



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
Commissioner

FINAL DECISION

May 23, 2017 Government Records Council Meeting

David Deegan
Complainant

Complaint No. 2015-233

v.

Township of Franklin (Gloucester)
Custodian of Record

At the May 23, 2017 public meeting, the Government Records Council (“Council”) considered the May 16, 2017 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 Executive Director respectfully recommends that the Council dismiss the complaint. The Complainant withdrew his complaint in a letter to the Honorable Elia A. Pelios, Administrative Law Judge, dated April 24, 2017. 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 23rd Day of May, 2017

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: May 30, 2017



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
May 23, 2017 Council Meeting**

**David Deegan¹
Complainant**

GRC Complaint No. 2015-233

v.

**Township of Franklin (Gloucester)²
Custodial Agency**

Records Relevant to Complaint: A copy of a memo regarding “Research and Draft Memo, Re: Termination of Municipal Clerk,” referenced on a bill from Weir and Partners, dated March 17, 2014. The date for services rendered was November 19, 2013.

Custodian of Record: Barbara Freijomil

Request Received by Custodian: July 16, 2015

Response Made by Custodian: July 18, 2015; July 20, 2015

GRC Complaint Received: July 24, 2015

Background

November 15, 2016 Council Meeting:

At its November 15, 2016 public meeting, the Council considered the November 9, 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, found that:

1. The Custodian did not comply with the Council’s October 3, 2016 Interim Order because she informed the GRC that she no longer possessed the record at issue. Absent an *in camera* review of the disputed record, the GRC is unable to determine whether the requested memo was, in fact, exempt under OPRA. This complaint should therefore be referred to the Office of Administrative Law to determine the facts of the case.
2. 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 Office of Administrative Law’s action.

¹ No legal representation listed on record.

² Currently represented by Stuart A. Platt, Esq. of Platt & Riso, P.C. (Stratford, NJ). Previously represented by John Eastlack, Esq. (Cherry Hill, NJ).

Procedural History:

On November 16, 2016, the Council distributed its Interim Order to all parties. On January 23, 2017, the Government Records Council (“GRC”) transmitted the complaint to the Office of Administrative Law (“OAL”).

On April 24, 2017, the Complainant faxed a letter to the Honorable Elia A. Pelios, Administrative Law Judge, requesting to withdraw his complaint. On May 2, 2017, OAL returned the complete file jacket to the GRC.

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends that the Council dismiss the complaint. The Complainant withdrew his complaint in a letter to the Honorable Elia A. Pelios, Administrative Law Judge, dated April 24, 2017. Therefore, no further adjudication is required.

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

May 16, 2017



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INTERIM ORDER

November 15, 2016 Government Records Council Meeting

David Deegan
Complainant

Complaint No. 2015-233

v.

Township of Franklin (Gloucester)
Custodian of Record

At the November 15, 2016 public meeting, the Government Records Council (“Council”) considered the November 9, 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 did not comply with the Council’s October 3, 2016 Interim Order because she informed the GRC that she no longer possessed the record at issue. Absent an *in camera* review of the disputed record, the GRC is unable to determine whether the requested memo was, in fact, exempt under OPRA. This complaint should therefore be referred to the Office of Administrative Law to determine the facts of the case.
2. 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 Office of Administrative Law’s action.

Interim Order Rendered by the
Government Records Council
On The 15th Day of November, 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: November 16, 2016



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
November 15, 2016 Council Meeting**

**David Deegan¹
Complainant**

GRC Complaint No. 2015-233

v.

**Township of Franklin (Gloucester)²
Custodial Agency**

Records Relevant to Complaint: A copy of a memo regarding “Research and Draft Memo, Re: Termination of Municipal Clerk,” referenced on a bill from Weir and Partners, dated March 17, 2014. The date for services rendered was November 19, 2013.

Custodian of Record: Barbara Freijomil

Request Received by Custodian: July 16, 2015

Response Made by Custodian: July 18, 2015; July 20, 2015

GRC Complaint Received: July 24, 2015

Background

September 29, 2016 Council Meeting:

At its September 29, 2016 public meeting, the Council considered the September 22, 2016 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 undisclosed record in order to validate the Custodian’s assertions that the memo withheld is, in fact, exempt from disclosure based on OPRA’s exemptions for attorney-client privilege.
2. **The Custodian must deliver³ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see #1 above), a document or redaction index⁴, as well as a legal certification from the Custodian, in accordance with**

¹ No legal representation listed on record.

² Represented by John Eastlack, Esq. (Cherry Hill, NJ).

³ 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.

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

N.J. Court Rule 1:4-4,⁵ 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 October 3, 2016, the Council distributed its Interim Order to all parties. On October 12, 2016, the Custodian's Counsel wrote to the GRC, seeking an extension of time to respond until October 14, 2016. The Custodian's Counsel explained that his staff had searched for the document at issue and was unable to find it in his firm's online system. He wrote that his assistant had thereafter requested the "2013/2014 hard files" to be retrieved from the firm's commercial storage facility.

On October 21, 2016, the Custodian wrote to the GRC, advising that she had received a call from the Custodian's Counsel's secretary that her firm had searched their archives and could not locate the record at issue. Custodian's Counsel's secretary further advised that the associate who had worked on the memo no longer worked for the firm.

Analysis

Compliance

At its September 29, 2016 meeting, the Council ordered the Custodian to provide nine (9) copies of the record at issue, a March 2014 memo, to the Council for *in camera* review and to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On October 3, 2016, 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 October 11, 2016.

