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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0183-13T2

GLENN KATON
(on behalf of Muslim Advocates),

Complainant-Appellant,

v.

NJ DEPARTMENT OF LAW AND PUBLIC SAFETY,
OFFICE OF THE ATTORNEY GENERAL,

Custodian of Record-Respondent.

Submitted January 26, 2015 – Decided February 12, 2015

Before Judges Sabatino, Guadagno and Leone.

On appeal from the Government Records
Council, Complaint No. 2012-267.

McCarter & English, LLP, attorneys for
appellant (Steven A. Beckelman and Roktim
Kaushik, on the briefs).

John J. Hoffman, Acting Attorney General,
attorney for respondent (Lewis A.
Scheindlin, Assistant Attorney General, of
counsel; Valentina M. DiPippo, Deputy
Attorney General, on the brief).

PER CURIAM

Complainant Glenn Katon, on behalf of an entity called
Muslims Advocates, appeals from a decision of the Government
Records Council (GRC). The GRC concluded the Records Custodian

(Custodian) of respondent, the Department of Law and Public Safety of the Office of the Attorney General (OAG), lawfully denied access to documents complainant had requested under the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13. Because the record is inadequate to resolve the issues raised, we vacate and remand this case to the GRC for further proceedings.

I.

On May 24, 2012, then-Attorney General Jeffrey S. Chiesa issued a press release stating that

his office has taken steps to improve law enforcement coordination and address concerns expressed by Muslim community leaders following a three-month fact-finding review of intelligence-gathering conducted by the New York Police Department (NYPD) in New Jersey. The fact-finding review, which is on-going, has revealed no evidence to date that NYPD's activities in the state violated New Jersey civil or criminal laws.

The press release stated the OAG had taken the following steps: reaching an "agreement . . . to strengthen the lines of communication with NYPD concerning investigative activities in New Jersey related to counter-terrorism"; issuing an Attorney General's Directive containing "formalized notification protocols" for New Jersey law enforcement agencies "to follow when they learn of law enforcement activity being conducted by out-of-state police agencies within their jurisdictions"; and

establishing "a Muslim outreach committee in order to enhance communication and encourage a greater understanding regarding issues of importance to both law enforcement and the Muslim community."

Complainant sent an OPRA request to the Custodian, requesting six categories of records regarding: (1) the fact-finding review, (2)-(3) the determination of the legality of the NYPD's activities, (4) the agreement with the NYPD, (5) the formalized notification protocols, and (6) the Muslim outreach committee. After not receiving a response to his requests, complainant filed a "Denial of Access Complaint" with the GRC.

The Custodian then responded to complainant's OPRA request in a "Receipt." The Custodian asserted that requests (1), (2), and (3) sought non-existent or privileged records. Regarding the other requests, the Custodian: (4) stated the agreements with NYPD were oral; (5) provided a copy of the Attorney General's directive; and (6) provided copies of five documents relating to the outreach committee. The Custodian gave similar responses in a "Statement of Information" (Statement) subsequently filed with the GRC.

Without reviewing any records, the GRC's Executive Director issued "Findings and Recommendations" that the Custodian had not unlawfully denied access to responsive records. On July 23,

2013, the GRC adopted those findings and recommendations as its final administrative determination. Complainant appeals, challenging only the Custodian's failure to produce records in response to requests (1), (2), and (3).

We must hew to our standard of review of a decision by the GRC, which "is governed by the same standards as review of a decision by any other state agency." Fisher v. Div. of Law, 400 N.J. Super. 61, 70 (App. Div. 2008). "A reviewing court will not overturn an agency's decision unless it violates express or implied legislative policies, is based on factual findings that are not supported by substantial credible evidence, or is arbitrary, capricious or unreasonable." Ibid. "[U]nder our deferential standard of review, we give weight to the GRC's interpretation of OPRA." McGee v. Twp. of E. Amwell, 416 N.J. Super. 602, 616 (App. Div. 2010). "We do not, however, simply rubber stamp the agency's decision." Paff v. N.J. Dept. of Labor, 392 N.J. Super. 334, 340 (App. Div. 2007) ("Paff II"); e.g., Paff v. N.J. Dept. of Labor, 379 N.J. Super. 346, 358 (App. Div. 2005) ("Paff I").

