



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

November 10, 2020 Government Records Council Meeting

Paul Liobe
Complainant

Complaint No. 2019-114

v.

County of Sussex
Custodian of Record

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 Custodian’s failure to provide a specific lawful basis for denying access to the responsive December 2018, February 2019, and March 2019 invoices was insufficient. N.J.S.A. 47:1A-5(g); Paff v. Borough of Lavallette, GRC Complaint No. 2007-209 (Interim Order dated June 25, 2008). The GRC declines to order disclosure of the December 2018 invoice because same was disclosed with redactions on May 3, 2019. However, the Custodian shall disclose the February 2019 and March 2019 invoices to the Complainant.
2. **The Custodian shall comply with conclusion No. 1 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 deliver¹ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,² to the Executive Director.³**
3. The GRC must conduct an *in camera* review of invoices responsive to the Complainant’s two (2) OPRA requests to determine the validity of the Custodian’s assertion that the redacted material was exempt from disclosure under the attorney-

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.

client privilege. 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). Should the Custodian redact the February and March 2019 minutes prior to disclosure, she shall submit copies of them to the GRC for an *in camera* review.

4. **The Custodian shall deliver⁴ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 3 above), nine (9) copies of the redacted records, a document or redaction index⁵, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4, 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 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

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 the GRC physically receives them 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.

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 10, 2020 Council Meeting**

**Paul Liobe¹
Complainant**

GRC Complaint No. 2019-114

v.

**County of Sussex²
Custodial Agency**

Records Relevant to Complaint:

January 20, 2019 OPRA request: Electronic copies via e-mail of any and all invoices from Special Labor Counsel Trimboli & Prusinowski from October 2018 through present.

April 1, 2019 OPRA request: Electronic copies via e-mail of invoices from Special Labor Counsel Timboli & Prusinowski from January 2019 through March 2019.

Custodian of Record: Teresa Lyons

Request Received by Custodian: January 20, 2019; April 3, 2019

Response Made by Custodian: January 22, 2019; May 3, 2019

GRC Complaint Received: June 24, 2019

Background³

Request and Response:

On January 20, 2019, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On January 22, 2019, the Custodian responded in writing stating that she expected a response from the Finance Department by January 31, 2019. On January 30, 2019, the Custodian responded in writing disclosing redacted copies of the October and November 2018 invoices. The Custodian noted that she would disclose the December 2018 invoice after the Board of Chosen Freeholders voted to pay same at the February 13, 2019 meeting. On March 31, 2019, the Complainant e-mailed the Custodian requesting that she disclose the December 2018 invoice as previously promised.

On April 1, 2019, the Complainant submitted an OPRA request to the Custodian seeking the above-mentioned records.

¹ No legal representation listed on record.

² No legal representation listed on record.

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.

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On April 17, 2019, the Complainant e-mailed the Custodian again asking whether the Complainant would release the December 2018 invoice responsive to his January 20, 2019 OPRA request or if he should submit a new OPRA request. On April 26, 2019, the Custodian responded advising that she would include the December 2018 invoice in her response to the April 1, 2019 OPRA request, which should occur “next week.”

On May 3, 2019, the Custodian responded in writing to the Complainant’s January 20, 2019 OPRA request disclosing a redacted copy of the December 2018 invoice. The Custodian noted that same was not available at the time that the Complainant submitted his OPRA request. The Custodian further noted that she forgot to “collect them” after the March 2019 Board meeting. On the same day, the Custodian responded in writing to the Complainant’s April 1, 2019 OPRA request disclosing a redacted copy of the January 2019 invoice. The Custodian noted that she could not provide copies of the February and March 2019 invoices but would check with the Finance Department the following week.

On May 7, 2019, the Complainant e-mailed the Custodian requesting that she provide the “nature of the blanket redactions” as required in Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346, 354 (App. Div. 2005). The Complainant further requested that the Custodian remove the redactions from “all matters which are lettered, assigned a specific firm number, and detailed in brief.” The Complainant noted that if the Custodian did not respond within five (5) business days, then he would assume that his request is denied. On May 13, 2019, the Custodian e-mailed the Complainant confirming receipt of his May 7, 2019 e-mail. The Custodian stated that she was discussing the issue with her OPRA Counsel and would withhold disclosure of the February and March 2019 invoices until after that discussion.

Denial of Access Complaint:

On June 24, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant contended that the Custodian unlawfully redacted those invoices she disclosed. The Complainant further took issue with the Custodian’s failure to disclose the February and March 2019 invoices responsive to his April 1, 2019 OPRA request.

Statement of Information:⁴

On September 17, 2019, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s second (2nd) OPRA request on April 3, 2019.⁵ The Custodian certified that she responded in writing on May 3, 2019 disclosing redacted copies of the January 2019 invoice, but did not disclose the February or March 2019 invoices because they “had not yet been approved for payment.” The Custodian noted that the redactions made under the attorney-client privilege included names of individuals and specific word references indicating the individual involved in the matter discussed in each entry.

⁴ On July 16, 2019, these complaints were referred to mediation. On August 15, 2019, these complaints were referred back for adjudication.

⁵ The Custodian did not address the Complainant’s first (1st) OPRA request in the SOI. Paul Liobe v. Cnty of Sussex, 2019-114 – Findings and Recommendations of the Executive Director

The Custodian contended that she previously disclosed thirteen (13) months of Labor Counsel invoices and two (2) years of “Insurance Company” invoices applying the same method of redaction without complaint. The Custodian argued that once the Complainant objected to the response here, she “deferred” action until the GRC could address this complaint.

