



State of New Jersey

DEPARTMENT OF COMMUNITY AFFAIRS
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Governor

TAHESHA L. WAY
Lieutenant Governor

JACQUELYN A. SUÁREZ
Acting Commissioner

INTERIM ORDER

November 8, 2023 Government Records Council Meeting

Stephen Schnitzer, Esq.
(o/b/o Vito's Trattoria, Inc.)

Complainant

v.

NJ Transit

Custodian of Record

Complaint No. 2016-140

At the November 8, 2023 public meeting, the Government Records Council ("Council") considered the October 31, 2023 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 portion of the Complainant's request seeking "documents" and "all discussed bid issues" is invalid. OPRA does not require the Custodian to perform the research necessary to locate responsive records. MAG Enm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Twp. of Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Assoc. v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); Feiler-Jampel v. Somerset Cnty. Prosecutor's Office, GRC Complaint No. 2007-190 (Interim Order dated March 26, 2008). Further, the portions of the Complainant's request seeking "communications" is invalid because they did not include all of the criteria required under Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010). See Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order dated May 24, 2011). Thus, the Custodian did not unlawfully deny access to the request seeking the aforementioned records. N.J.S.A. 47:1A-6.
2. With respect to draft RFPs and contracts, the Custodian did not unlawfully deny access to that portion of the Complainant's OPRA request. N.J.S.A. 47:1A-6. Such documents are protected from disclosure under the deliberative process privilege. N.J.S.A. 47:1A-1.1; Libertarians for Transparent Gov't v. Gov't Records Council, 453 N.J. Super. 83, 90-91 (App. Div.), cert. denied, 233 N.J. 484 (2018); O'Shea v. West Milford BOE, GRC Complaint No. 2004-93 (April 2006).
3. The GRC must conduct an *in camera* review of the redacted records to validate the Custodian's contention that they contain information protected by OPRA's competitive advantage exemption; confidential, trade secret, proprietary, commercial and financial

information exemption; and privacy interests exemption. See Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005) and N.J.S.A. 47:1A-1.1.

4. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion no. 3 above), nine (9) copies of the redacted records, a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 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 ten (10) business days from receipt of the Council's Interim Order.**
5. 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.
6. 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 8th Day of November 2023

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 9, 2023

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."

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 8, 2023 Council Meeting**

**Stephen Schnitzer, Esq.¹
(on Behalf of Vito's Trattoria, Inc.)
Complainant**

GRC Complaint No. 2016-140

v.

**New Jersey Transit²
Custodial Agency**

Records Relevant to Complaint:

“We request all documents in the possession of New Jersey Transit [“N.J. Transit”] of Greystone Properties within the stated period of time allowed by law pursuant to the Open Public Records Act (OPRA) concerning all bids made; all valuation of bids made for RFP 15-01 [“RFP”] and all amendments to it along with the original final and prior drafts of RFP 15-01 before it was let out for bid; all discussed bid issues with anyone; or any bidding party whether it be by [N.J. Transit] and/or Greystone Properties or anyone else since the time of the announcement of RFP 15-01 through the conclusion of the bid conclusions to date for a successful bid applicant for the leasehold property stated to be Space S Lease No. L0732-0865 or any other designated leasehold related to this RFP together with all bid responses in full. This information is sought in connection with a proposed bid protest hearing. I also wish to make sure that we get receive all communications and drafts of contracts including any final version with the deemed successful applicant and all rejections letters to all of the now prevailing bidders and any requests by them for a protest hearing.”

Custodian of Record: Whitman J. Portillo

Requests Received by Custodian: February 29, 2016

Response Made by Custodian: March 9, 2016; March 16, 2016

GRC Complaint Received: May 12, 2016

Background³

Request and Response:

On February 29, 2016, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On March 9, 2016, the Custodian

¹ The Complainant represents Vitto's Trattoria, Inc.

² Represented by Deputy Attorney Caroline Vachier.

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 Council Staff the submissions necessary and relevant for the adjudication of this complaint.

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sought an extension of time to respond to the Complainant's OPRA request until March 16, 2016. On March 16, 2016, the Custodian responded in writing, providing records to the Complainant. The Custodian stated that certain records were redacted to protect personal information in accordance with N.J.S.A. 47:1A-1.1. The Custodian further stated that other records were redacted or withheld from disclosure because they contained "proprietary commercial or financial information" and "information which, if disclosed, would give an advantage to competitors or bidders." N.J.S.A. 47:1A-1, N.J.S.A. 47:1A-1.1, and Executive Order No. 26 (McGreevey) ("E.O. 26").

