



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

February 27, 2018 Government Records Council Meeting

Luis Rodriguez
Complainant

Complaint No. 2016-40

v.

Kean University
Custodian of Record

At the February 27, 2018 public meeting, the Government Records Council (“Council”) considered the February 20, 2018 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 January 30, 2018 Interim Order because she responded in the prescribed time frame disclosing the responsive e-mails to the Complainant in accordance with the *In Camera* Examination. Further, the Custodian simultaneously provided certified confirmation of compliance to the GRC.
2. Although Custodian unlawfully denied access to certain portions of the responsive e-mails, she timely complied with both the Council’s Interim Orders. Further, the Custodian lawfully denied access to portions of four (4) of the e-mails. 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 actions do 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 27th Day of February, 2018

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: March 2, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Council Staff
February 27, 2018 Council Meeting**

**Luis Rodriguez¹
Complainant**

GRC Complaint No. 2016-40

v.

**Kean University²
Custodial Agency**

Records Relevant to Complaint: A copy of any and/or all correspondence between Felice Vasquez, Special Counsel to the President and VP, and Laura Haelig and/or Meaghan Lenahan on the September OPRA request [Complainant] submitted to Kean. The request concerned Senator Lesniak's trip to China.

Custodian of Record: Laura Barkley-Haelig

Request Received by Custodian: November 2, 2015

Response Made by Custodian: November 12, 2015; November 25, 2015

GRC Complaint Received: February 3, 2016

Background

January 30, 2018 Council Meeting:

At its January 30, 2018, public meeting, the Council considered the January 23, 2018 *In Camera* 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 complied with the Council's March 28, 2017 Interim Order because she responded in the extended time frame supplying nine (9) copies of the redacted and unredacted e-mails at issue here for an *in camera* review, a document index, and simultaneously provided certified confirmation of compliance to the Executive Director.
2. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order and**

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Jennifer McGruther.

simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.³

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 February 1, 2018, the Council distributed its Interim Order to all parties. On February 8, 2018, the Custodian responded to the Council's Interim Order. Therein, the Custodian certified that she was providing the Complainant those e-mails required to be disclosed in accordance with the Council's *In Camera* Examination.

Analysis

Compliance

At its January 30, 2018 meeting, the Council ordered the Custodian to comply with its *In Camera* Examination findings and to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On February 1, 2018, 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 February 8, 2018.

On February 8, 2018, the fifth (5th) business day after receipt of the Council's Order, the Custodian disclosed e-mails to the Complainant in accordance with the *In Camera* Examination Findings. The Custodian also submitted certified confirmation of compliance to the Government Records Council ("GRC").

Therefore, the Custodian complied with the Council's January 30, 2018 Interim Order because she responded in the prescribed time frame disclosing the responsive e-mails to the Complainant in accordance with the *In Camera* Examination. Further, the Custodian simultaneously provided certified confirmation of compliance to the GRC.

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],

³ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

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 Custodian unlawfully denied access to certain portions of the responsive e-mails, she timely complied with both the Council’s Interim Orders. Further, the Custodian lawfully denied access to portions of four (4) of the e-mails. 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 actions do 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 Council Staff respectfully recommends the Council find that:

1. The Custodian complied with the Council’s January 30, 2018 Interim Order because she responded in the prescribed time frame disclosing the responsive e-mails to the Complainant in accordance with the *In Camera* Examination. Further, the Custodian simultaneously provided certified confirmation of compliance to the GRC.
2. Although Custodian unlawfully denied access to certain portions of the responsive e-mails, she timely complied with both the Council’s Interim Orders. Further, the Custodian lawfully denied access to portions of four (4) of the e-mails. 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 actions do 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
Communications Specialist/Resource Manager

February 20, 2018



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

January 30, 2018 Government Records Council Meeting

Luis Rodriguez
Complainant

Complaint No. 2016-40

v.

