



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
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CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

CHARLES A. RICHMAN  
Commissioner

FINAL DECISION

September 29, 2016 Government Records Council Meeting

Naeem Akhtar  
Complainant

Complaint No. 2014-344

v.

NJ Department of Law & Public Safety,  
Division of Criminal Justice  
Custodian of Record

At the September 29, 2016 public meeting, the Government Records Council (“Council”) considered the September 22, 2016 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 complied with the Council’s April 28, 2015, Interim Order because he responded in the prescribed time frame providing nine (9) copies of the Manual and supplemental CD and simultaneously provided certified confirmation of compliance to the Executive Director.
2. **The *In Camera* Examination set forth in the above table reveals the Custodian has lawfully denied access to, or redacted portions of, the records listed in the document index pursuant to N.J.S.A. 47:1A-6.**

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 29<sup>th</sup> Day of September, 2016

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 4, 2016**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director  
September 29, 2016 Council Meeting**

**Naeem Akhtar<sup>1</sup>  
Complainant**

**GRC Complaint No. 2014-344**

v.

**New Jersey Department of Law & Public Safety,  
Division of Criminal Justice<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Hardcopies via e-mail of the New Jersey Prosecutor’s Manual (“Manual”) published by the Division of Criminal Justice (“DCJ”).

**Custodian of Record:** Robert McGrath  
**Request Received by Custodian:** September 24, 2014  
**Response Made by Custodian:** October 3, 2014  
**GRC Complaint Received:** October 15, 2014

**Records Submitted for *In Camera* Examination:** Manual and a supplemental CD

**Background**

April 28, 2015 Council Meeting:

At its April 28, 2015 public meeting, the 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, found that:

1. The GRC must conduct an *in camera* review of the Manual and a supplemental CD to determine the validity of the Custodian’s assertion that same are exempt from disclosure pursuant to the New Jersey Department of Law & Public Safety’s promulgated regulations. See Paff, 379 N.J. Super. at 346; N.J.S.A. 47:1A-9(a); N.J.A.C. 13:1E-3.2(a)2-3.
2. **The Custodian must deliver<sup>3</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 1 above), a document or redaction**

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

<sup>2</sup> Represented by Deputy Attorney General Jennifer Stonerod.

<sup>3</sup> 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.

**index,<sup>4</sup> as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,<sup>5</sup> 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.

#### Procedural History:

On April 29, 2015, the Council distributed its Interim Order to all parties.

On May 5, 2015, the Custodian responded to the Council's Interim Order. The Custodian certified that he provided nine (9) copies of the Manual and supplemental CD for review. The Custodian certified that no redactions were made to the records because he denied access to them in their entirety.

The Custodian asserted that, upon *in camera* review by the Council, it will be clear that the records are exempt under N.J.S.A. 47:1A-9(a) and N.J.A.C. 13:1E-3.2(a)2-3. The Custodian noted that he is limited as to what can be discussed about the records but highlights a few instances where the Manual and supplemental CD contain investigative and operational techniques. Specifically, the records contain, including but not limited to, guidelines for handling confidential witnesses and witness protection, as well as a section on setting up specialized units. Moreover, the Complainant asserted that the records contained, including but not limited to, advice and guidance composed by prosecutors and deputy attorney generals on court processes and inter-office interactions. The Custodian affirmed that the Preface of the Manual succinctly reflects its purpose:

The New Jersey Prosecutor's Manual is intended as a guide to the prosecutorial community. It will contribute to the dissemination of noteworthy programs and practices and enhance the knowledge and proficiency of prosecutors throughout the state. The manual is a sourcebook for an efficient and professional development of the Prosecutors' Offices in the state. It is not a collection of guidelines or directives. Rather, the sections herein contain discussions of existing law by law enforcement personnel who are knowledgeable in a particular area, for the use of their colleagues.

#### Id.

The Custodian thus argued that DCJ properly denied access to the responsive records.

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

<sup>5</sup> "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."

On May 13, 2015, the Complainant submitted a letter brief, arguing that strong public policy warranted disclosure of the Manual and supplemental CD.