Supplemental Responses:

On March 21, 2016, the Complainant replied to the Custodian via letter. The Complainant noted that the Custodian did not provide records from Greystone Properties ("Greystone") and omitted other records. The Complainant mentioned that those omitted records were needed to complete a formal protest application against an RFP reward.

Denial of Access Complaint:

On May 12, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that he submitted his OPRA request in response to his client's unsuccessful bid with N.J. Transit. The Complainant asserted that the Custodian's redactions were "excessive" and "incomplete," and that the explanations for redacting or withholding records were generic and missing a Vaughn Index.

The Complainant asserted that these documents were needed to file a bid protest against N.J. Transit. The Complainant contended that because the records were not provided in full, they were unable to file their protest within the March 21, 2016 deadline. Additionally, the Complainant asserted that they had been previously involved in a similar matter against N.J. Transit in Superior Court, Docket No. ESX-L-7887-15. The Complainant contended that this was evidence of obstruction and intentional non-disclosure on the part of N.J. Transit officials.

The Complainant requested that the GRC order production of the omitted records; enjoin and restrain N.J. Transit officials from interfering from the Complainant's OPRA rights; have a hearing to determine that a violation occurred and whether additional documentation requires disclosure; and that a knowing and willful determination be found against N.J. Transit and Interim Executive Director Dennis J. Martin, but not against the Custodian.

Statement of Information:⁴

On December 8, 2016, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on February 29, 2016. The Custodian certified that on March 9, 2016, he sought an extension of time to respond. The Custodian certified that he responded in writing on March 16, 2016, providing some records with redactions, and denying other records in full.

⁴ The Complaint was referred to mediation on June 6, 2016. The Complaint was referred back from mediation on November 4, 2016.
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The Custodian certified that the Complainant was under contract with N.J. Transit to operate a pizzeria at Newark Penn Station. The Custodian certified that on August 12, 2015, the Complainant was informed that an RFP would be issued for a new sublease for the pizzeria. The Custodian then certified that N.J. Transit informed the Complainant that it was not successful in winning the RFP on February 23, 2016, leading to the Complainant's OPRA request at issue.

The Custodian argued that he fulfilled the Complainant's OPRA request, providing responsive records. The Custodian argued that those records containing redactions were consistent with OPRA. The Custodian argued that any records withheld in full were because they did not exist or were exempt from disclosure as drafts or constituted "inter-agency or intra agency advisory, consultative or deliberative ("ACD") material." Paff v. Neptune Twp. Housing Auth., GRC Complaint No. 2011-174 (June 2012) (holding that "all these drafts, in their entirety, are reflective of the deliberative process") (quoting In re Amendments to N.J.A.C. 10A:23, 367 N.J. Super. 61, 75 (App. Div. 2004)). The Custodian also asserted that the Complainant's objections were meritless and are an attempt to stall the procurement process and other pending litigation between the parties.

Regarding the redactions, the Custodian asserted that they were made to prevent unfair competition amongst bidders and protect trade secrets. The Custodian argued that certain other redactions were made to protect privacy information. The Custodian included a Vaughn Index with his SOI.

The Custodian provided as an example that redactions were made to conceal floor plans submitted by other bidders, asserting that this information could give an unfair advantage to competitors if disclosed. N.J.S.A. 47:1A-1.1. The Custodian also stated that bidders' financial and background records were also redacted pursuant to N.J.S.A. 47:1A-1.1 and due to a reasonable expectation of privacy. The Custodian also noted that the contract award had not been finalized, as the award was under protest by the Complainant. The Custodian argued that disclosure without redaction would give the Complainant an unfair advantage, should its protest become successful and the RFP process needed to be restarted.

The Custodian noted that the Complainant's basis for requiring the records unredacted was immaterial as to whether such redactions are warranted, citing Spectraserv, Inc. v. Middlesex Cnty. Utilities Auth., 416 N.J. Super. 565 (App. Div. 2010). The Custodian asserted that the Complainant's ability to support its RFP protest should not be a factor in the GRC's determination as to whether the redactions were appropriate.