Kean University
Custodian of Record

At the January 30, 2018 public meeting, the Government Records Council (“Council”) considered the January 23, 2018 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 March 28, 2017 Interim Order because she responded in the extended time frame supplying nine (9) copies of the redacted and unredacted e-mails at issue here for an *in camera* review, a document index, and simultaneously provided certified confirmation of compliance to the Executive Director.
2. **On the basis of the Council’s determination in this matter, the Custodian shall comply with the Council’s Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.¹**
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 Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.



Interim Order Rendered by the
Government Records Council
On The 30th Day of January, 2018

Robin Berg Tabakin, Esq., Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: February 1, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Council Staff
January 30, 2018 Council Meeting**

**Luis Rodriguez¹
Complainant**

GRC Complaint No. 2016-40

v.

**Kean University²
Custodial Agency**

Records Relevant to Complaint: A copy of any and/or all correspondence between Felice Vasquez, Special Counsel to the President and VP, and Laura Haelig and/or Meaghan Lenahan on the September OPRA request [Complainant] submitted to Kean. The request concerned Senator Lesniak's trip to China.

Custodian of Record: Laura Barkley-Haelig

Request Received by Custodian: November 2, 2015

Response Made by Custodian: November 12, 2015; November 25, 2015

GRC Complaint Received: February 3, 2016

Records Submitted for *In Camera* Examination: Twelve (12) e-mails between the Custodian, Ms. Vasquez, and Ms. Lenahan.

Background

March 28, 2017 Council Meeting:

At its March 28, 2017 public meeting, the Council considered the March 21, 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, found that:

1. The GRC must conduct an *in camera* review of the redacted records in order to validate the Custodian's assertions that the redacted documents are, in fact, exempt from disclosure based on OPRA's exemptions for attorney-client privileged and ACD material, pursuant to N.J.S.A. 47:1A-1.1.
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**

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Jennifer McGruther.

index⁴, as well as a legal certification from the Custodian, in accordance with 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 March 30, 2017, the Council distributed its Interim Order to all parties on. On April 6, 2017, Custodian's Counsel sought an extension of time until April 13, 2017, which the Government Records Council ("GRC") granted.

On the same day, the Complainant e-mailed Custodian's Counsel disputing that the content of the responsive e-mails were exempt as attorney-client privilege. The Complainant argued that Ms. Vazquez's role as "Special Counsel to the President" did not reflect that she served as Kean's legal counsel. The Complainant asserted that Kean's position here insinuates that any communications with a public employee possessing a juris doctor ("JD") is privileged regardless of the capacity within which they are employed. The Complainant asserted that such an insinuation would decrease transparency under OPRA.

On April 13, 2017, the Custodian responded to the Council's Interim Order. Therein, the Custodian provided nine (9) copies of the redacted and unredacted e-mails at issue here for an *in camera* review and a document index. The Custodian also simultaneously provided certified confirmation of compliance to the Executive Director.

Custodian's Counsel also included a letter brief. Therein, Counsel argued that many of the redactions were protected under the attorney-client privilege because they related to obtaining legal advice. Hedden v. Kean Univ., 434 N.J. Super. 1, 11 (App. Div. 2013). Counsel averred that Ms. Vasquez, a Kean lawyer, counseled the Custodian as part of her duties. Counsel also asserted that the communications regarding the appropriate response to unrelated OPRA requests were exempt as inter-agency or intra-agency advisory, consultative, or deliberative ("ACD") material. N.J.S.A. 47:1A-1.1. Counsel thus requested that the GRC uphold the Custodian's redactions.

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.

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."

Analysis

Compliance

At its March 28, 2017 meeting, the Council ordered the Custodian to provide nine (9) copies of the redacted and unredacted e-mails at issue here for an *in camera* review and a document index. Further, the Council ordered the Custodian to simultaneously provide certified confirmation of compliance to the Executive Director. On March 30, 2017, 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 April 6, 2017.

