



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

FINAL DECISION

February 23, 2021 Government Records Council Meeting

Christopher C. McFarland
Complainant

Complaint No. 2018-289

v.

NJ Institute of Technology
Custodian of Record

At the February 23, 2021 public meeting, the Government Records Council (“Council”) considered the February 16, 2021 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 26, 2021 Interim Order because she responded in the prescribed time frame providing the responsive e-mails with redactions as set forth in the Council’s Order. The Custodian also simultaneously provided certified confirmation of compliance to the Executive Director.
2. Although the Custodian unlawfully denied access to portions of the responsive e-mails, she lawfully denied access to all remaining records that existed. N.J.S.A. 47:1A-6. Further, the Custodian lawfully denied access to the portion of the Complainant’s request seeking “any and all records” because same is invalid. 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 23rd Day of February 2021

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 25, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
February 23, 2021 Council Meeting**

**Christopher C. McFarland¹
Complainant**

GRC Complaint No. 2018-289

v.

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

Records Relevant to Complaint: Electronic or hard copies of “any and all records” regarding the Complainant’s “interviews and determination for suitability for the position of Laboratory Manager” that took place on April 24, and July 12, 2018, including “any and all. . . communications, meeting minutes, [and] notes . . .” New Jersey Institute of Technology (“NJIT”) used.

Custodian of Record: Clara B. Williams

Request Received by Custodian: November 5, 2018

Response Made by Custodian: November 7, 2018

GRC Complaint Received: November 26, 2018

Background

January 26, 2021 Council Meeting:

At its January 26, 2021 public meeting, the Council considered the January 19, 2021 *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 November 10, 2020 Interim Order because she responded in the prescribed time frame providing sufficient copies of the responsive e-mail chains for *in camera* review. Further, the Custodian 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. Further, the**

¹ No legal representation listed on record.

² Represented by Danielle-Ann Thomas, Esq. (Newark, NJ).

Custodian shall simultaneously deliver³ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁴ to the Executive Director.⁵

3. The Custodian must disclose all other portions of the responsive e-mails to the Complainant (*i.e.*, sender, recipients, date, time, subject, and salutations where applicable). This disclosure should take into account that the July 6, 2018 e-mail should be disclosed with only the website link redacted per the *In Camera* Examination table above. As to those portions of the responsive e-mail chains, the Custodian has unlawfully denied access. See Ray v. Freedom Acad. Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010).
4. **The Custodian shall comply with conclusion No. 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver⁶ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Executive Director.**
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.

Procedural History:

On January 27, 2021, the Council distributed its Interim Order to all parties. On January 29, 2021, the Custodian e-mailed the Complainant those e-mails reviewed *in camera* with redactions as ordered by the Council. On the same day, the Custodian responded to the Council's Interim Order. Therein, the Custodian certified that she received the Council's Order on January 27, 2021. The Custodian certified that on this day, she e-mailed to the Complainant redacted copies of the e-mails with redactions as set forth in the Order. The Custodian affirmed that she also included a document index as part of that disclosure.⁷

³ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

⁴ "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."

⁵ 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.

⁶ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

⁷ At the request of the GRC, the Custodian submitted an amended certification to the GRC on February 3, 2021 after the Complainant identified a typographical error in the original.

Analysis

Compliance

At its January 26, 2021 meeting, the Council ordered the Custodian to disclose the responsive e-mails to the Complainant in accordance with the Council's *In Camera* Examination Findings. The Council also ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Executive Director. On January 27, 2021 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 3, 2021.

On January 29, 2021, the second (2nd) business day after receipt of the Council's Order, the Custodian e-mailed the Complainant copies of the responsive e-mails with redactions as set forth in the Order and a document index. On the same day, the Custodian submitted certified confirmation of compliance to the Executive Director. Thus, the evidence supports that the Custodian complied with the Council's Order.

Therefore, the Custodian complied with the Council's January 26, 2021 Interim Order because she responded in the prescribed time frame providing the responsive e-mails with redactions as set forth in the Council's Order. The Custodian also simultaneously provided certified confirmation of compliance to the Executive Director.

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], 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 the Custodian unlawfully denied access to portions of the responsive e-mails, she lawfully denied access to all remaining records that existed. N.J.S.A. 47:1A-6. Further, the Custodian lawfully denied access to the portion of the Complainant's request seeking "any and all records" because same is invalid. 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 Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's January 26, 2021 Interim Order because she responded in the prescribed time frame providing the responsive e-mails with redactions as set forth in the Council's Order. The Custodian also simultaneously provided certified confirmation of compliance to the Executive Director.
2. Although the Custodian unlawfully denied access to portions of the responsive e-mails, she lawfully denied access to all remaining records that existed. N.J.S.A. 47:1A-6. Further, the Custodian lawfully denied access to the portion of the Complainant's request seeking "any and all records" because same is invalid. 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
Executive Director

February 16, 2021



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 26, 2021 Government Records Council Meeting

Christopher C. McFarland
Complainant

Complaint No. 2018-289

v.

