



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

July 26, 2022 Government Records Council Meeting

James A. Brown
Complainant

Complaint No. 2020-219

v.

NJ Department of Treasury,
Division of Lottery
Custodian of Record

At the July 26, 2022 public meeting, the Government Records Council (“Council”) considered the July 19, 2022 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. Pursuant to judicial notice of Brown v. N.J. Dep’t of Treasury, GRC Complaint No. 2018-293 (Interim Order dated May 31, 2022), while the Custodian lawfully denied access to majority of the e-mail bodies and attachments sought in the Complainant’s OPRA request item Nos. 1 and 3, she unlawfully denied access to ten (10) individual bodies and other non-exemption portions thereof. See Ray v. Freedom Acad. Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010). Thus, the Custodian shall disclose those e-mails to the Complainant consistent with the Council’s holding in Brown.
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 the 605 pages of e-mails responsive to the Complainant’s OPRA request to validate the Custodian’s assertion that the records

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.

were exempt from disclosure under the attorney-client privilege and attorney work product exemptions. See Paff, 379 N.J. Super. at 346; N.J.S.A. 47:1A-1.1; R. 4:10-2(c). To the extent that any of the records sought as part of the *in camera* review are also responsive to OPRA request items No. 1 and No. 3 being ordered for disclosure consistent with Brown, GRC 2018-293, the Custodian need not include those herein. However, the Custodian shall specifically identify those e-mails, along with number of pages, and the disclosure date in their document index.

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. 1:4-4,⁶ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
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 July 2022

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: July 27, 2022

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.

⁶ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 26, 2022 Council Meeting**

**James A. Brown¹
Complainant**

GRC Complaint No. 2020-219

v.

**N.J. Department of Treasury,
Division of Lottery²
Custodial Agency**

Records Relevant to Complaint: Electronic copies of:

1. All e-mails relevant to Claim No. 18062071280 between June 2018 and December 2018.
2. All e-mails in Claim No. 18-1164.
3. All e-mails relating to Arlene L. Moore.

Custodian of Record: Jill Dawson

Request Received by Custodian: August 1, 2019

Response Made by Custodian: October 16, 2019

GRC Complaint Received: October 26, 2020

Background³

Request and Response:

On August 1, 2019, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On October 16, 2019, the Custodian responded in writing stating that access to records responsive to OPRA request item Nos. 1 and 3 was denied under the attorney-client privilege and “inter-agency or intra-agency advisory, consultative, or deliberative [(“ACD”)] material” exemptions. N.J.S.A. 47:1A-1.1. The Custodian also advised that an extension of ten (10) business days, or until October 30, 2019, is necessary to continue searching for potentially responsive e-mails. On January 3, 2020, the Custodian responded in writing disclosing e-mails responsive to OPRA request item No. 2 with redactions and an exemption log.

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Roza Dabaghyan.

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 October 26, 2020, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant disputed the Custodian’s denial of OPRA request item Nos. 1 and 3, as well as significant redactions made to the 605 pages of documents disclosed in response to OPRA request item No. 2. The Complainant contended that the Custodian violated OPRA by failing to disclose basic information contained in the responsive e-mails withheld from disclosure. See Ray v. Freedom Acad. Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010) and Verry v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-287 (Interim Order dated June 30, 2015). The Complainant thus requested that the GRC conduct an *in camera* review of all records responsive to the subject OPRA request to determine the validity of the Custodian’s denial of access.

Statement of Information:

On December 1, 2020,⁴ the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on August 1, 2019. The Custodian certified that her search included referring the request to the Division of Revenue and Enterprise Services to conduct an e-mail search. The Custodian certified that once potentially responsive e-mails were identified, the Division of Lottery’s (“Lottery”) Deputy Attorney General (“DAG”) reviewed them for exemptions. The Custodian certified that she denied access to OPRA request item Nos. 1 and 3 on October 26, 2019 and extended the time frame to respond to OPRA request item No. 2 through October 30, 2019. The Custodian affirmed that she subsequently responded in writing on January 3, 2020 disclosing 605 pages of e-mails responsive to item No. 2 with redactions and a document index. The Custodian noted that the records denied in response to item Nos. 1 and 3 were at issue in Brown v. N.J. Dep’t of Treasury, GRC Complaint No. 2018-293 (Interim Order dated May 31, 2022).