On April 6, 2017, the fifth (5th) business day after receipt of the Council's Order, Custodian's Counsel sought an extension until April 13, 2017 to comply with the Order, which the GRC granted. On April 13, 2017, the Custodian responded to the Council's Order. Therein, the Custodian provided nine (9) copies of both the redacted and unredacted e-mails at issue here and a document index. Further, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.

Therefore, the Custodian complied with the Council's March 28, 2017 Interim Order because she responded in the extended time frame supplying nine (9) copies of the redacted and unredacted e-mails at issue here for an *in camera* review, a document index, and simultaneously provided 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 a "government record" shall not include "any record within the attorney-client privilege." N.J.S.A. 47:1A-1.1 (emphasis added). To assert attorney-client privilege, a party must show that there was a confidential communication between lawyer and client in the course of that relationship and in professional confidence. N.J.R.E. 504(1). Such communications are only those "which the client either expressly made confidential or which [one] could reasonably assume under the circumstances would be understood by the attorney to be so intended." State v. Schubert, 235 N.J. Super. 212, 221 (App. Div. 1989). However, merely showing that "the communication was from client to attorney does not suffice, but the circumstances indicating the intention of secrecy must appear." Id. at 220-21.

In the context of public entities, the attorney-client privilege extends to communications between the public body, the attorney retained to represent it, necessary intermediaries and agents through whom communications are conveyed, and co-litigants who have employed a lawyer to act for them in a common interest. *See* Tractenberg v. Twp. Of W. Orange, 416 N.J.

Super. 354, 376 (App. Div. 2010); In re Env'tl. Ins. Declaratory Judgment Actions, 259 N.J. Super. 308, 313 (App. Div. 1992).

Further, OPRA provides that the definition of a government record “shall not include . . . inter-agency or intra-agency advisory, consultative, or deliberative [(“ACD”)] material.” When the exception is invoked, a governmental entity may “withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated.” Educ. Law Center v. N.J. Dep't of Educ., 198 N.J. 274, 285 (2009)(*citing* NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975)). The New Jersey Supreme Court has also ruled that a record that contains or involves factual components is entitled to deliberative-process protection under the exemption in OPRA when it was used in decision-making process *and* its disclosure would reveal deliberations that occurred during that process. Educ. Law Ctr., 198 N.J. 274.

The custodian claiming an exception to the disclosure requirements under OPRA on this basis must initially satisfy two conditions: 1) the document must be pre-decisional, meaning that the document was generated prior to the adoption of the governmental entity's policy or decision; and 2) the document must reflect the deliberative process, which means that it must contain opinions, recommendations, or advice about agency policies. Id. at 286 (internal citations and quotations omitted). The key factor in this determination is whether the contents of the document reflect “formulation or exercise of . . . policy-oriented judgment or the process by which policy is formulated.” Id. at 295 (adopting the federal standard for determining whether material is “deliberative” and *quoting* Mapother v. Dep't of Justice, 3 F.3d 1533, 1539 (D.C. Cir. 1993)). Once the governmental entity satisfies these two threshold requirements, a presumption of confidentiality is established, which the requester may rebut by showing that the need for the materials overrides the government's interest in confidentiality. Id. at 286-87.

As a threshold issue, the Complainant disputed that Ms. Vasquez position as “Special Counsel to the President” did not prove she was serving as legal counsel for Kean. The Complainant asserted that to accept Kean’s position would render any communication to and from an employee with a JD exempt under the attorney-client privilege. Conversely, Kean has maintained that the responsive e-mails contained attorney-client privileged information because Ms. Vasquez was providing legal advice to the Custodian as part of her job duties. This echoed the Custodian’s SOI statement that Ms. Vasquez was hired by Kean as an attorney to provide legal advice to Kean’s employees.