Following receipt of the Interim Order, and a subsequent extension of time to respond, the Custodian wrote to the GRC on October 21, 2016, advising that she had received a phone call from the Counsel's secretary, who advised that her firm had "searched their archives and could not find any record of the document." She further noted that the "associate who did the work has left their firm."

Therefore, the Custodian did not comply with the Council's October 3, 2016 Interim Order because she informed the GRC that she no longer possessed the record at issue. Absent an *in camera* review of the disputed record, the GRC is unable to determine whether the requested memo was, in fact, exempt under OPRA. This complaint should therefore be referred to the Office of Administrative Law to determine the facts of the case.

⁵ "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."

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 Office of Administrative Law's action.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not comply with the Council's October 3, 2016 Interim Order because she informed the GRC that she no longer possessed the record at issue. Absent an *in camera* review of the disputed record, the GRC is unable to determine whether the requested memo was, in fact, exempt under OPRA. This complaint should therefore be referred to the Office of Administrative Law to determine the facts of the case.
2. 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 Office of Administrative Law's action.

Prepared By: Husna Kazmir
Staff Attorney

November 9, 2016



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CHRIS CHRISTIE
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CHARLES A. RICHMAN
Commissioner

INTERIM ORDER

September 29, 2016 Government Records Council Meeting

David Deegan
Complainant

Complaint No. 2015-233

v.

Township of Franklin (Gloucester)
Custodian of Record

At the September 29, 2016 public meeting, the Government Records Council (“Council”) considered the September 22, 2016 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. Without inspecting the withheld record, the GRC cannot conduct the “meaningful review of the basis for [the] agency’s decision to withhold government records” contemplated under OPRA. Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346, 354 (App. Div. 2005). Therefore, the GRC must conduct an *in camera* review of the undisclosed record in order to validate the Custodian’s assertions that the memo withheld is, in fact, exempt from disclosure based on OPRA’s exemptions for attorney-client privilege.
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 index², 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.”



Interim Order Rendered by the
Government Records Council
On The 29th 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 3, 2016

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**David Deegan¹
Complainant**

GRC Complaint No. 2015-233

v.

**Township of Franklin (Gloucester)²
Custodial Agency**

Records Relevant to Complaint: A copy of a memo regarding “Research and Draft Memo, Re: Termination of Municipal Clerk,” referenced on a bill from Weir and Partners, dated March 17, 2014. The date for services rendered was November 19, 2013.

Custodian of Record: Barbara Freijomil

Request Received by Custodian: July 16, 2015

Response Made by Custodian: July 18, 2015; July 20, 2015

GRC Complaint Received: July 24, 2015

Background³

Request and Response:

On July 16, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On July 18, 2015, the Custodian responded to the request in writing, denying the request and citing to the attorney-client privilege, “which is an exception to the OPRA law.”

On July 19, 2015, the Complainant replied, asserting that, according to his attorney, “there was no attorney-client relationship at the time the memo was produced.” The Complainant contended that Weir and Partners were not the counsel of record on November 19, 2013, and that Mr. William Ziegler of the Holston, MacDonald firm instead was the Township Solicitor in 2013. The Complainant also requested that the Custodian “tell Mr. Eastlack,” the Custodian’s Counsel, that the Complainant “was a seated committeeman at the time of the request and when he submitted his invoice for payment.” On July 20, 2015, Ms. Freijomil reiterated the denial.

¹ No legal representation listed on record.

² Represented by John Eastlack, Esq. (Cherry Hill, NJ).

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.

Denial of Access Complaint:

On July 23, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted no additional legal arguments, other than stating that the record denied was not attorney-client privileged because there “was no attorney/client relationship at the time the memo was produced.”

Statement of Information:

On August 6, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on July 16, 2015. The Custodian certified that she responded in writing on July 18, 2015, denying the request as it pertained to a document protected by the attorney-client privilege pursuant to N.J.S.A. 47:1A-3(b). The Custodian averred that the record denied consists of a memo drafted by Weir and Partners regarding the termination of the municipal clerk. The Custodian made no further legal arguments.

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.

In Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the GRC in which the GRC dismissed 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.

Paff, 379 N.J. Super. at 354.

The court also stated that:

The statute . . . 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 10:4-21, 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 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 the instant matter, the Complainant argues that the requested record was not attorney-client privileged at the time it was produced and is therefore disclosable. The Custodian asserted no other legal arguments, other than reiterating that the record is in fact attorney-client privileged and therefore exempt from disclosure.

Without inspecting the withheld record, the GRC cannot conduct the “meaningful review of the basis for [the] agency’s decision to withhold government records” contemplated under OPRA. Id. at 354. Therefore, the GRC must conduct an *in camera* review of the undisclosed record in order to validate the Custodian’s assertions that the memo withheld is, in fact, exempt from disclosure based on OPRA’s exemptions for attorney-client privilege.

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. Without inspecting the withheld record, the GRC cannot conduct the “meaningful review of the basis for [the] agency’s decision to withhold government records” contemplated under OPRA. Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346, 354 (App. Div. 2005). Therefore, the GRC must conduct an *in camera* review of the undisclosed record in order to validate the Custodian’s assertions that

the memo withheld is, in fact, exempt from disclosure based on OPRA's exemptions for attorney-client privilege.

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 index⁵, 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.

Prepared By: Husna Kazmir
Staff Attorney

September 22, 2016

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."