



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

OAL DKT. NO. GRC 11386-14
AGENCY DKT. NO. 2012-288

JEFF CARTER,

Petitioner,

v.

FRANKLIN FIRE DISTRICT NO. 1

(SOMERSET),

Respondent.

And

JEFF CARTER,

Petitioner,

v.

FRANKLIN FIRE DISTRICT NO. 1

(SOMERSET),

Respondent.

OAL DKT. NO. GRC 11389-14

AGENCY DKT. NO. 2012-289

(CONSOLIDATED)

Walter M. Luers, Esq., for petitioner (Law Office of Walter M. Luers, attorneys)

Dominic P. DiYanni, Esq., for respondent (Eric M. Bernstein & Associates,
attorneys)

Record Closed: July 27, 2015

Decided: August 25, 2015

BEFORE JOHN S. KENNEDY, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On September 10, 2014, the Government Records Council (GRC) transmitted two Denial of Access Complaints under the New Jersey Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 et seq., to the Office of Administrative Law (OAL) for a hearing to determine several issues: (1) whether the current records custodian unlawfully denied access to fifteen emails to which access was denied by way of in camera review; (2) whether the current custodian conducted a sufficient search and fully complied with the GRC Interim Order dated August 27, 2013 in its totality; (3) whether the original and/or current records custodian knowingly and willfully violated OPRA and unreasonably denied access to fifteen emails under the totality of the circumstances; and (4) a determination of an award of reasonable attorney's fees because the complainant primarily prevailed based on the GRC orders and the respondent's subsequent compliance with same.

On September 10, 2014, these two matters were filed under OAL Docket Numbers **GRC 11386-14** and **GRC 11389-14**. I hereby **ORDER** that these matters are consolidated for hearing, in camera review of the fifteen emails in question, and disposition.

On April 22, 2015, the fifteen emails were submitted to this tribunal for in camera review. On June 25, 2015, respondent filed a Motion to Quash the subpoenas of eight individuals called to testify at the hearing. On July 27, 2015, oral argument was heard on both the in camera review and the Motion to Quash.

FACTUAL DISCUSSION

In Camera Review

The within matters deal with a denial of access to government records pursuant to approximately ten OPRA requests filed by the petitioner concerning the release of fifteen email records from a number of individuals covering a number of different topics spanning over a period of ten years. Respondent denied access to the records

requested in all of these matters maintaining a legal position that the search for and retrieval of the requested records constituted a type of work which required a special service charge to be implemented pursuant to N.J.S.A. 47:1A-5. After the matter was brought before the GRC for adjudication by way of ten separately filed denial of access complaints, the GRC ultimately determined that the records requested were not those in which required the imposition of the special service fee pursuant to N.J.S.A. 47:1A-5. The District then provided the requestor with copies of all of the requested records that were responsive to the ten OPRA requests. On three of the ten submissions, respondent claimed certain exemptions to disclosure of fifteen total emails and provided a Vaughn Index of the Exemptions. The District has claimed exemptions to GRC 2012-287, GRC 2012-288 and GRC 2012-295.

GRC 2012-287

The first OPRA request in which the District denied access to certain records sought emails either sent or received from fourteen individuals covering a time frame from January 1, 2000 through February 2, 2011, regarding "workplace harassment" or "Workplace Violence." The District denied access to five emails claiming all five emails deal with personnel matters, and specifically a grievance, which are exempt under N.J.S.A. 47:1A-1.1. All five emails deal with a personnel issue which had been brought to the respondent's attention by one of its employees. Petitioner asserts that while these emails deal with a personnel matter, the employee is not represented by a union and there is no grievance procedure in place which would subject the exemption under N.J.S.A. 47:1A-1.1.

After an in camera review of these five emails, I **FIND** as follows. The first denied email, dated September 29, 2010, is from District employee Debi Nelson to three commissioners and others regarding a September 28, 2010 incident concerning a personnel complaint she made. In the email, Ms. Nelson asks that the correspondence be kept "Strictly Confidential." The second denied email is from one commissioner to all other commissioners dated August 9, 2010, forwarding an email from Debi Nelson dated August 8, 2010 requesting that her personnel complaints be investigated. The third denied email is Debi Nelson's August 8, 2010 email which was attached to the

previously mentioned email to all of the commissioners. The fourth email, dated August 2, 2010, is from Debi Nelson to the Chairman of the Fire District regarding the investigation of her personnel complaints. The last email, dated July 30, 2010, is from the Chairman of the Fire District to Ms. Nelson regarding her personnel complaint.

