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LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

February 26, 2020 Government Records Council Meeting

Michael Hootstein
Complainant

Complaint No. 2018-203

v.

NJ Institute of Technology
Custodian of Record

At the February 26, 2020 public meeting, the Government Records Council (“Council”) considered the February 19, 2020 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 e-mails sought in the Complainant’s August 12, 2018 OPRA request were personal communications and not “government records” subject to disclosure under OPRA. N.J.S.A. 47:1A-1.1; Carter v. Franklin Fire Dist. No. 1, 2018 N.J. Super. Unpub. LEXIS 2189 (App. Div. 2018). Thus, the Custodian lawfully denied access to those e-mails identified as responsive to the subject OPRA request. N.J.S.A. 47:1A-6.

Final Decision Rendered by the
Government Records Council
On The 26th Day of February 2020

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 3, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 26, 2020 Council Meeting**

**Michael Hootstein¹
Complainant**

GRC Complaint No. 2018-203

v.

**N.J. Institute of Technology²
Custodial Agency**

Records Relevant to Complaint: Copies of e-mails “sent/from/cc/bcc” Dr. J. Britt Holbrook’s account including those “sent/from/cc/bcc” Dr. Yanna Lambrinidou’s e-mail address, as well as inclusive of the terms “Marc,” “Edwards,” and “Flint” between January 1, and August 13, 2018.

Custodian of Record: Clara Williams
Request Received by Custodian: August 13, 2018
Response Made by Custodian: August 17, 2018
GRC Complaint Received: September 11, 2018

Background³

Request and Response:

On August 12, 2018, a Sunday, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On August 17, 2018, the Custodian responded in writing extending the response time frame through September 7, 2018 due to the potential for voluminous responsive records. On the same day, the Complainant agreed to the extension.

On September 6, 2018, the Custodian responded in writing denying access to the Complainant’s OPRA request on the basis that the records located constituted personal communications and not “government records” as defined under OPRA. N.J.S.A. 47:1A-1.1; Lewen v. Robbinsville Pub. Sch. Dist. (Mercer), GRC Complaint No. 2008-211 (February 2011) (citing Howell Educ. Ass'n MEA/NEA v. Howell Bd. of Educ., 789 N.W.2d 495 (2010) and others); Litowitz v. N.J. Dep’t of Trans., GRC Complaint No. 2015-301 (Interim Order dated May 22, 2018).

¹ No legal representation listed on record.

² Represented by Gary Potters, Esq., of Potters & Della Pietra, LLP (Fairfield, 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 September 11, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that, based upon information and belief, Dr. Holbrook accused Dr. Marc Edwards of unethical behavior in research relating to Flint, Michigan. The Complainant asserted that Dr. Holbrook made these allegations in the course of his official business and through his N.J. Institute of Technology (“NJIT”) e-mail account. The Complainant noted that Dr. Holbrook’s allegations were referred to the American Association for the Advancement of Science (“AAAS”) and that Dr. Holbrook discussed his allegations with Dr. Lambrinidou.

The Complainant asserted that based on the forgoing, he submitted an OPRA request seeking access to relevant e-mails. The Complainant averred that after extending the time frame, the Custodian denied access to his OPRA request. The Complainant disputed the denial, requesting that the GRC require disclosure of all responsive e-mails within “Dr. . . . Holbrook’s NJIT government e-mail account.

Statement of Information:⁴

On February 21, 2019, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on August 13, 2018. The Custodian certified that her search included forwarding the OPRA request to Associate Provost and Chief Information Officer David Ullman for review. The Custodian averred that Mr. Ullman and Database Administrator Devin Batra conducted a search based on the criteria set forth in the subject OPRA request. The Custodian certified that on August 14, 2018, Mr. Batra provided her a zip file containing 2,101 pages of e-mails. The Custodian certified that due to the extensive nature of her review, she responded in writing on August 17, 2018 extending the time frame to respond through September 7, 2018.

The Custodian affirmed that she reviewed the e-mails and received legal advice from NJIT’s legal counsel. The Custodian averred that she determined that the e-mails were personal in nature, as opposed to within the scope of Dr. Holbrook’s official business as an NJIT professor. The Custodian certified that she thus responded in writing on September 6, 2018 denying the Complainant’s OPRA request because those records located were not “government records” under OPRA.

The Custodian argued that she lawfully denied access to the subject OPRA request because the located records were not “government records” for purposes of OPRA. The Custodian stated that OPRA defines a “government record” as, among other things, “information stored or maintained electronically . . . that has been made, maintained, or kept on file . . . or that has been received *in the course of* . . . official business.” N.J.S.A. 47:1A-1.1 (emphasis in original). The Custodian asserted that OPRA does not include the terms “personal business” or “any business” within that definition.

⁴ On October 4, 2018, this complaint was referred to mediation. On January 31, 2019, this complaint was referred back to the GRC for adjudication.