Regarding OPRA's trade secrets and proprietary commercial or financial information exemption and the unfair advantage to bidders exemption, the Custodian referenced Communication Workers of Am. v. Rousseau, 417 N.J. Super. 341 (App. Div. 2010). The Custodian noted that in that case, the Appellate Division held that "OPRA does not require an independent demonstration of confidentiality. Rather, under OPRA, if the document contains commercial or proprietary information it is not considered a government record and is not subject to disclosure." Id. at 358. The Custodian argued that bidders would be unwilling or unable to submit proposals to the State knowing that their confidential, financial, proprietary, and trade secret information may be disclosed to competitors.

The Custodian next argued that the portions of the Complainant's request seeking "all documents" in N.J. Transit's possession; records concerning "all discussed bid issues with anyone"; and "all communications and drafts of contracts" were properly denied as invalid. The Custodian cited MAG Enm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 539 (App. Div. 2005), where the court held that "OPRA does not countenance open-ended searches of an agency's files. The Custodian asserted that the Complainant expected him to engage in an expansive and exhaustive search for "any" records that would be responsive to the request, and thus lacked the specificity to be valid under OPRA.

Analysis

Validity of Request

The New Jersey Appellate Division has held that:

While OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records "readily accessible for inspection, copying, or examination."* N.J.S.A. 47:1A-1.

[MAG, 375 N.J. Super. at 534 (emphasis added).]

The Court reasoned that:

Most significantly, the request failed to identify with any specificity or particularity the governmental records sought. *MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past.* Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted.

[Id. at 549 (emphasis added).]

The court further held that "[u]nder OPRA, agencies are required to disclose only 'identifiable' government records not otherwise exempt In short, OPRA does not countenance open-ended searches of an agency's files." Id. at 549 (emphasis added). See also Bent v. Twp. of Stafford Police Dep't, 381 N.J. Super. 30, 38 (App. Div. 2005);⁵ N.J. Builders Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

⁵ Affirming Bent v. Stafford Police Dep't, GRC Complaint No. 2004-78 (October 2004). Stephen Schnitzer, Esq. (on Behalf of Vito's Trattoria, Inc.) v. N.J. Transit, 2016-140 – Findings and Recommendations of the Executive Director

Regarding generic requests for “records,” the request at issue in MAG sought “all documents or records evidencing that the ABC sought, obtained or ordered revocation of a liquor license for the charge of selling alcoholic beverages to an intoxicated person in which such person, after leaving the licensed premises, was involved in a fatal auto accident” and “all documents or records evidencing that the ABC sought, obtained or ordered suspension of a liquor license exceeding 45 days for charges of lewd or immoral activity.” 375 N.J. Super. at 539-40. The court noted that plaintiffs failed to include additional identifiers such as a case name or docket number. See also Steinhauer-Kula v. Twp. of Downe (Cumberland), GRC Complaint No. 2010-198 (March 2012) (holding that the complainant’s request item No. 2 seeking “[p]roof of submission” was invalid); Edwards v. Hous. Auth. of Plainfield (Union), GRC Complaint No. 2008-183 *et seq.* (April 2012) (accepting the Administrative Law Judge’s finding that a newspaper article attached to a subject OPRA request that was related to the records sought did not cure the deficiencies present in the request). Id. at 12-13.

Moreover, in Feiler-Jampel v. Somerset Cnty. Prosecutor’s Office, GRC Complaint No. 2007-190 (Interim Order dated March 26, 2008), the Council similarly held that a request seeking “[a]ny and all documents and evidence” relating to an investigation being conducted by the Somerset County Prosecutor’s Office was invalid, reasoning that:

[B]ecause the records requested comprise an entire SCPO file, the request is overbroad and of the nature of a blanket request for a class of various documents rather than a request for specific government records. Because OPRA does not require custodians to research files to discern which records may be responsive to a request, the Custodian had no legal duty to research the SCPO files to locate records potentially responsive to the Complainant’s request pursuant to the Superior Court’s decisions in [MAG], [Bent] and the Council’s decisions in [Asarnow, GRC 2006-24] and Morgano v. Essex Cnty. Prosecutor’s Office, GRC Complaint No. 2007-190 (February 2008).

[Id. See also Schulz v. NJ State Police, GRC Complaint No. 2014-390 (Interim Order dated July 28, 2015) (holding that the portion of the request seeking “all documents” was overly broad and thus invalid).]