The GRC finds that there is sufficient evidence in the record to prove that Ms. Vasquez was hired in her capacity as an attorney to provide legal advice to other employees. Specifically, her job title “Special Counsel to the President” coupled with the presence of “Esq.” is particularly supportive of Kean’s position. Of course, as with any attorney-client relationship, only those communications in which legal advice is sought or dispensed would be exempt under the attorney-client privilege. However, it is clear here that Ms. Vasquez’s position called for her to act akin to an “in-house counsel.” Further, the Complainant’s allegation that viewing Ms. Vasquez in this light would decrease transparency is specious. For these reasons, the GRC will perform the *in camera* review taking into account both the attorney-client privilege and ACD arguments the Custodian asserted in her denial of access.

The GRC conducted an *in camera* examination on the submitted record. The results of this examination are set forth in the following table:

Record No.	Record Name/Date	Description of Redaction	Custodian's Explanation/ Citation for Redactions	Findings of the <i>In Camera</i> Examination ⁶
1.	E-mail from Ms. Lenahan to Ms. Vasquez, cc'ing the Custodian, dated October 8, 2015 (1:58 p.m.)	Follow-up on "requested legal advice" and discussion on appropriate response to an OPRA request.	Attorney-client privilege and ACD material. <u>N.J.S.A.</u> 47:1A-1.1	<p>The body of the e-mail contains Ms. Lenahan's request for direction regarding an OPRA request response.</p> <p>From an attorney-client privilege standpoint, there is no indication that Ms. Lenahan's e-mail constituted a response to a request for "legal advice." For this reason, the GRC is not satisfied that the content can reasonably be construed as attorney-client privileged. However, the ACD exemption does apply to the redacted content. Specifically, Ms. Lenahan sought direction from Ms. Vasquez prior to formulating a response to an OPRA request. Further, her request for direction included her opinions of what she assumed the response would be based on a prior meeting. The content thus meets that two-prong ACD test and the Custodian lawfully denied</p>

⁶ **Unless expressly identified for redaction, everything in the record shall be disclosed.** For purposes of identifying redactions, unless otherwise noted a paragraph/new paragraph begins whenever there is an indentation and/or a skipped space(s). The paragraphs are to be counted starting with the first whole paragraph in each record and continuing sequentially through the end of the record. If a record is subdivided with topic headings, renumbering of paragraphs will commence under each new topic heading. Sentences are to be counted in sequential order throughout each paragraph in each record. Each new paragraph will begin with a new sentence number. If only a portion of a sentence is to be redacted, the word in the sentence which the redaction follows or precedes, as the case may be, will be identified and set off in quotation marks. If there is any question as to the location and/or extent of the redaction, the GRC should be contacted for clarification before the record is redacted. The GRC recommends the redactor make a paper copy of the original record and manually "black out" the information on the copy with a dark colored marker, then provide a copy of the blacked-out record to the requester.

				access here. <u>N.J.S.A.</u> 47:1A-6.
2.	E-mail from Ms. Lenahan to Ms. Vazquez, cc'ing the Custodian, dated September 29, 2015 (9:56 a.m.) Note: Item Nos. 3, 4, 5, and 6 included in e-mail chain.	Conclusion of attempts to schedule a meeting.	Attorney-client privilege and ACD material. <u>N.J.S.A.</u> 47:1A-1.1	The body of this e-mail contains the parties' attempt to reschedule a meeting. The content of the e-mail does not include any information that can be reasonably construed as legal advice or ACD material. Thus, the Custodian unlawfully denied access to the body of this e-mail. <u>N.J.S.A.</u> 47:1A-6.
3.	E-mail from Ms. Lenahan to Ms. Vazquez, cc'ing the Custodian, dated September 29, 2015 (9:53 a.m.) Note: Item Nos. 2, 4, 5, and 6 included in e-mail chain.	Discussion of attempt to schedule a meeting	Attorney-client privilege and ACD material. <u>N.J.S.A.</u> 47:1A-1.1	The body of this e-mail contains the parties' attempt to reschedule a meeting. The content of the e-mail does not include any information that can be reasonably construed as legal advice or ACD material. Thus, the Custodian unlawfully denied access to the body of this e-mail. <u>N.J.S.A.</u> 47:1A-6.
4.	E-mail from Ms. Vazquez to Ms. Lenahan, cc'ing the Custodian, dated September 29, 2015 (9:44 a.m.) Note: Item Nos. 2, 3, 5, and 6 included in e-mail chain.	Discussion of attempt to schedule a meeting.	Attorney-client privilege and ACD material. <u>N.J.S.A.</u> 47:1A-1.1	The body of this e-mail contains the parties' attempt to reschedule a meeting. The content of the e-mail does not include any information that can be reasonably construed as legal advice or ACD material. Thus, the Custodian unlawfully denied access to the body of this e-mail. <u>N.J.S.A.</u> 47:1A-6.
5.	E-mail from Ms. Lenahan to Ms. Vazquez, cc'ing the Custodian, dated September 29, 2015 (9:06 a.m.)	Discussion of attempt to schedule a meeting, inclusive of a personal scheduling conflict.	Personal privacy interest, attorney-client privilege and ACD material. <u>N.J.S.A.</u> 47:1A-1;	The body of this e-mail contains the parties' attempt to reschedule a meeting. With respect to the personal privacy interest, the GRC is satisfied that the Custodian lawfully redacted the portion of the 1 st sentence from "I" to the end.