NJ Institute of Technology
Custodian of Record

At the January 26, 2021 public meeting, the Government Records Council (“Council”) considered the January 19, 2021 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 November 10, 2020 Interim Order because she responded in the prescribed time frame providing sufficient copies of the responsive e-mail chains for *in camera* review. Further, the Custodian 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. Further, the Custodian shall simultaneously deliver¹ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,² to the Executive Director.³**
3. The Custodian must disclose all other portions of the responsive e-mails to the Complainant (*i.e.*, sender, recipients, date, time, subject, and salutations where applicable). This disclosure should take into account that the July 6, 2018 e-mail should be disclosed with only the website link redacted per the *In Camera* Examination table above. As to those portions of the responsive e-mail chains, the Custodian has unlawfully denied access. See Ray v. Freedom Acad. Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010).

¹ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

² "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."

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.

4. **The Custodian shall comply with conclusion No. 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver⁴ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Executive Director.**
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.

Interim Order Rendered by the
Government Records Council
On The 26th Day of January 2021

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: January 27, 2021

⁴ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
January 26, 2021 Council Meeting**

**Christopher C. McFarland¹
Complainant**

GRC Complaint No. 2018-289

v.

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

Records Relevant to Complaint: Electronic or hard copies of “any and all records” regarding the Complainant’s “interviews and determination for suitability for the position of Laboratory Manager” that took place on April 24, and July 12, 2018, including “any and all. . . communications, meeting minutes, [and] notes . . .” New Jersey Institute of Technology (“NJIT”) used.

Custodian of Record: Clara B. Williams
Request Received by Custodian: November 5, 2018
Response Made by Custodian: November 7, 2018
GRC Complaint Received: November 26, 2018

Records Submitted for *In Camera* Examination: Two (2) e-mail chains dated May 1, 2018 and July 6 - 12, 2018.

Background

November 10, 2020 Council Meeting:

At its November 10, 2020 public meeting, the Council considered the October 27, 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, found that:

1. The portion of the Complainant’s request seeking “any and all records” relating to his interview for the Laboratory Manager position is invalid because it failed to identify a specific record. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005); 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); Feiler-Jampel v. Somerset Cnty. Prosecutor’s Office, GRC Complaint

¹ No legal representation listed on record.

² Represented by Danielle-Ann Thomas, Esq. (Newark, NJ).

No. 2007-190 (Interim Order dated March 26, 2008). Thus, the Custodian lawfully denied access to this portion of the request. N.J.S.A. 47:1A-6.

2. The responsive candidate score sheet and interviewer notes are exempt from disclosure under the “inter-agency or intra-agency advisory, consultative, or deliberative [(“ACD”)] material” exemption. N.J.S.A. 47:1A-1.1; Educ. Law Ctr. v. N.J. Dep’t of Educ., 198 N.J. 274 (App. Div. 2009); Vandy v. Burlington Co. Bd. of Social Serv., GRC Complaint No. 2016-319 (Interim Order dated November 13, 2018). For this reason, the Custodian lawfully denied access to same. N.J.S.A. 47:1A-6.
3. The GRC must conduct an *in camera* review of the May 1, and July 12, 2018 chain e-mails (and any applicable attachments) responsive to the Complainant’s OPRA request to determine the validity of the Custodian’s assertion that the e-mails were exempt as “inter-agency or intra-agency advisory, consultative, or deliberative material” exemption under OPRA. N.J.S.A. 47:1A-1.1. See Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).
4. **The Custodian shall deliver³ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 3 above), a document or redaction index⁴, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 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.**
5. The Custodian lawfully denied the Complainant access to the responsive e-mails he sent and received from the New Jersey Institute of Technology because disclosure of same to him “does not advance the purpose of OPRA . . .” Caggiano v. N.J. Office of the Governor, GRC Complaint No. 2014-408 (Final Decision dated July 25, 2016) (citing Bart v. City of Paterson Hous. Auth. 403 N.J. Super. 609, 618 (App. Div. 2008); N.J.S.A. 47:1A-6).
6. 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 November 12, 2020, the Council distributed its Interim Order to all parties. On November 13, 2020, the Custodian responded to the Council’s Interim Order. Therein, the

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 the GRC physically receives them 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."

Custodian certified that she was providing nine (9) copies of the required e-mails for an *in camera* review. The Custodian noted that these e-mails include discussions of the candidates' attributes and qualifications and are exempt from disclosure as ACD material. Sooy v. N.J. Dep't of Corr., GRC Complaint No. 2006-128 (October 2006).