The Complainant first argued that the Custodian failed to provide sufficient evidence proving that disclosure of the records would compromise an agency's ability to conduct investigations or would violate the attorney work-product privilege as required by N.J.A.C. 13:1E-3.2 (a) to be lawfully exempt. The Complainant contended that the GRC must weigh the benefits to the public of disclosing the responsive records. The Complainant conversely argued that disclosure would encourage the public to participate in government by educating them on these processes. The Complainant further argued that many of the Custodian's own descriptions about the records do not infer that they are consistent with blanket exemption under the attorney work-product privilege. The Complainant noted that factual information, sections not written by attorneys, and guidance provided to one level of the government from another are not considered attorney work-product. The Complainant argued that he was not seeking unfettered access to the records: the Custodian could disclose the records with appropriate redactions.

The Complainant argued that public policy favored disclosure of the records. The Complainant asserted that citizens' access to government records is one of the greatest checks on government efficiency. The Complainant asserted that the Custodian's own statements indicate that the records at issue were not intended to interpret laws; rather, the records were designed to provide general guidelines to assist staff in decision-making or administrative processes. The Complainant further argued that disclosure would encourage public discussion and likely encourage lawful conduct by the public as opposed to impeding an agency's operations.

The Complainant next asserted that in cases of first impression, the GRC should consider how other jurisdictions decided similar cases under their own public records laws. The Complainant stated that the federal Freedom of Information Act ("FOIA") and New York's Freedom of Information Law ("FOIL") provide precedent on the disclosure of training manuals. The Complainant further averred that the U.S. Supreme Court has applied a general rule to exemptions contained within FOIA: "Exemptions do not apply to matters of genuine and significant public interest." *See Dep't of Air Force v. Rose*, 425 U.S. 352, 353 (1976).

The Complainant stated that in Applegate v. Fischer, 2011 N.Y. App. Div. LEXIS 8109 (November 2011), a New York court determined that under FOIL, an agency failed to prove a lawful denial of access to training manuals for a urinalysis machine because disclosure would not have endangered the life or safety of persons. Further, the Complainant stated that the court held that the agency could not demonstrate how disclosure would specifically impede its functions. The Complainant stated that in Stokes v. Brennan, 476 F.2d 699 (5<sup>th</sup> Cir. 1973), the US Court determined that under FOIA an Occupational Safety and Health Administration ("OSHA") training manual and other training materials were disclosable because they were administrative rather than law enforcement materials. The Complainant noted that the Court reasoned that disclosure of the manuals serves the goals of enforcement by encouraging knowledgeable and voluntary compliance with the law. *Id.* at 701. The Complainant also noted that federal courts are somewhat divided on the issue of training manual disclosures. *See Stokes*, 476 F.2d 699 (manual not exempt) and Hawkes v. IRS, 467 F.2d 787 (6<sup>th</sup> Cir. 1972)(IRS training manual not exempt)

compared to Caplan v. ATF, 587 F.2d (2<sup>nd</sup> Cir. 1978)(portions of manual exempt) and Hardy v. ATF, 631 F.2d 653 (9<sup>th</sup> Cir. 1980)(portions of manual pertaining to law enforcement exempt).

In closing, the Complainant contended that the public had a compelling interest in disclosure of the responsive records. The Complainant also reiterated that the Custodian failed to provide sufficient evidence that the responsive records fell under the qualified exemptions set forth in N.J.A.C. 13:1E-3.2(a). The Complainant asserted that the Custodian could alternatively disclose redacted copies of the responsive records and that the burden of proving a lawful denial should not shift to the Council through an *in camera* review.

## **Analysis**

### **Compliance**

At its April 28, 2015 meeting, the Council ordered the Custodian to submit nine (9) copies of the responsive Manual and supplemental CD for an *in camera* review. Further, the Council ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On April 29, 2015, 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 May 6, 2015.

On May 5, 2015, the fourth (4<sup>th</sup>) business day after receipt of the Council's Order, the Custodian provided nine (9) copies of the responsive records, as well as certified confirmation of compliance to the Executive Director.

Therefore, the Custodian complied with the Council's April 28, 2015 Interim Order because he responded in the prescribed time frame by providing nine (9) copies of the Manual and supplemental CD and simultaneously providing certified confirmation of compliance to the Executive Director.