II.

Complainant's requests asked for "records, as defined in N.J.S.A. 47:1A-1.1." Specifically, request (1) sought:

1. All records collected and/or created as part of the "fact-finding review" of

intelligence-gathering conducted by the New York Police Department (NYPD) in New Jersey, including but not limited to all records reflecting communications with the NYPD, such as emails, audio recordings, notes of telephone and other communications, and memos[.]

The Custodian responded: "While the OAG met with and discussed intelligence gathering with the [NYPD], OAG is not in possession of records created by the NYPD pertaining to counter-terrorism investigations or intelligence gathering." That answer only partially responded to request (1), which sought records created or collected by the OAG as part of its fact-finding review. The Custodian did not state whether the OAG created any records, collected records not created by the NYPD, or created or collected records reflecting communications with the NYPD.¹

The Custodian's partial answer raises the possibility that responsive documents may not have been produced. The press release stated that the OAG's fact-finding review lasted three months and "included gathering information from individuals within the ranks of law enforcement in New Jersey, New York, and

¹ Elsewhere in the Receipt, and later in the Statement, the Custodian summarily stated that "[t]he records sought in (1) are not made, maintained, kept on file, nor have they been received in the ordinary course of business by OAG." However, in both the Receipt and the Statement, the Custodian then "explained" by giving the partially-responsive answer quoted above.

other states, as well as from civilians within the Muslim and other communities in New Jersey." Indeed, in his Statement, the Custodian reported there were 579 pages in the files of a Special Assistant to the Attorney General (SAAG) and 31 pages in the files of a Deputy Attorney General (DAG), which they "collected" and "created," and which "pertain[ed] to issues surrounding intelligence gathering by the [NYPD] in New Jersey." These 610 pages appear to fall within the scope of request (1). Nonetheless, the GRC simply accepted the Custodian's partially-responsive answer that there were no responsive documents. In these circumstances, it was "inconsistent with the GRC's responsibilities" to accept the Custodian's largely unresponsive, "blanket and conclusionary assertion." Paff I, supra, 379 N.J. Super. at 353.

The Custodian's response to request (1) also "note[d] that OPRA exempts from disclosure 'security measures and surveillance techniques which, if disclosed, would create a risk to the safety of persons, property, electronic data or software.'" (quoting N.J.S.A. 47:1A-1.1). The Custodian also cited executive orders and N.J.S.A. App. A:9-68(5)(a) and -68(11)(a) as exempting security records from disclosure. See N.J.S.A. 47:1A-9(a). However, the Custodian did not expressly allege that any records collected or created by the OAG fell within

these security exemptions. In any event, the GRC did not address the Custodian's claim of exemption, but upheld the Custodian solely "because the Custodian certified that no responsive records exist." The security-surveillance exemption claims thus remain unresolved.

We turn now to requests (2) and (3). They sought:

2. All records upon which the Office of the Attorney General relied for its determination that the NYPD's activities in the state did not violate New Jersey civil or criminal laws; [and]

3. All records reflecting the Office of the Attorney General's determination that the NYPD's activities in the state did not violate New Jersey's civil or criminal laws[.]

The Custodian's Receipt responded to request (2):

(2) Records relied upon by OAG in reaching its determinations are protected from access by the deliberative process privilege; see Educ. Law Ctr. v. N.J. Dep't of Educ., 198 N.J. 274 (2009). Legal research, legal memoranda and internal e-mails are also exempt as attorney work product and as attorney-client privileged documents[.]

The Receipt's response to request (3) was "see response to (2) above."