Analysis

Compliance

At its November 10, 2020 meeting, the Council ordered the Custodian to provide for *in camera* review nine (9) copies of a May 1, 2018 and July 6 - 12, 2018 e-mail chain. The Council further ordered the Custodian to simultaneously deliver certified confirmation of compliance, in accordance with R. 1:4-4, to the Executive Director. On November 12, 2020, 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 November 19, 2020.

On November 13, 2020, the first (1st) business day after receipt of the Council's Order, the Custodian responded providing the Government Records Council ("GRC") nine (9) copies of the e-mail chains for an *in camera* review. The Custodian also provided certified confirmation of compliance to the Executive Director. Based on the forgoing, the GRC is satisfied that the Custodian properly complied with the Council's Order.

Therefore, the Custodian complied with the Council's November 10, 2020 Interim Order because she responded in the prescribed time frame providing sufficient copies of the responsive e-mail chains for *in camera* review. Further, the Custodian 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 the definition of a government record "shall not include . . . [(ACD) material." N.J.S.A. 47:1A-1.1. 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, 198 N.J. at 285 (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.

A custodian claiming an exception to the disclosure requirements under OPRA on that 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.

The Council is permitted to raise additional defenses regarding the disclosure of records pursuant to *Paff v. Twp. of Plainsboro*, 2007 N.J. Super. Unpub. LEXIS 2135 (App. Div. 2007) (certif. denied 193 N.J. 292 (2007)).⁶ In *Paff*, the complainant challenged the GRC's authority to uphold a denial of access for reasons never raised by the custodian. Specifically, the Council did not uphold the basis for the redactions cited by the custodian. The Council, on its own initiative, determined that the Open Public Meetings Act prohibited the disclosure of the redacted portions to the requested executive session minutes. The Council affirmed the custodian's denial to portions of the executive session minutes but for reasons other than those cited by the custodian. The complainant argued that the GRC did not have the authority to do anything other than determine whether the custodian's cited basis for denial was lawful. The Court held that:

The GRC has an independent obligation to “render a decision as to whether the record which is the subject of the complaint is a government record which must be made available for public access pursuant to’ OPRA . . . The GRC is not limited to assessing the correctness of the reasons given for the custodian's initial determination; it is charged with determining if the initial decision was correct.”

The Court further stated that:

Aside from the clear statutory mandate to decide if OPRA requires disclosure, the authority of a reviewing agency to affirm on reasons not advanced by the reviewed agency is well established. *Cf. Bryant v. City of Atl. City*, 309 N.J. Super. 596, 629-30 (App. Div. 1998) (citing *Isko v. Planning Bd. of Livingston*, 51 N.J. 162, 175 (1968) (lower court decision may be affirmed for reasons other than those given below)); *Dwyer v. Erie Inv. Co.*, 138 N.J. Super. 93, 98 (App. Div. 1975) (judgments must be affirmed even if lower court gives wrong reason), certif. denied, 70 N.J. 142 (1976); *Bauer v. 141-149 Cedar Lane Holding Co.*, 42 N.J. Super. 110, 121 (App. Div. 1956) (question for reviewing court is propriety of action reviewed, not the reason for the action) (*aff'd*, 24 N.J. 139 (1957)).

OPRA provides that “[a] government record shall not include . . . administrative or technical information regarding computer hardware, software and networks which, if disclosed, would jeopardize computer security” N.J.S.A. 47:1A-1.1.

⁶ On appeal from *Paff v. Township of Plainsboro*, GRC Complaint No. 2005-29 (March 2006).

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 Record or Redaction	Custodian's Explanation/ Citation for Non-disclosure	Findings of the <i>In Camera</i> Examination⁷
1.	E-mail chain between multiple NJIT employees Re: Assessment of Lab Manager [Applicants] dated May 1, 2018 (3 e-mails in chain).	The three (3) e-mails contain deliberations regarding the Lab Manager candidate field.	ACD material. <u>N.J.S.A.</u> 47:1A-1.1.	The body of all three (3) e-mails clearly include discussions defined as ACD material. Thus, the body of each e-mail in this chain was properly withheld as ACD material. <u>N.J.S.A.</u> 47:1A-1.1.
2.	E-mail chain between multiple NJIT employees Re: Assessment of Lab Manager [Applicants] dated July 6 and 12, 2018 (2 e-mails in chain).	The July 6, 2018 e-mail alerts NJIT employees to Complainant's interview and contains a link to an internal website. The July 12, 2018 e-mail contains discussions regarding the Lab Manager candidate position.	ACD material. <u>N.J.S.A.</u> 47:1A-1.1.	The body of the July 6, 2018 e-mail does not contain any ACD discussions warranting nondisclosure. However, the website link contained in the e-mail appears to an internal website address utilized by NJIT to manage its interview process. This link thus falls within the administrative or technological information exemption. <u>N.J.S.A.</u> 47:1A -1.1. Thus, the Custodian must disclose this portion of the e-

⁷ **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.