### **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 provisions of [OPRA] shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to [OPRA]; any other statute; resolution of either or both Houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the

Governor; Executive Order of the Governor; Rules of Court; any federal law; federal regulation; or federal order.

N.J.S.A. 47:1A-9(a)

Additionally, the New Jersey Department of Law & Public Safety's ("LPS") regulations provide that:

[M]anuals, and training materials, that may reveal: the identity of a confidential informant, a confidential source, a citizen informant, or undercover personnel; or an agency's surveillance, security, tactical, investigative, or operational techniques, measures, or procedures, which, if disclosed, would create a risk to the safety of persons, property, electronic data, or software, or compromise an agency's ability to effectively conduct investigations;

...

[M]anuals, and training materials that may reveal: case or matter specific legal strategy or advice, attorney work product, attorney-client privileged material, or other privileged material.

N.J.A.C. 13:1E-3.2(a)2-3.

The GRC conducted an *in camera* examination on the Manual and supplemental CD. The Manual and supplemental CD act as a resource guide for prosecutors across the State and provides invaluable information on everything from performing school searches, setup and operation of various specialized units, and managing witnesses and confidential informants. The Manual and supplemental CD provide a vast array of resources, ranging from topics such as witness protection, handling bias crime incidents, and Megan's Law reporting. Additionally, the records delve into extremely sensitive investigative areas such as bias crime investigative techniques, treatment of juveniles in family crisis incidents, and homicide investigation tactics. In some sections, deputy attorney generals provide advice regarding prosecutorial procedures.

The Complainant argues in his letter brief, dated May 13, 2015, that the Custodian failed to provide sufficient evidence proving that disclosure of the records would compromise an agency's ability to conduct investigations or would violate the attorney work-product privilege. The GRC's *in camera* review confirmed the Custodian's May 5, 2015 certified confirmation of compliance that the responsive records were clearly exempt under LPS's regulations.

Further, the Complainant argued that the GRC should look to FOIA and FOIL because this complaint presented an issue of first impression. The Complainant provided several cases addressing the disclosure of training manuals and materials; however, the GRC does not find those cases on point. Specifically, in Applegate, 2011 N.Y. App. Div. LEXIS 8109, the record at issue was a training manual for use of a machine, which is misplaced to the facts here. The exemptions under review here also contain a broader array of qualifiers than the one in Applegate. As for the Court's decision in Stokes, 476 F.2d 699, OSHA was unable to prove that

their manual fell within a “law enforcement” exemption because it was deemed administrative in nature. That is certainly not the case here: DCJ composed the records at issue here expressly for prosecutors charged with investigating and trying individuals accused of committing crimes. The remaining cases address the “law enforcement” exemption present in FOIA and are not necessarily compelling here.

Finally, the Complainant urged the GRC to require disclosure because it was in the public’s interest and would likely encourage lawful conduct by the public. In support of this position, the Complainant cited to Stokes, 476 F.2d at 701, where the Court weighed whether the manual “affected the public and was subject to disclosure.” However, there is an important distinction between FOIA and OPRA. Specifically, FOIA, unlike OPRA, plainly requires disclosure of “administrative staff manuals and instructions to staff that affect a member of the public.” 5 U.S.C.A. § 552(a)(2). In contrast, the LPS regulation exempts such records from disclosure based on a number of qualifiers and does not even imply “that affect of a member of the public” is a threshold to overcome the qualifiers.

The GRC is thus satisfied that the responsive records are not subject to disclosure under OPRA. The Custodian lawfully denied access to the requested records because disclosure of same would “reveal . . . tactical, investigative, or operation techniques, measure and procedures,” which would “compromise an agency’s ability to effectively conduct investigations.” N.J.S.A. 47:1A-6; N.J.A.C. 13:1E-3.2(a)2.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council’s April 28, 2015, Interim Order because he responded in the prescribed time frame providing nine (9) copies of the Manual and supplemental CD and simultaneously provided certified confirmation of compliance to the Executive Director.
2. **The *In Camera* Examination set forth in the above table reveals the Custodian has lawfully denied access to, or redacted portions of, the records listed in the document index pursuant to N.J.S.A. 47:1A-6.**

Prepared By: Frank F. Caruso  
Communications Specialist/Resource Manager

September 22, 2016





State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
101 SOUTH BROAD STREET  
PO BOX 819  
TRENTON, NJ 08625-0819

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

CHARLES A. RICHMAN  
Acting Commissioner

INTERIM ORDER

April 28, 2015 Government Records Council Meeting

Naeem Akhtar  
Complainant

Complaint No. 2014-344

v.