The Custodian first contended that she lawfully denied access to the responsive records under the attorney-client privilege and attorney work-product exemptions because they related to litigation between Ms. Moore, the Complainant’s relative, and Lottery. The Custodian argued that OPRA clearly protects records containing attorney-client discussions, information exchanged for trial or the anticipation thereof, and work-product. N.J.S.A. 47:1A-1.1; N.J. Court Rules, R. 4:10-2(c); O’Boyle v. Borough of Longport, 218 N.J. 168, 183 (2014). The Custodian argued that it is obvious here that the responsive e-mails related to ongoing litigation between the Complainant’s relative (in the Appellate Division and as part of a “federal action”) and Lottery. The Custodian thus contended that all communications reasonably fell within the two exemptions and that no unlawful denial of access occurred.

The Custodian next contended that the ACD exemption applied to all the draft documents contained within the universe of responsive records. Ciesla v. N.J. Dep’t of Health & Senior Servs. 429 N.J. Super. 127, 140 (App. Div. 2012). The Custodian contended that any responsive draft

⁴ The GRC notes that delays resulting from the COVID-19 public health emergency, as well as confusion associated with another OPRA request that is concurrently being reviewed in Brown v. N.J. Dep’t of Treasury, Div. of Lottery, GRC Complaint No. 2020-219.

documents or notes included in the responsive universe of records were exempt from disclosure as ACD and no unlawful denial of access occurred.

Additional Submissions:

On December 9, 2020, the Complainant submitted a letter response to the SOI. The Complainant contended that the Custodian's denial of access to, or heavy redaction of, certain records amounted to an unlawful denial of access. The Complainant thus requested that the Council conduct an *in camera* review of the records withheld in response to item Nos. 1 and 3, as well as to the 605 pages of redacted records disclosed in response to item No. 2, as it has previously done in Pouliot v. N.J. Dep't of Educ., GRC Complaint No. 2015-281 (Interim Order dated January 31, 2017).

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.

OPRA Request item Nos. 1 and 3:

N.J.A.C. 1:1-15.2(a) and (b) state that official notice may be taken of judicially noticeable facts (as explained in N.J.R.E. 201 of the New Jersey Rules of Evidence), as well as of generally recognized technical or scientific facts within the specialized knowledge of the agency or the judge. The Appellate Division has held that it was appropriate for an administrative agency to take notice of an appellant's record of convictions because judicial notice could have been taken of the records of any court in New Jersey, and appellant's record of convictions were exclusively in New Jersey. See Sanders v. Div. of Motor Vehicles, 131 N.J. Super. 95 (App. Div. 1974).

As it relates to these items, the GRC must take judicial notice of that fact that the disclosability of thereof was recently addressed in Brown, GRC 2018-293. There, the Council required the Custodian to provide to it for an *in camera* review 133 pages of e-mails and attachments. Said review was conducted at the May 31, 2022 meeting, where the Council determined that all e-mails had to be disclosed with redactions of the bodies for all but ten (10) total e-mails. Thereafter, on June 23, 2022, the Custodian disclosed those records in accordance with the Council's Order.⁵

Here, the Custodian denied access to all e-mails responsive to item Nos. 1 and 3. The Custodian subsequently noted that said denied e-mails were presently under review *in camera* by the GRC in Brown, GRC 2018-293. That review has occurred and the question of access

⁵ The Custodian's compliance is being concurrently addressed at the Council's July 26, 2022 meeting in Brown, GRC 2018-293.

determined by the Council at its May 31, 2022 meeting. Based on this, the GRC finds it would be onerously duplicative on all parties to again review those records *in camera*. Instead, the GRC relies on the Council's conclusion in Brown which finds that the Custodian:

[A] vast majority of the e-mail bodies and every attachment are exempt from disclosure under the attorney-client and attorney-work product exemption. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9(b); R. 4:10-2(c).