In the Custodian's Statement's response to requests (2) and (3), he claimed that the more than 600 pages collected or created by the SAAG and DAG were exempt from OPRA "as they contain documents protected under the attorney work product,

attorney-client, and deliberative process privileges, along with records" which may fall under the security-surveillance exemption. The Custodian asserted that the files of the SAAG and DAG were created and used "to provide advice, deliberation and consultation, including legal advice, to Attorney General Chiesa pertaining to issues surrounding intelligence gathering by the [NYPD] in New Jersey, including advice in support of and in anticipation of litigation."

The GRC upheld the Custodian solely on the basis that "[t]he records responsive to request items numbered 2 and 3 are exempt from disclosure as inter-agency or intra-agency advisory, consultative, or deliberative materials" (ACD material). See N.J.S.A. 47:1A-1.1. For a document to be ACD material, it "must meet two requirements." In re Liquidation of Integrity Ins. Co., 165 N.J. 75, 84 (2000). "First, it must have been generated before the adoption of an agency's policy or decision. In other words, it must be pre-decisional. Second, the document must be deliberative in nature, containing opinions, recommendations, or advice about agency policies." Id. at 84-85 (citation omitted).

Regarding request (2), the GRC adopted its Executive Director's finding that "it is axiomatic that records relied upon to make a determination would necessary contain opinions,

recommendations, and/or advice." However, it is undeniable that a decision-maker can rely on factual documents containing no opinions, recommendations, or advice. In such circumstances, the Supreme Court has held that "'[p]urely factual material that does not reflect deliberative processes is not protected.'" Educ. Law Ctr., supra, 198 N.J. at 297 (quoting Integrity, supra, 165 N.J. at 85). Whether the withheld 610 pages contain such factual documents is unclear from the Custodian's Statement. On the one hand, the Custodian stated "that the documents in question were written by subordinates to their superior and that the documents contained inter/intra-agency advisory, consultative or deliberative materials."² On the other hand, the Custodian stated that the SAAG and the DAG "collected" documents and the documents were "created or relied upon" by the SAAG and DAG (emphasis added).

Addressing request (3) which sought records reflecting the OAG's determination, the GRC adopted the Executive Director's finding: "Although such records would have been made either contemporaneously with, or after the determination, they would represent pre-decisional deliberative material exempt from disclosure." However, that contravenes the Supreme Court's

² The Custodian added "that the facts and opinions in the documents were so inextricably intertwined that [he] could not reasonably redact material."

requirement that ACD material "must be 'pre-decisional,' which means that 'it must have been generated before the adoption of an agency's policy or decision.'" Id. at 286 (quoting Integrity, supra, 165 N.J. at 84).

Also with regard to requests (2) and (3), the GRC adopted the Executive Director's finding that "[c]omplainant, by the very wording of his request, is seeking ACD material." Because ACD material only includes pre-decisional material, that finding cannot alone support the denial of request (3), which could include decisional and post-decisional materials "reflecting the [OAG's] determination."³

By contrast, request (2) sought "[a]ll records upon which the [OAG] relied for its determination." By asking the OAG to detail the "culling process" that was "integral to the agency's process of deliberation," request (2) by definition would "expose the agency's deliberative processes." Id. at 300, 281. Accordingly, we uphold the GRC's finding that the Custodian properly declined to produce documents in response to request (2) because, by its own terms it sought ACD material.

³ Indeed, the OAG now argues that complainant already has records reflecting the OAG's determination, namely the press release and the Attorney General's directive. Because the Custodian did not make such an argument before the GRC, we do not now address it.

However, denial of request (2) does not resolve the status of any document. Every document on which the OAG relied was presumably "collected and/or created" by the OAG, and thus also sought by request (1). Unlike request (2), request (1) does not ask whether the OAG relied on the document. Thus, the disclosure of a document in response to request (1) would not necessarily reveal the OAG's deliberative processes. The Custodian would be required to make that showing. "[A] record, which contains or involves factual components, is entitled to deliberative-process protection when it was used in the decision-making process and its disclosure would reveal deliberations that occurred during that process." Id. at 280 (emphasis added).