New Jersey Department of Law & Public Safety,  
Division of Criminal Justice  
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. The GRC must conduct an *in camera* review of the Manual and a supplemental CD to determine the validity of the Custodian's assertion that same are exempt from disclosure pursuant to the New Jersey Department of Law & Public Safety's promulgated regulations. See Paff, 379 N.J. Super. at 346; N.J.S.A. 47:1A-9(a); N.J.A.C. 13:1E-3.2(a)2-3.
2. **The Custodian must deliver<sup>1</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 1 above), a document or redaction index,<sup>2</sup> as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,<sup>3</sup> 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.

<sup>1</sup> 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.

<sup>2</sup> The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

<sup>3</sup> "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 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 29, 2015**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Naeem Akhtar<sup>1</sup>  
Complainant**

**GRC Complaint No. 2014-344**

**v.**

**New Jersey Department of Law & Public Safety,  
Division of Criminal Justice<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Hardcopies via e-mail of the New Jersey Prosecutor’s Manual (“Manual”), published by the Division of Criminal Justice (“DCJ”).

**Custodian of Record:** Robert McGrath  
**Request Received by Custodian:** September 24, 2014  
**Response Made by Custodian:** October 3, 2014  
**GRC Complaint Received:** October 15, 2014

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

**Request and Response:**

On September 24, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian, seeking the above-mentioned records. On October 3, 2014, the Custodian responded in writing, denying access to the Manual and accompanying Reference Compact Disk (“CD”) under N.J.A.C. 13:1E-3.2(a)2 and N.J.A.C. 13:1E-3.2(a)3. The Custodian stated that the first regulation exempts access to manuals that may reveal tactical, investigative, or operational techniques, the disclosure of which may compromise the DCJ’s ability to conduct investigations. The Custodian stated that the second regulation exempts access to manuals that may reveal legal strategy, advice, or attorney work-product that is otherwise not subject to access under OPRA.

**Denial of Access Complaint:**

On October 15, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant argued that the Custodian failed to

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

<sup>2</sup> Represented by Deputy Attorney General Jennifer Stonerod.

<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.

Naeem Akhtar v. New Jersey Department of Law & Public Safety, Division of Criminal Justice, 2014-344 – Findings and Recommendations of the Executive Director

detail how disclosure of the Manual would compromise DCJ's ability to operate. Specifically, the Custodian did not indicate how the Manual would compromise legal strategy or reveal tactical strategy. The Complainant asserted that he wishes to see either a privilege log or the table of contents to ascertain the applicability of the cited exemptions.

#### Statement of Information:

On November 13, 2014, the Custodian filed a Statement of Information ("SOF"). The Custodian certified that he received the Complainant's OPRA request on September 24, 2014. The Custodian affirmed that he located the Manual and an accompanying Reference CD. The Custodian certified that he responded in writing on October 3, 2014, denying access to the Manual pursuant to DCJ regulations.

The Custodian affirmed that the cited regulations were promulgated by the New Jersey Department of Law & Public Safety ("DOL") and are applicable to all divisions and agencies within, to include DCJ. Further, the Custodian argued that his denial of access is consistent with the Appellate Division's suggestion that DOL "adopt the exemption" if it felt that nondisclosure of certain records was in the public interest. Slaughter v. NJ Dep't of Law & Pub. Safety, 413 N.J. Super. 544, 554-555 (App. Div. 2010). The Custodian also cited Vercammen v. NJ Dep't of Law & Pub. Safety, N.J. State Police, GRC Complaint No. 2010-57 (January 2012), where the Council upheld a denial of State Police training materials under N.J.A.C. 13:1E-3.2(a)2.