				<p>mail chain with a redaction for the website link.</p> <p>The body of the July 12, 2018 e-mail clearly includes discussions defined as ACD material. Thus, the body of each e-mail in this chain was properly withheld as ACD material. <u>N.J.S.A. 47:1A-1.1.</u></p>
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Thus, the Custodian unlawfully denied access to the body of the July 6, 2018 e-mail, except for the link, but has lawfully denied access to the remaining e-mail bodies under the ACD exemption.

However, and consistent with N.J.S.A. 47:1A-5(g), if the custodian of a government record asserts that part of a particular record is exempt from public access pursuant to OPRA, the custodian must delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and must promptly permit access to the remainder of the record.

Thus, the Custodian must disclose all other portions of the responsive e-mails to the Complainant (*i.e.*, sender, recipients, date, time, subject, and salutations where applicable). This disclosure should take into account that the July 6, 2018 e-mail should be disclosed with only the website link redacted per the *In Camera* Examination table above. As to those portions of the responsive e-mail chains, the Custodian has unlawfully denied access. See Ray v. Freedom Acad. Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010).

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 Custodian complied with the Council’s November 10, 2020 Interim Order because she responded in the prescribed time frame providing sufficient copies of the responsive e-mail chains for *in camera* review. Further, the Custodian 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. Further, the Custodian shall simultaneously deliver⁸ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁹ to the Executive Director.¹⁰**
3. The Custodian must disclose all other portions of the responsive e-mails to the Complainant (*i.e.*, sender, recipients, date, time, subject, and salutations where applicable). This disclosure should take into account that the July 6, 2018 e-mail should be disclosed with only the website link redacted per the *In Camera* Examination table above. As to those portions of the responsive e-mail chains, the Custodian has unlawfully denied access. See Ray v. Freedom Acad. Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010).
4. **The Custodian shall comply with conclusion No. 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, if applicable. Further, the Custodian shall simultaneously deliver¹¹ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4, to the Executive Director.**
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.

Prepared By: Frank F. Caruso
Executive Director

January 19, 2021

⁸ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.

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 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.

¹¹ The certified confirmation of compliance, including supporting documentation, may be sent overnight mail, regular mail, e-mail, facsimile, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives it by the deadline.



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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

November 10, 2020 Government Records Council Meeting

Christopher C. McFarland
Complainant
v.
NJ Institute of Technology
Custodian of Record

Complaint No. 2018-289

At the November 10, 2020 public meeting, the Government Records Council (“Council”) considered the October 27, 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:

1. The portion of the Complainant’s request seeking “any and all records” relating to his interview for the Laboratory Manager position is invalid because it failed to identify a specific record. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005); 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); Feiler-Jampel v. Somerset Cnty. Prosecutor’s Office, GRC Complaint No. 2007-190 (Interim Order dated March 26, 2008). Thus, the Custodian lawfully denied access to this portion of the request. N.J.S.A. 47:1A-6.
2. The responsive candidate score sheet and interviewer notes are exempt from disclosure under the “inter-agency or intra-agency advisory, consultative, or deliberative material” exemption. N.J.S.A. 47:1A-1.1; Educ. Law Ctr. v. N.J. Dep’t of Educ., 198 N.J. 274 (App. Div. 2009); Vandy v. Burlington Co. Bd. of Social Serv., GRC Complaint No. 2016-319 (Interim Order dated November 13, 2018). For this reason, the Custodian lawfully denied access to same. N.J.S.A. 47:1A-6.
3. The GRC must conduct an *in camera* review of the May 1, and July 12, 2018 chain e-mails (and any applicable attachments) responsive to the Complainant’s OPRA request to determine the validity of the Custodian’s assertion that the e-mails were exempt as “inter-agency or intra-agency advisory, consultative, or deliberative material” exemption under OPRA. N.J.S.A. 47:1A-1.1. See Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).

4. **The Custodian shall deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 3 above), 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 five (5) business days from receipt of the Council's Interim Order.**
5. The Custodian lawfully denied the Complainant access to the responsive e-mails he sent and received from the New Jersey Institute of Technology because disclosure of same to him "does not advance the purpose of OPRA . . ." Caggiano v. N.J. Office of the Governor, GRC Complaint No. 2014-408 (Final Decision dated July 25, 2016) (citing Bart v. City of Paterson Hous. Auth. 403 N.J. Super. 609, 618 (App. Div. 2008); N.J.S.A. 47:1A-6).
6. 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.