Further, the GRC has established specific criteria deemed necessary under OPRA to request an e-mail communication. See Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010). The Council determined that, to be valid, such requests must contain: (1) the content and/or subject of the e-mail, (2) the specific date or range of dates during which the e-mail(s) were transmitted, and (3) the identity of the sender and/or the recipient thereof. See Elcavage, GRC 2009-07; see also Sandoval v. N.J. State Parole Bd., GRC Complaint No. 2006-167 (Interim Order March 28, 2007). The Council later applied the criteria set forth in Elcavage to other forms of correspondence, such as letters. See Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order dated May 24, 2011).

In the current matter, the request sought in part all “documents,” “all discussed bid issues with anyone,” and “communications” related to Greystone Properties and RFP 15-01. The

Custodian argued that these portions of the request were crafted to be a request for documents in civil discovery, and not for specifically identifiable records.

As to the portion of the request for “documents” and “discussed bid issues,” the GRC concurs with the Custodian in that these terms insufficiently identify the records sought. The Complainant did not specify which records he requested which “discussed bid issues with anyone.” Additionally, a search for “documents” would necessarily require the Custodian to research every record within the agency to determine whether it references the RFP at issue. MAG, 375 N.J. Super. 534; Steinhauer-Kula, GRC 2010-198.

Regarding the portions of the request seeking “communications,” the Complainant failed to include all required criteria as prescribed in Elcavage, GRC 2009-07 and Armenti, GRC 2009-154. Specifically, the request sought “all communications,” presumably related to the RFP, but no time period was identified.

Accordingly, the portion of the Complainant’s request seeking “documents” and “all discussed bid issues” is invalid. OPRA does not require the Custodian to perform the research necessary to locate responsive records. MAG, 375 N.J. Super. at 546; Bent, 381 N.J. Super. at 37; N.J. Builders, 390 N.J. Super. at 180; Schuler, GRC 2007-151; Feiler-Jampel, GRC 2007-190. Further, the portions of the Complainant’s request seeking “communications” is invalid because they did not include all of the criteria required under Elcavage. See Armenti, GRC 2009-154. Thus, the Custodian did not unlawfully deny access to the request seeking the aforementioned records. N.J.S.A. 47:1A-6.

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.

Draft RFPs/Contracts

OPRA excludes from the definition of a government record “inter-agency or intra-agency advisory, consultative or deliberative material.” N.J.S.A. 47:1A-1.1. It is evident that this phrase is intended to exclude from the definition of a government record the types of documents that are the subject of the “deliberative process privilege.”

In O’Shea v. West Milford BOE, GRC Complaint No. 2004-93 (April 2006), the Council stated that:

[N]either the statute nor the courts have defined the terms ... “advisory, consultative, or deliberative” in the context of the public records law. The Council looks to an analogous concept, the deliberative process privilege, for guidance in the implementation of OPRA’s ACD exemption. Both the ACD exemption and the

deliberative process privilege enable a governmental entity to shield from disclosure material that is pre-decisional and deliberative in nature. Deliberative material contains opinions, recommendations, or advice about agency policies. In Re the Liquidation of Integrity Ins. Co., 165 N.J. 75, 88 (2000); In re Readoption With Amendments of Death Penalty Regulations, 182 N.J. 149 (App. Div. 2004).

In Libertarians for Transparent Gov't v. Gov't Records Council, 453 N.J. Super. 83 (App. Div.), certif. denied, 233 N.J. 484 (2018), the Appellate Division discussed the deliberative process privilege at length regarding a request for draft meeting minutes, stating:

The applicability of the deliberative process privilege is government by a two-prong test. The judge must determine both that a document is (1) “pre-decisional,” meaning it was “generated before the adoption of an agency’s police or decision;” and (2) deliberative, in that it “contain[s] opinions, recommendations, or advice about agency policies.” [Educ. Law Ctr. v. Dep’t of Educ., 198 N.J. at 276 (quoting Integrity, 165 N.J. at 83)]. If a document stratifies both prongs, it is exempt from disclosure under OPRA pursuant to the deliberative process privilege.

Regarding the first prong, the court stated that “a draft is not a final document. It has been prepared for another person or persons’ editing and eventual approval.” Id. at 90. Therefore, the court held that by their very nature, draft meeting minutes are pre-decisional since they are subject to revision and not yet approved for public release. Id. at 90-91.