	Note: Item Nos. 2, 3, 4, and 6 included in e-mail chain.		<u>N.J.S.A.</u> 47:1A-1.1	<u>N.J.S.A.</u> 47:1A-1. Thus, the Custodian lawfully denied access to this portion of the e-mail body. The remainder of the content of the e-mail does not include any information that can be reasonably construed as legal advice or ACD material. Thus, the Custodian unlawfully denied access to the non-exempt portion of this e-mail body. N.J.S.A. 47:1A-6.
6.	E-mail from Ms. Lenahan to Ms. Vazquez, cc'ing the Custodian, dated September 28, 2015 (8:23 p.m.). The <i>in camera</i> packet included a duplicate, stand-alone copy of this e-mail. Note: Item Nos. 2, 3, 4, and 5 included in e-mail chain.	Discussion of attempt to schedule a meeting.	Attorney-client privilege and ACD material. <u>N.J.S.A.</u> 47:1A-1.1	The body of this e-mail contains the parties' attempt to reschedule a meeting. The content of the e-mail does not include any information that can be reasonably construed as legal advice or ACD material. Thus, the Custodian unlawfully denied access to the body of this e-mail. N.J.S.A. 47:1A-6.
7.	E-mail from the Custodian to Ms. Vazquez, cc'ing Ms. Lenahan, dated September 28, 2015 (10:27 a.m.). Note: Item No. 8 included in e-mail chain.	The Custodian states "Yes."	Attorney-client privilege and ACD material. <u>N.J.S.A.</u> 47:1A-1.1	The body of this e-mail contains the parties' attempt to schedule a meeting. The content of the e-mail does not include any information that can be reasonably construed as legal advice or ACD material. Thus, the Custodian unlawfully denied access to the body of this e-mail. N.J.S.A. 47:1A-6.