GCR 2012-288

The next OPRA request in which the District denied access to certain records sought emails either sent or received from ten individuals covering a time frame from December 28, 2010 through February 21, 2011 regarding "insurance." The District denied access to nine emails claiming seven of the nine deal with communications concerning insurance between the Fire District and its insurance carrier which are exempt under N.J.S.A. 47:1A-1.1. One of the denied emails was claimed to be exempt from disclosure based upon the personnel exemption and was exempt because it sought legal advice from the Fire District's attorney. After oral argument, the parties agreed that the first two denied emails should not be part of consideration for in camera review.

After an in camera review of the remaining seven emails, I **FIND** as follows. The first denied email, dated February 6, 2011, is from one commissioner to all other commissioners regarding an insurance coverage issue. The Fire District's insurance carrier does not appear to be a party to this email. The next denied email dated, February 2, 2011, is from Debi Nelson to the commissioners relating to a member of the fire district and insurance coverage. The next denied email, dated February 1, 2011, is from one commissioner to another and the Fire District's attorney regarding an insurance coverage issue. The Fire District's insurance carrier does not appear to be a party to this email. The next denied email, dated January 28, 2011, is from the Fire District's insurance broker to a fire commissioner forwarding insurance exclusions for review. The next denied email, dated January 26, 2011, is from a commissioner to the Fire District's insurance carrier and other individuals regarding an insurance coverage issue. The next denied email, dated January 18, 2011, is from Debi Nelson to two of the commissioners forwarding the insurance policy currently in place at the time of the email. The last denied email, dated December 31, 2010, is from one commissioner to

another and the Fire District's attorney seeking legal advice from the attorney regarding an insurance coverage issue.

GRC 2012-295

The final OPRA request in which the District denied access to certain records sought emails either sent or received from six individuals covering a time frame from January 1, 2010 through February 21, 2011 regarding "mediation." The District denied access to one email claiming it to be exempted from disclosure based upon the attorney-client privilege under N.J.S.A. 47:1A-1.1.

After an in camera review of the email, I **FIND** as **FACT** that the email was dated May 14, 2010 and is between the Fire District's attorney at the time and Fire Chairman of the Fire District which concerned an upcoming mediation and provided legal advice to the chairman.

Motion to Quash

On June 25, 2015, respondent file a Motion to Quash the subpoenas to testify of Commissioner Jason Goldberg, Commissioner James Wickman, Assemblyman Joseph Danielsen, Richard Barlow, Esquire, William Cooper, Esquire, and former Commissioner Bernard Pongratz. At oral argument, it was agreed that the parties would depose the three current and former Commissioners and split the costs of these depositions equally. The parties also agreed that the testimony of Assemblyman Danielsen would not be necessary and the subpoena as well as the motion to quash was withdrawn as to Mr. Danielsen.

The parties gave argument regarding the Motion to Quash the subpoenas of former Fire District attorney William Cooper, Esquire, and former special counsel for the Fire District Richard Barlow, Esquire. Respondent asserts that the subpoenas of these two individuals potentially implicate the attorney-client privilege as well as the work product privilege.

Based on the brief filed and the oral arguments made, I **FIND** as **FACT** that Richard Barlow and William Cooper are both licensed attorneys in the State of New Jersey. Mr. Cooper was the Fire District's prior counsel serving in such capacity when the ten OPRA requests were filed with the District in February 2010. He now serves as Somerset County Counsel. Mr. Barlow had been previously assigned to defend the interests of the Fire District in a prior action in Superior Court to whom the petitioner's sister was a plaintiff.