The Custodian contended that the Manual and Reference CD were exactly the type of records that DOL had in mind when promulgating its regulations. The Custodian asserted that the responsive records are a guide and sourcebook for prosecutors throughout the State, designed by and for law enforcement. The Custodian contended that the Manual and Reference CD provide the prosecutorial community with a source for programs and practices; it is not meant to be for public dissemination. The Custodian asserted that the Manual, written largely by attorneys, provides advice and guidance, the disclosure of which would compromise DCJ's ability to conduct investigations. Thus, the Custodian argued that he lawfully denied access to the responsive records under N.J.A.C. 13:1E-3.2(a)2 and N.J.A.C. 13:1E-3.2(a)3.<sup>4</sup>

### 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.

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<sup>4</sup> On January 11, 2015, the Complainant requested guidance on the appropriate procedural method for submitting additional legal analysis. The GRC responded on January 20, 2015, providing the Complainant until January 27, 2015, to submit additional analysis. To date, the GRC has not received any additional submissions. Naeem Akhtar v. New Jersey Department of Law & Public Safety, Division of Criminal Justice, 2014-344 – Findings and Recommendations of the Executive Director

In Paff, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the Council<sup>5</sup> that accepted the custodian's legal conclusion for the denial of access without further review. The Appellate Division noted 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 stated that:

[OPRA] 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 found 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.

In this matter, the Complainant sought access to the Manual published by DCJ. The Custodian identified the Manual and a supplemental CD but denied access to these records based on DOL's regulations at N.J.A.C. 13:1E-3.2(a)2-3, which exempt access to:

[M]anuals, and training materials, that may reveal: the identity of a confidential informant, a confidential source, a citizen informant, or undercover personnel; or an agency's surveillance, security, tactical, investigative, or operational techniques, measures, or procedures, which, if disclosed, would create a risk to the safety of persons, property, electronic data, or software, or compromise an agency's ability to effectively conduct investigations;

. . .

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<sup>5</sup> Paff v. NJ Dep't of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

Naeem Akhtar v. New Jersey Department of Law & Public Safety, Division of Criminal Justice, 2014-344 – Findings and Recommendations of the Executive Director

[M]anuals, and training materials that may reveal: case or matter specific legal strategy or advice, attorney work product, attorney-client privileged material, or other privileged material.

Id.

The Complainant filed this complaint arguing that the Custodian failed to prove how disclosure of the records would meet this condition. The Custodian noted in the SOI that the Council previously determined that certain training materials were exempt based on DOL's regulations. Additionally, the Custodian noted that the Manual, created by and for law enforcement, acts as a guidebook that prosecutors could use for guidance and advice. The Custodian argued that attorneys largely wrote the Manual.

The disclosability of the Manual and CD is a matter of first impression for the Council. Notwithstanding the Custodian's SOI arguments, there is not enough evidence in the record to support that disclosure of the Manual and CD would reveal techniques creating a risk to the elements identified in the regulation or reveal attorney work product and attorney-client privilege. Additionally, the Complainant's assertion of the Custodian's failure to prove how disclosure would meet these conditions is persuasive. However, because the Manual and CD have the potential to include sensitive information, the GRC has decided to exercise an abundance of caution before ordering disclosure.

Therefore, the GRC must conduct an *in camera* review of the Manual and a supplemental CD to determine the validity of the Custodian's assertion that same are exempt from disclosure pursuant to DOL's promulgated regulations. See Paff, 379 N.J. Super. at 346; N.J.S.A. 47:1A-9(a); N.J.A.C. 13:1E-3.2(a)2-3.

**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 GRC must conduct an *in camera* review of the Manual and a supplemental CD to determine the validity of the Custodian's assertion that same are exempt from disclosure pursuant to the New Jersey Department of Law & Public Safety's promulgated regulations. See Paff, 379 N.J. Super. at 346; N.J.S.A. 47:1A-9(a); N.J.A.C. 13:1E-3.2(a)2-3.

2. **The Custodian must deliver<sup>6</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 1 above), a document or redaction index,<sup>7</sup> as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,<sup>8</sup> 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.

Prepared By: Frank F. Caruso  
Communications Specialist/Resource Manager

Reviewed By: Joseph D. Glover  
Executive Director

April 21, 2015

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<sup>6</sup> 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.

<sup>7</sup> The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

<sup>8</sup> "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."

Naeem Akhtar v. New Jersey Department of Law & Public Safety, Division of Criminal Justice, 2014-344 – Findings and Recommendations of the Executive Director