8.	<p>E-mail from Ms. Vazquez to the Custodian, cc'ing Ms. Lenahan, dated September 28, 2015 (10:24 a.m.)</p> <p>Note: Item No. 7 included in e-mail chain.</p>	Discussion of an attempt to schedule a meeting.	Attorney-client privilege. <u>N.J.S.A.</u> 47:1A-1.1	The body of this e-mail contains the parties' attempt to schedule a meeting. The content of the e-mail does not include any information that can be reasonably construed as legal advice or ACD material. Thus, the Custodian unlawfully denied access to the body of this e-mail. <u>N.J.S.A.</u> 47:1A-6.
9.	<p>E-mail from the Custodian to Ms. Vazquez, cc'ing Ms. Lenahan, dated September 28, 2015 (10:09 a.m.)</p> <p>The <i>in camera</i> packet included two (2) duplicate, stand-alone copies of this e-mail.</p> <p>Note: Item No. 8 included in e-mail chain.</p>	The Custodian advised Ms. Vasquez of a recent Denial of Access Complaint filing and alerted her to an upcoming meeting.	Attorney-client privilege. <u>N.J.S.A.</u> 47:1A-1.1	The body of the e-mail contains a statement regarding a recently filed complaint and that a meeting would be occurring later in the week. The content of the e-mail does not include any information that can be reasonably construed as legal advice or ACD material. Thus, the Custodian unlawfully denied access to the body of this e-mail. <u>N.J.S.A.</u> 47:1A-6.
10.	<p>E-mail from Ms. Vazquez to Ms. Lenahan, cc'ing the Custodian, dated September 25, 2015 (3:41 p.m.)</p> <p>Note: Item No. 11 included in e-mail chain.</p>	Discussion of an attempt to schedule a meeting.	Attorney-client privilege. <u>N.J.S.A.</u> 47:1A-1.1	The body of this e-mail contains the parties' attempt to reschedule a meeting. The content of the e-mail does not include any information that can be reasonably construed as legal advice or ACD material. Thus, the Custodian unlawfully denied access to the body of this e-mail. <u>N.J.S.A.</u> 47:1A-6.
11.	E-mail from Ms. Lenahan to Ms. Vazquez, cc'ing the Custodian, dated September 25, 2015 (2:03 p.m.)	E-mail attachment names and discussion of an attempt to schedule a meeting Re:	Attorney-client privilege and ACD material. <u>N.J.S.A.</u> 47:1A-1.1	The body of the e-mail is comprised of two (2) paragraphs. Paragraph 1 contains the parties attempts to meet regarding several OPRA requests. The

	<p>The <i>in camera</i> packet included a duplicate, stand-alone copy of this e-mail.</p> <p>Note: Item No. 10 included in e-mail chain.</p>	OPRA requests.		<p>paragraph is non-specific as to those exact requests being discussed. Further, the paragraph does not appear to actively seek legal advice. Further, as with the prior e-mails regarding meeting schedules, the paragraph does not elicit any ACD material. Thus, the Custodian unlawfully denied access to paragraph No. 1 of this e-mail. <u>N.J.S.A. 47:1A-6.</u></p> <p>Paragraph 2 contains a list of specific topics that Ms. Lenahan wished to discuss and noted that she attached documents (also redacted from e-mail) for Ms. Vasquez's reference. This paragraph (and accompanying attachments) can be reasonably construed to be seeking legal advice on the topics identified. Thus, the Custodian lawfully denied access to paragraph 2 of the e-mail body (and accompanying attachment names). <u>N.J.S.A. 47:1A-6.</u></p>
12.	E-mail from Ms. Lenahan to Ms. Vazquez, cc'ing the Custodian, dated September 11, 2015 (12:11 p.m.)	E-mail attachment names and discussion of pending OPRA requests.	Attorney-client privilege and ACD material. <u>N.J.S.A. 47:1A-1.1</u>	<p>The body of the e-mail is comprised of three (3) paragraphs.</p> <p>Paragraph 1 contains a request to Ms. Vasquez to provide legal advice regarding certain OPRA requests. Paragraph 2 contains Ms. Lenahan's request for additional advice on other pending OPRA requests. Multiple attachments to the e-mail identifying the exact OPRA requests were redacted as well. These paragraphs (and</p>

				<p>accompanying attachments) can be reasonably construed as a request for legal advice regarding specific pending OPRA requests. Thus, the Custodian lawfully denied access to paragraphs 1 and 2 of the e-mail body (and accompanying attachment names). <u>N.J.S.A. 47:1A-6.</u></p> <p>Paragraph 3 is a one (1) sentence suggesting future interaction, if required. This paragraph does not include any information that can be reasonably construed as legal advice or ACD material. Thus, the Custodian unlawfully denied access to paragraph 3 of this e-mail. N.J.S.A. 47:1A-6.</p>
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Accordingly, the Custodian unlawfully denied access to a portion of the requested redactions, and lawfully denied access to other portions. N.J.S.A. 47:1A-1.1. The Custodian shall thus comply with the findings of the *In Camera* Examination set forth in the above table.