LEGAL ANALYSIS AND CONCLUSION

In Camera Review

This tribunal has been charged with conducting an in camera review of the fifteen emails to which respondent has denied access. These emails have been outlined above and grouped based on the GRC docket numbers. The District has claimed exemptions to GRC 2012-287, GRC 2012-288 and GRC 2012-295.

GRC 2012-287

The first OPRA request in which the District denied access to certain records sought emails either sent or received from fourteen individuals covering a time frame from January 1, 2000 through February 2, 2011 regarding "workplace harassment" or "Workplace Violence." The District denied access to five emails claiming all five emails deal with personnel matters, and specifically a grievance, which are exempt under N.J.S.A. 47:1A-1.1. Specifically, N.J.S.A. 47:1A-1.1 states:

A government record shall not include the following information which is deemed to be confidential for the purposes of P.L. 1963, c.73 (C.47:1A-1 et seq.) as amended and supplemented:

Information generated by or on behalf of public employers or public employees in connection

with any sexual harassment complaint filed with a public employer or

with any grievance filed by or against an individual or

in connection with collective negotiations, including documents and statements of strategy or negotiating position.

Petitioner asserts that while these emails deal with a personnel matter, the employee is not represented by a union and there is no grievance procedure in place which would subject the exemption under N.J.S.A. 47:1A-1.1.

The first denied email, dated September 29, 2010, is from District employee Debi Nelson to three commissioners and others regarding a September 28, 2010 incident concerning a personnel complaint she made. In the email, Ms. Nelson asks that the correspondence be kept "Strictly Confidential." As this email is directly from the employee complaining about a personnel issue to the Commissioners, it appears to fall under the exemption outlined above as any grievance filed by an individual. Furthermore, it was requested by Ms. Nelson that the email be kept strictly confidential. Petitioner provided a certification of Ms. Nelson, dated May 5, 2015, making clear that she has no objection to the production of any email that is from her, to her, copied to her or that mentions or references her. This certification, however, does not permit the production of a document if it was appropriately exempted pursuant to N.J.S.A. 47:1A-1.1. As a result, I **CONCLUDE** that access to the September 29, 2010 email was appropriately **DENIED**.

The second denied email is from one commissioner to all other commissioners, dated August 9, 2010, forwarding an email from Debi Nelson, dated August 8, 2010, requesting that her personnel complaints be investigated. The third denied email is Debi Nelson's August 8, 2010 email which was attached to the previously mentioned email to all of the commissioners. While access to these two emails would be exempt under the grievance exemption outline above, the emails were forwarded from one

commissioner to all other commissioners. This is a violation of the Open Public Meetings Act (OPMA) which requires proper notice of a public "meeting," discussion, etc., between an effective majority of the fire commissioners conducting "public business." See, Roman v. Township of S. Hackensack, 302 N.J. Super. 568 (App. Div. 1997). The OPMA is specific in its definition of a public body "meeting" to include any gathering whether corporeal or by means of communication equipment which is attended by or open to all members of the public body held with intent to discuss or act upon a specific public business of that body. I **CONCLUDE** that the August 9, 2010 email and the August 8, 2010 email attached thereto violated OPMA and therefore access to those emails shall be **GRANTED**.

The fourth email, dated August 2, 2010, is from Debi Nelson to the Chairman of the Fire District regarding the investigation of her personnel complaints. The last email, dated July 30, 2010, is from the Chairman of the Fire District to Ms. Nelson regarding her personnel complaint. Neither of these emails violate OPMA and both clearly relate to Ms. Nelson's personnel grievance. Therefore, I **CONCLUDE** that access to the August 2, 2010 and the July 30, 2010 emails was appropriately **DENIED**.

GCR 2012-288

The next OPRA request in which the District denied access to certain records sought emails either sent or received from ten individuals covering a time frame from December 28, 2010 through February 21, 2011 regarding "insurance." The District denied access to nine emails claiming seven of the nine deal with communications concerning insurance between the Fire District and its insurance carrier which are exempt under N.J.S.A. 47:1A-1.1. One of the denied emails was claimed to be exempt from disclosure based upon the personnel exemption and one was exempt because it sought legal advice from the Fire District's attorney. After oral argument, the parties agreed that the first two denied emails should not be part of consideration for in camera review.