Moreover, the Custodian has failed to furnish us or the GRC with the necessary information to resolve requests (1) and (3). "OPRA 'generally places the burden upon the custodian of a public record to state the "specific basis" for the denial of access.'" Newark Morning Ledger Co. v. N.J. Sports & Exposition Auth., 423 N.J. Super. 140, 162 (App. Div. 2011) (citation omitted); see N.J.S.A. 47:1A-5(g), -6. "[T]he agency to which [an OPRA] request is made shall be required to produce sworn statements by agency personnel setting forth in detail" specified information, including "the documents found that are

responsive to the request," and "the determination of whether the document or any part thereof is confidential and the source of the confidential information." Paff II, supra, 392 N.J. Super. at 341. "The sworn statement shall have appended to it an index of all documents deemed by the agency to be confidential in whole or in part, with an accurate description of the documents deemed confidential." Ibid. "The index is essentially a 'privilege log' that must provide sufficient information 'respecting the basis of the privilege-confidentiality-exception claim vis a vis each document.'" Ibid. "An accurate index is necessary for substantive review by the requesting party as well as the reviewing court." Ibid.

Contrary to Paff II, the Custodian's sworn Statement and index listed only those documents responsive to the requests that were not confidential. The Custodian did not index the documents deemed confidential, did not give a description of any such document, and did not particularize the privilege claim for each document. Instead, he simply stated he was withholding more than 600 pages and asserting four privileges. His failure to relate each privilege to particular documents is particularly worrisome as the GRC did not consider three of the asserted privileges, and thus it is possible "that some of the documents may not in fact be privileged." See Paff v. Div. of Law, 412

N.J. Super. 140, 161 & n.9 (App. Div.) ("Paff III"), certif. denied, 202 N.J. 45 (2010). The Custodian's index is insufficient "to facilitate the decision-maker's review of governmental records to determine whether they contain privileged material" or "to provide the party seeking disclosure with as much information as possible to use in presenting his case" for disclosure. See Fisher, supra, 400 N.J. Super. at 76.

Accordingly, we vacate and remand this case to the GRC. The Custodian shall provide the GRC with a revised Statement and index that responds in full to requests (1) and (3), lists all responsive documents which are not being produced, and particularizes the claim of privilege for each document. In light of our rulings, the Custodian may alter his assertions of privilege to requests (1) and (3).⁴

The Custodian must provide sufficient information "to establish why confidentiality is necessary." Corr. Med. Servs. v. State, Dep't of Corrs., 426 N.J. Super. 106, 125 n.6 (App. Div. 2012). The Custodian

⁴ If the Custodian renews his claim of attorney-client privilege, he should identify the client. See N.J.S.A. 2A:84A-20(3). Further explanation may be needed if he identifies the client as the Attorney General, given that "the Attorney General, acting through the Division of Law, is the 'sole legal adviser' for all state agencies, boards and authorities, and is also responsible for 'interpret[ing] all statutes and legal documents' for those clients." Paff III, supra, 412 N.J. Super. at 145 (quoting N.J.S.A. 52:17A-4(e)).

should be guided by the standard included in R. 4:10-2(e), which permits a party claiming privilege to "describe the nature of the documents . . . not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection."

Paff I, supra, 379 N.J. Super. at 354.

The index shall be provided to complainant, ibid., unless the GRC decides this is one of the "rare cases" in which submission of a confidential index for "in camera inspection is appropriate." Loigman v. Kimmelman, 102 N.J. 98, 111-13 (1986).

The GRC shall "determine, on a document-by-document basis, whether each such claim of privilege should be accepted or rejected." Paff III, supra, 412 N.J. Super. at 161 n.9. The GRC should conduct an "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." Paff I, supra, 379 N.J. Super. at 355; see Fisher, supra, 400 N.J. Super. at 174; see also N.J.S.A. 47:1A-7(c), (e), (f).

Given the GRC's finding that the Custodian failed to respond in a timely fashion to complainant's initial request, the Custodian shall produce the revised Statement and index promptly in a reasonable time to be set by the GRC within ten days of the date of this opinion.

Affirmed in part, vacated in part, and remanded. We do not
retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION