2015 Government Records Council Meeting**

James D'Andrea  
Complainant

Complaint No. 2014-153

v.

NJ Civil Service Commission  
Custodian of Record

At the April 28, 2015 public meeting, the Government Records Council ("Council") considered the April 21, 2015 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. No exemption contained in OPRA allows a custodian to deny access to information in a record on the basis that same is not responsive to the subject OPRA request. ACLU v. NJ Div. of Criminal Justice, 435 N.J. Super. 533, 540-541 (App. Div. 2014). Additionally, the Custodian failed to provide a lawful basis for redacting the subject/date in the e-mail between Mr. Hill and himself. The Custodian has thus unlawfully denied access to redacted lines in the e-mail dated April 4, 2013, and the subject/date in Mr. Hill's e-mail to the Custodian. *See also* Hyland v. Twp. of Lebanon (Hunterdon), GRC Complaint No. 2012-227 *et seq.* (Interim Order dated June 24, 2014). However, the GRC declines to order disclosure because the Custodian provided the records without these redactions to the Complainant as part of the Statement of Information.
2. The Custodian did not unlawfully deny access to the redacted personal e-mail addresses. N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-6. Specifically, the Custodian's redactions are consistent with the Council's decision in Gettler v. Twp. of Wantage (Sussex), GRC Complaint No. 2009-73 *et seq.* (Interim Order dated June 25, 2013), and there is sufficient information in the e-mails to determine the identity of the senders/recipients.
3. Although the Custodian unlawfully denied access to approximately three (3) lines in the April 4, 2013, e-mail and the subject/date information in the undated e-mail, he lawfully denied access to the personal e-mail addresses contained in the header information. 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 unlawful denial of access did 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 28<sup>th</sup> Day of April, 2015

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: April 30, 2015**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
April 28, 2015 Council Meeting**

**James D'Andrea<sup>1</sup>  
Complainant**

**GRC Complaint No. 2014-153**

v.

**New Jersey Civil Service Commission<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies via e-mail of correspondence (letters, e-mails, memoranda, facsimiles, *etc.*) between Union City ("City") and the Civil Service Commission ("CSC") regarding the City's not posting for a 2013 police captain promotional examination for an eligibility list due to expire in April 2014.

**Custodian of Record:** Christopher Randazzo  
**Request Received by Custodian:** September 4, 2013  
**Response Made by Custodian:** September 6, 2013  
**GRC Complaint Received:** March 31, 2014

**Background<sup>3</sup>**

**Request and Response:**

On September 4, 2013, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On September 6, 2013, the Custodian acknowledged receipt of the request and advised that he would respond within seven (7) business days. On September 13, 2013, the Custodian responded in writing to provide access to one (1) letter and multiple e-mails. The Custodian noted that specific information was redacted as either personal information exempt under N.J.S.A. 47:1A-10 or because same was not responsive to the Complainant's OPRA request.<sup>4</sup>

On September 13, 2013, the Complainant e-mailed the Custodian asking about the existence of an approval letter dated "April 10" per a handwritten note on the letter he received as part of the Custodian's response. On September 16, 2013, the Custodian clarified that no

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Deputy Attorney General Pamela N. Ullman.

<sup>3</sup> 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.

<sup>4</sup> The Custodian also stated that the Complainant's OPRA request was overly broad and unclear. However, the GRC will not address this issue because the Custodian provided responsive records.

“April 10” letter existed, despite the notation and that the disclosed e-mails represented the method of communication between CSC and the City.

On January 5, 2014, the Complainant sent a letter to the Custodian, disputing redactions made to two (2) lines of text in one of the responsive e-mails and additional redactions to header information in other e-mails. Regarding the two (2) lines of text, the Complainant surmised that same was redacted as not responsive to the request. The Complainant disputed that this is true, given the context of the e-mail. Regarding the header information, the Complainant asserted that all parties are government employees thus rendering e-mail addresses, subjects, and dates disclosable under OPRA. The Complainant requested that the Custodian disclose the responsive records without redactions.