The Custodian argued that Carter v. Franklin Fire Dist. No. 1, 2018 N.J. Super. Unpub. LEXIS 2189 (App. Div. 2018)⁵ is instructive in the instant complaint. The Custodian stated that there, appellant sought e-mails involving political action committee (“PAC”) activity and argued that same should have been disclosed because they were on the District’s server. The Custodian stated that the Appellate Division disagreed, holding that the definition of a “government record” did not include records that became the District’s “property” by virtue of an internal policy. Id. at 14-15 (citing Bart v. Paterson Hous. Auth., 403 N.J. Super. 609, 617 (App. Div. 2008)). The Custodian also noted that other states have similarly found that personal e-mails within a public agency’s server are not subject to disclosure under public record laws. See State v. City of Clearwater, 863 So.2d 149 (2003); Denver Publishing Co. v. Cnty. of Arapahoe, 121 P.3d 190 (2005); Schill v. Wisconsin Rapids Sch. Dist., 327 Wis.2d 572 (2010); Tiberino v. Spokane Cnty., 103 Wash.App. 680 (2000); Howell Ed. Ass’n v. Howell Bd. of Educ., 287 Mich.App. 288 (2010)

The Custodian contended that the court’s decision in Carter, 2018 N.J. Super. Unpub. LEXIS 2189 supports that not every e-mail stored or maintained on a public server is subject to access under OPRA. The Custodian argued that the Carter recognized that employees may engage in innocuous, personal e-mails not otherwise pertaining to their official business. Id. at 14. The Custodian argued that the court’s ruling applied here: the e-mails at issue, although relative Dr. Holbrook’s field of “scholarly interest,” were sent in his personal capacity. The Custodian further asserted that the e-mails “did not relate to any research project, paper[,] or other authorized work performed by Dr. Holbrook under the auspices of NJIT.” The Custodian thus argued that the responsive e-mails were not defined as “government records” subject to disclosure under OPRA. See also Lewen, GRC 2008-211; Litowitz, GRC 2015-301.

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 Carter, 2018 N.J. Super. Unpub. LEXIS 2189, the complainant appealed the Council’s decision finding that Political Action Committee (“PAC”) e-mails housed on the District’s server were not “government records” subject to disclosure. See Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-318 (September 2016). The complainant argued that the Council erred in deciding that the requested e-mails were not “government records” for several reasons. Among them, the complainant argued that the Council failed to consider a resolution stating that the District’s usage policy converted the requested e-mails into “government records.” The court disagreed and affirmed the Council’s decision, reasoning that:

The definition of “government record” does not include every document that by virtue of a public agency's computer use policy becomes the agency's property

⁵ On appeal from Carter v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2011-318 (September 2016).

because it is stored or maintained on the agency's computer network . . . An employee of a public agency may use a government email account to send an innocuous, personal email, which in no way pertains to the agency's "official business." It would be an overreach to suggest that such an email is subject to disclosure under OPRA just because it was sent or received on a public entity's computer network. The email must first fall within the definition of a "government record," which limits the disclosure to emails made, maintained, or kept in the course of the public agency's or public officer's "official business."

[Id. at 13-14.]

In the matter before the Council, the Complainant sought access to e-mails between Dr. Holbrook and Dr. Lambrinidou with certain keywords over an identifiable period of time. After review of the 2,101 pages of potentially responsive records, the Custodian denied access stating that the e-mails constituted personal communications and not "government records" as defined under OPRA. The instant complaint followed, wherein the Complainant requested that the GRC require NJIT to disclose all e-mails within "Dr. . . . Holbrook's . . . government e-mail account." In the SOI, the Custodian maintained that the e-mails in question were not "government records." The Custodian argued that although the e-mails in question may have pertained to Dr. Holbrook's field of "scholarly interest," they were personal and in no way connected to his position with NJIT. The Custodian cited Carter in support of her position, as well as multiple decisions from the GRC and other states' court decisions on the issue. The Custodian also included in her SOI an exhaustive document index providing details of each e-mail chain she reviewed.

The GRC is persuaded that the Custodian lawfully denied access to the responsive e-mails based on its review of the document index, case law concerning the issue of personal communications within a government e-mail account, and the arguments of the parties here. The e-mail descriptions paint a picture of Dr. Holbrook's involvement in the Edwards issue not as a member of NJIT, but as a member of AAAS. See Dr. Holbrook's Curriculum Vitae (August 2015).⁶ Further, there does not appear to be any direct link between the Edwards issue and Dr. Holbrook's position as an Associate Professor in NJIT's Department of Humanities.⁷ Thus, it is clear that any e-mails between Dr. Holbrook and Dr. Lambrinidou did not take place within the scope of Dr. Holbrook's "official [NJIT] business." N.J.S.A. 47:1A-1.1. The sole fact that Dr. Holbrook sent these e-mails through his "government e-mail account" does not convert them into "government records" disclosable under OPRA. Such a holding is consistent with Carter, 2018 N.J. Super. Unpub LEXIS 2189.

Accordingly, the e-mails sought in the Complainant's August 12, 2018 OPRA request were personal communications and not "government records" subject to disclosure under OPRA. N.J.S.A. 47:1A-1.1; Carter, 2018 N.J. Super. Unpub. LEXIS 2189. Thus, the Custodian lawfully denied access to those e-mails identified as responsive to the subject OPRA request. N.J.S.A. 47:1A-6.

⁶ njit.academia.edu/JPBrittHolbrook/CurriculumVitae (accessed February 13, 2020).

⁷ <https://humanities.njit.edu/people> (accessed February 13, 2020).

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the e-mails sought in the Complainant's August 12, 2018 OPRA request were personal communications and not "government records" subject to disclosure under OPRA. N.J.S.A. 47:1A-1.1; Carter v. Franklin Fire Dist. No. 1, 2018 N.J. Super. Unpub. LEXIS 2189 (App. Div. 2018). Thus, the Custodian lawfully denied access to those e-mails identified as responsive to the subject OPRA request. N.J.S.A. 47:1A-6.

Prepared By: Frank F. Caruso
Executive Director

February 19, 2020