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 Council Staff respectfully recommends the Council find that:

1. The Custodian complied with the Council’s March 28, 2017 Interim Order because she responded in the extended time frame supplying nine (9) copies of the redacted and unredacted e-mails at issue here for an *in camera* review, a document index, and simultaneously provided certified confirmation of compliance to the Executive Director.
2. **On the basis of the Council’s determination in this matter, the Custodian shall comply with the Council’s Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order and**

simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.⁷

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

January 23, 2018

⁷ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.



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

INTERIM ORDER

March 28, 2017 Government Records Council Meeting

Luis Rodriguez
Complainant

Complaint No. 2016-40

v.

Kean University
Custodian of Record

At the March 28, 2017 public meeting, the Government Records Council ("Council") considered the March 21, 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:

1. The GRC must conduct an *in camera* review of the redacted records in order to validate the Custodian's assertions that the redacted documents are, in fact, exempt from disclosure based on OPRA's exemptions for attorney-client privileged and ACD material, pursuant to N.J.S.A. 47:1A-1.1.
2. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see #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 28th Day of March, 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: March 30, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
March 28, 2017 Council Meeting**

**Luis Rodriguez¹
Complainant**

GRC Complaint No. 2016-40

v.

**Kean University²
Custodial Agency**

Records Relevant to Complaint: A copy of any and/or all correspondence between Felice Vasquez, Special Counsel to the President and VP, and Laura Haelig and/or Meaghan Lenahan on the September OPRA request [Complainant] submitted to Kean. The request concerned Senator Lesniak’s trip to China.

Custodian of Record: Laura Barkley-Haelig

Request Received by Custodian: November 2, 2015

Response Made by Custodian: November 12, 2015; November 25, 2015

GRC Complaint Received: February 3, 2016

Background³

Request and Response:

On November 2, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. Later that same day, the Complainant wrote to the Custodian with a revision to his original request, adding that the request was submitted on August 2, 2015, and that he sought correspondence from that date to the present.

On November 12, 2015, the Custodian responded in writing, advising that she was in receipt of the request and informing the Complainant that she required an extension of time, until November 25, 2015, to process the request appropriately. On November 25, 2015, the Custodian responded in writing, disclosing fifteen (15) pages of responsive records, with redactions made pursuant to N.J.S.A. 47:1A-1.1(1); N.J.S.A. 47:1A-1.1(7); and N.J.S.A. 47:1A-1.

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Jennifer McGruther.

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 February 2, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian had failed to provide a Vaughn Index with her response and that she provided no other information on the grounds for each redaction. He noted that according to the GRC Custodian’s Handbook, such an index is required, because custodians are required to identify a legal basis for each redaction.

The Complainant also argued that, given the circumstances of his request, the Custodian’s invocation of OPRA’s attorney-client privilege exemption is inappropriate. He noted that his request sought documents related to a separate complaint filed with the GRC, which at the time of this Complaint, had yet to be decided. He therefore argued that Ms. Vasquez “can not” be an attorney offering advice to a client because she is “an active participant in the complaint.” He contended that this “disqualifies her from serving any privileged role in her communications with the Custodian.”

Statement of Information:

On March 4, 2016, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on November 2, 2015. She averred that she forwarded the request to Felice Vasquez on November 4, 2015, in order to identify potentially responsive records. She certified that she reviewed her files to collect any responsive correspondence and simultaneously directed Meaghan Lenahan to do the same.

The Custodian certified that she responded in writing on November 12, 2015, advising that she was in receipt of the request and informing the Complainant that she required an extension of time, until November 25, 2015, to process the request appropriately. She certified that when all documents were collected, her office reviewed them for responsiveness and redactions to protect privileged information and other pending matters related and unrelated to OPRA. She certified that she responded in writing on November 25, 2015, disclosing fifteen (15) pages of responsive records with redactions made pursuant to N.J.S.A. 47:1A-1.1(1); N.J.S.A. 47-1A-1.1(7); and N.J.S.A. 47-1A-1.