#### Denial of Access Complaint:

On March 31, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant stated that he initially submitted an OPRA request on August 27, 2013 which the Custodian denied on September 3, 2013. The Complainant stated that, based on this denial, he submitted a clarified request on September 4, 2013, which the Custodian treated as a new OPRA request. The Complainant noted that, following the Custodian’s response, he disputed the following redactions made to responsive e-mails:

1. E-mail from Judy Gottlieb, Personnel Consultant for the City, to Daniel Hill, Director of Selection Services at CSC, dated April 4, 2013 – e-mail address and two (2) lines of text.
2. E-mail from Mr. Hill to Ms. Gottlieb dated April 11, 2013 – e-mail addresses.
3. E-mail from Ms. Gottlieb to Mr. Hill dated April 11, 2013 – e-mail addresses.
4. E-mail from Mr. Hill to the Custodian – subject and date

The Complainant argued that he sent a letter the Custodian on January 5, 2014, disputing the validity of the exemptions that the Custodian applied to the redactions. Further, the Complainant argued that he resent the letter on February 10, 2014, after not receiving a response.

#### Statement of Information:

On May 19, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on September 4, 2013. The Custodian certified that he responded to the Complainant on September 13, 2013, disclosing a letter and three (3) e-mails<sup>5</sup>

The Custodian first certified that he initially disclosed the e-mails with redactions of City employees’ personal e-mail addresses. Additionally, the Custodian affirmed that he redacted approximately three (3) lines of text in the April 4, 2013, e-mail on the basis that same was not responsive to the Complainant’s OPRA request.

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<sup>5</sup> The GRC notes that the evidence of record indicates that four (4) e-mails in a chain with redactions were included in the response.

Regarding the redacted lines of text, the Custodian certified that, subsequent to disclosure, the Appellate Division determined that a custodian did not have the authority to redact portions of responsive records not exempt under OPRA on the basis that those portions were not responsive to an OPRA request. ACLU v. NJ Div. of Criminal Justice, 435 N.J. Super. 533, 540-541 (App. Div. 2014). The Custodian averred that he believed that the Court's decision was instructive here and that no exemption applied to the redacted lines. As such, he disclosed the responsive e-mail without redactions for the lines of text as part of the SOI.

However, the Custodian also noted that he believed the redacted lines represented "inter-agency or intra-agency advisory, consultative or deliberative" ("ACD") material at the time of the request. The Custodian believed that because the City settled the issue, he did not think the ACD exemption applied any longer.<sup>6</sup>

Regarding the e-mail addresses, the Custodian stated that OPRA requires a public agency to safeguard personally identifying information "with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy . . ." N.J.S.A. 47:1A-1. Further, the Custodian stated that in Mayer v. Borough of Tinton Falls (Monmouth), GRC Complaint No. 2008-245 (Interim Order dated April 8, 2010), the Council determined that privacy interest applied to personal e-mail addresses contained in government records. The Custodian noted that Ms. Gottlieb and Mark Albiez, whose personal e-mail addresses were redacted, work for the City and can be contacted through official City e-mail addresses. The Custodian contended that, based on the forgoing, he lawfully denied access to the City officials' personal e-mail addresses.

#### Additional Submissions:

On February 25, 2015, the GRC requested that the Custodian and Complainant complete balancing test questionnaires.<sup>7</sup> On March 2, 2015, the Custodian responded to the GRC's request as follows:

**1. The type of record.**

**Response:** E-mails between City officials and the CSC.

**2. Information contained in the record.**

**Response:** Personal e-mail addresses of City officials, which the Custodian redacted based on the personal privacy exemption.

**3. Potential for harm in subsequent nonconsensual disclosure.**

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<sup>6</sup> The GRC notes that the definition of a government record does not include ACD material. N.J.S.A. 47:1A-1.1. To this end, the Council has previously held that "the ACD exemption is not predicated on the finalization of a matter." *See Hyland v. Twp. of Lebanon, et al*, GRC Complaint No. 2012-227 *et seq.* (December 2014) at 15.

<sup>7</sup> To date, the Complainant has not responded to the GRC's request for a balancing test questionnaire.