Analysis

Sufficiency of Response

OPRA provides that if a “custodian is unable to comply with a request for access, the custodian *shall indicate the specific basis therefor . . . on the request form and promptly return it to the requestor.*” N.J.S.A. 47:1A-5(g) (emphasis added). In Paff v. Borough of Lavallette, GRC Complaint No. 2007-209 (Interim Order dated June 25, 2008), the custodian responded in a timely manner providing redacted records to the complainant; however, he failed to provide a specific legal basis for said redactions. The Council, relying on prior decisions in Schwarz v. N.J. Dep’t of Human Serv., GRC Complaint No. 2004-60 (February 2005) and Paff v. Twp. of Plainsboro, GRC Complaint No. 2005-29 (July 2005) held that:

The Custodian’s response was legally insufficient under OPRA because he failed to provide a written response setting forth a detailed and lawful basis for each redaction . . . Therefore, the Custodian violated OPRA pursuant to N.J.S.A. 47:1A-5.g. and has not borne his burden of proving the denial of access to the redacted portions was authorized by law pursuant to N.J.S.A. 47:1A-6.

[Id. at 4.]

Here, the Custodian denied access to invoices from December 2018, February 2019, and March 2019 on the basis that the Board of Chosen Freeholders had not yet voted to pay them at the time of the Complainant’s OPRA requests. However, the Custodian failed to include any specific lawful basis for this denial. Factually, there are no exemptions in OPRA that allow for such a denial. Thus, the forgoing evidence of record here is on point with Paff, GRC 2007-209 and supports a finding that the Custodian’s response was insufficient.

Accordingly, the Custodian’s failure to provide a specific lawful basis for denying access to the responsive December 2018, February 2019, and March 2019 invoices was insufficient. N.J.S.A. 47:1A-5(g); Paff, GRC 2007-209. The GRC declines to order disclosure of the December 2018 invoice because same was disclosed with redactions on May 3, 2019. However, the Custodian shall disclose the February 2019 and March 2019 invoices to the Complainant.

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, 379 N.J. Super. 346, the complainant appealed a final decision of the Council⁶ that accepted the custodian's legal conclusion for the denial of access without further review. The Appellate Division noted that "OPRA contemplates the GRC's meaningful review of the basis for an agency's decision to withhold government records When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers." Id. The court stated that:

[OPRA] also contemplates the GRC's *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the 'Open Public Meetings Act,' N.J.S.A. 10:4-6 to -21, it also provides that the GRC 'may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.' N.J.S.A. 47:1A-7(f). This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.

[Id. at 355.]

Further, the court found that:

We hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC's obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7(f), which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.

[Id.]

In the matter before the Council, the Complainant's two (2) OPRA requests sought access to invoices from October 2018 through March 2019. The Custodian ultimately disclosed copies of invoices for October 2018 through December 2018 and January 2019 with redactions citing the attorney-client privilege. N.J.S.A. 47:1A-1.1. This complaint followed, wherein the Complainant argued in part that the Custodian unlawfully redacted the responsive invoices. In the SOI, the Custodian noted that the redacted material included names and any information that might identify those individuals involved in the matters for which Trimboli & Prusinowski billed.

Upon review of the evidence of record in the instant complaint, the GRC cannot determine whether the Custodian properly denied access to those redactions contained in the disclosed invoices. Although those invoices disclosed were included in the both the Denial of Access Complaint and SOI, the GRC cannot independently determine the validity of those redactions. Also complicating this issue is the likelihood that the Custodian will redact the February and March 2019 invoices prior to disclosing them. For these reasons, a "meaningful review" is necessary to determine whether the redacted invoices fall within the asserted exemption. Paff, 379 N.J. Super.

⁶ Paff v. NJ Dep't of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).
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at 355. Further, the GRC has routinely reviewed invoices *in camera* in complaints with facts similar to the present complaint. See e.g. Law Offices of Walter M. Luers, LLC v. Eastern Camden Cnty. Reg'l Sch. Dist., GRC Complaint No. 2015-15 (Interim Order dated October 27, 2015).

Therefore, the GRC must conduct an *in camera* review of invoices responsive to the Complainant's two (2) OPRA requests to determine the validity of the Custodian's assertion that the redacted material was exempt from disclosure under the attorney-client privilege. N.J.S.A. 47:1A-1.1. See Paff, 379 N.J. Super. at 346. Should the Custodian redact the February and March 2019 minutes prior to disclosure, she shall submit copies of them to the GRC for an *in camera* review.

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's failure to provide a specific lawful basis for denying access to the responsive December 2018, February 2019, and March 2019 invoices was insufficient. N.J.S.A. 47:1A-5(g); Paff v. Borough of Lavallette, GRC Complaint No. 2007-209 (Interim Order dated June 25, 2008). The GRC declines to order disclosure of the December 2018 invoice because same was disclosed with redactions on May 3, 2019. However, the Custodian shall disclose the February 2019 and March 2019 invoices to the Complainant.
2. **The Custodian shall comply with conclusion No. 1 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 deliver⁷ certified confirmation of compliance, in accordance with N.J. Court Rules, R. 1:4-4,⁸ to the Executive Director.⁹**
3. The GRC must conduct an *in camera* review of invoices responsive to the Complainant's two (2) OPRA requests to determine the validity of the Custodian's

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assertion that the redacted material was exempt from disclosure under the attorney-client privilege. 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). Should the Custodian redact the February and March 2019 minutes prior to disclosure, she shall submit copies of them to the GRC for an *in camera* review.

4. **The Custodian shall deliver¹⁰ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 3 above), nine (9) copies of the redacted records, a document or redaction index¹¹, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4, 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 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

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