N.J.S.A. 47:1A-1.1 provides an exemption for "information which is a communication between a public agency and its insurance carrier, administrative

service organization or risk management office.” Of the five emails that the District denied access claiming an exemption under this provision, only the January 26, 2011 and the January 28, 2011 emails are a communication between the Fire District and its insurance broker. While the emails dated January 18, 2011, February 1, 2011, and February 6, 2011 deal with insurance issues, the broker is not a party to the communication. Therefore, I **CONCLUDE** that access to the January 26, 2011 email and to the January 28, 2011 email was appropriately **DENIED**. I further **CONCLUDE** that access to the emails dated January 18, 2011, February 1, 2011, and February 6, 2011 shall be **GRANTED**.

The next denied email dated February 2, 2011 is from Debi Nelson to the commissioners relating to a member of the Fire District and insurance coverage. This email was exempted based on the personnel exemption outlined above. Based on my review of this email, I **CONCLUDE** that the February 2, 2011 email was appropriately **DENIED**.

The next denied email, dated December 31, 2010, is from one commissioner to another and the Fire District’s attorney seeking legal advice from the attorney regarding an insurance coverage issue. This email is exempt under the N.J.S.A. 47:1A-1.1 which exempts any record within the attorney-client privilege. This exemption shall not be construed as exempting from access attorney bills or invoices. Accordingly, I **CONCLUDE** that the December 31, 2010 email was appropriately **DENIED**.

GRC 20120-295

The final OPRA request in which the District denied access to certain records sought emails either sent or received from six individuals covering a time frame from January 1, 2010 through February 21, 2011 regarding “mediation.” The District denied access to one email claiming it to be exempted from disclosure based upon the attorney-client privilege under N.J.S.A. 47:1A-1.1.

The email was dated May 14, 2010 and is between the Fire District’s attorney at the time and Fire Chairman of the Fire District which concerned an upcoming mediation

and provided legal advice to the chairman. I **CONCLUDE** that the May 14, 2010 email was appropriately **DENIED**.

Motion to Quash

The parties gave argument regarding the Motion to Quash the subpoenas of former Fire District attorney William Cooper, Esquire, and former special counsel for the Fire District Richard Barlow, Esquire. Respondent asserts that the subpoenas of these two individuals potentially implicate the attorney-client privilege as well as the work product privilege. It has been held that materials to which the work product privilege attaches are protected from disclosure unrelated litigation. See Duplan Corp v. Moulinage et Retorderie de Chavanoz, 487 F.2d 480 (4th Cir. 1973). Our courts have held that any discussion and analysis by attorneys with their governmental clients fall within the deliberative process privilege. See Paff v. Director, Office of Attorney ethics, 399 N.J. Super. 632 (Law Div. 2007). While the testimony of both Mr. Barlow and Mr. Cooper will surely be protected by the attorney-client privilege and the work product privilege, respondent's has not demonstrated that they should not be called as witnesses. There may be questions that can be asked that are probative and do not violate the aforementioned privileges. Therefore, I **CONCLUDE** that both Mr. Barlow and Mr. Cooper may be called to testify as witnesses at the hearing.

ORDER

I hereby **ORDER** that access to the following emails shall be **GRANTED**:

1. Email dated August 8, 2010
2. Email dated August 9, 2010
3. Email dated January 18, 2011
4. Email dated February 1, 2011
5. Email dated February 6, 2011

I further **ORDER** that access to all other emails subject to this tribunal's in camera review is hereby **DENIED**.

I further **ORDER** that the Motion to Quash the subpoenas of William Cooper, Esquire, and Richard Barlow, Esquire, is **DENIED**.

I further **ORDER** OAL Docket Number **GRC 11386-14** and **GRC 11389-14** are hereby consolidated for all purposes including hearing, in camera review of the fifteen emails in question and disposition.

This order may be reviewed by the **GOVERNMENT RECORDS COUNCIL** either upon interlocutory review pursuant to N.J.A.C. 1:1-14.10 or at the end of the contested case, pursuant to N.J.A.C. 1:1-18.6.

August 25, 2015

DATE



JOHN S. KENNEDY, ALJ

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