. . .

[W]hile the Custodian lawfully denied access to a majority of the e-mail bodies responsive to the subject OPRA request, she unlawfully denied access to the body of the specific e-mails identified in the above table.

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). 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).

[Id. at 4, 7.]

Accordingly, and pursuant to judicial notice of Brown, GRC 2018-293, while the Custodian lawfully denied access to majority of the e-mail bodies and attachments sought in the Complainant's OPRA request item Nos. 1 and 3, she unlawfully denied access to ten (10) individual bodies and other non-exemption portions thereof. See Ray, GRC 2009-185. Thus, the Custodian shall disclose those e-mails to the Complainant consistent with the Council's holding in Brown.

OPRA Request item No. 2:

In Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the Council⁶ that accepted the custodian's legal conclusion for the denial of access without further review. The Appellate Division noted that "OPRA contemplates the GRC's meaningful review of the basis for an agency's decision to withhold government records When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers." Id. The Court stated that:

⁶ Paff v. NJ Dep't of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

[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.]

Here, the Custodian denied access to portions of 605 total pages of e-mails and attachments. The Custodian argued in the SOI that the records were exempt from disclosure under the attorney-client privilege, attorney work product, and ACD exemptions. N.J.S.A. 47:1A-1.1; R. 4:10-2(c). However, the Custodian rested on similar exemptions in Brown, GRC 2018-293 and an *in camera* revealed that not every record fell under the exemptions in total, as noted above. It should also be noted that while the Custodian did not list in the SOI index e-mails responsive to item Nos. 1 and 3 because they were at issue in Brown, it appears there may be some records therein that are at issue in both complaints. Further, the GRC has routinely reviewed e-mails *in camera* in complaints with facts like the present complaint. See *e.g.* Pouliot, GRC 2015-281. Thus, the GRC must review same to determine the full applicability of the cited exemptions.

Therefore, the GRC must conduct an *in camera* review of the 605 pages of e-mails responsive to the Complainant's OPRA request to validate the Custodian's assertion that the records were exempt from disclosure under the attorney-client privilege and attorney work product exemptions. See Paff, 379 N.J. Super. at 346; N.J.S.A. 47:1A-1.1; R. 4:10-2(c). To the extent that any of the records sought as part of the *in camera* review are also responsive to OPRA request items No. 1 and No. 3 being ordered for disclosure consistent with Brown, GRC 2018-293, the Custodian need not include those herein. However, the Custodian shall specifically identify those e-mails, along with number of pages, and the disclosure date in their document index.

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. Pursuant to judicial notice of Brown v. N.J. Dep't of Treasury, GRC Complaint No. 2018-293 (Interim Order dated May 31, 2022), while the Custodian lawfully denied access to majority of the e-mail bodies and attachments sought in the Complainant's OPRA request item Nos. 1 and 3, she unlawfully denied access to ten (10) individual bodies and other non-exemption portions thereof. See Ray v. Freedom Acad. Charter Sch. (Camden), GRC Complaint No. 2009-185 (Interim Order dated August 24, 2010). Thus, the Custodian shall disclose those e-mails to the Complainant consistent with the Council's holding in Brown.
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 the 605 pages of e-mails responsive to the Complainant's OPRA request to validate the Custodian's assertion that the records were exempt from disclosure under the attorney-client privilege and attorney work product exemptions. See Paff, 379 N.J. Super. at 346; N.J.S.A. 47:1A-1.1; R. 4:10-2(c). To the extent that any of the records sought as part of the *in camera* review are also responsive to OPRA request items No. 1 and No. 3 being ordered for disclosure consistent with Brown, GRC 2018-293, the Custodian need not include those herein. However, the Custodian shall specifically identify those e-mails, along with number of pages, and the disclosure date in their document index.

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⁹ 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 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. 1:4-4,¹² 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

July 19, 2022

¹⁰ 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.

¹¹ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

¹² "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."