Regarding the second prong, the court held that “the document must be shown to be closely related to the ‘the formulation or exercise of . . . policy-oriented judgment or [to] the process by which policy is formulated.’” [Ciesla v. N.J. Dep’t of Health & Sr. Servs., 429 N.J. Super. 127, 138 (App. Div. 2012) (quoting McGee v. Twp. of E. Amwell, 416 N.J. Super. 602, 619-20 (App. Div. 2010)). Id. at 91. The court found that the requested draft minutes, as compiled by the writer in attendance at the meeting, were subject to additions, suggestions, and other edits from the members of the public body. Id. Thus, the draft minutes satisfied the second prong of the test. Id. at 92.

Here, the Complainant explicitly sought “drafts” of the RFP at issue as well as draft contracts with the successful bidder. Therefore, the requested records satisfy the first prong of the test. Libertarians, 453 N.J. Super. at 90. As to the second prong, draft RFPs and contracts can be subject to change by N.J. Transit. Furthermore, such documents and their revisions invariably reflect upon N.J. Transit’s public policy deliberations when crafting an RFP and executing an agreement with a vendor. Therefore, draft RFPs and contracts satisfy the second prong of the test. Id. at 91.

Therefore, with respect to draft RFPs and contracts, the Custodian did not unlawfully deny access to that portion of the Complainant’s OPRA request. N.J.S.A. 47:1A-6. Such documents are protected from disclosure under the deliberative process privilege. N.J.S.A. 47:1A-1.1; Libertarians, 453 N.J. Super. at 90-91; O’Shea, GRC 2004-93.

Redacted Records

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 Council⁶ 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 the instant matter, the Custodian argued that the redactions within the records provided to the Complainant were made to protect trade secrets and proprietary information and/or information that would provide an unfair advantage to bidders. See N.J.S.A. 47:1A-1.1. The Custodian also stated that some of the redactions were made under the privacy interest exemption. Id. Without inspecting the withheld records, and in light of the Custodian's burden to prove a lawful denial of access, the GRC cannot conduct the "meaningful review of the basis for an agency's decision to withhold government records" contemplated under OPRA. Paff, 379 N.J. Super. at 354.

Accordingly, the GRC must conduct an *in camera* review of the redacted records to validate the Custodian's contention that they contain information protected by OPRA's

⁶ Paff v. NJ Dep't of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).
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competitive advantage exemption; confidential, trade secret, proprietary, commercial and financial information exemption; and privacy interests exemption. See Paff, 379 N.J. Super. at 346 and N.J.S.A. 47:1A-1.1.

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. The portion of the Complainant's request seeking "documents" and "all discussed bid issues" is invalid. OPRA does not require the Custodian to perform the research necessary to locate responsive records. MAG Enm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Twp. of Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Assoc. v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); Feiler-Jampel v. Somerset Cnty. Prosecutor's Office, GRC Complaint No. 2007-190 (Interim Order dated March 26, 2008). Further, the portions of the Complainant's request seeking "communications" is invalid because they did not include all of the criteria required under Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010). See Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order dated May 24, 2011). Thus, the Custodian did not unlawfully deny access to the request seeking the aforementioned records. N.J.S.A. 47:1A-6.
2. With respect to draft RFPs and contracts, the Custodian did not unlawfully deny access to that portion of the Complainant's OPRA request. N.J.S.A. 47:1A-6. Such documents are protected from disclosure under the deliberative process privilege. N.J.S.A. 47:1A-1.1; Libertarians for Transparent Gov't v. Gov't Records Council, 453 N.J. Super. 83, 90-91 (App. Div.), certif. denied, 233 N.J. 484 (2018); O'Shea v. West Milford BOE, GRC Complaint No. 2004-93 (April 2006).
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4. **The Custodian must deliver⁷ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion no. 3 above), nine (9) copies of the redacted records, a document or redaction index⁸, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,⁹ 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 ten (10) business days from receipt of the Council's Interim Order.**
5. 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.
6. 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: Samuel A. Rosado
Staff Attorney

October 31, 2023¹⁰

⁷ 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.

⁸ The document or redaction index should identify the record, and/or each redaction asserted and the lawful basis for the denial.

⁹ "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."

¹⁰ This complaint was prepared for adjudication since the Council's February 26, 2019 meeting, but could not be adjudicated due to lack of quorum.

Stephen Schnitzer, Esq. (on Behalf of Vito's Trattoria, Inc.) v. N.J. Transit, 2016-140 – Findings and Recommendations of the Executive Director