Interim Order Rendered by the
Government Records Council
On The 10th Day of November 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: November 12, 2020

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 the GRC physically receives them 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 10, 2020 Council Meeting**

**Christopher C. McFarland¹
Complainant**

GRC Complaint No. 2018-289

v.

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

Records Relevant to Complaint: Electronic or hard copies of “any and all records” regarding the Complainant’s “interviews and determination for suitability for the position of Laboratory Manager” that took place on April 24, and July 12, 2018, including “any and all. . . communications, meeting minutes, [and] notes . . .” New Jersey Institute of Technology (“NJIT”) used.

Custodian of Record: Clara B. Williams
Request Received by Custodian: November 5, 2018
Response Made by Custodian: November 7, 2018
GRC Complaint Received: November 26, 2018

Background³

Request and Response:

On October 31, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On November 7, 2018, the Custodian responded in writing denying the subject OPRA request under the “inter-agency or intra-agency advisory, consultative, or deliberative [(“ACD”)] material” exemption. N.J.S.A. 47:1A-1.1; Sooy v. N.J. Dep’t of Corr., GRC Complaint No. 2006-128 (October 2006).

Denial of Access Complaint:

On November 26, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that Executive Order No. 26 (Gov. McGreevey, 2002) (“EO 26”) allowed the “Governor to make decisions in secrecy” but did not allow “all lower levels of government” to deny access to records in their entirety under the

¹ No legal representation listed on record.

² Represented by Danielle-Ann Thomas, Esq. (Newark, 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.

ACD exemption. The Complainant contended that the Custodian misapplied EO 26 to the instant OPRA request because it only applied to the Governor and not NJIT.

The Complainant argued that the Custodian misapplied the ACD exemption and wrongly relied on Sooy, GRC 2006-128 in violation of OPRA. The Complainant asserted that the Council's decision in Sooy did not prohibit access to basic facts about the promotion test at the center of that complaint, such as that it was administered, interviews were conducted, and discussions occurred. The Complainant argued that per Sooy, the ACD exemption did not allow the Custodian to "hide all evidence of the selection process" from the public. The Complainant argued that the Custodian applied the ACD exemption here more broadly than "any court in" New Jersey and failed to disclose those portions of the responsive records that did not fall under the exemption. The Complainant asserted that through this misapplication, the Custodian erroneously denied access to the "events, dates, times and places, to these privileged events happened." The Complainant thus argued that the Custodian should have disclosed that information that did not fall within the ACD exemption.

The Complainant also contended that when applying the basic legal definitions of the words "consult" and "material," it is evident that the Custodian violated OPRA. The Complainant argued that the Custodian barred from disclosure the "existence of a legal or personnel consult" and errantly denied "the form of the [ACD] communication" not falling within the definition of "material." The Complainant thus "demand[ed] the form of any and all of the [ACD] communications requested to include the timing, frequency, date, agents, agencies, contractors, and persons communicated to, and any monies paid, whether part of a package of services or a one[-]time fee."

The Complainant finally argued that the Custodian unlawfully denied access candidate resumes, which were responsive to the portion of his OPRA request seeking "[a]ny and all records . . . used." The Complainant argued that the Custodian failed to adhere to EO 26 by disclosing the successful candidate's resume, as well as all those for unsuccessful candidates from whom the Custodian received consent to disclose. The Complainant requested that the GRC require the Custodian to disclose the responsive resumes.⁴

Statement of Information:⁵

On March 19, 2019, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on November 5, 2018. The Custodian certified that her search included contacting Ms. Candida Rocha and Dr. Bryan Pfister to obtain responsive records. The Custodian affirmed that she received ten (10) e-mail chains, the Complainant's cover letter and resume, candidate scores, and interview notes responsive to the subject OPRA request, she determined they were exempt from disclosure. The Custodian certified

⁴ The Complainant also contended that he had a public interest in obtaining the records at issue in this complaint. However, to the extent that the Complainant is arguing that he had a common law right to access the records at issue, the GRC has no authority to address this issue. N.J.S.A. 47:1A-7. See also Rowan, Jr. v. Warren Hills Reg'l Sch. Dist. (Warren), GRC Complaint No. 2011-347 (January 2013).

⁵ On December 20, 2018, this complaint was referred to mediation. On March 15, 2019, this complaint was referred back to the GRC for adjudication.

that she responded in writing on November 7, 2018 denying access to the subject OPRA request under the ACD exemption.