**Response:** Disclosure could result in the official being harassed, having his or her identity stolen, or a host of other misuses. Public employees maintain an expectation of privacy in their personal e-mail address, even if used in connection with official business. The e-mail addresses were not intended to be disclosed to anyone other than the e-mail recipients.

**4. Injury from disclosure to the relationship in which the record was generated.**

**Response:** Disclosure could result in unnecessary contact with the public officials away from work. Additionally, the Complainant has no need for the personal e-mail addresses because he is already in possession of their official City addresses.

**5. Adequacy of safeguards to prevent unauthorized disclosure.**

**Response:** The GRC could order the Complainant to maintain confidentiality of the e-mail addresses and not use same, which would likely be sufficient. However, disclosure in the first instance is unnecessary. Pointedly, the Complainant did not seek personal e-mail addresses; they were simply contained within the responsive record.

**6. Whether there is an express statutory mandate, articulated public policy, or other recognized interest militating towards access.**

**Response:** There is no express statutory mandate, articulated public policy, or other recognized public interest militating towards access to the officials' personal e-mail addresses. Substantial arguments supporting this fact were provided as part of the SOI.

**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.

As a preliminary issue, the GRC will first address the redactions that the Custodian retracted in his SOI. Therein, the Custodian disclosed to the Complainant the e-mails, including approximately three (3) lines of text in the April 4, 2013, e-mail that he previously redacted and the subject/date lines of Mr. Hill's e-mail.

Initially, the Custodian responded to the request noting that lines of text were redacted as personnel information under N.J.S.A. 47:1A-10. Later, in the SOI, the Custodian noted that he redacted the lines because they were not responsive to the request and because they represented ACD material. However, the Custodian certified that he disclosed the records in accordance with the Appellate Division's decision in ACLU, 435 N.J. Super. at 540-541, and because the City

settled the issue discussed in the redacted material. Further, the Custodian did not provide a reason for redacting the subject/date on the e-mail between Mr. Hill and himself.

Although these redactions are no longer at issue, the GRC reviewed the unredacted e-mails and is satisfied that the Custodian initially unlawfully denied access to the lines and subject/date. Specifically, and as noted by the Custodian in SOI, OPRA contains no exemption for information “not responsive to” an OPRA request. The GRC need not address the other exemptions set forth by the Custodian in his initial response and subsequently in his SOI, namely the personnel and ACD exemption, because he has disclosed the record at issue here.

Therefore, no exemption contained in OPRA allows a custodian to deny access to information in a record on the basis that same is not responsive to the subject OPRA request. ACLU, 435 N.J. Super. at 540-541. Additionally, the Custodian failed to provide a lawful basis for redacting the subject/date in the e-mail between Mr. Hill and himself. The Custodian has thus unlawfully denied access to redacted lines in the April 4, 2013, and the subject/date in Mr. Hill’s e-mail to the Custodian. *See also* Hyland v. Twp. of Lebanon (Hunterdon), GRC Complaint No. 2012-227 *et seq.* (Interim Order dated June 24, 2014). However, the GRC declines to order disclosure because the Custodian provided the records without these redactions to the Complainant as part of the SOI.

The GRC must next address the disclosability of the personal e-mail addresses. 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 . . .” N.J.S.A. 47:1A-1. As privacy interests are at issue here, the GRC asked both parties to respond to balancing test questions so the Council could employ the common law balancing test established by the New Jersey Supreme Court in Doe v. Poritz, 142 N.J. 1 (1995).

The Supreme Court has explained that N.J.S.A. 47:1A-1’s safeguard against disclosure of personal information is substantive and requires “a balancing test that weighs both the public’s strong interest in disclosure with the need to safeguard from public access personal information that would violate a reasonable expectation of privacy.” Burnett v. County of Bergen, 198 N.J. 408, 422-23, 427 (2009).

When “balanc[ing] OPRA’s interests in privacy and access” courts consider the following factors:

- (1) the type of record requested;
- (2) the information it does or might contain;
- (3) the potential for harm in any subsequent nonconsensual disclosure;
- (4) the injury from disclosure to the relationship in which the record was generated;
- (5) the adequacy of safeguards to prevent unauthorized disclosure;
- (6) the degree of need for access; and
- (7) whether there is an express statutory mandate, articulated public policy, or other recognized public interest militating toward access.