The Custodian’s Counsel argued that the Custodian did not unlawfully deny access to records because the Complainant sought communications between a University attorney and the Custodian. The Custodian’s Counsel argued that OPRA expressly exempts any record within the attorney-client privilege and therefore such records are “beyond OPRA’s reach.” Paff v. Div. of Law, 412 N.J. Super. 140, 150-51 (App. Div).

The Custodian’s Counsel argued that the Complainant’s request clearly identified one of the participants in the requested communications as a University lawyer, given that he identified “Felice Vasquez, Special Counsel to the President.” Counsel noted that Ms. Vasquez is employed as a lawyer by Kean University, her client. Counsel further noted that the Custodian, an authorized representative of the University, is also a client, whose communications seeking legal advice from in-house counsel would therefore be protected. Counsel argued that the redacted communications occurred exclusively between the University’s Special Counsel and the

Custodian and that such communications between lawyer and client are “presumed to have been made in professional confidence unless knowingly made within the hearing of some person whose presence nullified the privilege.” N.J.S.A. 2A:84A-20(3); N.J.R.E. Rule 504(3).

Counsel further noted that OPRA exempts “inter-agency or intra-agency advisory, consultative, or deliberative material.” N.J.S.A. 47:1A-1.1. Counsel argued that this exemption encompasses the common law deliberative process privilege and therefore extends to decision-making communications between agency employees. Educ. Law Ctr. v. N.J. Dep’t of Educ., 198 N.J. 274, 284 (2009).

She asserted that the deliberative process privilege additionally shields documents or communications that are pre-decisional and deliberative, and that pre-decisional records are those that are generated “before the adoption of an agency’s policy or decision.” In re Liquidation of Integrity Ins. Co., 165 N.J. 75, 83-84 (2000). She argued that the requested communications fell within this category, as the records addressed certain OPRA requests and the University’s formulation of a response to those requests. She contended that the discussions were therefore pre-decisional, deliberative, and not subject to disclosure.

She also stated that the redacted communications contained a statement of personal information not subject to disclosure, noting that OPRA also prohibits disclosure of a citizen’s personal information when “disclosure thereof would violate the citizen’s reasonable expectation of privacy.” N.J.S.A. 47:1A-1.

The Custodian’s Counsel finally argued that the Custodian was not required to provide a Vaughn Index because the Appellate Division had previously determined that a Vaughn Index “is used in circumstances where it is evident that some of the documents may not in fact be privileged.” Paff v. Div. of Law, 412 N.J. Super. 140, 161 (App. Div). She contended that the communications at issue are exclusively between lawyer and client, who are also fellow agency employees. She argued that here, the Complainant knows the date, time, subject matter, sender(s) and recipient(s) of the requested records “because they are responsive to his OPRA request” and therefore a Vaughn Index “was not necessary.” She thereafter argued that the Custodian properly responded to the Complainant’s OPRA request and did not unlawfully deny access to government records.

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, which 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.

Here, the Custodian has argued that the responsive e-mails provided to the Complainant were redacted pursuant to N.J.S.A. 47:1A-1.1, as inter-agency or intra-agency advisory, consultative, or deliberative ("ACD") material and attorney-client privileged material. 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. Id. at 354.

Therefore, the GRC must conduct an *in camera* review of the redacted records in order to validate the Custodian's assertions that the redacted documents are, in fact, exempt from

disclosure based on OPRA's exemptions for attorney-client privileged and ACD material, pursuant to 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.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The GRC must conduct an *in camera* review of the redacted records in order to validate the Custodian's assertions that the redacted documents are, in fact, exempt from disclosure based on OPRA's exemptions for attorney-client privileged and ACD material, pursuant to N.J.S.A. 47:1A-1.1.
2. **The Custodian must deliver⁴ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see #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

March 21, 2017

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."