The Custodian argued that she lawfully denied access to the subject OPRA request under the ACD exemption. N.J.S.A. 47:1A-1.1; Educ. Law Ctr. v. N.J. Dep't of Educ., 198 N.J. 274 (App. Div. 2009). The Custodian contended that the Council has previously held that interview score sheets, summaries, and bank questions were exempt under the ACD exemption. Vandy v. Burlington Co. Bd. of Social Serv., GRC Complaint No. 2016-319 (December 2018). The Complainant noted that there, the Council emphasized the ACD nature of score sheets and summaries. The Custodian further argued that in Sooy, GRC 2006-128, the Council held that the custodian lawfully denied access to interviewers' notes and scoring forms under the ACD exemption. The Custodian contended that her denial of the two (2) e-mail chains, candidate scores, and interview notes was lawful based on the forgoing. The Custodian asserted that this denial is further supported by the fact that these records related to the decision-making process regarding the Complainant's suitability for the Laboratory Manager position.

The Custodian further argued that she was not required to disclose the remaining e-mails and the Complainant's cover letter and resume because he already possessed them. Bart v. City of Paterson Hous. Auth. 403 N.J. Super. 609, 618 (App. Div. 2008); Caggiano v. N.J. Office of the Governor, GRC Complaint No. 2014-408 (September 2015). The Custodian asserted that here, each of the remaining records were either composed by or were sent to the Complainant. The Custodian argued that it is presumed that the Complainant possessed the e-mails to which he was a party, as well as the cover letter and resume he himself submitted to NJIT. The Custodian thus contended that pursuant to Bart and Caggiano, she was not required to disclose these records to the Complainant

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 Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005) (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. (emphasis added). Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005);⁶ 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).

The validity of an OPRA request typically falls into three (3) categories. The first is a request that is overly broad (“any and all,” requests seeking “records” generically, *etc.*) and requires a custodian to conduct research. MAG, 375 N.J. Super. 534; Donato v. Twp. of Union, GRC Complaint No. 2005-182 (January 2007). The second is those requests seeking information or asking questions. See e.g. Rummel v. Cumberland Cnty. Bd. of Chosen Freeholders, GRC Complaint No. 2011-168 (December 2012). The final category is a request that is either not on an official OPRA request form or does not invoke OPRA. See e.g. Naples v. N.J. Motor Vehicle Comm’n, GRC Complaint No. 2008-97 (December 2008).

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.” Id. at 539-540. 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.* (Final Decision dated April 25, 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:

⁶ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

[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 v. Department of Labor and Workforce Development, GRC Complaint No. 2006-24 (May 2006) and Morgano v. Essex Cnty. Prosecutor's Office, GRC Complaint No. 2007-190 (February 2008).

[Id. See also Schulz v. N.J. 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).]

Here, a portion of the Complainant's request sought "any and all records" of his "interviews and determination for suitability for the position of Laboratory Manager" that took place on April 24, and July 12, 2018. The Custodian responded denying access to potentially responsive records under the ACD exemption. In the Denial of Access Complaint, the Complainant noted that this portion of the request included resumes, which the Complainant failed to provide. In the SOI, the Custodian reiterated that she lawfully denied access to all responsive records under the ACD exemption (except for those e-mail chains already in the Complainant's possession).

Notwithstanding that the Custodian denied access to multiple records, which will be addressed below, the portion of the Complainant's request seeking "any and all records" is clearly invalid. Not only does MAG and its progeny support this conclusion, the Complainant himself supported that same was invalid. That is, the Complainant argued that the Custodian failed to disclose resumes in response to this portion of the request. However, the Complainant never specifically requested resumes. To the contrary, he utilized overly broad language intended to require the Custodian to perform an open-ended search of every record in her office that may pertain to the Complainant's employment candidacy.

Accordingly, the portion of the Complainant's request seeking "any and all records" relating to his interview for the Laboratory Manager position is invalid because it failed to identify a specific record. 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. Thus, the Custodian lawfully denied access to this portion of the request. 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.

Having found that the portion of the Complainant's request seeking "any and all records" was invalid, the GRC now turns to those records the Complainant identified as responsive to the remainder of the OPRA request.

Candidate Score Sheets & Interview Notes

OPRA provides that the definition of a government record "shall not include . . . inter-agency or intra-agency advisory, consultative, or deliberative ["ACD"] material." N.J.S.A. 47:1A-1.1. 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, 198 N.J. at 285 (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.

A custodian claiming an exception to the disclosure requirements under OPRA on that 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.