Id. at 427 (*quoting* Doe, 142 N.J. at 88).

Notwithstanding the Custodian's responses (and the Complainant's failure to provide same), the GRC looks to Gettler v. Twp. of Wantage (Sussex), GRC Complaint No. 2009-73 *et seq.* (Interim Order dated June 25, 2013), in which the Council was tasked with determining whether the custodian lawfully denied access to redacted personal e-mail addresses. After determining that additional development of the record was necessary, the Council referred the complaint to the Office of Administrative Law ("OAL"). As part of this referral, the Council directed the OAL to determine whether personal e-mail addresses were disclosable both in the instance when a name is displayed or not displayed with the address.

The OAL obtained balancing test responses from the parties and conducted the test based on the Burnett factors. Based on its application of the test, the OAL determined that the factors weighed in favor of redaction of personal addresses. In reaching this conclusion, the OAL reasoned that the potential for harm in subsequent nonconsensual disclosure and the lack of any adequate safeguards preventing unauthorized disclosure of the email addresses outweighed the complainant's degree of need for access to the email addresses. The OAL applied this reasoning to all e-mails where names accompanied the personal e-mail addresses but did require the disclosure of those e-mail addresses not accompanied by a name. The Council accepted the OAL's Initial Decision without modification.

The facts of Gettler, GRC 2009-73 *et seq.*, are applicable here. Specifically, the Custodian certified that the redacted e-mail addresses were personal addresses. Additionally, these addresses were accompanied by identifiers making it clear to whom the e-mail addresses belonged. The Custodian's redactions are consistent with those the OAL determined to be lawful in Gettler, GRC 2009-73 *et seq.* Moreover, an additional factor against disclosure in this case is the Complainant's failure to provide balancing test responses. Ultimately, there is sufficient information in the e-mails to determine the senders/recipients without disclosing their personal e-mail addresses.

Therefore, the Custodian did not unlawfully deny access to the redacted personal e-mail addresses. N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-6. Specifically, the Custodian's redactions are consistent with the Council's decision in Gettler, GRC 2009-73 *et seq.*, and there is sufficient information in the e-mails to determine the identity of the senders/recipients.

### **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)).

Although the Custodian unlawfully denied access to approximately three (3) lines in the April 4, 2013 e-mail and the subject/date information in the undated e-mail, he lawfully denied access to the personal e-mail addresses contained in the header information. 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 unlawful denial of access did 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 Deputy Executive Director respectfully recommends the Council find that:

1. No exemption contained in OPRA allows a custodian to deny access to information in a record on the basis that same is not responsive to the subject OPRA request. ACLU v. NJ Div. of Criminal Justice, 435 N.J. Super. 533, 540-541 (App. Div. 2014). Additionally, the Custodian failed to provide a lawful basis for redacting the subject/date in the e-mail between Mr. Hill and himself. The Custodian has thus unlawfully denied access to redacted lines in the e-mail dated April 4, 2013, and the subject/date in Mr. Hill's e-mail to the Custodian. *See also* Hyland v. Twp. of Lebanon (Hunterdon), GRC Complaint No. 2012-227 *et seq.* (Interim Order dated June 24, 2014). However, the GRC declines to order disclosure because the Custodian provided the records without these redactions to the Complainant as part of the Statement of Information.
2. The Custodian did not unlawfully deny access to the redacted personal e-mail addresses. N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-6. Specifically, the Custodian's redactions are consistent with the Council's decision in Gettler v. Twp. of Wantage (Sussex), GRC Complaint No. 2009-73 *et seq.* (Interim Order dated June 25, 2013), and there is sufficient information in the e-mails to determine the identity of the senders/recipients.

3. Although the Custodian unlawfully denied access to approximately three (3) lines in the April 4, 2013, e-mail and the subject/date information in the undated e-mail, he lawfully denied access to the personal e-mail addresses contained in the header information. 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 unlawful denial of access did 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: Frank F. Caruso  
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April 21, 2015