In Vandy, GRC 2016-319, the complainant sought multiple records regarding interview score sheets and interview panel notes. The custodian initially denied access under the personnel exemption; however, she expanded her bases for denial in the SOI to include the ACD exemption. The Council looked to Fegley, Esq. v. N.J. Dep't of Env'tl. Protection, GRC Complaint No. 2006-91 (December 2006) (citing Sooy v. N.J. Dep't of Corr., GRC Complaint No. 2006-128 (October 2006)) in determining that the custodian lawfully denied access to the responsive score sheets and summaries under the ACD exemption. (Interim Order dated November 13, 2018) at 4.

Here, a portion of the Complainant's OPRA request sought multiple records including "notes." The Custodian denied access to those records located, a candidate score sheet and interviewer notes, under the ACD exemption. In the Denial of Access Complaint, the Complainant disputed that the ACD exemption applied to the e-mails. The Complainant argued that the ACD exemption only applied to the Governor and not other government agencies. The Complainant also argued that the ACD exemption did not allow an agency to hide the basic facts of the selection process or "evidence of selection process." The Complainant finally argued that the Custodian failed to disclose the basic elements of the records not falling within the definition of "material."

In the SOI, the Custodian argued that she lawfully denied access to these records based on Vandy, GRC 2016-319.

Upon review of precedential case law, as well as the Council's decision in Vandy, GRC 2016-319, the Council is persuaded that the Custodian lawfully denied access to these records. Specifically, the score sheet and interviewer notes clearly meet the two-prong test to be considered ACD material. Educ. Law Ctr., 198 N.J. 274. Further, the deliberative nature of the score sheets and the interviewer notes prior to NJIT's decision to hire one individual over others is apparent. Based on this, the score sheet and interviewer notes were exempt under the ACD exemption.

To briefly address the Complainant's Denial of Access Complaint arguments, same fail to appreciate that a record need only meet the two-prong test outlined in Educ. Law Ctr., 198 N.J. 274. It is also not true that the ACD exemption applies only the Governor: OPRA does not contain such a limitation anywhere in the statute. Finally, the Complainant's attempts to draw a distinction between the records at issue here and the literal definition of "material" or "consult" does not apply for the reasons stated above.

Accordingly, the responsive candidate score sheet and interviewer notes are exempt from disclosure under the ACD exemption. N.J.S.A. 47:1A-1.1; Educ. Law Ctr., 198 N.J. 274; Vandy, GRC 2016-319. For this reason, the Custodian lawfully denied access to same. N.J.S.A. 47:1A-6.

Internal E-mails Re: Interview

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 Council⁷ 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:

⁷ Paff v. NJ Dep't of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

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 matter before the Council, a portion of the Complainant’s OPRA request sought specific correspondence regarding his “interviews and determination” for Laboratory Manager. The Custodian identified two (2) chain e-mails dated May 1, and July 12, 2018, which she denied access under the ACD exemption. The arguments for and against disclosure are discussed above.

Upon review of the evidence of record in the instant complaint, the GRC cannot determine whether the Custodian properly denied access to those two (2) chain e-mails (and any potential attachments). For this reason, a “meaningful review” is necessary to determine whether the chain e-mails (and attachments where applicable) fall within the asserted exemption. Paff, 379 N.J. Super. at 355. Further, the GRC has routinely reviewed e-mails *in camera* in complaints with facts similar to the present complaint. See *e.g.* Ehrenreich v. N.J. Dep’t of Trans., GRC Complaint No. 2016-192 (Interim Order dated April 24, 2018).

Therefore, the GRC must conduct an *in camera* review of the May 1, and July 12, 2018 chain e-mails (and any applicable attachments) responsive to the Complainant’s OPRA request to determine the validity of the Custodian’s assertion that the e-mails were exempt as ACD material under OPRA. N.J.S.A. 47:1A-1.1. See Paff, 379 N.J. Super. at 346.

E-mails Sent or Received by the Complainant

New Jersey Courts have provided that “[t]he purpose of OPRA ‘is to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process.’” Times of Trenton Publ’g Corp. v. Lafayette Yard Cmty. Dev. Corp., 183 N.J. 519, 535 (2005) (quoting Asbury Park Press v. Ocean Cnty. Prosecutor’s Office, 374 N.J. Super. 312, 329 (Law Div. 2004)). In Bart, 403 N.J. Super. 609,⁸ the Appellate Division looked to the Lafayette Yard case in determining whether a custodian knowingly and willfully violated OPRA by not providing to the complainant a record already in his possession. The Court held that a complainant could not have been denied access to a requested record if he already had in his possession at the time of the OPRA request the document he sought pursuant to OPRA. Id. at 617. The Appellate Division reasoned that requiring a custodian to duplicate another copy of the requested record and send it to the complainant does not advance the purpose of OPRA, which is to ensure an informed citizenry. Id. at 618 (citing Lafayette Yard, 183 N.J. at 535).

The Appellate Division’s decision in Bart, however, turns upon the specific facts of that case. The Council’s decision noted that the custodian certified that copies of the requested record

⁸ Reversing Bart v. City of Paterson Hous. Auth., GRC Complaint No. 2005-145 (May 2006).

were available at the Housing Authority's front desk upon simple verbal request by any member of the public. Bart, GRC 2005-145. Moreover, the complainant actually admitted that he was in possession of this record at the time of the OPRA request for the same record. Id.

In Caggiano, GRC 2014-408, the complainant sought access to e-mails he composed and sent to the Office. The Council, relying on Bart, 403 N.J. Super. 609, held that no unlawful denial of access occurred. In reaching its conclusion, the Council reasoned that

Although the Complainant has not affirmatively established that he possessed all responsive e-mails he sent to the Office at the time of his request, the intent of the Court's decision in Bart can be applied to the facts of this complaint. Specifically, requiring the Custodian to locate, reproduce, and disclose same does not advance the purposes of OPRA. Additionally, disclosing to the Complainant e-mails that he composed and sent to the Office neither maximizes his own knowledge about public affairs nor fosters a more informed Complainant.

[Id. (Final Decision dated July 28, 2015) at 6. See also Owoh (on behalf of O.R.) v. West Windsor-Plainsboro Regional School District (Mercer), GRC Complaint No. 2012-330 (Interim Order February 2013).]

In the matter currently before the Council, a portion of the Complainant's OPRA request sought communications regarding his "interviews and determination for suitability for the position of Laboratory Manager." While the Custodian initially denied access under the ACD exemption, she subsequently identified in the SOI several responsive chain e-mails that the Complainant sent or received. The Custodian contended that she was under no obligation to provide said records in accordance with Bart, 403 N.J. Super. at 618 and Caggiano, GRC 2014-408. The GRC notes that the Custodian also attached some of those e-mails to the SOI to support her position.

The GRC agrees that disclosing to the Complainant correspondence that he sent to, or received from, NJIT neither maximizes his own knowledge about public affairs nor fosters a more informed Complainant. Simply put, the Complainant could not glean any insight into the inner workings of government by reviewing e-mails he was privy to in the few months preceding the OPRA request at issue here. Caggiano, GRC 2014-408 underscores this point; thus, the Custodian was not required to disclose those e-mails to the Complainant.

Therefore, the Custodian lawfully denied the Complainant access to the responsive e-mails he sent and received from NJIT because disclosure of same to him "does not advance the purpose of OPRA . . ." Caggiano, GRC 2014-408 (citing Bart, 403 N.J. Super. at 618); N.J.S.A. 47:1A-6.

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 portion of the Complainant's request seeking "any and all records" relating to his interview for the Laboratory Manager position is invalid because it failed to identify a specific record. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); 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); Feiler-Jampel v. Somerset Cnty. Prosecutor's Office, GRC Complaint No. 2007-190 (Interim Order dated March 26, 2008). Thus, the Custodian lawfully denied access to this portion of the request. N.J.S.A. 47:1A-6.
2. The responsive candidate score sheet and interviewer notes are exempt from disclosure under the "inter-agency or intra-agency advisory, consultative, or deliberative material" exemption. N.J.S.A. 47:1A-1.1; Educ. Law Ctr. v. N.J. Dep't of Educ., 198 N.J. 274 (App. Div. 2009); Vandy v. Burlington Co. Bd. of Social Serv., GRC Complaint No. 2016-319 (Interim Order dated November 13, 2018). For this reason, the Custodian lawfully denied access to same. N.J.S.A. 47:1A-6.
3. The GRC must conduct an *in camera* review of the May 1, and July 12, 2018 chain e-mails (and any applicable attachments) responsive to the Complainant's OPRA request to determine the validity of the Custodian's assertion that the e-mails were exempt as "inter-agency or intra-agency advisory, consultative, or deliberative material" exemption under OPRA. N.J.S.A. 47:1A-1.1. See Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).
4. **The Custodian shall deliver⁹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 3 above), a document or redaction index¹⁰, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,¹¹ 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.**
5. The Custodian lawfully denied the Complainant access to the responsive e-mails he sent and received from the New Jersey Institute of Technology because disclosure of same to him "does not advance the purpose of OPRA . . ." Caggiano v. N.J. Office of the Governor, GRC Complaint No. 2014-408 (Final Decision dated July 25, 2016)

⁹ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives them by the deadline.

¹⁰ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

¹¹ "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."

(citing Bart v. City of Paterson Hous. Auth. 403 N.J. Super. 609, 618 (App. Div. 2008); N.J.S.A. 47:1A-6.

6. 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
Executive Director

October 27, 2020